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Legislative and Judicial Strategies in Danish Law: Accommodation or Evasion of International Obligations?

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Abstract

Whereas Danish legislation traditionally accommodated international human rights obligations, as demonstrated by the 1992 incorporation of the European Convention on Human Rights, the past two decades have seen a significant counter-reaction. The changing approach has become manifest in connection with numerous restrictions of immigration and asylum policy in which international obligations were perceived as a constraint to domestic lawmaking. In order to manage the limits of international law, the Danish legislature has developed various strategies with a view to reconciling increasingly restrictive measures with human rights obligations. As compatibility became more difficult, new regulatory strategies were introduced along with rhetoric openly challenging international obligations, based on more unilateral or nationalist policy framing in light of the 2015 asylum crisis. The article will provide a typology of these strategies and analyse them in the context of judicial responses at domestic and international levels.

Keywords

1 Introduction: Changing Perceptions of Human Rights

By tradition, Danish law has generally been based on unequivocal official respect for human rights. This was particularly clear in legislative practices accommodating international human rights obligations, whereas the separate role of the judiciary in this respect was less clear. The primary reason for this is most likely the dualistic principle that has traditionally been framing the perception of international legal sources in Danish law, albeit modified over time. As a result, the interpretation and application of human rights standards in Danish judicial practice were often perceived as raising complex problems in two interrelated dimensions: one concerning the status of international law as such in the domestic legal system, and one pertaining to the division of powers between the legislature and the judiciary. The latter problem was further exacerbated by the fact that not only domestic courts but also international judicial and other monitoring bodies were involved when interpreting human rights standards and applying them in order to review the human rights compatibility of decisions made at national level in Denmark.1

These problems are considered particularly controversial in areas of law and policy where vague or open-textured international human rights standards may impact the scope of manoeuvre in legislative and subsequent administrative decision-making. As such impact of human rights standards is tangible in migration and asylum matters, this policy area has to a significant extent come to influence, if not determine, the debates on international human rights in Danish media and politics, and to some extent in academic discourse as well. Notwithstanding an often unfortunate implicit identification or conflation of human rights with asylum and migration, frequently even with criminal migrants, this regulatory area can serve as a lens through which dilemmas and dichotomies in the protection of human rights at the domestic level can be most clearly visualised.

The traditional respect for international human rights obligations among the Nordic countries was demonstrated in connection with the general revision of the Danish Aliens Act in 1983\(^2\) as well as by the incorporation of the European Convention on Human Rights (ECHR) into Danish law in 1992.\(^3\) Certain restrictions of the Aliens Act were introduced during the 1990s, yet still based on a clear assumption of compatibility with human rights standards and emphasising the role of Danish courts to ensure this, especially as regards the ECHR. The past two decades, however, have seen a significant shift in the relative weight attached to upholding human rights standards and in the general approach to international legal obligations. This changing approach is generally understood as a counter-reaction to real and perceived societal problems seemingly caused by overly liberal immigration and asylum policies. As these policies were often justified, or allegedly even imposed, by human rights standards, scepticism towards these standards has become manifest in connection with restrictions of immigration and asylum policy where international obligations are seen as a constraint to domestic lawmaking.

In addition to increasing political nationalism and cultural ethnocentrism, an important background to the debate over such human rights-induced constraints is the Danish opt-out from EU measures concerning the Area of Freedom, Security and Justice according to Title V of the TFEU. Due to this opt-out, the rules harmonising asylum and immigration policies pursuant to Articles 78 and 79 TFEU are not binding upon or applicable in Denmark.\(^4\) As a result, the Danish legislature is neither constrained by EU standards on immigration of third-country nationals nor by the instruments of the Common European Asylum System, and administrative authorities are not supposed to take these EU standards into account.\(^5\) In the

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\(2\) Aliens Act no. 226 of 8 June 1983 (in force 1 October 1983, amended numerous times, cf. the most recent Consolidated Aliens Act no. 1513 of 22 October 2020). See also the preparatory report with draft legislative text, Betænkning om udlændingelovgivningen. Udkast til ny udlændingelov (Betænkning nr. 968, Ministry of Justice, Copenhagen, 1982).


\(4\) Protocol No. 22 on the Position of Denmark, annexed to the TEU and the TFEU, OJ 2016, C 202, p. 1 (pp. 298-302).

\(5\) The latter, however, is modified by three factors in particular: the Danish parallel agreement on the Dublin and Eurodac Regulations; adherence to the Schengen rules on the basis of international law obligations pursuant to
absence of EU law curbing domestic law and policy, the ECHR and other human rights standards of international law thus have a relatively stronger impact on measures taken by Danish legislative and executive authorities. Hence, frustrations over such constraints tend to target the European and international human rights systems more so than the EU, albeit in some instances combining or conflating the two legal systems.

The present article provides an exposé of Denmark’s regulatory strategies that have been employed in order to manage the limits imposed by international human rights law in regard to domestic asylum and immigration policy. These strategies will be illustrated by an account of significant legislative developments and judicial responses relating to the rules on expulsion of criminal offenders (section 2) and family reunification (section 3), as well as the legal and institutional framework that is decisive for the leverage of international law in asylum cases (section 4). Against this background, a set of general observations are made on the interconnectedness between the regulatory strategies within migration and asylum law and the more general discourse on international human rights standards and their impact on Danish domestic law (section 5). A particular illustrative example in this regard concerns the debates preceding the adoption of the Copenhagen Declaration as a priority issue during Denmark’s presidency of the Council of Europe in 2017-2018.

2 Expulsion of Criminal Aliens: Narrowing or Exceeding the Margin?

2.1 International Standards Framing Domestic Expulsion Rules

As stated above, the original 1983 Aliens Act was well in line with the Danish tradition of legislative accommodation of human rights obligations. Although the preparatory report and policy discussions showed considerable disagreement on specific substantive rules and procedural safeguards, there was general agreement that the revised Act should be based on respect for international obligations, especially those enshrined in the UN Refugee Convention and the ECHR. This was reflected in the adopted Act, not least in the rules on expulsion of criminal offenders.

The reasoning behind the expulsion rules was often couched in humanitarian terms, yet they were explicitly drafted with a view to securing compliance with human rights standards under the ECHR. In technical terms, this was based on a system of double proportionality, enhancing protection against expulsion according to the offender’s period of lawful residence while at the same time providing for concrete balancing of the reasons for expulsion against the intensity of such an interference with the family and private life of the individual offender as well as of the impact on family members who would be affected by an expulsion decision.

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6 See Betænkning nr. 968, supra note 2, pp. 20, 22, 30-31, 42-44, 49, 57, 67-69, 76 and 176-177.


8 Sections 22-24 and Section 26 of the 1983 Aliens Act, respectively.
balancing exercise was based on criteria very similar to those taken into account by the European Court of Human Rights (ECtHR) when reviewing expulsion decisions under Article 8 ECHR, in particular as regards the proportionality requirement pursuant to Article 8(2). Yet, the Aliens Act was also designed so as to leave considerable discretion to the domestic courts. This resulted in some domestic judgments declining expulsion of a criminal offender even if such a measure might, and in certain instances most likely would, have been accepted by the ECtHR as being in compliance with Article 8.

2.2 Narrowing the Margin, Introducing the ‘Procedural Risk’

The expulsion rules in the Aliens Act have been frequently amended during the past 25 years with the aim of narrowing the margin of discretion left to Danish courts. Notably, this has enhanced the impact of international human rights standards by substituting these for the discretion that had previously been left to domestic courts when balancing the reasons for expulsion against humanitarian and human rights considerations of the impact of such a decision. Different legislative approaches have been employed in this process which have, in turn, led to varying judicial responses. The evolving interaction between the legislature and the judiciary has shown a remarkable shift in the power balance, which can be seen as setting an example that has inspired subsequent developments in other areas of migration and asylum law.

A first set of legislative restrictions modified the system of proportionality described above by providing for expulsion of any offender who had been sentenced to prison, regardless of his or her period of residence in Denmark and of the duration of the imprisonment imposed by the court. This change was initially adopted in 1996 with a view to drug offences and later became the model for ongoing legislative amendments listing still new criminal offences that were to be dealt with under this ‘one strike and you are out’ approach.\footnote{The current list of such criminal offences, resulting in expulsion on the basis of any prison sentence regardless of the duration of residence, is found in Section 22, no. 4-9 of the Aliens Act.} It was, however, pointed out by the legislature that the human rights caveat should still apply. This led the Supreme Court to a quite remarkable position in which it essentially set aside a statement in the preparatory notes according to which it would only exceptionally be possible to refrain from expulsion in cases with such specific offences. In the light of the general proviso that Article 8 ECHR should still be complied with, the Supreme Court held that the legislature’s statement on ‘exceptionality’ could not be accorded any separate impact on the expulsion decision.\footnote{Supreme Court judgment of 19 May 1999, reported in Ugeskrift for Retsvæsen (Weekly Legal Journal, 1999), p. 1394 (1397).}

In addition to adding numerous criminal offences to the list of specific expulsion grounds,\footnote{For an overview of the legislative amendments of the expulsion rules, see G. Homann and E. O. R. Khawaja, ‘Udvisning’, in E. Ersbøll et al., Udlændingeret, 4th edn., vol. 2 (DJØF Publishing, Copenhagen, 2021), pp. 549-559.} the legislature also changed the relative weight of the human rights criteria to be taken into account in the judicial balancing exercise. Formally, expulsion was made mandatory in all cases where offences fell within the list, yet still subject to the human rights modification.\footnote{Section 26(2) of the Aliens Act, as amended by Act. no. 301 of 19 April 2006.} Later, it was explicitly stated in the legislative provision that expulsion could only be omitted
if such a decision would ‘with certainty’ be in violation of Denmark’s international obligations.\textsuperscript{13}

At the time of its adoption in 2011, the latter amendment was controversial due to ambiguity of the wording of the provision and not least of the preparatory works accompanying it. It was therefore abandoned already one year later, but reintroduced in 2016.\textsuperscript{14} As a remarkable novelty that has come to influence subsequent legislative initiatives and debates, the minister proposing the 2011 amendment explained that it would entail a \textit{procedural risk} in the sense that it could result in legal proceedings at the ECtHR, the outcome of which might be the finding of a violation of Article 8 ECHR.\textsuperscript{15} Once introduced, the term ‘procesrisiko’ (procedural risk) has become part of several legislative debates on controversial matters in recent years, reflecting a significant change in the official approach to balancing domestic restrictions and international obligations. Whereas human rights standards had traditionally been attributed significant authority as a normative bottom line, they were now rather seen as a risk to be managed by accepting that affected persons might initiate and potentially succeed in proceedings challenging Danish legislation.\textsuperscript{16}

While it is difficult to prove the effects of the modification of the human rights caveat in the practice of Danish courts, it appears likely that they did not attach significant weight to it upon its adoption in 2011 and reintroduction in 2016. Thus, when deciding a case that had attracted much public attention and had been seen as part of the policy background of the 2011 legislative amendment, the restricted rule on human rights violation ‘with certainty’ was not applicable due to its transitory provisions. Nonetheless, against the background of the debate surrounding this restriction, it is inevitable to consider it a factor contributing to the rather assertive approach taken by the Supreme Court in this expulsion case.

Before entering into the balancing exercise under Article 8(2) ECHR, the Danish Supreme Court gave a general account of the principles guiding the proportionality assessment, referring to the ECtHR Grand Chamber judgment in \textit{Maslov},\textsuperscript{17} thereby demonstrating its preparedness to independently apply relevant precedents from the Strasbourg Court, with no sign of deferral to domestic legislative signals.\textsuperscript{18} Notably, the decision to expel one of the three offenders was later upheld by the ECtHR.\textsuperscript{19} The \textit{Salem} case represents an early example of the Court’s increasingly systematic application of the margin of appreciation in expulsion cases, provided that the domestic courts have carefully balanced the competing interests at stake and explicitly

\textsuperscript{13} Section 26(2) of the Aliens Act, as amended by Act no. 758 of 29 June 2011. On the legislative context of this amendment, see J. Vedsted-Hansen, “‘Med sikkerhed i strid med internationale forpligtelser” – om EU-ret og andre regler som politisk handelsobjekt’, in N. D. Legind et al. (eds.), \textit{Festskrift til Nis Juul Clausen} (DJØF Publishing, Copenhagen, 2013) p. 423.

\textsuperscript{14} Act no. 569 of 18 June 2012 and Act no. 1744 of 27 December 2016, amending Section 26(2) of the Aliens Act.


\textsuperscript{16} \textit{See}, in remarkable contrast, the explanatory remarks to Bill no. L 152/2001-02, p. 12, as discussed further below in section 3.1.

\textsuperscript{17} \textit{Maslov} v. \textit{Austria}, ECtHR Grand Chamber judgment, 23 June 2008, application no. 1638/03.


\textsuperscript{19} \textit{Salem} v. \textit{Denmark}, ECtHR judgment, 1 December 2016, application no. 77036/11, para. 62-65 and 82.
taken into account the criteria set out in the Strasbourg Court’s case law, including the applicant’s family situation.

2.3 *Legislative Limits on the Impact of Human Rights*

In parallel with the above-mentioned reorientation of the ECtHR’s approach to reviewing expulsion decisions and the rather heated domestic debate in Denmark on international human rights, in particular those pertaining to expulsion of criminal offenders (*cf.* section 5, *infra*), yet another amendment of the human rights balancing rule was adopted.²⁰ Notably, this amendment left the wording entirely unchanged, and the legislative initiative served the exclusive purpose of providing the pretext for the Ministry of Immigration and Integration to include explanatory remarks in the Bill setting out in detail how the Danish courts in future cases would be expected to apply that rule laying down the standard ‘with certainty in violation of Denmark’s international obligations’.²¹ Formally having due regard to the division of powers, the legislature thereby intended to take stronger responsibility for defining under which circumstances criminal offenders would generally be subject to expulsion.²²

In addition to the somewhat peculiar legislative technique employed in the Bill, the adoption of the unchanged statutory provision with the explicit intention to lower the threshold for expulsion of criminal offenders²³ seems to raise a more principled problem as regards respect for the rule of law and judicial independence. Setting out rather detailed guidelines for the application of relevant rules in the explanatory remarks of a legislative proposal is a well-established regulatory method in Danish law, and as such it can most likely be considered compliant with the requirement of a legal basis for interferences with rights under Article 8(2) ECHR (“in accordance with the law”). In this instance, however, the particular feature of the legislative measure was the quite overt political intention to interfere with domestic judicial decisions by directing the courts towards a specific understanding of the balancing of the criteria in the proportionality assessment as exercised by the ECtHR.

Arguably, this legislative approach does not sit well with the constitutional principle according to which Danish courts are bound to apply the law,²⁴ thus presupposing that it is for the judges themselves to identify the relevant sources of law and determine the contents of the applicable norms. It is difficult to see why this principle should not apply similarly to the criteria under Article 8 ECHR, especially as the Convention has been incorporated and is therefore part of domestic law at the same level as statutory provisions. Thus, the legislative interference with the judiciary cannot be based on a dualistic view of international legal sources, neither can there be any governmental prerogative to determine the domestic impact of international obligations.

As another special feature, the description of ECtHR case law in the Bill was not necessarily beyond doubt as the representation of certain details could be seen as somewhat selective,

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²⁰ See Bill no. L 156/2017-18.
²⁴ Section 64 of the Constitutional Act of Denmark, 5 June 1953: “In the performance of their duties, the judges shall be governed solely by the law....”
possibly serving the policy aim to influence future judicial practice. It is further remarkable that whereas the Bill was intended to admonish Danish courts to use the guidelines set out in the explanatory remarks as a ‘point of departure’ in adjusting their expulsion practice, at the same time it indicated to the courts that they ought to make it appear from future judgments that they had conducted the proportionality assessment with the Maslov criteria as a ‘point of departure’. Although certainly a wise approach in order to benefit from the margin of appreciation as specified in recent ECtHR case law, this could undeniably have the effect of making the legislative interference with judicial rulings less overt to the outside world.

So far, it is hardly possible to draw firm conclusions on the effects of the most recent amendment of the human rights balancing rule by means of the 2018 Bill and its accompanying explanatory remarks. However, it is noteworthy that the Supreme Court has been prepared in at least two cases – one of which receiving extensive media attention – to expel offenders on the basis of prison sentences that were significantly shorter than envisioned as the point of departure in the guidelines of the 2018 Bill. Both cases were brought before the ECtHR which subsequently confirmed that the expulsion decisions under the specific circumstances of the individual cases were in conformity with Article 8 ECHR, thus displaying an interesting interaction between domestic courts and the supervision conducted by the ECtHR in this particular area.

3 Family Reunification: Restrictions and Suspension

3.1 Legislative Presumptions of Human Rights Compatibility

The Danish rules on family reunification have similarly been subject to significant and frequent restrictions since the 1990s, in particular during the period 2002-2011 and again since 2015. The shift in legislative approach towards international human rights obligations in this area has probably been even more visible than described above, and in some ways, both the policy orchestration and the judicial responses have been more remarkable than within the relatively narrowly delimited area of expulsion rules.

In the first place, the systematic tightening of the conditions for family reunification for spouses in 2002 was introduced as part of a policy plan for a ‘new immigration policy’ that was launched by the new government following an electoral campaign that had been won by a strong focus on restrictions on immigration, asylum and integration policy. Nonetheless, the policy plan was presented within a framework of respect for human rights. Among the fundamental objectives, restated in the implementing Bill, the first listed was respect for Denmark’s international obligations, the second was reducing the number of new arrivals and

25 Bill no. L 156/2017-18, explanatory remarks, pp. 12 and 13, 14 and 15, respectively.
26 For a similar conclusion pertaining to the criterion on attachment to the Danish society, see G. Homann and E. O. R. Khawaja, supra note 11, p. 630.
27 Khan v. Denmark, ECtHR judgment, 12 January 2021, application no. 26957/19, and Munir Johana v. Denmark, ECtHR judgment, 12 January 2021, application no. 56803/18.
strengthening requirements regarding economic self-support, and the third was enhanced integration and employment.\textsuperscript{28}

Perhaps realising that some of the most restrictive new conditions might lead to the refusal of residence for spouses in situations where that could be incompatible with Article 8 ECHR, the amended rules included a general fall-back provision intended to allow for family reunification in cases were it would be considered necessary to dispense with certain conditions in order to fulfil ECHR obligations.\textsuperscript{29} Similarly, when conditions for permanent residence permits were tightened, the legislature was aware that employment and other socio-economic conditions might have discriminatory effects towards persons with disabilities, and therefore included an explicit rule according to which such conditions should be dispensed with if the failure to comply with those requirements were to be seen as caused by the applicant’s disability.\textsuperscript{30}

The political intention to respect international obligations and the administrative application of the dispensation rule apparently did not prevent problems in terms of securing family reunification where necessitated by human rights standards. In addition to a number of cases before the Danish courts that were mainly unsuccessful, some cases raising issues of international law and EU law of a more principled nature were brought before the ECHR and the Court of Justice of the European Union (CJEU). Before accounting for these inter- and supranational rulings (section 3.3 below), however, it is important to point out how domestic political rhetoric became adjusted to the prospect of potentially lost cases in international monitoring fora (section 3.2 below).

In fact, the reorientation of Danish migration and asylum policy already attracted the attention of international human rights monitors before the more firm reactions were seen from judicial bodies. As early as 2004 the Commissioner for Human Rights of the Council of Europe launched a report on the basis of his visit to Denmark.\textsuperscript{31} Here the Commissioner raised criticism against some of the specific restrictions of the right to family reunification and further presented more principled observations on the lack of clarity in the Aliens Act and the frequency of amendments which could, in his view, risk jeopardising the principle of legal certainty.\textsuperscript{32} The Commissioner also expressed concern over rules that seemed incompatible with the principle of equality before the law, including the rule on preferential treatment for persons having held Danish citizenship for more than 28 years in terms of one of the requirements for family reunification with spouses.\textsuperscript{33}

\textsuperscript{28} Explanatory remarks to Bill no. L 152/2001-02, p. 12, referring to the policy plan ‘En ny udlændingepolitik’, presented by the government in January 2002 and based on the same fundamental considerations.

\textsuperscript{29} Section 9 c(1) of the Aliens Act, cf. the explanatory remarks in Bill no. L 152/2001-02, pp. 65-66.


\textsuperscript{31} Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Denmark 13-16 April 2004 (CommDH(2004)12), Council of Europe, Strasbourg, 8 July 2004.

\textsuperscript{32} Ibid., pp. 5-9.

\textsuperscript{33} Ibid., p. 7.
Although the Commissioner’s critical observations were largely refuted by the Danish government, they were reflected in a number of subsequent amendments of the Aliens Act. Without going into detail, it is safe to say that these amendments were mostly technical in terms of stating certain criteria related to human rights in the statutory text proper instead of in the explanatory remarks, thus aiming to accommodate some of the criticism pertaining to legal certainty. As regards issues concerning the composition and status of the Refugee Appeals Board, the amendments in the light of the Commissioner’s report are to be considered merely symbolic.

3.2 Crisis Response and ‘Procedural Risk’

The more general human rights scepticism that may provide the conceptual framework for understanding the development and current status of the perceptions of international law in Danish migration law and policy (see section 5 below) started gradually taking over the political agenda on migration law in the wake of the 2015 asylum crisis. Once again, a new government was presenting policy initiatives against the background of not only an electoral campaign where restrictions had been a priority, but also the increasing number of asylum seekers that had been arriving in Denmark and other European countries in the past few months. During the summer and autumn of 2015, the instability at the external borders of the EU and the increasingly dysfunctional asylum processing and reception systems in a number of Member States became highly visible.

Reponing to these challenges, the Danish government tabled a series of legislative proposals in November and December 2015 as part of an ‘asylum package’ and announced plans to take additional administrative measures, including reduction of the duration of residence permits issued to refugees. In addition to the notorious ‘jewellery law’ and numerous other restrictions, the package included a proposal to extend the suspension of the right to family reunification for refugees having been granted ‘temporary protection status’ from one to three years. Since this suspension was met with severe human rights criticism and ultimately was considered in violation of the ECHR, a few details of the proposal and its context will be provided as background to the following analysis of the various judicial responses (section 3.3.3 below).

The ‘temporary protection status’ under Section 7(3) of the Aliens Act is to be seen as a subcategory of ‘protection status’ as defined in Section 7(2) of the Act, specifically aimed at persons fleeing indiscriminate violence and generalised human rights violations. In both

34 Ibid., pp. 24-29 (Annex to the Report, containing reactions on the report that were presented by the Danish government at the meeting of the CoE Committee of Ministers on 8 July 2004).
provisions, the criteria for being granted protection are phrased in terms corresponding to Article 3 ECHR. Section 7(3) can be considered largely similar to Article 15(c) of EU Qualification Directive 2011/95 regardless of the somewhat uneasy relationship between the latter provision and Article 3 ECHR. Section 7(3) was adopted in 2015 in order to reflect the perceived temporary nature of protection need in such cases, and not least to provide the legal basis for limitations of entitlements for the beneficiaries of ‘temporary protection status’ under this pretext. Among these limitations, the suspension of, or waiting period for, family reunification was the most important.

Initially providing for a waiting period of one year, the suspension of family reunification was extended to three years only a year later, in 2016. The extended waiting period would apply both to newly arrived beneficiaries of ‘temporary protection status’ and to those who had already been granted such status while the one-year suspension of family reunification was still in force. In proposing this extension, the government referred to the high number of refugees arriving to Europe, arguing that this was putting pressure on all countries, including Denmark, and that the pressure was growing day by day:

We assume a shared responsibility, but in the Danish Government’s opinion, we should not accept so many refugees that it will threaten the social cohesion in our own country, because the number of newcomers has an impact on the subsequent success of integration. It is necessary to strike the right balance to maintain a good and safe community.

Having accounted for other policy measures taken on asylum issues, the government continued with the following remarkably blunt statement:

However, there is a need to do more. … the conditions within the area of asylum have an impact on how attractive it is to seek towards Denmark. Therefore the government … created a new and reduced integration benefit … With the present proposal the government wants to further restrict the asylum conditions and access to Denmark, so that it will become markedly less attractive to seek towards Denmark.

Finally, the government resorted to the procedural risk reasoning again in this context, even more so than when such arguments were introduced in connection with the amendment of the expulsion rules in 2011 (section 2.2 above). While stating that there was no relevant case law

38 See, in particular, Sufi and Elmi v. United Kingdom, ECtHR judgment, 28 June 2011, applications no. 8319/07 and 11449/07, para. 225-226.
40 Section 9(1)(i)(d) of the Aliens Act for spouses, and similarly Section 9(1)(ii)(d) and 9(1)(iii)(d) for children.
41 Bill no. L 87/2015-16, explanatory remarks, p. 8 (the English text above is based on the translation quoted by the ECtHR in para. 33 of M.A. v. Denmark, ECtHR Grand Chamber judgment, 9 July 2021, application no. 6697/18, further discussed below in section 3.3.3).  
42 Ibid. (italics added; author’s translation, given that this passage was notably not included in the translation quoted by the ECtHR in M.A. v. Denmark). The bluntness of this statement aptly reflects the intention of these legislative measures as part of an indirect deterrence strategy, cf. T. Gammeltoft-Hansen, ‘Refugee policy as ‘negative nation branding’: the case of Denmark and the Nordics’, in K. Fischer and H. Mouritzen (eds.), Danish Foreign Policy Yearbook 2017 (DIIS, Copenhagen, 2017), p. 99 (pp. 104-105).
from the ECtHR on such statutory waiting periods and explaining why there were weighty arguments to support the view that the proposed scheme was compatible with Article 8 ECHR, the government conceded that there would be “a certain risk that when reviewing a specific case, the Court may decide that Denmark cannot generally make it a condition for family reunification that aliens issued with a residence permit under Section 7(3) of the Aliens Act have resided for three years in Denmark”.

As will appear from the following, this acknowledged risk became reality five years and seven months later.

3.3 Judicial Approaches to Human Rights Compatibility

3.3.1 Domestic Courts’ Deferral to the Legislature

Due to the principled issues that were ruled upon by the ECtHR in the case concerning suspension of the right to family reunification, this case will be analysed in some detail in section 3.3.3 focusing on the judicial review conducted both at domestic level and by the ECtHR. As to the former, it appears relevant to mention that the somewhat deferential approach to the legislative choices taken by the Supreme Court was quite well in line with what may be considered a tradition in judicial review of legislative measures affecting human rights issues in Denmark.

Over the years, Danish courts, including the Supreme Court, have appeared rather unprepared to conduct any closer scrutiny of statutory rules – or rather, individual administrative decisions applying such rules adopted by the legislature – and potentially disapply them or reduce their concrete impact in the light of international obligations that may have been disregarded or underestimated by the legislature. Significant examples include cases in which international equal treatment or anti-discrimination standards were invoked in order to challenge a citizenship requirement for holders of taxi driving licenses, the reduction of social welfare benefits for refugees and other newcomers and the refusal of family reunification due to non-fulfilment of an economic requirement resulting from the sponsor’s disability.

3.3.2 Judicial Cracks in the Wall

The most significant case of the last decade that resulted in Denmark being held in violation of the ECHR in the area of migration law was decided by a narrow majority of the Supreme Court.

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43 Ibid., p. 13 (based on the translation quoted by the ECtHR in para. 33 of M.A. v. Denmark).
47 Supreme Court judgment of 22 December 2016, reported in Ugeskrift for Retsvæsen (Weekly Legal Journal, 2017), p. 973. In this case domestic law actually enabled the administration to dispense with the requirement. The case was brought before the UN Committee on the Rights of Persons with Disabilities which found Denmark to have violated the CRPD (Communication no. 39/2017, CRPD/C/20/D/39/17, 31 August 2018).
In the Court’s judgment from 2010, the majority found no violation of Article 14 ECHR, taken together with Article 8, due to the rule on preferential treatment of persons having held Danish citizenship for more than 28 years in terms of the requirements for family reunification with spouses. The minority of the Supreme Court, however, considered the application of this rule to constitute indirect discrimination on the basis of ethnic origin, thus violating Article 14.48

The ECtHR was similarly divided in its Chamber judgment which did not contain entirely clear premises in finding no violation of the Convention.49 By contrast, the Grand Chamber found Denmark in violation of Article 14 ECHR, read in conjunction with Article 8, due to indirect discrimination on grounds of ethnic origin.50 By a majority of twelve votes to five, the Grand Chamber concluded that “having regard to the very narrow margin of appreciation in the present case, the Court finds that the Government have failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule. That rule favours Danish nationals of Danish ethnic origin, and places at a disadvantage, or has a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish”.51

While the disputed rule in this case had already been exposed to criticism by international monitoring actors (see, as a significant example, section 3.1 above), this was the first case in which one of the restrictive Danish rules on family reunification was found to be in violation of the ECHR. It was not the last, however, and in fact, another European court had already started creating cracks in the wall of restrictions on family reunification – or in the perception that these domestic restrictions were fully compatible with international law and EU law.

Already a month earlier, in April 2016, the CJEU had critically scrutinised a Danish rule laying down restrictive conditions for family reunification in the light of the ‘stand-still clause’ in Article 13 of Decision no. 1/80 linked to the 1963 EU-Turkey Association Agreement.52 The CJEU concluded that the national measure in question – making family reunification between a Turkish worker residing lawfully and his minor child subject to the condition that the latter have, or have the possibility of establishing, sufficient ties with Denmark to enable him successfully to integrate, when the application is made more than two years from the date on which the parent residing in the Member State obtained a residence permit with the possibility of permanent residence – constituted a ‘new restriction’, within the meaning of Article 13 of Decision 1/80. In the Court’s view, this restriction was not justified.

While the CJEU’s proportionality test in this case was quite strict,53 the Court appears to have been even more sceptical towards the logic and the application of Danish rules on family

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49 Biao v. Denmark, ECtHR judgment, 25 March 2014, application no. 38590/10.
51 Biao v. Denmark, supra note 50, para. 138.
52 Caner Genc v. Integrationsministeriet, CJEU judgment, 12 April 2016, case C-561/14.
53 Ibid., para. 57-66.
reunification in a more recent preliminary ruling.\textsuperscript{54} Again here, the CJEU found the disputed rule concerning spouses’ attachment to Denmark to constitute a ‘new restriction’ in the terms of the ‘stand-still clause’, and found the restriction to be unjustified. In reaching this conclusion, the Court pointed out that:

\[\text{… it is apparent from the documents before the Court that the assessment by the competent national authorities of the condition laid down in Paragraph 9(7) of the Law on foreign nationals is based on diffuse and imprecise criteria, giving rise to diverse and unpredictable practices, in breach of the principle of legal certainty.}\]

\text{It follows that the national measure at issue in the main proceedings is not suitable for ensuring that the objective of successfully integrating third-country nationals in Denmark is achieved.\textsuperscript{55}}

Although these CJEU rulings exclusively affected a limited number of Turkish citizens who were lawfully residing and economically active in Denmark, they might be seen as illustrative of more general outside perspectives on the fundamental rights compatibility of some of the central restrictions on family reunification introduced in Danish law.

3.3.3 International Scrutiny of the Danish Crisis Response

Returning to the issue of suspension of the right to family reunification for beneficiaries of ‘temporary protection status’ (see section 3.2), the review conducted by domestic courts and at European level displays interesting differences. To begin with, it has to be emphasised that there were no clear precedents from the ECtHR on such a statutory waiting period for a particular category of refugees, a fact that was explicitly mentioned by both the Danish Supreme Court\textsuperscript{56} and the ECtHR.\textsuperscript{57} In that light, the ECtHR judgment was expected with significant interest, even more so because almost 13 months had passed since the oral hearing in the case in June 2020, thus suggesting that either the conclusion or the premises had required particularly thorough contemplation within the Court.

This was confirmed by the Grand Chamber judgment which appears to have been extremely carefully, not to say cautiously, drafted. While an extensive analysis of the judgment falls outside of the confines of this article, some of the core features of the ECtHR’s approach in this case will be discussed as they provide useful insights into the interaction between the domestic and international judicial responses to human rights issues. More generally, this ECtHR judgment has been seen as “a signal from Strasbourg to Copenhagen that the Danish strategy of consistently adopting a minimalist reading of its international human rights

\textsuperscript{54} A v. Udlændinge- og Integrationsministeriet, CJEU judgment, 10 July 2019, case C-89/18.

\textsuperscript{55}Ibid., para. 41-42; \textit{but cf.} the more lenient approach to an apparently rather flexible national rule in \textit{B v. Udlændingenevnet}, CJEU judgment, 2 September 2021, case C-379/20.

\textsuperscript{56} Supreme Court judgment of 6 November 2017, reported in \textit{Ugeskrift for Retsvæsen} (Weekly Legal Journal, 2018), p. 688 (714).

\textsuperscript{57} M.A. v. Denmark, ECtHR Grand Chamber judgment, 9 July 2021, application no. 6697/18, para. 140.
obligations is not without limits”.

This is not least noteworthy against the background of the 2018 Copenhagen Declaration by which the Danish government, albeit with less success than hoped for, had attempted to push the ECtHR towards widening the margin of appreciation left to states, especially in migration and asylum matters.

Second, and certainly not incidental against this background, the ECtHR judgment most carefully considers the issue of the scope of the margin of appreciation in relation to waiting periods for family reunification such as the one imposed by the disputed Danish rule. The Court’s line of reasoning may not seem entirely clear insofar as it ends up stating that there is no common ground at national, international and European levels in regard to the length of waiting periods and at the same time indicates a kind of limit of two years, apparently inspired by the EU Family Reunification Directive. While, on the one hand, implicitly setting a standard, this is, on the other hand, not necessarily meant to be an absolute time limit for the duration of suspended family reunification, nor an acceptance of any waiting period below this limit. In any event, the EU law reference is not the sole, and perhaps not even the primary, reason for the Court’s conclusion that the Danish three-year waiting period was incompatible with Article 8 ECHR.

Third, there are certain specificities in the Danish waiting period scheme and not least in its application in the concrete case that appear to have effectively narrowed the margin of appreciation. The fact that there was no ECtHR precedent on which to base the assessment of whether a ‘fair balance’ had been struck between the individual’s right to respect for family life and the state interests in restricting that right would in and of itself seem to warrant a closer scrutiny by the Court, thus favouring a narrower margin. This was particularly relevant in this case where the Danish Supreme Court had not conducted an independent and thorough balancing exercise, but had essentially deferred to legislative decisions and considerations and even observed in its conclusion that the required waiting period was within the margin appreciation that is enjoyed by the state when balancing the interests in respect for family life against those of the society under Article 8 ECHR.

This points to an element in the ECtHR’s reasoning that was perhaps decisive for the outcome of the M.A. case: the domestic decision-making process. Having referred to its own case law on the procedural requirements for processing requests for family reunification of refugees and noted that these requirements should apply equally to beneficiaries of subsidiary protection, the Court made some observations on the ‘quality of the parliamentary and judicial review’, including the following:

It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to

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59 Copenhagen Declaration on the reform of the European Convention on Human Rights system, Council of Europe, 13 April 2018 (hereafter Copenhagen Declaration).
60 M.A. v. Denmark, supra note 57, para. 151-163.
61 Ibid., para. 160 and 162.
62 Ibid., para. 189. See the Supreme Court judgment, supra note 56, p. 715.
63 Ibid., para. 137-139 and 146.
determine whether a fair balance has been struck between the competing interests of the State or the public generally and those directly affected by the legislative choices …

In this respect the Court also recalls that the domestic courts must put forward specific reasons in the light of the circumstances of the case, not least to enable the Court to carry out the European supervision entrusted to it. Where the reasoning of domestic decisions is insufficient, with any real balancing of the interests in issue being absent, this would be contrary to the requirements of Article 8 of the Convention … 64

Before applying the general principles to the concrete case, the ECtHR concluded on the scope of the margin of appreciation by once again referring to the procedural requirements, stating that “the said fair-balance assessment should form part of a decision-making process that sufficiently safeguards the flexibility, speed and efficiency required to comply with the applicant’s right to respect for family life under Article 8 of the Convention …”. 65

By its emphasis on procedural requirements, the ECtHR implicitly seems to display some scepticism towards the procedures that had taken place at domestic level in the adoption and administration of the statutory waiting period. Without dissociating itself expressly from the Danish authorities’ application of the waiting period scheme, the ECtHR notes that the Danish Supreme Court had “accepted” that the spouses were facing insurmountable obstacles to cohabiting in Syria, and that it had found that the three-year waiting period “fell within the margin of appreciation enjoyed by the State”. As regards the legislature, the ECtHR observes that the sharp fall in the number of asylum seekers in 2016 and 2017 did not prompt the Parliament to avail itself of the possibility under the ‘revision clause’ to review the duration of the waiting period. 66

In consequence, the ECtHR considered that the Danish three-year suspension rule did not allow for an individualised assessment of the interest of family unity in the light of the concrete situation of the persons concerned beyond the very limited exceptions falling under Section 9c(1) of the Act, nor did it provide for a review of the situation in the country of origin with a view to determine the actual prospect of return or obstacles thereto. The Court therefore concluded:

Thus, for the applicant, the statutory framework and the three-year waiting period operated as a strict requirement for him to endure a prolonged separation from his wife, irrespective of considerations of family unity in the light of the likely duration of the obstacles. In these circumstances, it cannot be said that the applicant was afforded a real possibility under the applicable law of the respondent State of having an individualised assessment of whether a shorter waiting period than three years was warranted by considerations of family unity. 67

64 Ibid., para. 148-149.
65 Ibid., para. 163 (italics added).
66 Ibid., para. 188-191.
67 Ibid. para. 193 (italics added).
Amidst the most careful wording and cautious approach, it is therefore hard to avoid the impression that the ECtHR was influenced by the rigidity of the Danish waiting period scheme and the close to non-existent possibility to dispense with the suspension rule. As the case did not represent a clearcut situation falling within the margin of appreciation, and as an individual assessment in reality had not taken place at the domestic level, there was in fact little reason to rely on a wide margin being granted to the respondent state under the concrete circumstances of this Article 8 complaint.

## 4 The Legal and Institutional Framework for Asylum Governance

### 4.1 Current International Law Challenges

The Danish system of asylum governance is characterised by a number of features, which could merit more extensive examination due to the often complex interaction between substantive and procedural aspects of the law. As far as the reception of international law is concerned, the system is formally simple due to the en bloc incorporation of the Refugee Convention definition as well as the principle of non-refoulement of the ECHR in the relevant provisions of the Aliens Act. Notwithstanding the simplicity, the leverage of international law is being challenged as asylum issues have become increasingly politicised in recent years, apparently resulting in insufficient scrutiny of decisions implementing recent policy initiatives to reduce the number of persons receiving protection in Denmark.

The primary current example is the ‘paradigm shift’ in Danish asylum policy that was adopted in 2019 with a view to systematically reconsidering the need for continued protection and at the same time, in cases where protection is ceased and the residence permit revoked, limiting the impact of links to Danish society to the minimum as required by international law. On the basis of a screening of asylum cases of Syrian refugees having ‘subsidiary protection’ or ‘temporary protection status’, the Immigration Service has revoked, or refused renewal of, numerous residence permits resulting in a significant caseload being brought before the Appeals Board.

So far, the outcome of appeals cases has raised public concern not only over the Appeals Board’s less than transparent application of the country of origin information about the security situation and the risk of persecution or ill-treatment of returning refugees, but also over the Appeals Board’s approach to the application of Article 8 ECHR in terms of respecting the integrative links to Denmark of potential returnees. Here again, there is a particular problem

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68 Sections 7(1)-(3), 31(1) and (2) and 48(a)(1) of the Aliens Act. Notably, the latter provision defining the ‘safe third country’ notion is less transparent due to important guidelines for its interpretation being contained in the preparatory works.


due to the absence of clear precedents from the ECtHR. Yet, the Appeals Board has been criticised for not conducting the individual balancing pursuant to Article 8(2) in accordance with the general requirements under the ECHR as well as the stipulations in Danish law.\textsuperscript{71}

In the future, the Refugee Appeals Board may further have to assume a decisive role in regard to a novel and even more politically sensitive issue of refugee and human rights law. This involves the possible interpretation and application of the recently adopted statutory provisions on the outsourcing of asylum procedures and protection from Denmark to a non-EU Member State, in all likelihood located outside Europe. As the legal complexities of this legislation have been discussed elsewhere in this special issue,\textsuperscript{72} it needs only pointing out here that in the light of the experience from the Appeals Board’s review of the above-mentioned cessation and revocation decisions, it may appear reasonable to raise the question whether the Board will be capable of subjecting decisions on the transfer of individual asylum applicants under the prospective outsourcing scheme to the requisite scrutiny according to standards of international law and EU law.

4.2 Institutional Particulars of the Asylum Procedure

Arguably, the institutional framework pertaining to Danish asylum governance may itself weaken the capability of the Refugee Appeals Board to secure the adequate interpretation and application of international law in case of potential pressure from political level. While the first instance body examining asylum applications, the Danish Immigration Service, is formally a subordinate of the Ministry of Immigration and Integration, there have over time been attempts to represent it as an independent body. This may have good policy reasons and administrative advantages, but it simultaneously risks resulting in insufficient transparency as regards the application of international standards, perhaps especially those of a ‘soft law’ nature for whose actual implementation the government could be expected to be responsible. More importantly, appeals against negative asylum decisions lie with the Refugee Appeals Board which is a quasi-judicial body composed of a judge, a practising lawyer, and a government official employed with the Ministry of Immigration and Integration. Given the majority of non-government appointed members, the Refugee Appeals Board is able to operate independently when deciding appeal cases. In that regard, the procedural safeguards are in line with the quasi-judicial aspirations, in particular due to the appointment of a lawyer representing appellants in most substantive asylum cases as well as the right of the appellant and the lawyer to an oral hearing before the Refugee Appeals Board.\textsuperscript{73}

Despite the formal independence and procedural safeguards, however, the Refugee Appeals Board can hardly be considered an effective guarantor of the correct interpretation and application of international refugee law in all respects. Among the institutional factors explaining this observation is the relative degree of expertise and engagement of the Board.


\textsuperscript{72} See N. F. Tan, in this special issue.

\textsuperscript{73} Sections 53-56 of the Aliens Act.
members. Thus, while the Board exclusively deals with cases concerning asylum, most of its members are mainly working outside the field of asylum law and only spend limited time examining asylum appeal cases. The members’ substantive expertise and experience within asylum law is furthermore not structurally secured. This administrative reality has to be compared to the role and involvement of the secretariat of the Refugee Appeals Board whose staff are employed by the Ministry of Immigration and Integration, albeit currently with formal deployment to a directorate subordinate to the Ministry.

As a third institutional feature of the Danish asylum procedure, the lack of judicial review of the Refugee Appeals Board’s decisions remains a critical issue. The ‘finality clause’ in the Aliens Act that normally prevents domestic courts from reviewing asylum decisions may on face value appear to have rather limited practical impact. Nonetheless, the clause can potentially contribute to uncertainty about the status of the Refugee Appeals Board and its decisions, in addition to raising a constitutional issue of barring access to judicial review of administrative decisions.\(^74\) Importantly, however, the absence of domestic remedies is a factor that contributes to numerous decisions of the Refugee Appeals Board being brought before international bodies, in particular committees monitoring states’ compliance with the relevant UN human rights treaties.\(^75\) Although this should be seen as a procedural safeguard of last resort for asylum applicants, it has not necessarily enhanced respect for these UN treaties and their monitoring bodies inasmuch as the Refugee Appeals Board normally reopens cases in which a UN committee has levelled criticism against its initial decision, but it is less than certain that such criticism will be accommodated or an elaborated explanation be given if that is not the case.\(^76\)

5 Migration Law and General Human Rights Scepticism

In parallel with the changing perceptions of human rights and the shift in regulatory strategies in order to manage the sometimes uneasy relationship between international law and Danish migration and asylum law and policy, Denmark has seen a rise in more general human rights scepticism. As already illustrated above (sections 2.2 and 3.2) such scepticism was somewhat inherent in the political rhetoric accompanying some of the most far-reaching restrictions of the rules on expulsion and family reunification. What might perhaps seem more surprising is the normative and institutional scepticism towards international human rights obligations and the attached monitoring bodies, including the ECtHR, which has evolved as a regular feature in Danish public discourse.

This became particularly visible during the preparations for Denmark’s presidency of the Council of Europe in 2017-2018. Here, the adoption of what later became known as the Copenhagen Declaration\(^77\) had been proclaimed as a priority issue for the Danish government,

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\(^75\) See S. S. Ford, in this special issue.


\(^77\) Copenhagen Declaration, *supra* note 59.

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not unrelated to domestic political debates that were often triggered by spectacular cases on expulsion and other issues concerning migration control. The government’s declared intention was the attempt to push the ECtHR further towards widening the margin of appreciation left to states, especially in migration and asylum matters. While the initial draft Copenhagen Declaration was considered extraordinarily far-reaching in that respect, the adopted text was significantly modified and mostly reconfirmed previous political statements and existing ECtHR practice.

During the preparatory debates on the Copenhagen Declaration, reference was not infrequently made to certain academic contributions that had been reflecting criticism against the European human rights system, some of which apparently perceived as delegitimisation of the ECtHR and its current approach to reviewing human rights complaints. Thus, just as identification with unwanted migrants has often been unfortunate for human rights and for the systems established to protect them, the increasingly sceptical human rights discourse is likely to have been influential in the context of the shifting regulatory strategies pertaining to the impact of international law on domestic migration and asylum law and policy.

This interaction between the regulatory strategies employed by the legislature and the judicial review of legislative measures may seem to be a particular feature of the general approach to international law in the Danish legal system. While the tendencies here analysed are indeed influenced by the specific sensitivity and political framing of migration and asylum law, the legal strategies and responses within this regulatory area and the academic discourse reflecting them may seem to hold the potential to reinforce normative and structural scepticism towards international law well beyond the area of migration and asylum.

78 Draft Copenhagen Declaration, Danish Ministry of Justice, 5 February 2018. For critical observations, see ECtHR, Opinion on the draft Copenhagen Declaration, 19 February 2018, and in particular Council of Europe, Parliamentary Assembly, Declaration on the Draft Copenhagen Declaration on the European Human Rights system in the future Europe, 16 March 2018.

79 Copenhagen Declaration, supra note 61, see in particular para. 26-28.

80 As a notable example, see the editorial introduction by J. Kristiansen, ‘Menneskerettighedsdomstolens dynamiske fortolkningstil til debat’, Juristen (2017) p. 71, to the special issue with contributions by J. S. Sørensen p. 73, M. B. Andersen p. 81 and A. Henriksen p. 98.