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COMMISSAIRE AUX DROITS DE L'HOMME



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REPORT

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Following his visit to Denmark
from 19 to 21 November 2013

Summary

Commissioner Nils Muižnieks and his delegation visited Denmark from 19 to 21 November 2013. In the course of this visit the Commissioner held discussions with representatives of the Danish authorities and institutions and with members of civil society. The present report draws on the themes of the Commissioner's visit and focuses on the following selected human rights issues:

I. Human rights of asylum-seekers and immigrants

In recent years, the Danish authorities have adopted measures in the field of asylum, immigration and integration in order to address some of the human rights issues raised by the restrictive asylum and immigration policies implemented in Denmark since 2002. However, further improvements are required to ensure better protection of the human rights of asylum-seekers and immigrants.

1. The rights of children in the context of asylum and immigration

The Commissioner is concerned that considerations relating to migration control tend to have primacy over the best interests of the child in actions and decisions affecting children in the context of asylum and immigration. The Danish authorities should ensure that the rights protected under the UN Convention on the Rights of the Child (UN CRC) are better reflected in asylum and immigration policies and practices. In particular, requests for family reunification involving children should be dealt with in a more positive, humane and expeditious manner. Moreover, the best interests of the child should prevail over their integration potential, or the integration potential of their parents.

The Commissioner is alarmed at the impact that life in asylum centres for indefinite periods of time has on children belonging to families of rejected asylum-seekers whose deportation order cannot be implemented. He therefore notes with interest the possibility, introduced in 2013, for families with children to live outside asylum centres. Lasting solutions should be identified to ensure that these children can fully enjoy their rights as protected under the UN CRC, in particular their right to quality education on the basis of equal opportunities and their right to a standard of living adequate for their physical, mental, spiritual, moral and social development.

Unaccompanied minor migrants are in a highly vulnerable position. The Danish authorities are called upon to improve their age determination procedures and effectively investigate the fate of unaccompanied minor migrants who have disappeared from reception centres. The prospect of being returned to their country of origin as soon as they turn 18 places unaccompanied minors whose asylum claims have been rejected in a situation of uncertainty which is harmful to their wellbeing and development. Moreover, the envisaged possibility of returning children whose asylum claims have been rejected to countries of transit or origin, including to reception facilities established for this purpose, is of serious concern because of the risk of human rights violations to which these children would be exposed.

A child-sensitive approach to asylum should be in place to allow for any protection needs of children as a specific social group to be identified. In the Commissioner's opinion, the detention of minors for asylum and immigration purposes should not be allowed and should be replaced with appropriate care arrangements. Lastly, when taking return decisions affecting families, the authorities should treat the best interests of the child as a primary consideration.

2. Other human rights issues pertaining to asylum and immigration

Steps have been taken to strengthen human rights safeguards in the asylum procedure, including a more independent Refugee Appeals Board. However, the quality of interpretation provided in the initial stages of asylum procedures could be improved. The Danish authorities should also ensure that any transfers of asylum-seekers under the Dublin regulation take place in full compliance with Denmark's human rights obligations, including the obligation not to expose the persons concerned to a risk of being subjected to inhuman or degrading treatment.

Measures should urgently be taken to put an end to the "legal limbo" of rejected asylum-seekers whose deportation order cannot be implemented. Stays of indefinite duration in asylum centres cannot

be considered as a viable option and the willingness of authorities to incite voluntary return should never result in arrangements that impinge on the human rights of the persons concerned and the members of their families.

When rejected asylum-seekers are returned, the utmost care should be taken to ensure that their right not to be exposed to a real risk of being subject to treatment contrary to Article 3 of the European Convention on Human Rights (hereinafter referred to as ECHR) or onward refoulement is thoroughly respected. In cases where the returnee is a person who has resided in Denmark on humanitarian grounds related to health, the effective availability and accessibility of the necessary medical treatment to the returnee in the country of destination should be considered.

Additionally, the detention of asylum-seekers and irregular migrants should remain exceptional and for the shortest possible length of time. Moreover, the authorities should not detain persons in a situation of particular vulnerability, such as children, persons with disabilities and victims of trafficking in human beings.

Permanent residence should be granted to refugees as early as possible in order to establish a stable basis for their integration in Denmark and attention should be paid to ensuring that they do not fall into destitution at retirement age.

Public discourse and hate speech targeting ethnic and religious minority groups, particularly Muslims, continue to be of concern to the Commissioner, in spite of reported improvements. Although a number of cases of hate speech have been prosecuted in recent years, the number of convictions remains limited. The authorities should firmly condemn all instances of racist and xenophobic speech in political discourse and raise awareness about the limits of freedom of expression in accordance with international standards and the case-law of the European Court of Human Rights (hereinafter: the Court). Positive steps were taken in 2011 by the Director of Public Prosecutions to provide detailed guidance to prosecutors and police officers on the processing of cases of hate speech and hate crime. Further efforts should be made to encourage the reporting of hate crimes.

The setting up of an independent police complaints authority is a particularly commendable development. In this context, it is important that law enforcement officials are easily identifiable, so as to facilitate the prosecution and sanctioning of perpetrators of abuse. The Danish authorities should examine reported practices of ethnic profiling by the police and ensure that adequate safeguards against this phenomenon are in place.

II. Human rights of persons with disabilities

Denmark has developed positive policies regarding the provision of individualised support and services in the community, in order to promote the autonomy of persons with disabilities. However, there is a worrying trend among local authorities to provide accommodation to persons with disabilities in large residences, with around 20 to 80 housing units. This approach does not favour the independent living and inclusion in the community of persons with disabilities, a right guaranteed under the UN Convention on the Rights of Persons with Disabilities (UN CRPD). Local authorities should be provided with guidance on the building of housing facilities for persons with disabilities which are more compliant with the principles contained in the UN CRPD.

Denmark maintains a system of guardianship for persons considered incapable of managing their own matters due to psycho-social or intellectual disabilities, including full deprivation of their legal capacity. Persons under plenary guardianship are, moreover, automatically deprived of their right to vote. The Danish authorities should bring their legislation and practice in these fields in line with international standards, including the case-law of the Court and the provisions of the UN CRPD which guarantee the right for persons with disabilities to equal recognition before the law. Progress is required towards replacing substituted decision-making, including guardianship, with supported decision-making. As a first step to this end, full incapacitation and plenary guardianship should be abolished. Measures must be taken to ensure that persons with disabilities can enjoy their right to vote.

The Commissioner calls on the Danish authorities to ensure that legislation and practices regarding coercion in psychiatry, including forced hospitalisation, forced treatment and the use of physical restraints are in full compliance with human rights standards. The publication in October 2013 of a

comprehensive report on the care of persons with mental health problems, commissioned by the government, is a welcome development. The report's proposals aimed at reducing involuntary placement and treatment and limiting drastically the use of coercion must be followed up swiftly through the adoption and implementation of an action plan. The authorities should strengthen guarantees against arbitrary or disproportionate decisions regarding forced placement, ensure respect for the consent of the patient and prevent further violations of the right of patients to physical integrity from occurring.

Introduction

1. The present report follows a visit to Denmark by the Council of Europe Commissioner for Human Rights from 19 to 21 November 2013.¹ The visit focused on the human rights of asylum-seekers and immigrants, with particular emphasis on the rights of children in the context of asylum and immigration, and on the human rights of persons with disabilities, particularly those with psycho-social and intellectual disabilities.
2. During his visit the Commissioner held discussions with the Danish authorities, including the Minister of Justice, Mr Morten Bødskov, the Minister for Social Affairs, Children and Integration, Ms Annette Wilhelmsen and the Minister for Health and Prevention, Ms Astrid Krag. He also met with the Under-Secretary of State for Foreign Affairs, Mr Jonas Bering Lissberg, the Director of Public Prosecutions, Mr Ole Hasselgaard and representatives of the Danish Immigration Service, the Danish National Police and the Refugee Appeals Board. He held meetings with the representative of Greenland, Ms Tove Søvn Dahl Gant, the Parliamentary Ombudsman, Mr Jørgen Steen Sørensen, the Director of the Danish Institute for Human Rights, Mr Jonas Christoffersen, and with members of the Danish Human Rights Council.
3. The Commissioner also met with a number of representatives of civil society organisations active in the field of human rights. He visited a residence for persons with autism in Copenhagen, and the asylum reception centre of Sandholm and the Danish Prison and Probation Service's Institution for Asylum Seekers (Ellebaek).
4. The Commissioner wishes to sincerely thank the Danish authorities in Strasbourg and in Copenhagen for their assistance in organising his visit and facilitating its independent and smooth execution. He also extends his thanks to all his interlocutors for their willingness to share with him their knowledge and views.
5. The Commissioner wishes to continue his constructive dialogue with the Danish authorities on strengthening human rights protection in Denmark. He trusts that this dialogue will be facilitated by the present report, which consists of the following chapters: I. Human rights of asylum-seekers and immigrants; and II. Human rights of persons with disabilities.

I. Human rights of asylum-seekers and immigrants

6. The introduction of restrictive asylum and immigration legislation and policies since 2002 has led international human rights bodies, including the Commissioner's predecessors, to focus extensively on the human rights of asylum-seekers and immigrants as part of their work on Denmark over the last decade. More recently, the Danish authorities have taken a series of measures which address some of the human rights issues raised in those contexts. In spite of these positive developments, there are areas related to asylum and immigration which continue to be of concern to the Commissioner.

1. The rights of children in the context of asylum and immigration

7. One of these areas is the extent to which the Danish authorities take into account the rights of the child in their policies and practices concerning asylum and immigration. Article 3 of the UN CRC, to which Denmark is a party, requires that the best interests of the child be treated as a 'primary consideration' in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. However, civil society organisations have consistently reported to the Commissioner that considerations relating to immigration control tend to have clear primacy in such actions and decisions in Denmark.

¹ During his visit the Commissioner was accompanied by the Deputy to the Director of his Office, Mr Giancarlo Cardinale, and his adviser, Ms Françoise Kempf.

8. In this context, the Commissioner takes note of the ongoing debate in Denmark on the incorporation of international human rights instruments into domestic legislation. Denmark having adopted a dualist system, the only human rights treaty which has to date been fully incorporated is the ECHR. It has been argued that the full incorporation of the UN CRC could have a positive impact on the protection of children's rights, including children in the asylum and immigration process. For instance, it would help to raise awareness of the provisions of the Convention and encourage judges to apply them more systematically.
9. The Commissioner is concerned, in particular, about: the requirements imposed on children for family reunification (sub-section a.); the situation of children belonging to families of rejected asylum-seekers, especially as a result of their prolonged stay in asylum centres (sub-section b.); the situation of unaccompanied minor migrants (sub-section c.) and the full respect of the rights of the child in some further areas related to asylum and immigration (sub-section d.).

a. The best interests of the child in family reunification procedures

10. Since 2002 Denmark has significantly toughened the requirements to obtain a residence permit on the grounds of family reunification. In spite of amendments to the relevant legislation introduced in 2012, some of the requirements regarding the reunification of children with their families residing in Denmark continue to raise concern.
11. The Commissioner understands that, according to the authorities, children who have not lived long enough in Denmark, or who came to the country after a certain age, have little chance of integrating, and should thus in principle not be allowed to settle. Therefore, children older than 14 have no statutory right to reunification, even though the Aliens Act allows for some exceptions in case the best interests of the child require family reunification to be granted-- for instance, when a child older than 14 has no other family residing in his/her country of origin, has a serious disease or disability for which there is no treatment available in his/her country of origin, or if one or both parents in Denmark are refugees. The Commissioner regrets that the best interests of the child are only considered as a determining factor in exceptions to the prevailing principle, which sets the age of 14 as maximum age. In this respect he emphasises that, according to the UN CRC, a child means every human being below the age of 18 years, which is also the age retained by the Council of Europe Committee of Ministers in its [Recommendation](#) on the legal status of persons admitted for family reunification.²
12. The Commissioner notes that children applying for family reunification with a parent permanently residing in Denmark must demonstrate their ability to integrate in Denmark.³ The assessment is based *inter alia* on their Danish and other language skills, level of education, previous contacts with Denmark and links to the country of origin. Proof of the ability to integrate is not required in cases in which the application for reunification with the child was made by the parent living in Denmark within two years of meeting the requirements to apply for residence for a child. The Commissioner understands that the presumption for this latter exemption is that parents deliberately postpone the reunification with their child and thus harm their ability to integrate. He underscores that many reasons can prompt a request for reunification with a child more than two years after the arrival of the parent in Denmark, such as a change in the political situation in the country of origin, or the death or illness of the persons taking care of the child. Since 2012, children younger than eight are no longer required to demonstrate their integration potential and the aforementioned two-year deadline was eased in instances of disputed custody rights. However, the Commissioner notes that a new requirement was also introduced for parents to demonstrate their willingness and ability to integrate, should they request family reunification with a child beyond the two year deadline.
13. The Commissioner is concerned that the importance granted to the assessment of the integration potential can in practice result in insufficient consideration for the best interests of the child. The right of the child to live within his/her family environment and not to be forcefully

² Recommendation Rec(2002)4 of the Committee of Ministers to the member states on the legal status of persons admitted for family reunification, adopted on 26 March 2002.

³ This requirement applies if one of the child's parents still lives in his/her native country or in another country, where the child also lives (Article 9§16 of the Aliens Act). See also Portal of the Danish Immigration Service, New to Denmark (www.nyidanmark.dk).

separated from the family, enshrined in Article 9 of the UN CRC, clearly represents a key element in determining the best interests of the child, as also [reiterated](#) by the UN Committee on the Rights of the Child.⁴

14. Moreover, a number of children have in recent years been expelled to their countries of origin as they no longer met the requirements for family reunification. More than 1 000 children younger than 12 have reportedly been expelled since 2005. One such case took place shortly before the visit of the Commissioner to Denmark. It involved a Thai child who was expelled to her country of origin together with her Thai mother after the death of her Danish father, even though the child had spent half of her life in Denmark. The authorities considered that her (and her mother's) connection to Denmark became weaker than their connection to Thailand after the death of their father/husband.
15. The Commissioner is aware that following the expulsion of the child and her mother, and the ensuing debate, the Danish authorities have proposed amendments to the Aliens Act so as to enable persons whose Danish partner dies to remain in Denmark with their children. He understands, however, that an assessment of the remaining parent's willingness and ability to integrate in Denmark will still be carried out before allowing a prolongation of the residence permit.
16. Additionally, the Commissioner notes that a number of children have lost their residence permit and right to be reunited with their family after having stayed abroad for a certain time. According to the Aliens Act, a foreign child shall lose his/her residence permit after three months of a "re-education" trip⁵ or any other trip "that has had a negative impact on the education and integration process of the child".⁶ In [Osman v. Denmark](#),⁷ the Court ruled that Denmark violated the right to private and family life (Article 8 of the ECHR) of a Somali minor by denying her right to family reunification. The applicant had lived in Denmark between the age of seven and 15. She was sent to Kenya for two years by her father and then re-applied for a residence permit in Denmark on the grounds of family reunification (her parents and siblings were still living in Denmark). She was denied this right as she was older than 15 and had resided outside of Denmark for more than 12 consecutive months.⁸ The Court found that the applicant's interests had not been sufficiently taken into account or balanced fairly against the State's interest in controlling immigration. The Commissioner understands that, following this judgment, the authorities have re-opened cases of children denied family reunification because they had spent a certain time living outside Denmark. The Commissioner also notes that in November 2012, the Danish Supreme Court concluded that revoking the residence permit of a child who spent four years in a school in Nigeria, but who had previously spent most of his childhood in Denmark, amounted to a violation of Article 8 of the ECHR.⁹

Conclusions and recommendations

17. The Commissioner calls on the Danish authorities to ensure that in all their actions and decisions regarding family reunification the best interests of children constitute a primary consideration with respect to all other considerations, including migration control and integration policies, in line with the principles enshrined in the UN CRC and the Council of Europe Committee of Ministers' [Guidelines](#) on Child Friendly Justice.¹⁰ As emphasised by the

⁴ UN Committee on the Rights of the Child, General Comment N° 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), §58-72.

⁵ "Re-education trips", as mentioned in Article 9§17 of the Aliens Act, refers to long-term stays (of months or years) of a foreign children in their country of origin or any other country, presumably with the aim of maintaining or strengthening the ties of these children with their country, culture and language of origin.

⁶ Article 17 of the Aliens Act. Consideration must however be given to whether the trip was imposed on a child against his/her will when assessing a request for a renewal of residence permit by a child in such a situation, on the ground of family reunification (Article 9§17).

⁷ *Osman v. Denmark*, app. N° 38058/09, judgment of 14 August 2011.

⁸ Article 17 of the Aliens Act establishes that the residence permit of a foreigner will expire after six months of continuous residence abroad or, should the persons have resided for more than two years in Denmark, after a year of continuous residence abroad.

⁹ Judgment of the Danish Supreme Court of 7 November 2012 (case N°288/2011).

¹⁰ Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, adopted on 17 November 2010, part III.B.

UN Committee on the Rights of the Child, this obligation “requires a consciousness about the place that children’s interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned”.¹¹ The Commissioner stresses that migrant and asylum-seeking children must be treated first and foremost as children, and not as migrants. In general, the rights protected in the UN CRC should be better reflected in legislation, policies and practices which have an impact on migrant and refugee children. To this end, the Commissioner invites the Danish authorities to consider incorporating the UN CRC into Danish legislation, in line with the [recommendations](#) made by the UN Committee on the Rights of the Child on this matter.¹²

18. The Commissioner considers that progress is needed in Denmark to ensure that family reunification proceedings involving children are dealt with in a positive, humane and expeditious manner, as required by Article 10 of the UN CRC, and to guarantee the right for these children to live within their family environment and not to be forcefully separated from the family, as also enshrined in the UN CRC (Article 9). In particular, he urges the authorities to extend the right to family reunification to children older than 14, so as to comply with the definition of a child provided in the UN CRC.
19. The Commissioner draws attention to the Council of Europe Committee of Ministers [Recommendation \(2002\)4](#) on the legal status of persons admitted to family reunification,¹³ which calls on governments to pay special consideration to the best interest and wellbeing of children when decisions concerning the renewal of residence permits on the grounds of family reunification must be taken. In particular, he firmly believes that the best interests of children should have primacy over their integration potential, ties to Denmark, or the integration potential of their parents, when considering claims for family reunification or renewal of residence permits regarding children.

b. The rights of children belonging to families of rejected asylum-seekers

20. The situation of rejected asylum-seekers who cannot be deported from Denmark to their countries of origin and are required to stay in asylum centres for a potentially unlimited period of time has raised concern among international bodies, including the previous Commissioners for Human Rights and the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs.¹⁴ This situation is examined in another part of this report.¹⁵ In the present section the Commissioner addresses the specific situation of the children of these families of rejected asylum-seekers, which is of particular concern to him.
21. During his visit to the asylum reception facility of Sandholm, where many of the rejected asylum-seekers and their families live, he was informed that ten families with children had been residing in the centre for more than two years. In June 2013, a report of the Danish Parliament’s Integration Committee indicated that among the 123 rejected asylum-seekers who had spent more than ten years in asylum centres at that date, eight of them were younger than 18. According to a 2011 report by a non-governmental organisation, 27 children of rejected asylum-seeker parents had been born and raised in asylum centres as of early 2011 and 246 children had spent more than one year in an asylum centre.¹⁶
22. The Commissioner is alarmed at the impact that life in an asylum centre for indefinite periods of time has on children. Even though the material living conditions are adequate, he is

¹¹ UN Committee on the Rights of the Child, General Comment N° 14 (2013), op. cit., §40.

¹² UN Committee on the Rights of the Child, General Comment N°5 (2003) on general measures of implementation of the Convention on the Rights of the Child, §20.

¹³ Recommendation Rec(2002)4, op. Cit..

¹⁴ Commissioner for Human Rights, [Memorandum](#) to the Danish government: Assessment of the progress made in implementing the 2004 recommendations of the Council of Europe Commissioner for Human Rights (following a visit by a delegation of the Office of the Commissioner from 5-7 December 2006), 11 July 2007; European Parliament, Final report of the Committee on Civil Liberties, Justice and Home Affairs on the delegation to Denmark, April 2008.

¹⁵ See below, sub-section 2.b.

¹⁶ See Michala Clante Bendixen, [Asylum camp limbo](#), 2011.

informed that many of these children suffer from psycho-social disorders and other developmental problems due to long-term uncertainty, in some cases moving from one centre to another and lacking exposure to the outside world. Many children reportedly fail to develop a core language, due to lack of education in their mother tongue and lack of access to mainstream education in Danish and contacts with Danish society. In the Commissioner's view this situation can hardly be reconciled with the requirements of Article 27 of the UN CRC, which protects the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

23. Children residing in the asylum centres managed by the Red Cross, including Sandholm, have access to education provided by this organisation, which aims at preparing them to integrate into mainstream schools in nearby localities within about six months. However, the Commissioner is informed that a number of the children residing for long periods of time in the centres also spend longer than six months in the Red Cross schools. The curriculum offered by the Red Cross schools is not fully comparable with the curriculum in mainstream schools. Moreover, those living in asylum centres managed by the local authorities (in Jutland mainly) are reportedly educated in special reception classes within mainstream schools. Some of the Commissioner's interlocutors have raised doubts about the conformity of this situation with Article 28 of the UN CRC, which guarantees the right for every child to non-discriminatory access to quality education.
24. The Commissioner notes with interest that since May 2013, an amendment to the Aliens Act makes it possible for families of rejected asylum-seekers to live outside designated centres 12 months after their asylum claim was rejected and to have access to employment.

Conclusions and recommendations

25. The Commissioner calls on the Danish authorities to ensure full respect of the right of children of families of rejected asylum-seekers who cannot be deported to have their best interests treated as a primary consideration in all decisions affecting them, including as members of their families. In the Commissioner's view, the current arrangements whereby children spend prolonged – and potentially unlimited – time periods in asylum centres are incompatible with this right.
26. Lasting solutions should be identified in order to ensure that the children concerned can fully enjoy their rights as protected under the UN CRC, in particular their right to quality education on the basis of equal opportunities in Denmark and their right to a standard of living adequate for their physical, mental, spiritual, moral and social development.

c. Human rights of unaccompanied and separated minor migrants

27. A number of unaccompanied or separated minor migrants, many of them from Afghanistan, have reached Denmark in recent years. According to the Danish Immigration Service, 355 of them sought asylum in 2012 and 268 between January and September 2013.
28. The Commissioner notes that the living conditions and the support provided to unaccompanied and separated minors in Denmark have been assessed as generally adequate, including by the UN Committee on the Rights of the Child.¹⁷ Separated minor migrants can request accommodation outside a refugee centre after having applied for asylum and while the procedure is under way, should they have relatives living in the country. However, the Commissioner was informed that unaccompanied minors seeking asylum are sometimes accommodated in institutions for young offenders, even though they have committed no offence.
29. The Commissioner notes that, in case of doubt, the authorities assess the age of unaccompanied minor migrants based on a strictly medical procedure, including X-rays, a dental and a medical examination. In 2009, the Danish Supreme Court stressed that age

¹⁷ See UN Committee on the Rights of the Child, [Concluding Observations](#) on Denmark, 7 April 2011.

assessment should include other elements, such as information provided by the minor or his/her relatives or carers concerning his/her age.¹⁸

30. Additionally, the Commissioner is informed that some unaccompanied migrant minors have disappeared from reception centres and that, regrettably, no adequate investigation has until now been carried out by the immigration authorities. A figure of 10% of children disappearing from asylum centres has been reported.¹⁹
31. According to the Aliens Act, if their asylum application is rejected, unaccompanied minor migrants can be granted a residence permit until they turn 18, should they find themselves in a situation of emergency if they were to be returned to their country of origin. A situation of emergency is defined by the absence of family ties or relatives to take care of the minor in the home country or, since 2010, by the lack of access to a public care centre.²⁰ If they are not mature enough to go through the asylum procedure (younger than 15), unaccompanied minors can also be granted a temporary residence permit under the same conditions as rejected minor asylum-seekers. Since 2011, such residence permits are only valid until minors turn 18, at which age they will be returned to their country of origin. Civil society organisations have emphasised that the prospect of return as soon as they turn 18 places minor migrants in a situation of uncertainty, which is harmful to their well-being and mental and social development. Such a perspective limits their willingness and capacity to get involved in education and integrate in society and is said to increase their vulnerability to the risk of becoming victims of human trafficking. Moreover, the Commissioner is informed that, once their residence permit expires, these children no longer have access to legal representation, which limits their possibilities to explore alternatives to expulsion, such as applying for a residence permit on the grounds of “exceptional circumstances”, as provided for in the Aliens Act.
32. The Commissioner notes that since 2010, Denmark participates as an observer in the European Returns Platform for Unaccompanied Minors (ERPUM), an EU-funded pilot project aimed at ensuring the orderly and secure return of unaccompanied minors who have received final rejections of their asylum applications, to countries of transit or origin.²¹ The stated objectives of ERPUM are to develop methods to trace the parents of the minors who must return home, but also to find safe and adequate shelter in the country of origin. The two first countries of return selected for the pilot phase of the project (2010-2012) were Iraq and Afghanistan.
33. While he is aware that actual returns of unaccompanied minors under the ERPUM project have not yet started, the Commissioner reiterates his concern that this project, if implemented in Afghanistan or Iraq under the current circumstances, is likely to expose returnees to human rights violations, particularly of rights protected under the UN CRC.²² These include the right to have their best interests treated as a primary consideration in all decisions affecting them (Article 3), the right to life and development (Article 6), the right to express their views and be heard (Article 12) and the right to special protection and assistance provided by the state as children deprived of their family environment (Article 20). Experts have indeed expressed concerns that the tracing of family members in Afghanistan is extremely difficult, that families are often reluctant to take the children back and that repatriated children would in fact be exposed to a high risk of being trafficked for sexual or forced military recruitment purposes. The Commissioner found it disquieting that, in November 2012, three teenage Afghan asylum-seekers attempted to commit suicide in a Danish reception centre, reportedly for fear of being repatriated to Afghanistan.

¹⁸ Supreme Court judgment N°83/2009 of 27 August 2009.

¹⁹ See the [first report](#) of the Group of Experts on Action against Trafficking in Human Beings (GRETA), December 2011, §123.

²⁰ In this connection, see below remarks on the ERPUM project.

²¹ The countries participating in this project are the Netherlands, Sweden and the United Kingdom. Belgium and Denmark participate as observers.

²² See also the Commissioner’s Human Rights Comment of 19 September 2013: [Decisions concerning migrant children must always be based on their best interests](#).

Conclusions and recommendations

34. The Commissioner calls on the Danish authorities to strengthen their efforts to ensure that the human rights of unaccompanied and separated minor migrants are fully respected in accordance with international standards and best practice. To this end he draws the attention of the Danish authorities to the [General Comment](#) prepared by the UN Committee on the Rights of the Child on this subject²³ and to [Resolution 1810 \(2011\)](#) of the Parliamentary Assembly of the Council of Europe,²⁴ which provide extensive guidance on policies and practices to be followed.
35. The Commissioner calls on the Danish authorities to ensure that all accommodation arrangements for unaccompanied minor migrants are fully in line with Article 22 of the UN CRC, which entitles children seeking asylum to receive appropriate protection.
36. The Commissioner reiterates that age determination of unaccompanied minor migrants is a complex process involving physical, social and cultural factors and that incorrect age assessments may result in detrimental consequences for the child concerned, including wrongful detention. Therefore, age assessment should not depend only on a medical examination. Multidisciplinary procedures should be established and minors must be given the benefit of the doubt where there is uncertainty as to their age. He draws attention to the view expressed by the UN Committee on the Right of the Child that age assessment should not only take into account the physical appearance of the individual, but also his or her psychological maturity and should be conducted “in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child”.²⁵
37. The Commissioner urges the Danish authorities to carry out an effective investigation into the fate of unaccompanied minor migrants who have disappeared from reception centres. They should also take measures, particularly in the areas of identification and protection of child victims of trafficking, to prevent further disappearances and limit the risks of unaccompanied migrant minors becoming victims of trafficking, in line with the [recommendations](#) of the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA).²⁶
38. The Commissioner draws the attention of the Danish authorities to the particular vulnerability of unaccompanied minor migrants whose asylum claim was rejected, or could not be processed, and who face expulsion once they turn 18. In line with the Council of Europe Committee of Ministers’ [Recommendation](#) on life projects for unaccompanied minor migrants,²⁷ he encourages the Danish authorities to consider durable solutions for each minor on the basis of a lifelong project which can extend to the age of adulthood. The Commissioner also draws attention to the Committee of Ministers’ [guidelines on forced return](#),²⁸ which stress that separated children who arrived as minors but who have reached the age of 18 and have not been allowed to remain in the receiving country must be treated as vulnerable and consulted on the conditions required for a successful reintegration into their country of origin or resettlement in, or transfer to, a third country. In view of their particular vulnerability, the Commissioner also encourages the authorities to consider providing unaccompanied migrants turning 18 with legal assistance once their residence permit lapses, so that they can effectively explore all the alternatives provided for in the Aliens Act.
39. The Commissioner shares the view expressed by the Parliamentary Assembly in the aforementioned Resolution that institutional care in the country of origin should not be considered as a durable solution for unaccompanied minor migrants whose asylum claim was

²³ UN Committee on the Rights of the Child, [General Comment N° 6 \(2005\)](#): Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005.

²⁴ Parliamentary Assembly Resolution 1810(2011), Unaccompanied children in Europe: issues of arrival, stay and return.

²⁵ UN Committee on the Rights of the Child, General Comment N° 6 (2005), op. cit., §31(i).

²⁶ See first report of the GRETA, op. cit., 2011.

²⁷ Recommendation CM/Rec(2007)9 of the Committee of Ministers to the member states on life projects for unaccompanied migrant minors, adopted on 12 July 2007.

²⁸ Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return, September 2005.

rejected.²⁹ He also firmly believes that irrespective of the existence of reception facilities for unaccompanied minors who are returned, no child should be returned to such a facility in a country which does not have a properly functioning child protection system and concrete arrangements for care and custodial responsibilities. He highlights that similar views have been expressed by the UN Committee on the Rights of the Child.³⁰ More generally, the Commissioner stresses that the existence of such centres in some countries should in no way pre-empt a decision as to whether return is in the child's best interests.

d. The respect of the rights of the child in further areas related to asylum and immigration

40. It has been reported to the Commissioner that in asylum proceedings, the Danish authorities tend not to consider children independently from their parents and that efforts to provide children with a child-sensitive assessment of their protection needs are limited. According to the information at the disposal of the Commissioner, no child has until now been granted refugee status on the grounds of belonging to a specific social group pursuant to Article 1.a, paragraph 2, of the 1951 Convention relating to the Status of Refugees. However, he stresses that children may have serious grounds for claiming asylum in their own right, and can be confronted with persecution, fear of persecution and risks of a child-specific nature, such as under-age military recruitment, trafficking, sexual exploitation or genital mutilation.
41. The Commissioner notes that minors are at times held in the detention centre of Ellebaek. Civil society organisations have raised concerns regarding the extent to which the authorities treat the best interests of the child as a primary consideration in their decisions to detain these children and whether they use detention as a measure of last resort, as required by international standards.
42. Concerns have also been expressed regarding children's rights in the context of the expulsion of rejected asylum-seekers having resided in Denmark on the basis of a humanitarian residence permit issued for health reasons. As further detailed below, following an amendment to the Aliens Act of 2010, these persons are to be returned once medication adapted to their condition has become available in their country of origin.³¹ The Commissioner notes reports according to which decisions to return such persons to their country of origin together with their children have been taken without due consideration for the best interests of the children involved, especially those having resided for many years in Denmark. Furthermore, he notes with concern reports according to which children suffering from health problems have in some instances been returned to countries where medical treatment for their condition was not accessible. He was for instance informed about the return to Kosovo, in 2013, of a teenager who had lived in Denmark since he was three years old, mainly in asylum reception centres, and suffered from a psycho-social disability. The authorities considered in their decision to return the child that the required medication was available in Kosovo, whereas it appeared that it was in practice accessible only through illegal means.

Conclusions and recommendations

43. The Commissioner exhorts the Danish authorities to ensure that children are recognised as "active subjects of rights" in asylum proceedings³² and that a child-sensitive approach to asylum is in place, allowing for any particular protection needs of children as a specific social group to be identified. Children should be heard by the asylum authorities and benefit from adequate support and protection during the asylum procedure, in line with the Committee of Ministers' [Guidelines](#) on child-friendly justice.³³ Useful guidance can also be found in the 2009 UNHCR [Guidelines](#) on processing child asylum claims.³⁴

²⁹ Parliamentary Assembly Resolution 1810(2011), op. cit., § 5.15

³⁰ UN Committee on the Rights of the Child, General Comment N° 6 (2005), op. cit., § 85 and 86.

³¹ See below, sub-section 2.b.i.

³² UNHCR Executive Committee, Conclusion on Children at Risk, 5 Oct. 2007, No. 107 (LVIII) - 2007, para. (b)(x)(viii).

³³ Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, *ibid*.

³⁴ UNHCR, Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugee, 22 December 2009.

44. The Commissioner calls on the Danish authorities to ensure that the international standards applicable to the detention of migrant children are strictly observed. These include notably the obligation for the authorities to treat the best interests of the child as a primary consideration in all decisions affecting them and to rule out detention if non-custodial alternatives are available. In the Commissioner's view, however, no detention of children on grounds related to migration should be allowed; detention should be replaced with appropriate care arrangements.³⁵
45. The Commissioner urges the Danish authorities to ensure that the best interests of the child are treated as a primary consideration in practice when taking return decisions affecting families. He emphasises that according to the established case-law of the Court, in order to assess the proportionality of an expulsion measure concerning a child who has settled in the host country, "it is necessary to take into account the child's best interests and well-being, and in particular the seriousness of the difficulties which he or she is likely to encounter in the country of destination and the solidity of social, cultural and family ties both with the host country and with the country of destination. The seriousness of any difficulties which may be encountered in the destination country by the family members who would be accompanying the deportee must also be taken into account".³⁶

2. Other human rights issues pertaining to asylum and immigration

46. As noted above, the Danish authorities have recently introduced changes to their asylum and immigration laws and policies, which have led to improvements in the asylum procedure and integration opportunities for refugees. The Commissioner appreciates in particular the change of public discourse on asylum and immigration issues over the last two years. However, areas for further improvement remain, notably as regards some aspects of the asylum procedure (sub-section a.), the situation of rejected asylum-seekers (sub-section b.) and the use of migration detention (sub-section c.). Some gaps also persist in the frameworks for promoting the integration of refugees (sub-section d.) and countering racism and intolerance targeting migrants and refugees (sub-section e.).

a. Strengthening human rights safeguards in asylum procedures

47. With 5 456 asylum applications received in the first nine months of 2013 and 6 184 in 2012, Denmark has experienced an increase in asylum applications since 2011, when 3 806 applications were registered.
48. The Commissioner is pleased to note that in 2012 the composition of the Refugee Appeals Board, which is competent for second-instance asylum proceedings, was broadened in line with recommendations made by his predecessors in order to strengthen its independence. As a result, the Board now comprises five members, including a representative of the Danish Refugee Council.
49. As regards first-instance asylum proceedings, the Commissioner welcomes the decision, taken as part of the 2013 amendments to the Aliens Act, to transfer part of the initial stage of the procedure from the National Police to the Danish Immigration Service. Concerns have however been voiced regarding the quality of interpretation provided in first instance asylum interviews, which can have substantial negative consequences for the asylum-seekers affected. Civil society organisations have suggested that the recording of interviews could usefully contribute to dispelling doubts in cases of complaints about the quality of interpretation.
50. It is also positive that the Refugee Appeals Board became, as of 2014, the appeal authority against first instance decisions concerning transfers of asylum-seekers from Denmark to other EU countries under the Dublin regulation,³⁷ an area which was previously under the

³⁵ See also A/HRC/13/30, Report of the UN Working Group on Arbitrary Detention, 18 January 2010, para. 60 and Parliamentary Assembly [Recommendation 1985\(2011\)](#) on: Undocumented migrant children in an irregular situation: a real cause for concern, §9.4.

³⁶ [Neulinger and Shuruk v. Switzerland](#), App. N°41615/07, Grand Chamber judgment of 6 July 2010, §146.

³⁷ See Council Regulation (EC) [No 343/2003](#) of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member

responsibility of the Ministry of Justice. In this connection the Commissioner notes that in 2012 Denmark suspended returns to Greece under this regulation following the Court's decision in [M.S.S. v. Belgium and Greece](#).³⁸ Moreover, he notes that the authorities had stopped returns of persons belonging to vulnerable groups to Italy under the Dublin regulation between January and April 2012, after the indication on two occasions by the Court of interim measures under Rule 39 of its Rules.³⁹ Returns were reportedly resumed after that date, with a specific vulnerability assessment for certain groups.

51. The Commissioner welcomes that the Danish authorities have, as of February 2014, suspended transfers of asylum-seekers to Bulgaria under the Dublin regulation. This measure is in line with the Commissioner's [findings](#) following a visit to Bulgaria in December 2013⁴⁰ and with guidance issued by UNHCR in January 2014 as a result of systemic deficiencies in reception conditions and asylum procedures in Bulgaria.⁴¹
52. The Commissioner notes the decision taken by the Refugee Appeals Board in September 2013 to lift the requirement for asylum-seekers originating from war-ravaged areas of Syria to demonstrate that they faced persecution on an individual basis. A monthly review of the situation in Syria serves as a basis to determine the regions of Syria in respect of which the new criteria for the determination of protection needs should be applied. The Commissioner is informed that 95% of the Syrians who had applied for asylum between January and October 2013 obtained protection, about 76% of them as refugees. He was also informed by the Refugee Appeals Board that persons who were denied asylum before September 2013 but cannot be returned to Syria, as returns to this country have been halted, have had their asylum claims re-opened in the light of the change in the assessment criteria introduced in September 2013.

Conclusions and recommendations

53. The Commissioner welcomes the amendments to the asylum procedure introduced in the last two years, which have strengthened guarantees of fairness and effectiveness of the asylum procedure. He encourages the authorities to continue in this direction, in particular by ensuring that interpretation provided during first instance interviews is of adequate quality.
54. The Commissioner welcomes the decision of the Danish authorities to suspend transfers of asylum-seekers to Bulgaria. He invites them to continue this policy and ensure that any transfers of asylum-seekers under the Dublin regulation take place in full compliance with their human rights obligations, including the obligation not to expose the persons concerned to a risk of being subjected to inhuman or degrading treatment.
55. As regards persons fleeing Syria in particular, while welcoming the application of facilitated criteria for the determination of protection needs to Syrians originating from war-ravaged areas, the Commissioner draws the attention of the Danish authorities to [UNHCR's guidance](#), according to which "most Syrians seeking international protection are likely to fulfil the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention relating to the Status of Refugees, since they will have a well-founded fear of persecution linked to one of the Convention grounds".⁴²

States by a third-country national and Regulation (EU) [No 604/2013](#) of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

³⁸ *M.S.S. v. Belgium and Greece*, App. N° 30696/09, Grand Chamber judgment of 21 January 2011.

³⁹ *B.M. and Others v. Denmark*, App. N°4346/12, lodged on 13 January 2012, communicated on 23 January 2012 and *M.S.M. and Others v. Denmark*, App. N°25404/12, lodged on 25 April 2012, communicated on 1 May 2012.

⁴⁰ See Human Rights Comment of 20 December 2013, Syrians: a neglected human rights crisis in Europe.

⁴¹ UNHCR, Observations on the current situation of asylum in Bulgaria, 2 January 2014.

⁴² UNHCR's International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update II, October 2013, § 14.

b. Situation of rejected asylum-seekers

56. As mentioned above, the Commissioner shares the concern expressed by various civil society organisations and international bodies about the situation of rejected asylum-seekers who are required to stay in asylum centres, mainly in Sandholm, for a potentially unlimited period of time. He was informed by the authorities during his visit to Sandholm that as of March 2013, 123 persons had resided in the centre for over ten years, on a continuous basis for at least 17 of them, and that 29 persons had resided there for more than 15 years. The Commissioner understands that long-term residents in Sandholm are mostly rejected asylum-seekers whose deportation order cannot be implemented, due to a lack of identity documents or other reasons. Persons who are to be expelled for having committed a criminal offence in Denmark, but who cannot be deported for the same reasons, also form part of this group.
57. During his visit to Sandholm, the Commissioner noted the high quality of the services provided by the Red Cross, including the kindergarten and school located within the centre. He also noted that rejected asylum-seekers accommodated in asylum centres can move in and out of the centres, although some of them are obliged to report to the police on a regular basis. In this respect the Commissioner notes that in June 2012 the Danish Supreme Court ruled in the case of a rejected asylum seeker from Iran, that some of the requirements imposed on him under the “tolerated stay” (*tålt ophold*) regime (i.e. having to remain at Sandholm Centre and report regularly to the police) were disproportionate and violated his right to freedom of movement.⁴³
58. Clearly, the situation of “legal limbo” in which these persons find themselves, the prolonged uncertainty about their fate and lack of contacts with the outside world can but have seriously negative consequences on their physical and mental health. Information brought to the Commissioner’s attention indicated widespread mental health problems, high rates of suicide attempts, problems of over-medication and other forms of substance abuse and cognitive and other developmental problems affecting children.⁴⁴
59. The Danish authorities are aware of the problems arising from indefinite stays in asylum centres. However, they insist on the fact that the persons concerned could put an end to this situation by co-operating towards their return. The Commissioner notes with interest that, since May 2013, asylum-seekers and rejected asylum-seekers residing in asylum centres can apply for accommodation outside the centres and for a work permit, after six months of residence in a centre for asylum-seekers, 12 months for rejected asylum-seekers with children and 18 months for other rejected asylum-seekers. However, this possibility is opened only to those who agree to co-operate with the authorities in organising their return to their country of origin, except for families with children. The Commissioner was informed by the Danish authorities that about 700 persons have applied for accommodation outside centres and 75 for a work permit. However, civil society organisations have reported that only a limited number of persons have actually been granted the right to live outside asylum centres or to work.
60. The Commissioner notes that Denmark has been criticised in the last decade for returning rejected asylum-seekers to countries where they could face risks of torture or imprisonment, such as Afghanistan, Iraq or Somalia, sometimes on the basis of diplomatic assurances. Readmission agreements have been concluded by the Danish authorities with a number of these countries, including Afghanistan and Iraq. The UN Committee against Torture (UNCAT) found twice in recent years that Denmark would violate Article 3 of the CAT, which protects individuals against expulsions, returns or extraditions to states “where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture”, if it deported rejected asylum-seekers to Iran and Afghanistan.⁴⁵

⁴³ Supreme Court judgment of 1 June 2012, case N°10/2011.

⁴⁴ See also sub-section I.b. above.

⁴⁵ See UN CAT, Decision of 15 November 2010 on Communication N° 3999/2008 (*Said Amini v. Denmark*) and Decision of 27 November 2012 on Communication N° 464/2011 (*K.H. v. Denmark*), see: <http://tb.ohchr.org/default.aspx>.

61. Returns to Somalia were suspended in 2011 after the Court's decision in [Sufi and Elmi v. The United Kingdom](#)⁴⁶ in which it was considered that returning rejected asylum-seekers to Mogadishu, as well as other parts of Somalia and IDP camps, would be in breach of Article 3 of the ECHR because of the situation of generalised violence and substandard living conditions in IDP camps. The Commissioner is pleased to note that the Refugee Appeals Board has consequently re-assessed a number of requests submitted by Somali asylum-seekers and reconsidered Denmark's practice of returning Somalis to their country of origin. However, he also understands that the asylum authorities of Denmark have concluded in January 2013, after a visit to Mogadishu in October 2012, that this part of the country was safe enough to return rejected asylum-seekers without exposing them to risks of ill-treatment or persecution. The Commissioner notes that in January 2014, UNHCR [called](#) on all states not to forcibly return Somali nationals to Somalia unless the returning state is convinced that the persons involved would not be at risk of persecution.⁴⁷
62. The Commissioner notes with satisfaction that the practice of implementing returns based on diplomatic assurances was terminated in June 2012.
63. As mentioned above,⁴⁸ rejected asylum-seekers holding a "humanitarian status" on grounds of their health status can, since 2010, be expelled to their country of origin once treatment becomes available. The Commissioner heard reports of persons having been expelled, or being threatened with expulsion, on the grounds that treatment had become available in their country of origin even though it was unclear whether the medication or treatment required was effectively available to the persons concerned. It appears that in some cases medication was only available illegally, at a prohibitive cost or in areas of the country which the person concerned would be unlikely to reach.

Conclusions and recommendations

64. The Commissioner urges the Danish authorities to find a long-term solution to the situation of rejected asylum-seekers who cannot be deported from Denmark to their countries of origin. He emphasises that indefinite duration stays in asylum centres cannot be considered as a viable option. The willingness to incite voluntary return or to punish refusal to return should never result in arrangements that impinge on the human rights of the persons concerned and the members of their families. The Commissioner strongly encourages the Danish authorities to draw from experiences in other countries who have dealt with similar situations by granting residence permits with a range of rights attached.
65. The Commissioner calls on the Danish authorities to ensure that the right of persons not to be returned to countries where they would face a real risk of being subject to treatment contrary to Article 3 of the ECHR is thoroughly respected. To this end, in cases where the returnee is a person who has resided in Denmark on humanitarian grounds related to health, he strongly encourages the Danish authorities to consider the effective availability and accessibility of the medical treatment to the returnee in the country of destination.

c. Use of migrant detention

66. While most asylum-seekers are accommodated in asylum centres, they can be detained if there is a suspicion that they intend to go underground or that they have used a false identity. Refugees granted subsidiary protection, including minors, suspected of having used a false identity or forged documents can even be prosecuted. Rejected asylum-seekers can also be detained as an "incentive" for them to co-operate with the authorities in order to organise their departure from Denmark.
67. The Commissioner notes that, in 2003, the authorities adopted rules on "incentives" for departure. These measures aim to encourage rejected asylum-seekers to leave Denmark as soon as possible and include *inter alia* detention in the Ellebaek detention centre for aliens,

⁴⁶ *Sufi and Elmi v. the United Kingdom*, App. N° 8319/07 and 11449/07, Judgment of 28 June 2011.

⁴⁷ UNHCR, International Protection Considerations with Regard to people fleeing Southern and Central Somalia, January 2014.

⁴⁸ See sub-section I.d.

which the Commissioner visited in November 2013. In 2004 and 2005, the Eastern High Court (*Østre Landsrets*) questioned the proportionality, and compatibility with Article 5§1 of the ECHR, of using detention as a tool to force rejected asylum-seekers to co-operate with the authorities in organising their departure, notably in the case of persons whose return could not reasonably be implemented in the near future. In 2013, the authorities decided that a more targeted use of incentives to departure, and in particular of detention, should be applied, based on a case-by-case assessment.⁴⁹ This new approach seems to result from the acknowledgment that detention as an incentive for departure has not achieved its aim. It is coupled with a policy aimed at providing rejected asylum-seekers with more positive incentives for departure, including access to counselling on reintegration in the country of origin and grants for this purpose. Nevertheless, the Commissioner notes with concern that, even if detention as an “incentive” for rejected asylum-seekers to co-operate in implementing their deportation order is now used in a less systematic manner, it continues to raise questions of compatibility with Article 5§1(f) of the ECHR, in particular when prolonged over a certain period of time.

68. In this connection, the Commissioner was informed during his visit to the Ellebaek centre that the average detention time is 24 days, but that it has in some cases been prolonged for up to one year. The detainees he met during his visit complained about the uncertainty of their situation caused by a reported lack of information of the grounds for and length of detention. Likewise, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) in its [2008 report](#) reported “considerable stress and frustration” experienced by many detainees due to the uncertainty of their situation.⁵⁰ The UN Special Rapporteur on Torture, referring to cases of detention for up to 18 months, also considered in his 2008 report on Denmark that “deprivation of liberty for administrative reasons for a prolonged period without knowing the length of the detention may amount to inhuman and degrading treatment”.⁵¹
69. Moreover, the Commissioner received worrying information indicating that persons in a situation of particular vulnerability have sometimes been detained in Ellebaek, including children, persons with disabilities and victims of trafficking.⁵²
70. Lastly, the length of detention and subsequent prolongations are determined by a court every four weeks. The Commissioner noted that the court hearings take place within the Ellebaek detention centre, through video conference facilities. He stresses that, under Article 5§4 of the European Convention on Human Rights, every person deprived of liberty has the right to undertake proceedings to ascertain the lawfulness of his/her detention before a court which must be, but also appear to be, independent and impartial, as established under Article 6§1 of the ECHR. The Commissioner is concerned that holding court hearings near the detention facility in which the claimant is detained and without the physical presence of the judges can undermine the trust of the claimant in the independence and impartiality of the court. Moreover, derogating from normal conditions in the case of foreigners can strengthen the view that the latter are in a different position from other persons involved in judicial proceedings.

Conclusions and recommendations

71. The Commissioner notes the new approach of the Danish authorities regarding migrant detention, which is to be used in a more selective manner. Nonetheless, he reiterates that, according to the Court’s case-law, administrative detention of asylum-seekers and rejected asylum-seekers is to be considered arbitrary if it continues for an unreasonable length of

⁴⁹ Ibid.

⁵⁰ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment, Report to the Government of Denmark on the visit to Denmark from 11 to 20 February 2008.

⁵¹ Report of the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Mission to Denmark, 18 February 2009, §47.

⁵² See *inter alia* the [first report](#) of the Group of Experts on Action against Trafficking in Human Beings (GRETA), December 2011, §111. See also sub-section I.d. above.

time.⁵³ It is also to be considered arbitrary if it is not closely connected to the ground of detention,⁵⁴ for instance if an alien is detained for the purpose of expulsion although the latter cannot reasonably be carried out.⁵⁵ The Commissioner also highlights the Court's case-law indicating that the detention of a rejected asylum seeker with a view to his/her expulsion is justified under Article 5§1(f) only for as long as deportation proceedings are in progress.⁵⁶

72. The Commissioner also draws the attention of the Danish authorities to the Parliamentary Assembly's [Resolution 1707\(2010\)](#) which stresses that the detention of asylum-seekers and irregular migrants shall be exceptional, for the shortest possible length and only used after first reviewing all other alternatives and finding that there is no effective alternative.⁵⁷ He would also like to refer to the 2011 [CPT Standards](#) which offer useful guidelines on respect for human rights in the context of migrants' detention.⁵⁸ Lastly, he underscores that vulnerable persons, notably children, persons with disabilities and victims of trafficking, should not be kept in detention.
73. The Commissioner invites the authorities to reconsider the practice of holding court hearings to decide on the legality and length of detention within the premises of the Ellebaek detention centre and via video conference. He considers that this practice can harm the confidence among aliens brought to court that the latter is impartial and independent.

d. Integration of refugees in Danish society

74. The Commissioner welcomes a series of amendments to the legal framework on integration introduced in recent years. These include the abolition of the controversial points system for migrants and refugees to obtain permanent residence as well as of the demanding immigration test. Fees and collateral requirements for family reunification were lowered and the requirement to demonstrate one's attachment to Denmark when applying for family reunification was eased. The establishment in 2012 of an independent appeals board for family reunification matters is also a positive development. While the Commissioner considers that these changes are conducive to a smoother integration process, he wishes to draw the attention of the Danish authorities to remaining legal provisions and practices which, in his view, can still slow the integration process of refugees in Danish society
75. The Commissioner welcomes the introduction in 2012 of the possibility for refugees to obtain permanent residence after five years, should they have successfully passed a level 1 Danish language test and worked or studied for three out of the last five years. Those not meeting these requirements can obtain permanent residence after eight years, like other categories of migrants. However, interlocutors of the Commissioner have stressed that having to wait for five years to be in a secure situation can be harmful to the integration process of refugees, who have no other choice than to live in Denmark.
76. The attention of the Commissioner has also been drawn to the fact that the Danish authorities reassess the protection needs of refugees when they request family reunification. He understands that the aim of this practice is to assess whether the family of the refugee can benefit from the facilitated family reunification procedure available to refugees and that no recognised refugee has to date had his/her status withdrawn following this reassessment.
77. The Commissioner notes with satisfaction that the system of granting lower social welfare benefits and lower child allowances to newcomers, including refugees, was abolished in 2011. Nonetheless, he is informed that since 2010, refugees of retirement age can no longer be

⁵³ See *inter alia*, [Saadi v United Kingdom](#), App. No. 13229/03, Grand Chamber judgment of 29 January 2008, §72 and [Suso Musa v. Malta](#), App. N°42337/12, judgment of 23 July 2013, §91.

⁵⁴ See [Kanaqaratnam and others v. Belgium](#), App. N° 15297/09, judgment of 13 December 2011, §93; [A. and Others v. the United Kingdom](#), App. N° 3455/05, Grand Chamber judgment of 19 February 2009, §164.

⁵⁵ See [Louled Massoud v. Malta](#), App. N°24340/08, judgment of 27 July 2010, §67.

⁵⁶ See [Chahal v. United Kingdom](#), App. N° 22414/93, Grand Chamber judgment of 15 November 1996, §113.

⁵⁷ Parliamentary Assembly Resolution 1707(2010) on the detention of asylum seekers and irregular migrants in Europe.

⁵⁸ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment, CPT Standards, revised in 2013, see Chapter IV on immigration detention.

exempted from the requirement of having worked for 40 years in order to have access to full pension rights. In this connection, the Commissioner notes that most refugees have not lived and worked in Denmark for 40 years and, consequently, many of them reportedly experience poverty at the time of retiring.

78. As regards “quota refugees” whom Denmark accepts for resettlement, the Commissioner welcomes the announced intention of the authorities to discontinue the assessment of the refugees’ integration potential. However, he notes with concern that proposals have been made to replace this criterion with other criteria, such as the existence of family ties in Denmark.
79. Following a thematic visit he undertook in December 2013 to Turkey, Bulgaria and Germany to gather first-hand knowledge of the situation of persons fleeing Syria in Europe, the Commissioner called on member states of the Council of Europe to respond with more generosity to the needs for resettlement of Syrians who took refuge in countries neighbouring Syria. He notes that Denmark has so far pledged to resettle 140 Syrians.

Conclusions and recommendations

80. The Commissioner calls on the Danish authorities to consider granting permanent residence to refugees as early as possible, and possibly before the current five year deadline set in the Aliens Act, in order to establish a stable basis for their integration into society.
81. In line with [UNHCR Guidelines](#) on procedures and criteria for determining refugee status, the Commissioner encourages the Danish authorities to ensure that refugees enjoy a basic degree of stability,⁵⁹ and invites them in particular to review their procedures with a view to eliminating the reassessment of protection needs of refugees who apply for family reunification.
82. The Commissioner invites the Danish authorities to actively examine and address the situation of destitution in which many refugees of retirement age are likely to find themselves, because they are unable to meet the requirement of 40 years of work in Denmark in order to gain access to full pension rights.
83. The Commissioner encourages the Danish authorities to ensure that the selection of quota refugees eligible for resettlement in Denmark is guided by the needs of the persons concerned. He furthermore calls on the Danish authorities to step up their efforts to provide Syrian asylum-seekers with protection, including by means of resettlement in Denmark.

e. Combating racism and intolerance

i. Hate speech and hate crime

84. Racism and intolerance, and particularly public discourse and hate speech targeting ethnic and religious minority groups, have repeatedly been highlighted as priority issues of concern in Denmark by international human rights monitoring bodies in the last decade. Concerns have been expressed not only about growing levels of hate speech but also about hate speech as an element favouring the adoption of legislation and policies that contravene human rights standards and best practice.
85. While the situation has reportedly improved in the last two years, the Commissioner remains concerned about the use of stigmatising discourse and hate speech, particularly in politics and public debates in the media and on the Internet. In May 2013 for instance, following the Danish authorities’ decision to grant citizenship to 685 stateless persons, including one who had been identified as a threat to Danish security by the domestic intelligence agency, the Danish Peoples’ Party (*Dansk Folkeparti*) published in a newspaper the full list of names of the persons concerned, highlighting that one was a threat for the security of Denmark.

⁵⁹ See UNHCR Guidelines on procedures and criteria for determining refugee status, Geneva, December 2011, in particular Chapter III on cessation clauses.

86. The Commissioner deplors in particular the continuing presence of racist and stigmatising speech against Muslims, or persons perceived as being Muslims, in public debate. Several of the Commissioner's interlocutors have indicated that the focus of stigmatising media and political debate has shifted from colour and ethnicity to religion and culture, with Muslims and Islam being at the centre of this shift. Terminology frequently used to refer to Islam includes words such as "barbaric", "tyrannical", "fundamentalist" and Muslim men have frequently been portrayed as violent and rapists.
87. The media reportedly play a negative role in spreading an often distorted and discriminatory image of groups such as Muslims and Roma, despite the existence of ethical guidelines and of supervisory mechanisms such as the Press Council and the Danish National Radio and Television Board. One practice which largely contributes to disseminating prejudices in society is the mention, by various media outlets, of the ethnic, religious or national origin of alleged perpetrators of crimes. Moreover, the dissemination of racist and anti-Muslim hatred through social media and blogs is a particularly worrying development.
88. The Commissioner notes that the criminalisation of hate speech has often been perceived as impinging on freedom of expression and being at odds with Denmark's strong tradition of free speech. Therefore, cases of prosecution under the provision criminalising hate speech (Section 266.b of the Criminal Code)⁶⁰ have in recent years triggered heated debates in society, including proposals to remove the criminalisation of insulting and degrading speech and criminalise only statements leading to a disturbance of public order.
89. The Commissioner notes with interest that a number of high profile cases of hate speech by public personalities have resulted in prosecutions in recent years. However, the number of successful prosecutions for hate speech remains limited. The Commissioner notes that in 2012, there were 14 indictments under Section 266.b, four convictions and four acquittals. In one case, a politician who had posted on her Facebook page stigmatising comments and a picture associating a burka-clad Muslim woman with a garbage bag was acquitted in December 2013 because the court found that there was no intention to insult and that the objective of the incriminated remarks was to trigger a debate about the oppression of women.
90. NGOs active in the field of combating racism continue to question the effectiveness of existing legal remedies and deplore the lack of opportunities for them to represent alleged victims of hate speech. The Commissioner notes that the effectiveness of Section 266.b of the Criminal Code in sanctioning hate speech has also been questioned by the UN Committee for the Elimination of Racial Discrimination (UN CERD) and the UN Human Rights Committee (UN HRC), as well as by the Council of Europe's European Commission against Racism and Intolerance (ECRI).⁶¹ In recent years, the UN CERD has found that Denmark had violated the UN Convention on the Elimination of Racial Discrimination because of the lack of effective investigations into and sanctions against racist and islamophobic statements made by Danish politicians.⁶²
91. Concerning hate crime, pursuant to Section 81§6 of the Criminal Code, the racist motivation of an offence is an aggravating circumstance in Denmark. However, interlocutors of the Commissioner have reported that the racist motivation is often not adequately investigated by the police and that there is a general lack of reporting of hate crime, a concern also highlighted by ECRI.⁶³ In 2012, the UN CERD found for instance that the authorities did not thoroughly investigate the possible racist motivation of an attack perpetrated by a mob of 30 persons against Iraqi citizens in their house, despite the fact that racist insults had been made before

⁶⁰ "(1) Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.

(2) It shall be considered an especially aggravating circumstance if the conduct can be characterised as propaganda".

⁶¹ ECRI, [Fourth Report on Denmark](#), adopted on 23 March 2012.

⁶² UN CERD, Opinion of 6 March 2006 (Communication N° 34/2004: [Mohammed Hassan Gelle v. Denmark](#)).

⁶³ See ECRI, Fourth Report on Denmark, 2012, op. cit.

and during the assault.⁶⁴ The Commissioner finds it positive in this context that both the police and prosecutorial authorities have acknowledged the need for increased awareness of hate crime legislation. He also notes with interest the launching, in 2011, of a campaign to promote reporting of hate crime and discrimination experiences by the Danish Institute for Human Rights as well as of a campaign to “Stop hate crime” implemented in 2011 by the municipality of Copenhagen.

92. The Commissioner particularly welcomes that, in 2011, the Director of Public Prosecutions issued detailed guidelines for the attention of the police and prosecution on when a statement can be considered in violation of Section 266 b. of the Criminal Code; they also contain guidance on the processing of cases of hate crime under Section 81§6 of the Criminal Code and of racial discrimination under the relevant legal provisions. The inclusion in the guidelines of a detailed list of hate crime indicators is particularly useful. The Commissioner is not aware of the proportion of recorded hate crime cases which reaches courts. He notes from the information provided to him by the Director of Public Prosecutions that, in 2012 and 2013, 10 out of respectively 21 and 28 court decisions related to racially-motivated offences resulted in convictions.
93. The Danish Security and Intelligence Service (PET) has in recent years strived to improve its monitoring of hate crime, which is also an important prevention tool. Since 2009, it has been reporting on offences potentially motivated by extremist attitudes based on data collected from the regional police databases. In 2009 it expanded the crime reporting system to crimes motivated by skin colour, nationality, ethnic origin and sexual orientation, in addition to racist and religious motivation. Since then, the number of crimes motivated by “extremist attitudes” therefore markedly increased (320 for the first nine months of 2012 and 384 for 2011, as compared with 175 in 2008). PET attributes these higher figures to better reporting and to the widening of the grounds considered, but also possibly to an increase in crimes committed. The Commissioner notes in particular that, between 2011 and 2012, the percentage of crimes motivated by ethnic origin and religion increased substantially (to respectively 24,1% and 10,3% of all crimes motivated by extremist attitudes).⁶⁵

ii. Work of the national police

94. The Commissioner welcomes the efforts made by the Danish National Police in recent years to improve the capacity of its staff to work in a multicultural environment. He notes in particular that since 2011, the police authorities have been co-operating with the Danish Institute for Human Rights to provide more guidance to police officers on hate crime. It has also started a project to increase diversity in the police force through the recruitment of police officers with a minority background.
95. However, the Commissioner is concerned about reports of ethnic profiling practices. Recent examples of ethnic profiling that were brought to his attention include a search operation carried out in December 2012 at the entrance of a Copenhagen church frequented by Africans. The Commissioner understands that in January 2013, the police authorities apologised for this operation.
96. In this connection, a lack of adequate legal safeguards against ethnic profiling by the police has been reported. The Commissioner notes in particular that Danish law allows police officers to carry out random stop-and-search operations without reasonable suspicion in designated areas. It has been reported that the geographical spread of the designated areas and lack of time limits for these operations, coupled with the possibility for the latter to be carried out without reasonable suspicion, result in increased risks of ethnic profiling.
97. The Commissioner warmly welcomes the setting up in January 2012 of an Independent Police Complaints Authority (*Den Uafhængige Politiklagemyndighed*), headed by a Council chaired by a High Court judge and composed of an attorney, a law professor and two representatives

⁶⁴ UN CERD, Opinion of 6 March 2012, Communication N° 46/2009: *Mahali Dawas and Yousef Shava v. Denmark*, see: <http://tb.ohchr.org/default.aspx>.

⁶⁵ See Danish Security and Intelligence Service, *Kriminelle forhold I 2012 med mulig ekstremistisk baggrund*, 6 September 2013.

of the general public. It is in charge of investigating alleged cases of police misconduct. The Commissioner was informed that in its short existence, the authority referred an increasing number of cases of police abuse to the Director of Public Prosecutions, including cases in which lower level prosecutor's offices had opted not to refer the case to court.

98. The Commissioner notes that, in August 2012, the director of the independent police complaints authority stated that a considerable number of complaints against the police had to be closed without further action being taken because it was not possible to identify the officers involved. This statement triggered a debate on the need for identification of police officers, which the Commissioner understands is still ongoing.

Conclusions and recommendations

99. The Commissioner encourages the Danish authorities to step up their efforts to combat hate speech, and in particular islamophobia, which continues to be widespread in public and political debate. He particularly urges the authorities to condemn firmly and unequivocally all instances of racist and xenophobic political discourse. Furthermore, he draws the attention of the Danish authorities to ECRI's [Declaration on the use of racist, antisemitic and xenophobic elements in political discourse](#),⁶⁶ which lists a series of legal and policy measures that governments should take to counter this phenomenon, including the signature and implementation of the 1998 [Charter of European political parties](#) for a non-racist society.⁶⁷
100. He stresses the importance of adequately investigating, prosecuting and sanctioning instances of hate speech, as underlined by ECRI in its [General Policy Recommendation N°7](#) on national legislation to combat racism and racial discrimination.⁶⁸
101. The Commissioner also invites the authorities to raise awareness about the limits to freedom of expression and the case-law of the Court, which has made it clear that although freedom of expression of politicians and political parties deserves a high degree of protection, the latter cannot advocate for racial discrimination and fuel racism as this goes against the fundamental principle of democracy.⁶⁹
102. The Commissioner welcomes the steps taken by the Director of Public Prosecutions to provide practical guidance on the implementation of criminal law provisions against hate speech and hate crime. He encourages the Danish authorities to pursue efforts to train the police on recording and investigating hate crime. The Commissioner stresses that the Danish authorities are under an obligation to carry out an effective investigation on the possible racist motives of an offence when there are indications of the existence of such motives and that according to the Court's case-law, treating racially-motivated offences as ordinary offences is incompatible with Article 14 of the ECHR.⁷⁰ The Danish authorities should also step up efforts to encourage potential victims to report hate crimes and cases of discrimination. The Commissioner draws the attention of the Danish authorities to [ECRI's General Policy Recommendation N°11](#) on combating racism and racial discrimination in policing,⁷¹ which provides useful guidance on the role of the police in reporting and monitoring hate crime.
103. The Commissioner calls on the Danish authorities to look into possible practices of racial profiling by the police and to start a discussion on the best way of addressing any such practices. He strongly encourages them to use the guidance provided by ECRI in its General Policy Recommendation N°11. In particular the Commissioner stresses ECRI's recommendation that member states should define and prohibit racial profiling by law; introduce a reasonable suspicion standard; and carry out research on racial profiling and monitor police activities in order to identify any such practices. The Commissioner recalls that

⁶⁶ ECRI Declaration on the use of racist, antisemitic and xenophobic elements in political discourse, adopted on 17 March 2005.

⁶⁷ Charter of European political parties for a non-racist society, 18 February 1998.

⁶⁸ ECRI, General Policy Recommendation N°7 on national legislation to combat racism and racial discrimination.

⁶⁹ See *inter alia* [Féret v. Belgium](#), App. N°15615/07, judgment of 16 July 2009.

⁷⁰ See in particular [Secic v. Croatia](#), App. N° 40116/02, judgment of 31 May 2007, §66-67.

⁷¹ ECRI, Policy General Recommendation N° 11 on combating racism and racial discrimination in policing, adopted on 29 June 2007.

the Court [found](#) that granting broad discretion to police officers to carry out stop-and-search operations entailed a clear risk of arbitrariness.⁷²

104. The Commissioner welcomes the efforts made to address police misconduct by law enforcement officials, in particular through the setting up of an independent police complaints authority. He stresses that it is essential to ensure that all law enforcement officers are easily identifiable, by means of visible identification plates, so as to facilitate the prosecution and sanctioning of perpetrators of abuse.

II. Human rights of persons with disabilities

105. Denmark has developed commendable policies to implement the rights enshrined in the UN CRPD, including policies aimed at promoting a better inclusion of persons with disabilities by means of community-based services and other forms of support. Nonetheless, the current trend towards building larger housing units for persons with disabilities raises concerns in terms of the full respect of the right to independent living and inclusion in the community guaranteed in the UN CRPD (sub-section 1). Moreover, important shortcomings persist concerning the legal capacity of persons with disabilities (sub-section 2), as well as the use of coercion in psychiatric hospitals (sub-section 3).
106. The Commissioner notes that the UN CRPD, like the UN CRC, is not incorporated into domestic legislation. He is of the opinion that the full incorporation of this convention could have a positive impact on the protection of the rights of persons with disabilities and contribute to raising awareness of its provisions, which appear not to be well-known, notably at the local level.
107. Moreover, the Commissioner notes that Denmark lacks comprehensive legislation against discrimination on the grounds of disability. As is the case for discrimination on most other grounds, protection against disability discrimination is limited to the labour market.⁷³ The legislation on hate crime does not cover disability as a relevant bias motivation. Several interlocutors of the Commissioner have stressed the need for more effective and comprehensive protection against discrimination on the grounds of disability in all spheres of life.

1. Deinstitutionalisation and inclusion in the community of persons with disabilities

108. The Commissioner notes that Denmark abolished institutions for persons with disabilities in 1998. Large institutions have since been replaced by other forms of accommodation, mainly residences in which dwellers are in principle allocated individual apartments and share common areas and facilities.
109. Moreover, positive policies have been developed regarding the provision of support and services in the community, in order to promote the autonomy of persons with disabilities. Municipalities (supplemented by the state beyond certain amounts) are by law responsible for providing persons with disabilities with financial assistance for support equipment, housing modifications, home care, support for transportation and personal assistance at work, based on an assessment of their needs. There are no limitations of amounts, which are based on the needs of the person concerned, and except for equipment, the user can manage his/her own budget. The need for support is assessed by municipal social workers.
110. Additionally, the “citizen controlled personal assistance” scheme (known in Denmark as BPA), introduced in 2000, provides for additional support for persons with a high degree of disability and whose freedom of movement is limited due to a physical or mental impairment. It involves personal assistants for up to 15 hours a day and seven days a week. Persons with disabilities are themselves the employer of the personal assistant. However, interlocutors of the Commissioner have indicated that, in practice, not all of the persons requiring assistance under the BPA scheme have access to it.

⁷² *Gillan and Quinton v. the United Kingdom*, App. N°4158/05, judgment of 12 January 2010, §85.

⁷³ Act on the Prohibition of Discrimination on the Labour Market of 1996.

111. In contrast to this well-developed policy of individual support, which is to be commended, the Commissioner finds it worrying that municipalities and regional authorities have tended, in the last few years, to build clusters of about 20 to 80 housing units in order to provide accommodation for persons with disabilities. According to official research, in 2010, the average number of persons living in a residence was 15,2 while the largest residence hosted 233 persons.⁷⁴ According to the national organisation of persons with learning disabilities (LEV), 20 residences with more than 20 residents have been built between 2011 and 2013. The Commissioner has for instance been informed of the existence in Copenhagen of a residence providing accommodation to about 75 persons and of an entire neighbourhood in Sølund (Jutland) composed of small housing units for about 220 persons with intellectual disabilities.⁷⁵ Such housing units are reportedly often concentrated in small cities or in the suburbs of larger cities, away from city centres.
112. The Commissioner visited a new residence, managed by the municipality of Copenhagen and composed of 27 individual apartments for persons with disabilities, mainly persons with autism, aged between 20 and 39 years. He noted with interest that the residents have individual lease contracts and that the residence is located in a district in which the “Social + programme” is being implemented. This housing programme involves persons from different backgrounds and with different needs and aims at promoting good neighbourly relations and respect for diversity. Moreover, he was impressed by the high standard of the material living conditions and professionalism of the staff working with the residents. However, he is of the opinion that the relatively large number of persons living in the residence he visited is not conducive to promoting the right to autonomy and independent living, protected under Article 19 of the UN CRPD and Article 15 of the European Social Charter (Revised).⁷⁶
113. Local authorities argue that such larger clusters are not only more cost effective, but also allow for the provision of more support and care. They consider that better services can be provided in larger clusters, in terms of staff or facilities such as sports and other leisure clubs, than in smaller, more scattered settings. Additionally, the Commissioner was informed during his visit that in larger residences, personal assistance can be provided to the residents, which is comparable to services provided under the aforementioned BPA scheme, to which only a limited number of persons seem to have access. Local authorities also contend that, although some residences accommodate several dozens of residents, they are organised in smaller units so as to avoid ending up in a situation comparable to the large institutions of the past.
114. The Commissioner notes, however, that living in a residence means in most cases that the persons concerned do not have a genuine opportunity to choose with whom and where they want to live. They usually have to live together with other persons with disabilities. Furthermore, their interaction with society is often limited to contacts with the staff in charge of providing care and assistance to them, which is at variance with the principle of full and effective participation and inclusion in society on which the UN CRPD is grounded.⁷⁷ The more facilities and specific services are provided within the residence, the less opportunities for contacts with the outside world become available to the residents in practice, as highlighted in the [Issue Paper](#) of the Commissioner’s predecessor on the right of people with disabilities to

⁷⁴ See Krevi, Botilbudsområdet: HVEM – HVAD – HVOR, June 2012.

⁷⁵ See Academic Network of European Disability Experts (ANED), Country report on the implementation of policies supporting independent living for disabled persons, Denmark, May 2009.

⁷⁶ Under Article 19 of the UN CRPD, States Parties “recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that: a) persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement; b) persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community; c) community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs. Article 15 of the Revised European Social Charter provides that “disabled persons have the right to independence, social integration and participation in the life of the community.”

⁷⁷ See Article 3 UN CRPD.

live independently and be included in the community.⁷⁸ A 2012 study on Article 19 of the CRPD prepared by the UN Office of the High Commissioner for Human Rights, also underlines that “[s]maller institutions are no less objectionable than larger ones particularly where the structural opportunities for real engagement in community life are absent. Congregated settings generally draw attention to the commonality of their residents (disability) rather than to their innate personhood and thereby militate against open intercourse with civil society”.⁷⁹

115. Additionally, the Commissioner is informed that freedom of choice and autonomy can be seriously limited when residents are accommodated in a facility based on a temporary placement offer. Under this scheme, provided for by the Act on Social Services, persons can be moved without their consent to another residence following an assessment of the authorities. While such moves can serve the purpose of allowing the persons concerned to receive services more adapted to their needs, they also hamper their ability to make choices as to the place they want to live in.

Conclusions and recommendations

116. The Commissioner is concerned about the current trend to build residences accommodating a growing number of persons with disabilities in Denmark. In his view, such an approach is not in line with the right to independent living and inclusion in the community, as defined in Article 19 of the UN CRPD and Article 15 of the Revised European Social Charter. He underscores that arguments of cost-effectiveness and administrative organisation of care and services should not have primacy over this right.
117. The Commissioner urges the Danish authorities to raise further awareness among local authorities about the rights protected and principles enshrined in the UN CRPD, to which Denmark is bound, and about the way these should be implemented in practice. While fully abiding by the principles of local democracy, they could, in particular, provide local authorities with guidelines on how to provide housing for persons with disabilities in compliance with the UN CRPD. The Commissioner draws the attention of the Danish authorities to his predecessor’s Issue Paper on the right of people with disabilities to live independently and be included in the community, which contains indicators and guiding questions to help member states to monitor their progress towards full compliance with this right.⁸⁰
118. The Commissioner also invites the authorities to pursue and expand, as far as possible and in accordance with the principle of progressive realisation, the policies aimed at providing individualised support in housing, work and life planning, so as to prevent the isolation of persons with disabilities from society and promote their full and equal participation, without that support being contingent on a particular living arrangement.
119. The Commissioner encourages the Danish authorities to consider incorporating the UN CRC into Danish legislation and ratifying the Optional Protocol to the Convention, which allows individuals or groups of individuals who claim to be victims of a violation of the UN CRC to submit communications to the UN Committee on the Rights of Persons with Disabilities.
120. Additionally, he calls on the authorities to consider expanding protection against discrimination on the ground of disability beyond the labour market so as to ensure comprehensive protection against discrimination for persons with disabilities in all areas of life. Ratification by Denmark of Protocol 12 to the European Convention on Human Rights, which establishes a general prohibition of discrimination, would also contribute to this goal.

2. The legal capacity of persons with disabilities

⁷⁸ Issue Paper on the right of people with disabilities to live independently and be included in the community, 2012, p. 13.

⁷⁹ See OHCHR Regional Bureau for Europe, [Getting a Life: Living Independently and Being Included in the Community](#), April 2012.

⁸⁰ Issue Paper on the right of people with disabilities to live independently and be included in the community, 2012, *ibid*.

121. Denmark maintains a system of guardianship for persons considered to be incapable of managing their own affairs due to a psycho-social or intellectual impairment. The Commissioner notes with concern that the 1995 Act on Legal Incapacity and Guardianship allows for full deprivation of the legal capacity and of the financial responsibility of the persons concerned.⁸¹ Full guardianship is decided by a judge, possibly based on the opinion of a psychiatric expert.
122. The Commissioner finds it worrying that increasing use has reportedly been made of full guardianship in the last fifteen years. In 2011, courts decided to impose full guardianship in 194 cases whereas only 48 such decisions were made in 1997.⁸² Assisted guardianship, a form of curatorship which does not result in the loss of legal capacity, represents only a very limited share of the guardianship decisions.
123. The Commissioner stresses that guardianship and similar mechanisms of substituted decision-making, associated with automatic deprivation of legal capacity, are not in line with Article 12 of the UN CRPD, which guarantees to persons with disabilities the right to equal recognition before the law and, in particular, the right to enjoy legal capacity on an equal basis with others in all aspects of life. In its draft General comment on Article 12 of the Convention, the CRPD Committee specified that practices such as “guardianship, conservatorship, [...] need to be abolished to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others”. Moreover, the Commissioner underscores the Committee’s consistent view that states should replace regimes of substituted decision-making by supported decision-making, “which respects the person’s autonomy, will and preferences”.⁸³
124. The Commissioner’s predecessor, in his [Issue Paper](#) on the right to legal capacity of persons with intellectual and psycho-social disabilities, has also stated that mechanisms providing for full incapacitation and plenary guardianship should be abolished as a first step, while the ultimate goal should be the replacement of all forms of substituted decision-making with supported decision-making systems.⁸⁴
125. Furthermore, the Court has found in a number of cases that incapacitation amounted to a violation of Article 8 of the ECHR as it severely interfered with the individual’s right to respect for private life.⁸⁵ In particular, the Court [stated](#) that full incapacitation did not constitute a response tailored to the needs of the persons concerned and that it violated the principles of proportionality and necessity.⁸⁶
126. Additionally, the Commissioner is concerned that the Act on Legal Incapacity and Guardianship appears not to meet the criteria established in the relevant Council of Europe Committee of Ministers’ [Recommendation](#),⁸⁷ which sets as key requirements when taking decisions on the legal capacity of a person the need for flexibility in the legal response, proportionality, maximum preservation of capacity, the right to be heard in person prior to the incapacitation decision and the right to appeal such a decision. The Commissioner is concerned that the Act on Legal Incapacity and Guardianship does not contain any obligation for guardians to promote the person’s capacity to act over time and does not establish safeguards against possible conflicts of interest for guardians and undue influence or exploitation of vulnerability. Moreover, there is no procedural guarantee that persons placed under guardianship will be consulted prior to establishing a guardianship agreement and prior

⁸¹ Section 6 of the 1995 Act on Legal Incapacity and Guardianship.

⁸² Danish Institute for Human Rights, *Selvbestemmelse og værgemål i Danmark*, 2012, [Chapter V](#): Conclusion and recommendations (in English).

⁸³ UN Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 of the Convention-Equal Recognition before the Law, June 2013, see:

<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>. See §7. *Ibid.*

⁸⁴ Council of Europe Commissioner for Human Rights, *Who gets to decide? Issue Paper on the right to legal capacity for persons with intellectual and psychosocial disabilities*, 2012, pp. 7-8.

⁸⁵ *Shtukaturov v. Russia*, App. N°44009/05, judgment of 27 March 2008; [Salontaji-Drobnjak v. Serbia](#), App. N°36500/05, judgment of 13 October 2009.

⁸⁶ *Shtukaturov v. Russia*, §95.

⁸⁷ Recommendation CM/Rec(99)4 on principles concerning the legal protection of incapable adults, adopted on 23 February 1999.

to any decision on important matters. Neither does the law stipulate that the duration of guardianship should be as short as possible and that there should be a regular review of the guardianship arrangement.

127. Another issue of concern to the Commissioner is the automatic deprivation of the right to vote for persons placed under plenary guardianship, in accordance with Section 29 of the Danish Constitution and the legislation on elections.⁸⁸ He understands that the authorities do not intend to amend the Constitution with a view to recognising the right to vote of these persons in parliamentary elections. However, he emphasises that the Court has established that the routine removal of voting rights of persons under guardianship, irrespective of their actual faculties, violates Article 3 of Protocol N°1 of the ECHR.⁸⁹ He also stresses that the Council of Europe Committee of Ministers has, in its [Recommendation](#) on the participation of persons with disabilities in political and public life,⁹⁰ stated that all persons with disabilities have the right to vote and stand for election at all levels on the same basis as other citizens, and should not be deprived of this right by any measure based on their disability, cognitive functioning or perceived capacity.
128. Deprivation of the right to vote is also a violation of Article 12 of the UN CRPD on the right to equal recognition before the law and of Article 29, which guarantees to persons with disabilities “political rights and the opportunity to enjoy them on an equal basis with others”, as underlined by the UN Committee on the Rights of Persons with Disabilities in its Communication N°4/2011.⁹¹ In this decision regarding a complaint brought by six persons with intellectual disabilities who had been deprived of their right to vote due to their incapacitation, the Committee invited the authorities of the country concerned to enact “laws that recognize, without any “capacity assessment” the right to vote for all persons with disabilities, including those with more need of support, and provide for adequate assistance and reasonable accommodation in order for them to be able to exercise their political rights.”

Conclusions and recommendations

129. The Commissioner urges the Danish authorities to take measures with a view to replacing substituted decision-making with supported decision-making, so as to comply as soon as possible with the requirements of Article 12 of the UN CRPD. As a first step, plenary guardianship as defined in Section 6 of the Act on Legal Incapacity and Guardianship should be abolished.
130. The Commissioner also calls on the Danish authorities to amend the relevant legislation in order to meet their obligations under Articles 12 and 29 of the UN CRPD and ensure that persons with disabilities enjoy, in practice, their right to vote. The Commissioner highlights that abolishing plenary guardianship would in practice remedy the deprivation of the right to vote imposed on persons under this form of guardianship. He also draws attention to the views of the UN Committee on the Rights of Persons with Disabilities which request from the authorities that they guarantee voting procedures, facilities and materials that are appropriate, accessible and easy to understand and use, and where necessary, allow assistance in voting to persons with disabilities by a person of their choice.⁹²

3. Use of coercion in psychiatry

131. The Commissioner is concerned about the long-standing problem of the excessive use of coercion in Denmark’s psychiatric institutions, including involuntary placement in psychiatric

⁸⁸ Including the Parliamentary Election Act, Municipal Election Act, Act on the Election of Members of the European Parliament. Section 29 of the Constitution reads as follows: “People who have been declared legally incompetent are not entitled to vote [in parliamentary elections]. This could be due to mental illness or mental disability, for instance.”

⁸⁹ [Alajos Kiss v. Hungary](#), App. N°38832/06, judgment of 20 May 2010, final on 20 August 2010.

⁹⁰ Recommendation CM/Rec(2011)14 of the Committee of Ministers to member states on the participation of persons with disabilities in political and public life, adopted on 16 November 2011.

⁹¹ UN CRPD, Communication N°4/2011, *Zsolt Bujdosó and five others v. Hungary*, Views adopted on 9 September 2013, see: www.ohchr.org/EN/HRBodies/CRPD/Pages/Jurisprudence.aspx

⁹² UN CRPD, Communication N°4/2011, op. cit.

hospitals, forced treatment and the use of physical restraints. He notes that 928 persons were subjected to forms of forced treatment in psychiatry in 2012, a figure which has constantly been on the rise since 2001 (when 715 persons were subjected to forced treatment).⁹³ Involuntary hospitalisations in psychiatric wards made up between 20 and 22% of the total number of psychiatric hospitalisations between 2001 and 2012. 2 803 persons were detained in a psychiatric ward against their will in 2012.⁹⁴

132. According to the Act on Deprivation of Liberty and Use of Force in Psychiatry (referred to hereinafter as “law on psychiatry”), persons can be hospitalised against their will if 1) they present an imminent danger for themselves or others or 2) in order to prevent an acute deterioration of their condition or not to hamper the prospect of a cure. The Commissioner is informed that about 50% of involuntary placements are made on grounds of need for treatment and 50% to avoid danger for the person concerned or others.
133. High occurrences of involuntary hospitalisation and treatment often result from the lack of mechanisms to ensure due consideration for the views of persons with psycho-social disabilities, support their decision-making and accommodate their specific needs, in line with Article 12 of the UN CRPD. In a 2013 report, the Danish Institute for Human Rights expressed concerns about the lack of safeguards in the law on psychiatry against arbitrary decisions likely to jeopardise the autonomy and integrity of the person. In particular, the law does not seem to provide sufficient guarantees that the proportionality requirement will be strictly applied in decisions concerning involuntary hospitalisation on grounds of the need for treatment (as opposed to danger avoidance) and in decisions concerning forced treatment. Decisions to impose forced treatment on patients have for instance been taken on the grounds that the patient lacked awareness of the disease or did not adequately understand the need for treatment.⁹⁵ The Commissioner draws attention to the Court’s [case-law](#), in which it underlined that using the applicant’s refusal to undergo hospitalisation (interpreted as lack of insight into his condition) as a ground for deprivation of liberty (in this case, hospitalisation in a psychiatric ward) was incompatible with the principle of effective protection of Convention rights.⁹⁶ The Commissioner also refers to Article 14, §1(b) of the UN CRPD, which states that “the existence of a disability shall in no case justify a deprivation of liberty.”
134. Additionally, the Commissioner is informed that patients hospitalised and treated on a voluntary basis are sometimes denied release, which amounts to forced hospitalisation. He wishes to recall that, according to the 1997 Council of Europe [Oviedo Convention](#) on human rights and biomedicine, which Denmark ratified in 1999, a person subjected to treatment on the basis of consent should be able to withdraw his/her consent at any time.⁹⁷
135. The Commissioner notes that Psychiatric Patient Complaint Boards at regional level and a Psychiatric Appeals Board are available to patients. However, a lack of consistency has been reported in the decisions of the various complaints boards at local level regarding involuntary hospitalisation, treatment and the use of physical restraint, leading to their merging in 2013 into a single Complaints Board.
136. The Commissioner is particularly concerned by the persisting problem of excessive use of physical restraint in Danish psychiatric institutions. In its 2008 [report](#) on Denmark,⁹⁸ the CPT described cases of physical immobilisation lasting up to six months. Patients subject to such measures had been tied to their beds by means of an abdominal belt (a method known as “fixation” in Denmark), and sometimes wrist and ankle straps, day and night, including for meals. In one institution, “fixation” had been carried out in full view of other patients, which was

⁹³ Statistics provided by the Ministry of Health, 5 July 2013.

⁹⁴ Ibid.

⁹⁵ See Danish Institute for Human Rights, Recommendations on human rights and compulsory psychiatric treatment, 2013.

⁹⁶ See *Plesó v. Hungary*, §67. The Court found Hungary to be in violation of Article 5§1 of the ECHR for the involuntary hospitalisation of the applicant in a psychiatric ward on grounds of a psycho-social disorder and alleged “unconventional lifestyle”.

⁹⁷ Article 6§5.

⁹⁸ See CPT, Report on the visit to Denmark, 2008, op. cit.

considered particularly degrading by the CPT.⁹⁹ The CPT considers that imposing physical restraint on patients for a period of days cannot have any therapeutic justification and amounts to ill-treatment.¹⁰⁰

137. Against this background, the Commissioner notes with concern that every year between 2005 and 2012, more than 350 persons have experienced forced fixation lasting longer than 72 hours, despite several pilot projects aimed at reducing the use of coercion.¹⁰¹ These figures indicate that physical restraint is not used only as a last resort. In 2012 alone, 5 657 occurrences of physical restraint were recorded, 715 of them lasting longer than 48 hours.¹⁰² Interlocutors of the Commissioner also reported that physical restraint can sometimes be used to address behaviour, such as shouting at the staff.
138. The law on psychiatry has been repeatedly amended in the last 10 years. In accordance with amendments adopted in 2007, physical immobilisations lasting more than 24 hours need to be reported in a special protocol and those lasting more than 48 hours have to be reviewed by an outside expert. The right to request a court review of the legality of an immobilisation through restraint was also introduced in 2007. Despite these legislative improvements, the CPT highlighted that the law still failed to set limits on the duration of forced physical immobilisation and to stipulate that it should stop as soon as the danger of causing harm has ceased to exist.
139. Moreover, the CPT deplored gaps in the supervision, review and reporting on the use of restraint. It appears that the protocols in place to report the use of restraints have not always been adequately followed and that guidance emanating from complaint mechanisms is not systematically followed. Therefore, there seems to be a lack of clarity as to the criteria guiding the imposition of physical restraint. It was also reported to the Commissioner that sedation is widely used as an alternative to restraint, or to forced treatment, as it does not have to be recorded as such.
140. The Commissioner was also informed that, according to some research, a disproportionate number of men with an ethnic minority background are subjected to forced treatment and the use of force/restraint in psychiatry.¹⁰³ These findings could indicate a pattern of direct or indirect discrimination, which should be investigated by the authorities.
141. Lastly, the Commissioner is worried by the high -and apparently growing- number of forensic psychiatric patients who, during their hospitalisation, are sentenced to treatment on grounds of misconduct or offences allegedly committed against staff members of psychiatric institutions. This leads to a prolongation of their stay in a psychiatric institution. Interlocutors of the Commissioner have stressed a lack of communication skills among part of the staff as one reason for this growing number of cases. Sentencing to treatment leads to prolonged stays of patients in psychiatric institutions and to the latter having to face a growing number of patients. Between 2001 and 2011, the number of persons sentenced to treatment has reportedly increased from 1 300 to 3 900. The Commissioner appreciates that there is increasing awareness of this problem among the Danish authorities and that the Parliamentary Ombudsman has expressed the intention to pay specific attention to this issue.
142. The Commissioner notes with satisfaction that the Danish authorities appear to be well aware of the shortcomings in the legislation and practices related to psychiatry, particularly regarding the excessive use of physical restraint. He warmly welcomes the publication in October 2013 of a comprehensive [report](#), commissioned in 2012 by the Ministry of Health from a mixed group of experts (including disability NGOs and associations of users of psychiatry) on the care of persons with mental health problems in Denmark.¹⁰⁴ The report is critical, inter alia, of

⁹⁹ See CPT, Report on the visit to Denmark, *ibid*, paragraphs 124-128.

¹⁰⁰ CPT Standards, 2011.

¹⁰¹ See Danish Institute for Human Rights, Status Report on Disabilities 2012.

¹⁰² Statistics provided by the Ministry of Health, *ibid*.

¹⁰³ See Danish Institute for Human Rights, Recommendations on human rights and compulsory psychiatric treatment, 2013.

¹⁰⁴ *En moderne, åben og inkluderende indsats for mennesker med psykiske lidelser* (a modern, open and inclusive approach to persons with mental disorders), October 2013.

the excessive use of coercion and restraint, the use of sedation instead of restraint and, more generally, the problem of overmedication, the significantly lower life expectancy of psychiatric patients and the growing number of patients sentenced to treatment.

143. The report contains 89 proposals to the government, which should form the basis for a government action plan to reform the psychiatric system and modernise the law on psychiatry. It highlights the need to combat discrimination against persons with psycho-social disabilities more effectively, to value the right to self-determination of patients and to reduce the use of coercion to an absolute minimum by setting binding targets. The report lists a number of measures to achieve these goals. They include: increased patient involvement in decisions on placement and treatment; increased co-operation with civil society and users' organisations; better accommodation of specific patient needs; enhanced training of staff, including on communication skills; improved reporting and monitoring; and institutional changes in order to create an environment more conducive to achieving the goal of modernising psychiatry. The Commissioner notes with great interest that the government intends to achieve a reduction of 50% in the use of coercion by 2020. It also foresees the establishment, in the form of pilot projects, of hospital units which do not use involuntary hospitalisations or restraint, with a view to testing alternatives to the current model.

Conclusions and recommendations

144. The Commissioner calls on the authorities to ensure that legislation and practices regarding forced hospitalisation, forced treatment and the use of physical restraints are in full compliance with human rights standards. He welcomes the process of reform of the psychiatric system undertaken by the Danish authorities, based on the work of the mixed commission on psychiatry. He strongly encourages the Danish authorities to make swift progress on the elaboration and implementation of an action plan to remedy the main human rights problems generated by current legislation and practices.
145. The Commissioner stresses that the use of support to persons with psycho-social disabilities for decision-making, in line with the provisions of Article 12 of the UN CRPD, and reasonable accommodation of the patients' information needs,¹⁰⁵ could lead to a decrease in the number of cases of involuntary hospitalisation and forced treatment.
146. Increased involvement of users' groups and other civil society organisations, including in court proceedings relating to placement without consent, could substantially contribute to reinforcing the safeguards against arbitrary or disproportionate decisions and ensure better compliance with the guarantees established under Article 5 of the ECHR on the right to liberty.
147. As regards treatment, the Commissioner attaches particular importance to the need for the consent of the patient to be fully respected. He draws attention to Article 25 (d) of the UN CRPD which establishes the right for persons with disabilities to enjoy the highest attainable standard of health care, without discrimination on grounds of disability and on the basis of free and informed consent. States parties are therefore obliged to require all health and medical professionals to obtain free and informed consent from persons with disabilities and to refrain from permitting substituted decision-makers to provide consent on their behalf.¹⁰⁶ He also wishes to highlight the [view](#) of the UN Special Rapporteur on Torture, Juan Méndez, that non-consensual treatment should be limited to life-threatening emergencies, as is the case for persons without disability, in line with the prohibition of discrimination on the ground of disability enshrined in Article 4 of the UN CRPD.¹⁰⁷

¹⁰⁵ Under Article 2 of UN CRPD "reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. In the present case, it would mainly consist of the provision of information in a format adapted to the patients' condition, as well as assistance in decision-making.

¹⁰⁶ See UN Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 of the Convention, op. cit., §37-38.

¹⁰⁷ UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Report to the Human Rights Council, 1 February 2013.

148. The Commissioner commends the stated objective of the government to drastically limit the use of coercion and to test new methods excluding the use of forced hospitalisation and physical restraints. He invites the authorities to implement these plans swiftly with a view to progressively eliminating the use of restraint and coercion in general, as recommended by the CPT¹⁰⁸ and by the UN Special Rapporteur on Torture, the latter of whom also called for “an absolute ban on all coercive and non-consensual measures, including restraint and solitary confinement of people with psychological and intellectual disabilities,[...] in all places of deprivation of liberty, including psychiatry and social care institutions”.¹⁰⁹
149. In the meantime, the authorities should ensure that adequate safeguards are in place to prevent violations of the rights of patients, including violation of their right not to be subjected to torture (protected in Article 15 of the UN CRPD), not to be exposed to violence, exploitation and abuse (Article 16) and the right to personal integrity (Article 17). He draws particular attention to the safeguards identified by the CPT in case of use of physical restraint: it should only very rarely be justified and must always be either expressly ordered by a doctor or immediately brought to the attention of a doctor; it should be stopped at the earliest opportunity; and it should never be applied as a punishment.¹¹⁰

¹⁰⁸ See CPT standards, 2011, op. cit., p. 44.

¹⁰⁹ UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *ibid.*

¹¹⁰ CPT Standards, 2011, op. cit., p. 54.