



UNHCR's Observations
on the proposed amendments to the Danish law on social pension
Lov om ændring af lov om social pension (Harmonisering af regler om opgørelse af
bopælstid for folkepension), L72.

Introduction

UNHCR provides these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees.¹ As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the *1951 Convention relating to the Status of Refugees* (hereinafter; "the 1951 Convention") and Article II of the *1967 Protocol relating to the Status of Refugees* (hereinafter "the 1967 Protocol"), according to which State parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention". Denmark is party to both the 1951 Convention and the 1967 Protocol.

Considering the short deadline given by the Danish government, the Office will limit itself to making a few observations relating to the interpretation of Article 24 of the 1951 Convention concerning social security as well as relevant human rights provisions. UNHCR reserves the right, once adequate analysis is completed, to provide further detailed and public comments to the legislation, and to further elaborate any opinion provided in these preliminary observations.

Proposed amendments concerning old-age pension for refugees

The current legislation from 1984 relating to old-age pensions ensures that refugees have the same old-age pension as Danish nationals by including the period of residence in the country of origin in the calculation for the entitlement to the pension. According to the proposed amendments, the period of residence in the country of origin shall no longer be taken into account when calculating refugees' entitlement to old-age pension.

¹ Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1, available at <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

Similar to immigrants and nationals, who have lived abroad, refugees must reside in Denmark for 40 years after the age of 15 in order to obtain full old-age pension. Many refugees will most likely not meet the requirement for full pension. Older refugees will also have constraints in securing other forms of pension. For instance, the minimum requirement of three-years-residence may exclude some refugees from so-called "fraction pension". As a consequence, they will not be entitled to other social benefits which pensioners enjoy, such as housing, heating and health allowances.

While the proposed amendments would bring the calculation of old-age pension for refugees in line with the rules for calculation of old-age pension for Danish citizens and immigrants who have lived abroad, they do not take into consideration the specific circumstances of refugees. Refugees who may have worked and would be entitled to pensions in their home countries will generally not be able to access such pension after they fled. Furthermore, the proposed amendments do not take into consideration that some refugees may be stateless and therefore, as a matter of law, would be unable to secure the benefits accorded to nationals of his or her country of former habitual residence. Not having access to the full old-age pension in Denmark and other benefits will leave them in a potentially vulnerable situation, in destitution, severe poverty and with little means to integrate.

International legal framework

The interpretation of Article 24 of the 1951 Convention must be consistent with the protective and rights-based object and purpose of the Convention. Article 24 (Social security) together with Article 23 (Public relief) aim to ensure that there are no unjustified or unnecessary gaps in the social security systems for refugees.

Article 24(1)(b)(i) of the 1951 Convention provides that refugees lawfully staying in a State party should be accorded the same treatment as is accorded to nationals with regard to social security, including old-age pensions. This right may be limited in situations where part of the social benefit would ordinarily be paid by another country, for example, where the entitlement has been accrued in the country of origin or other third country.

Article 24(1)(b)(ii) further provides that special arrangements may be prescribed for benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfill the contribution conditions prescribed for the award of a normal pension. While this provision places a limitation on States parties on the extent to which refugees may be entitled to enjoy the same treatment as nationals, "it does not absolve States of the responsibility of ensuring that special arrangements are made to cover those refugees whose situation cannot be adequately covered by the usual arrangements that are in place for nationals generally".² Refugees may receive less than a national, however, this provision does not mean that States can deny pension and other social security benefits to refugees altogether.³

Obligations under the 1951 Convention thus require the granting of certain social security benefits even in cases where refugees may not have had the opportunity to contribute to the relevant pension schemes, *inter alia*, due to their short period of residence in the country of asylum. This takes into consideration that in many instances refugees will be in

² E. Lester, 'Article 24', in A. Zimmerman (ed.), *Commentary of the 1951 Convention relating to the Status of Refugees* (Oxford University Press, forthcoming 2011), 1057-1078, at F.III.2.

³ Grahl Madsen, *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, October 1997, available at: <http://www.unhcr.org/refworld/docid/4785ee9d2.html>, Article 24 (para. 8).

an unfair and disadvantaged situation as they generally cannot claim the social security benefits towards which they contributed in their country of origin.

A similar right to that of Article 24(1)(b) of the 1951 Convention is set out in Article 9 of the International Covenant on Economic, Social and Cultural Rights (hereinafter "the ICESCR")⁴ which recognizes "the right of everyone to social security, including social insurance". This article applies to *all* older persons, including refugees, and requires States parties to pay special attention to this group, including ensuring that they enjoy equal treatment in access to non-contributory pension schemes. It prohibits any discrimination in the law, whether direct or indirect, on the basis of a person's national or social origin, and which has the effect of impairing the right to social security, including old-age pension.

The right in Article 9 of the ICESCR is interpreted by the Committee of the ICESCR in its General Comment No. 19⁵. Paragraph 15 specifies that

"States parties should, within the limits of available resources, provide non-contributory old-age benefits, social services and other assistance for all older persons who, when reaching the retirement age prescribed in national legislation, have not completed a qualifying period of contributions or are not otherwise entitled to an old-age insurance-based pension or other social security benefit or assistance, and have no other source of income."

Paragraph 29 further states that

"The Covenant ... [p]rohibits any discrimination, whether in law or in fact, whether direct or indirect, on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security."

Specific mentioning is made in relation to refugees. Paragraphs 31 and 38 respectively set out that

"Whereas everyone has the right to social security, States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular women, the unemployed, workers inadequately protected by social security, persons working in the informal economy, sick or injured workers, people with disabilities, older persons, children and adult dependents, domestic workers, home workers, minority groups, refugees, asylum-seekers, internally displaced persons, returnees, non-nationals, prisoners and detainees."

"Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards."

⁴ International Covenant on Economic, Social and Cultural Rights Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, available at:

<http://www2.ohchr.org/english/law/pdf/cescr.pdf>.

⁵ General Comment No. 19: The right to social security (Art. 9 of the Covenant), 4 February 2008, E/C.12/GC/19, available at: <http://www.unhcr.org/refworld/docid/47b17b5b39c.html>.

The General Comment thus emphasizes that special attention needs to be given to refugees, bearing in mind the difficulties they have in exercising their right to social security. Such difficulties may arise, for instance, because they have not resided in the country of asylum throughout all their adult and/or working life and may thus not be able to meet the requirements.

Other provisions in international human rights law are also relevant for understanding the right of refugees to social security, including the right to an adequate standard of living as well as the right to the highest attainable standard of physical and mental health, enshrined in the ICESCR Articles 11 and 12 respectively. The right to non-discrimination, including on the basis of national and social origin, is also relevant. This principle has been affirmed and elaborated in international and regional jurisprudence. For instance, in a judgment from the European Court of Human Rights, *Thlimmenos v. Greece*, the Grand Chamber underlined that "the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention [the European Convention of Human Rights] is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different." (paragraph 44).⁶

In Europe, the European Social Charter and the European Convention on Social Security both extend to refugees.⁷ The EU Qualification Directive provides that the necessary social assistance shall be provided to refugees and beneficiaries of subsidiary protection as provided to nationals of Member States.⁸

To conclude, UNHCR considers that the proposed amendments fall short of the requirements under the 1951 Convention as they do not sufficiently take into account the specific situation of refugees and leads to the un-equal treatment and enjoyment of the right to social security, contrary to the principle of non-discrimination. The combined intent of Articles 23 and 24 of the 1951 Convention as well as relevant human rights obligations establishes a minimum standard of treatment with regard to social security below which there would be concerns that inhuman or degrading treatment could arise. UNHCR therefore recommends that the current provision (9) of the law on social pension is retained in order for refugees to receive the same benefits as the general national population, including old age pension.

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⁶ *Thlimmenos c. Grèce*, Application no. 34369/97, Council of Europe: European Court of Human Rights, 6 April 2000, available at: <http://www.unhcr.org/refworld/docid/4a3a3af70.html>.

⁷ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, available at: <http://www.unhcr.org/refworld/docid/3ae6b3678.html>, Appendix, 2; Council of Europe, *European Convention on Social Security*, 14 December 1972, ETS 78, available at: <http://www.unhcr.org/refworld/docid/3ae6b367c.html>, Article 4.1.

⁸ Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 19 May 2004, 2004/83/EC, available at: <http://www.unhcr.org/refworld/docid/4157e75e4.html>, Recitals 30, 33 and Article 28.