

DENMARK'S REPORT

rapporter

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FIRST CASE :**CONDITIONS GOVERNING THE ISSUANCE OF A RESIDENCE AND WORKING PERMIT TO A NON-COMMUNITY ALIEN****Introductory observation :**

It follows from sections 9 (1) 2 of the Danish Aliens Act that a residence permit is granted on application to an alien who is cohabiting in a common home in a matrimonial relationship or an extra-matrimonial relationship of a certain duration with a person having permanent residence in Denmark.

Decisions to grant a residence or work permit by virtue of section 9 (1) 2 of the Aliens Act are taken by the Directorate for Aliens whose decisions may be appealed against to the Ministry of the Interior.

QUESTIONS :**1. Before which jurisdiction can the alien contest the administrative decision ?**

- in first instance ?
- upon appeal ?

The **Aliens Act** does not provide for a judicial review of a refusal to grant a residence permit under section 9 (1) 2 of the Aliens Act. However, aliens may by virtue of section 63 of the Danish Constitution bring an appeal before the ordinary courts of law against such decision.

Under section 63 the courts have authority to adjudge on any matter concerning the limits to the competence of public authorities. The courts will normally confine the review to the question of deciding on the legality of the administrative decision and will generally refrain from adjudging on the administrative discretion exercised, cf. the answer to question 5 below.

Court proceedings under section 63 of the Constitution against a decision of the Ministry of the Interior are brought before the High Court, whose judgments may be appealed to the Supreme Court.

**2. Must he be represented by legal counsel in order to seize the competent jurisdiction ?
What can be the Final cost of the procedure accruing to the applicant ?**

It is not a requirement that a party to civil proceedings must be represented by legal counsel. Presumably, the alien will be represented by legal counsel, and the alien may be granted free legal aid.

The losing party is as a starting point liable to compensate the other party for any cost incurred by him in connection with the proceedings. However, the court may find it justified to depart from this rule. This means that if the alien loses the case, he may be ordered to pay the other party's costs, but presumably the court will not order such payment.

3. Does his application have suspensive effect ?

- by right ?
- by way of stay of execution ?
- in which case, under what conditions may the judge order a stay of execution of the administrative decision ?
- within what time limits may the decision granting a stay of execution or pronouncing judgment on the merits be made ?

3.1. If the Directorate for Aliens refuses to grant a residence and work permit, the decision must, if the alien is still staying in this country, state a time limit for departure.

If an appeal is brought against the decision of the Directorate for Aliens to the Ministry of the Interior, the appeal will have suspensive effect if the appeal is brought within 7 days after the decision was served upon the person concerned if he is either

- covered by the EC rules, or
- is a citizen of another Nordic country and has had his residence in this country, or
- has until now held a residence permit in this country.

If the decision is upheld by the Ministry of the Interior, a new time limit will be fixed in the decision of the Ministry.

3.2. If the decision of the Ministry to refuse to grant a residence and work permit under section 9 (1) 2 of the Aliens Act is brought before a court of law by virtue of section 63 of the Constitution, this will not have suspensive effect in relation to the time limit fixed for the alien's departure from this country. Furthermore, it must be presumed that the courts have no authority to decide to give suspensive effect to the bringing of an appeal.

4. What provisions may the applicant invoke before the judge in order to obtain the protection of the law for the right in claims to lead a normal family life ?

- provisions of national law ?
- general principles of law ?
- international conventions ?
- If more than one provision is applicable, how will the judge combine them?

4.1. The court will make its decision on the basis of national legislation and administrative provisions. The Court will also draw upon judicial precedents, the practice of the Ombudsman and administrative practice. General principles of law may be reflected in those sources of law and in international conventions. Should this not be the case such principles are not likely to be invoked before the court in a case like the one under consideration.

4.2. As regards the question concerning the use of international conventions before the Danish courts the starting point in Danish law is that the fact that the Government has entered into a treaty does not in itself have the effect that the treaty becomes part of national Danish law. If the treaty is to become part of Danish law, it must be incorporated into Danish law.

However, ratification may have internal legal effects even though the treaty has not (yet) been incorporated into Danish law. There is thus a presumption that a Danish court would - in a case of doubt as to the interpretation of the national law - interpret the national law in accordance with any commitments laid down in a treaty. It is further presumed that the courts would in such cases prefer a more teleological approach rather than a literal interpretation if this would lead to liability under international law on the part of the Danish state for an unintended breach of a treaty.

The UN Convention of 28 July 1951 concerning the legal status of refugees has been incorporated into Danish law by section 7 (1) of the Aliens Act, and the European Convention on Human Rights has been incorporated into Danish law by Act no. 285 of 29 April 1992 on the European Convention on Human Rights. Thus, the provisions in the latter Convention on protection of family life may be invoked before a Danish court.

4.3. As regards the question of combining (conflicting) sources of law, the detailed and concise regulation in the legislation on aliens means that statutory law will be given a decisive weight when the court decides a case. It must thus be presumed that the courts will hardly consider a Person to be entitled to a residence permit unless a legal basis is found in the Aliens Act and any provisions issued under this Act. On the other hand, both case law and more broad considerations will be of importance in connection with an interpretation of the provisions laid down in the Aliens Act. Furthermore, attention is drawn to the fact that the review of the court under section 63 of the Constitution does not normally include the free discretion exercised by the administration, cf. Para. 5.

The relationship between international conventions and the national Aliens Act must be decided on the basis of similar principles as those applied in relation to non-incorporated treaties and national law, cf. para. 4.2. An international convention will thus constitute an important contribution to the interpretation of a provision in the legislation on aliens.

5. May the administrative judge :

- censure the administrative authorities who refuse to take account of a marriage whose validity they contest ?
- form his own appreciation of the bona fide nature or otherwise of the marriage ?
- submit the matter to another jurisdiction ?

5.1. If a decision of an administrative authority is brought before a court of law by virtue of section 63 of the Constitution, the judge may alone try the question of whether the administrative decision falls "within the competence of the authority concerned". In such cases the claim will typically be that the defendant be ordered to acknowledge that the administrative decision is void.

The courts will normally confine themselves to reviewing the legality of the administrative decision made and will normally refrain from adjudging on the administrative discretion exercised.

5.2. If the administrative authority finds that there is not sufficient proof of cohabitation at the common residence and that the conditions for granting a residence permit under section 9 (1) 2 of the Aliens Act are thus not satisfied, it is not a matter of the exercise of a free administrative discretion, but an interpretation of the condition laid down in the Aliens Act to determine whether the applicant has a statutory right to family unification.

The evaluation of whether the cohabitation requirement is satisfied is a matter of evidence, and the courts are competent to decide on the basis of the information available to the court whether there is sufficient evidence to presume that the parties are cohabiting at their joint residence.

5.3. The courts have no power to refer the matter to another (judicial or administrative) body for a decision. The courts may decide whether it is the competent administrative authority which has taken a decision in a concrete case, but may not order any other administrative body to deal with the case.

6. If the administrative refusal is overruled, be it in the first instance or upon appeal :

- must the administrative authorities issue the residence permit required ?
- if so, what powers are at the judge's disposal in order to compel compliance (injunction, fine for noncompliance) ?

6.1. If the judge finds that the administrative decision is void, he may not make a new decision instead of the decision appealed against. It is the administrative authority alone which may issue a new administrative decision.

If a decision to refuse to grant a residence permit on the ground that the applicant was not considered to be cohabiting at the common residence with his spouse residing in this country is declared void by a court of law, the administrative authority must subsequently consider whether the person concerned should then be granted a residence permit.

In the situation where a previous refusal has been quashed by a court of law the administration will normally be obliged to grant a residence permit. However, there are exceptions :

Firstly, as the court trial is, in principle, confined to consider the situation as at the date of the trial - it is possible that the parties may now - due to circumstances which have changed since the judgment - no longer be considered to cohabit at their common residence.

Secondly, it is possible that a residence permit may be refused because other conditions laid down in section 9 of the Aliens Act are not satisfied. The situation might be that the aliens authorities find after a concrete evaluation that it should be made a condition that the spouse residing in this country will be able to support the applicant, cf. section 9 (4) of the Aliens Act, or that the person residing in this country does not belong to one of the categories of persons listed in section 9 (2) of the Aliens Act who may be united with a spouse in this country under the family unification rules, for instance if the person residing in this country is also a foreigner and has stayed lawfully in this country for a shorter period than 5 years.

6.2. Under Danish law it is possible to enforce a judgment against the administration. However, a judgment which declares an administrative decision to be void will be a declaratory judgment, i.e. a judgment which only decides the legal relationship in relation to the parties to the case, but which does not provide any basis for enforcement proceedings.

It may be possible to impose criminal liability on the public servant in the administration under the rules laid down in part 16 of the Civil Penal Code concerning offences committed in public service or posts, etc. Furthermore, the administration will expose itself to criticism from the Ombudsman of the Parliament if the administration without valid reasons fails to comply with the judgment.

SECOND CASE :**ASYLUM-SEEKER WHOSE REFUGEE STATUS IS CONTESTED AND WHOM THE ADMINISTRATIVE AUTHORITIES WISH TO DEPORT.****Introductory observations :**

In the case under consideration, the administrative authorities have issued a deportation order regardless of the submission of an application for asylum.

However, such a situation will normally not occur under the Danish legislation on aliens.

A refusal to grant a residence permit shall set a time limit within which the alien is to leave this country. He may, however, not be expelled to a country in which he is at risk of being persecuted on the grounds set out in Article 1 A of the 1951 Convention on the Status of Refugees, or in which the alien will not be protected against further expulsion to such country. A refusal to grant a residence permit must include a decision as to whether the alien can be expelled from the country by coercion.

These provisions mean that if an alien's application for a residence permit has been refused, and a time limit has been fixed for his departure, and he has subsequently submitted an application for asylum, he may not then be expelled until his asylum case has been finally dealt with and the authorities have decided whether he will risk persecution in his home country.

The aliens authorities will therefore refrain from fixing a time limit in connection with a refusal to grant of residence permit if the applicant has submitted an application for asylum at the time of the decision of the case.

If the Directorate for Aliens has fixed a time limit for departure in connection with a decision to refuse to grant a residence permit in spite of the fact that an application for asylum has been submitted, the matter of the time limit may be brought independently before the Ministry of the Interior.

QUESTIONS :

1. Which jurisdiction is competent to rule in the first instance, upon appeal, in cassation? on an alien's request for refugee status? on the legality of the decision to deport him ?

11. The decision on asylum is made by the Directorate for Aliens, acting in the first instance. The decision of the Directorate may be appealed against to the Refugee Board whose decisions cannot be appealed against to any other administrative authority, nor to the Minister of the Interior. The Board considers a case with the participation of 7 members, of whom the chairman is a judge, 3 members are appointed on nomination from the Ministry of Social Affairs, the Ministry of Foreign Affairs, and the Ministry of the Interior, 2 members on nomination from the Danish Refugee Council and 1 member on nomination from The Danish Bar Association.

However, the Directorate for Aliens may decide with the consent of the Danish Refugee Council that a decision made in a case where the application is considered clearly unfounded may not be brought before the Refugee Board. Such cases are decided by one authority only.

The Aliens Act does not provide for a judicial review against a refusal to grant asylum. Nor is there any right of appeal by virtue of the Aliens Act against a decision on compulsory deportation.

12. However, aliens may by virtue of section 63 of the Danish Constitution bring an appeal before the ordinary courts of law against such decisions, cf. the answers to questions 1 and 5 in case nr.1.

Court proceedings under section 63 of the Constitution against the final decision of the Directorate for Aliens or the Refugee Board on asylum are brought before the city court whose judgment may be appealed to the High Court.

If an alien brings a decision of the Directorate for Aliens on a time limit for departure before a court of law after the Ministry of the Interior has upheld the decision, the case is dealt with by the High Court whose judgment may be appealed to the Supreme Court.

2. Must the alien be represented by legal counsel in order to seize the competent jurisdiction ? Must he submit his request in the language of the host country ? What will be the final cost of the procedure ?

2.1. It is not a condition under administrative law that a party must be represented by legal counsel in connection with the aliens authorities' procedure for considering an application for residence work permit. Neither must the application be submitted in Danish. If the application is written in a foreign language, the aliens authorities will take steps to have the application translated. The applicant is not required to pay any costs in connection with the provision of any information which the authority may need in order to make its decision. The applicant must himself pay any costs in connection with the provision of any information which the applicant may need for his application.

The Refugee Board may appoint a legal counsel to the alien, unless he has himself obtained legal assistance. In practice, the Board appoints a legal counsel in virtually all the cases in which an asylum seeker appeals against the Directorate for Aliens' refusal to grant asylum.

It is not a requirement that the documents and pleadings submitted by the alien and his counsel must be in Danish. The Board provides for a translation of the material received.

Fees to the legal counsel is paid by the public according to the rules applying to free legal aid. The asylum seeker cannot be ordered to pay any costs involved in the Board's consideration of the case, including the Board's provision of the necessary basis of information.

2.3. Concerning representation by legal counsel during court proceedings and payment of costs, reference is made to the reply to question nr. 2 in case 1.

As regards the question of using languages other than Danish, the oral court proceedings take place in Danish always provided that examination in court of persons who do not understand Danish, takes place with the assistance of an interpreter. Documents written in a foreign language are admitted as evidence ; in that case, however, the documents normally have to be accompanied by a translation into Danish.

3. Does his application have suspensive effect ?

- *by right ?*
- *by way of a stay of execution ?*

3.1. If an alien who has hitherto stayed legally in this country, but who has been refused a residence permit and been given a time limit for departure, subsequently submits an application for asylum, the application for asylum will imply that the alien cannot be expelled until the asylum case has been finally dealt with and the competent authorities have decided whether he risks persecution in his home country, cf. the introductory observations.

3.2. If the Directorate for Aliens refuses to grant asylum according to the normal procedure so that the refusal may be appealed against to the Refugee Board, the complaint will have suspensive effect.

3.3 If a decision on refusal of asylum made by the Directorate for Aliens or the Refugee Board is brought before the courts by virtue of section 63 of the Constitution, the bringing of the question before the courts does not by virtue of section 63 suspend the operation of the time limit set out for the alien to leave the country. Furthermore, it must be presumed that the courts have no authority to give suspensive effect to the bringing of an appeal.

4. Once the residence permit previously held by the alien as a student has expired and he has been refused the right to work as a salaried employee, what is his status while awaiting an administrative or judicial ruling on his request for refugee status ?

Is he entitled to :

- *a provisional residence permit ?*
- *a provisional work permit ?*

If so, is it by virtue of :

- *the Geneva Convention ?*
- *a general principle of law ?*
- *national legislation ?*

An alien who is entitled to stay in the country under the rules of the Aliens Act as described in para. 3 above while the application for asylum is being considered by the aliens authorities, is not granted any residence or work permit. He is merely staying lawfully in this country in the sense that his presence is tolerated by the Danish authorities.

That legal status of the alien follows from national legislation. The background for the asylum seekers' right to stay in this country while awaiting the administrative decision is Article 33 of the Geneva Convention which provides that a person covered by the refugee definition of that Convention may not be deported to another country.

5. Assuming now that the alien's request for refugee status has been refused by the competent Office :

- *in assessing the legality of the refusal, does the judge take account of the situation pertaining in his country of origin or in another country in which the applicant may previously have resided ?*
- *may he take account of the repeated or manifestly dilatory account of the request ?*

5.1. As regards the question concerning the intensity of the review carried out by the courts by virtue of section 63 of the Constitution the courts will normally confine themselves to reviewing the legality of the administrative decision and refrain from adjudging on the administrative discretion exercised.

The decision whether a person can be considered a refugee under the Geneva Convention, cf. section 7 (1) of the Aliens Act, will to some extent depend on a discretionary assessment. That assessment will take into account not only the weight that may be attached to the asylum seeker's information about what he has been exposed to in his home country but also the risk of persecution on his return. The background information available on the conditions in the home country forms an element of the asylum assessment.

Presumably the courts will be reluctant to set aside the assessment of the aliens authorities whether the conditions of the Aliens Act for asylum (i.e. reasonable fear of persecution) have been satisfied provided that the courts find that the administrative decision is based upon adequate factual information.

6. In assessing the legality of the deportation order does the judge take account of the situation pertaining in the country of destination ?

If the administrative authorities decide, regardless of the submission of an application for asylum, that the person concerned is to be deported from this country, such a decision will be in contravention of the Aliens Act, cf. the introductory observations.

The bringing of an appeal in a court of law by virtue of section 63 of the Constitution will have no suspensive effect, cf. question 3, but it must be presumed that the courts will declare the decision on deportation to be void as it is in contravention of the provisions of the Aliens Act on this matter.

Reference is further made to Para. 5.

7. What will happen if the alien rather than having previously resided with a regular residence permit and providing the precise details of his civil status and country of origin, refuses to provide this information or claims to have lost his identity papers ?

7.1. There is no authority in the Aliens Act for refusing to consider the merits of an application for asylum on the grounds that the applicant for asylum does not wish to state his identity and/or does not hold identification papers.

7.2. Nor does this Act confer any powers to deny such an asylum seeker entry at the border on the mere grounds of lack of identity papers. However the Directorate for Aliens may decide that he is to be refused entry at the border, but it is a condition that he can be expelled to a country where there is no risk of persecution as referred to in Article 1 A of the Geneva Convention, and which offers protection against further deportation to such country (refoulement). However, it may prove difficult - due to the lack of identity papers - to expel the asylum applicant to a safe country. Refusal of entry requires a thorough mapping of the applicant's itinerary to Denmark and the establishment of any contacts he may have had with the immigration authorities of the countries in which he has been in transit.

The police must make an investigation into the asylum seeker's identity, nationality and itinerary for the purpose of deciding whether he can be refused entry under the above mentioned provision. Refusal of entry may be effected until 3 months after the asylum seeker's entry.

If no decision can be made on refusal of entry on this basis, the merits of the application for asylum submitted will be considered. For this purpose the police investigation into the identity, nationality and whereabouts of the asylum seeker will continue.

Under section 36 of the Aliens Act, the police are further empowered to decide that an asylum seeker shall be detained in custody while the police investigation takes place. Under this provision, an alien not resident in Denmark may be detained in custody if less stringent measures, such as deposit of passport, providing bail,

etc., are not sufficient to ensure the alien's presence in connection with the enforcement of any decision on expulsion or refusal of entry. In practice, detention in custody is often used in connection with unidentified asylum seekers.

An alien detained in custody under section 36 shall within 3 days after having been detained in custody be brought before a judge, and the judge shall rule on the lawfulness of the detention in custody and its continuance, cf. section 37 of the Aliens Act.

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CONCERNING CASE 1 AND 2 :

Following a political discussion in the fall 1993 the Government has now submitted a bill in Parliament amending the Aliens Act. If adopted the bill may change the above description of the Danish legislation.