The End of an (Unlawful) Era

On the Danish Supreme Court´s judgement concerning the non-penalization of refugees

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On June 17th, the Danish Supreme Court delivered an important judgement concerning the principle of *non-penalization* of refugees, enshrined in Article 31 of the Convention Relating to the Status of Refugees from 1951. While the Court's interpretation does not break new ground doctrinally, it ends decades of unlawful prosecutorial practices, with immediate consequences for refugees with convictions and future asylum seekers crossing the border without formal documentation. A closer reading points to longstanding deficiencies in informing asylum seekers of their rights during the procedure. Moreover, in a Danish context, the ruling only encompasses refugees under the Convention, and questions therefore remain regarding the interpretation of Article 31 for beneficiaries of subsidiary protection.

Substance of the non-penalization principle

The *non-penalization* principle, as laid out in Article 31 of the Refugee Convention, reads as follows:

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

It is one of the main innovations of the 1951 Convention, as it extends the obligation of *non-refoulement* (Article 33 of the Refugee Convention) to all refugees, regardless of whether they enter lawfully or not. The addition of this provision is intended to recognize the fact that refugees are rarely able to secure formal documentation prior to their flight. The Article is formulated in such a way that it rests on the refugee to notify the authorities and explain their reasons for illegal entry. Yet, refugee scholars have long criticized, such as here and here, the lack of national rules for asylum seekers that would protect them from prosecution for breaching general immigration laws, such as using false documents.

In many other fields of international law, such a key provision would likely have been interpreted by at least one international court, especially considering states' restrictive practices. Yet, there is no dedicated court of international refugee law. When a matter concerning a forged passport and the question of Article 31 came before the CJEU in *Qurbani* in 2014, the court refused to interpret it on the basis that it fell outside EU law. Consequently, decisions by national apex courts continue to play an important role in this area, at times even striking down unlawful legislation, like the Constitutional Court of Belgium, which in 2021 found that recent amendments did not take *non-penalization* under Article 31 into account. The Danish Supreme Court has once again entered this ongoing legal conversation.

Nordic apex courts and international migration law

The Nordic courts are distinct from their continental neighbours. The Nordic legal culture is characterized by a historic scepticism of judicial review and absence of constitutional courts, with its variant of majoritarian democracy that lends a decisive role to the legislature. As a result, scholars have long noted how Nordic courts are wary of independently relying on international law and are generally deferential to the interpretation of international law as laid down in policy.

This image of cautious courts has slowly begun to shift through important internal reforms and outward attention towards human rights law. In 2011, Ran Hirschl noted that the transformative constitutional changes in the absence of political or economic changes in this region mean that "the Nordic countries' unique constitutional scenery is a largely unexplored paradise for theory building in the field of comparative constitutional law and politics."

It is no coincidence that Nordic courts are taking on a more pronounced role precisely when it comes to questions of foreigners' rights. These are often cases where recent decades have seen the passing of legislative amendments that test minimum interpretations, often in the name of indirect deterrence, while organized legal mobilizations and media attention spread awareness. However, the courts' involvement in asylum challenges the institutional insulation of this legal area, traditionally borne out through administrative boards. While Finland and Sweden have since undergone court reforms, in practice, the higher courts often delegate matters of interpretation to the specialist administration. The crucial difference between the appeal boards of Norway and Denmark is that decisions of the Norwegian Immigration Appeals Board can be heard by the national courts, while this option is effectively void in Denmark. Because of this institutional design, Danish courts only rarely weigh in on questions related to international protection. The Supreme Court only decided on the present case as it entered through the back door, as a challenge to an infraction and deportation order.

The main components of the Supreme Court's acquittal

The landmark decision concerned a Syrian man, T, who crossed the Danish border in Kruså on November 7th, 2022. He was arrested for presenting an Italian ID issued to another person and arraigned on the same day for violating Article 174 of the Danish Criminal Code, to which he pled guilty. Upon arrest, T explained to police that he wanted to visit his sisters in Denmark before returning to Germany and seeking asylum there. He informed them that he had fled Syria, as he was wanted for having deserted the Syrian army. Nevertheless, because his intention was not to seek protection in Denmark specifically, the District Court treated this as a matter of criminal law only. Just a day after arriving, T was sentenced by the District Court to 14 days in prison, expulsion from Denmark, and a six-year entry ban.

Shortly after his release from prison, T lodged a claim for asylum, and a year later, he was granted refugee status in Denmark. He then sought acquittal before the High Court concerning Article 31 of the Convention, which was appealed before the Supreme Court. For this reason, the interpretation of the Convention Article came before the ordinary courts.

The courts were asked to consider if the use of another person's ID would be excused with reference to the Convention's Article 31. This centres the question of what it means to come "directly" from a place where there is risk of persecution and to "present [oneself] to the authorities without delay". In their ruling, the High Court employed a narrow interpretation of these two elements. First, T had not arrived "directly" from Syria, as he had spent two years in Turkey and two months in Greece before travelling by bus to Denmark. Second, when he was asked during the arraignment if he wanted to claim asylum in Denmark, he declined, as he intended to seek asylum in Germany.

The Supreme Court's reasoning was different. Whereas the High Court stressed the duration of the stays in Turkey and Greece, the Supreme Court classified these as mere transits. Similarly, where the High Court emphasized that T did not intend to seek protection in Denmark specifically, the Supreme Court found T's expressed intent to seek asylum – irrespective of the location – and his explanation about fleeing Syria to fulfil Article 31's requirement of contacting authorities "without delay".

The bigger picture: procedural slippages in accessing an asylum procedure

T's case highlights systemic gaps in how Danish authorities handle irregular border crossings. T notified the authorities that he was a deserter from the

Syrian army and that he intended to seek asylum in Germany. Yet, this is *de facto* impossible due to the Dublin Rules' principle of first entry, of which the authorities would be aware. Before the High Court, T stated that he was never informed that he could not travel back and seek asylum in Germany, as he had now been arrested in Denmark, and that none of the authorities he was in contact with had mentioned the Refugee Convention to him. The Supreme Court somewhat sidesteps this larger question of whether the police, prosecution, and courts had failed their due process obligations in relation to T when they neglected to inform him on the relevant refugee law aspects of his case. In their ruling, the Supreme Court subtly implies this critique when mentioning that T's expressed intent to seek asylum in Germany does not lead to his exclusion from Article 31. In this context, it is further notable that T was not informed by the police nor the judiciary of having to seek asylum in Denmark instead of Germany. Instead, it was a staff member at the deportation centre Kærshovedgård who informed T of this crucial and practical component of accessing asylum.

Open questions remain after the judgement. For instance, whether an individual benefits from the protective clause of Article 31 when attempting to leave or cross the state in a situation of transit, for example at the airport. Due to the nature of global travel mobility, asylum seekers must seek asylum in the state in which they are stopped. But once again, they may not know this and believe themselves able to continue. In 2013, the Supreme Administrative Court of Finland found that a person stopped while exiting the country with a forged passport still benefits from the protective scope of Article 31. We might know whether the Danish Supreme Court reasons similarly, as a comparable case concerning a man attempting to reach Ireland, having sought asylum when stopped at an airport in Denmark, has recently been granted access to appeal before the Danish Supreme Court.

The ramifications of penalization

This practice of *penalization* goes against the Danish Director of Public Prosecutions' own guidelines from 2010, which warned that prosecution in such cases should await a final decision in the asylum case so as not to violate international law. Even as early as 2008 and 2009, while the authorities were still debating the practice, many were charged in this situation, typically with a sentence of 40 days, a deportation order, and an entry ban. Throughout the years, these hasty prosecutions have resulted in a long list of onset effects.

At a basic level, the sentencing impacts where the individual asylum seeker is housed. In T's case, the sentence, while only 14 days, meant that he was housed at a deportation centre (*Kærshovedgård*) for foreign nationals on tolerated stay after serving his sentence until the authorities had processed his asylum claim. Located in a forest 7 km from public transportation, the former prison turned deportation centre is administered by the Danish Prison and Probation Service. While technically open, it requires residents to be at the premises at night, restricting their freedom of movement. Whereas residents at regular asylum centres are allowed to work and receive a small allowance, this is not the case for residents at deportation centres. In practice, these centres prevent engagement with society. To the contrary, they are designed to motivate the residents to return. Many others in this situation wait out their case at the detention centre *Ellebæk*, which in 2020 received damning critique from the Council of Europe's anti-torture committee.

The later onset effects of *penalization* may influence many aspects of a refugee's future. Finding a job with a tainted criminal record is notoriously difficult. Further, persons who have been sentenced to prison are suspended for 12 years from applying for permanent residency, just like they are ineligible for applying for Danish citizenship. These are just a few of the long-term consequences that could befall the now ruled-to-be-illegal conviction of asylum seekers travelling with false IDs.

Going forward

The Supreme Court judgement has already resulted in the reopening of many cases. This will presumably lead to the acquittal of many refugees previously

charged with using false documents to enter Denmark. Cases where the claimant alludes to fleeing their home country without lodging an official asylum claim might also be affected. Cases on other aspects of Article 31 are already pending, in what appears to be a moment of mobilization by lawyers and civil society in response to the longstanding practice of systematic penalization. And their efforts appear successful: in an earlier case described this year, the Copenhagen District Court relied on a letter from the Danish Refugee Council to characterize a stay in Greece as "transit", thus acquitting the person on the basis of Article 31.

Yet, there are important limits to the protective ambit of Article 31 in the Danish context. Danish asylum law draws a sharp distinction between refugees and those granted subsidiary or temporary subsidiary protection, with resulting legal unclarity, e.g. concerning the cessation of status. In 2012, the Danish Supreme Court held that Article 31 only applies to those granted Convention status. Thus, there is nothing to prevent penalization for using false documents if the person is found not to fit the refugee category but is nevertheless granted protection under a subsidiary category. Put crudely, an asylum claimant would have to know that they would be considered a Convention refugee – and not someone risking ill-treatment under Article 3 ECHR – before risking travelling with false travel documents. As the application of Article 31 depends on this distinction, the Danish approach may consequently continue to have discriminatory effects.

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