

Part III:

Solidarity at a Crossroad: Solidarity and Member State Public Policies on Unemployment, Disabilities and Migration/Asylum

Solidarity in Times of Crisis: Disability, Immigration and Unemployment in Denmark

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Introduction

In a European comparative context, the Danish Welfare State is considered to be relatively supportive in terms of providing care for the three areas discussed in this chapter: disability immigration, and unemployment. Among other things, the state grants relatively high disability and unemployment benefits, guarantees job security for disabled people, and offers extensive rehabilitation to help sick people re-enter the labour market. This is in line with a particular understanding of *solidarity* which, in the Danish context is strongly grounded in *welfare*, and encompasses equal distribution of income through taxation. Reciprocal solidarity as welfare is in this sense state-centred, while citizens invest at the same time in horizontal and privately organised solidarity action in support of the state supplied welfare services.

The economic and financial crisis in 2008 marks some modest changes, but not, as we shall argue, a radical rethinking of the welfare state. As a result of the very recent policy changes in the three issue areas under analysis, social benefits have been cut or become more conditional with preference given to measures that seek to reintegrate service receivers into the labour market. This is, however, in line with the tradition of the universalistic Danish Welfare State, which has always combined a generous social safety net and free education by collecting high taxes and contributing actively to the wealth of society through work, volunteering and social responsibility.

The relative stability of the welfare state in times of crisis can, in part, be explained by Denmark's quick economic recovery after suffering from recession in the initial crisis years. The GDP growth dropped from 1.6 % in 2010 to 0.66 % in 2012 – and rose to 1.3 % in 2016 – and in turn the population did not suffer from a substantial loss in wealth, while recession or economic stagnation endured in other parts of Europe. Furthermore, the debt and deficit of the Danish government is the lowest in the EU; its Gini

coefficient – a socio-economic measure that allows income inequality among the population to be compared – remains the lowest in Europe (around 0.25 during the crisis years); the average annual wage is one of the highest in Europe, and inflation is at a historical low level.¹ Contrary to what is often assumed, moreover, the tax burden for the average Danish worker is not higher than the average in other European countries.²

Unemployment rose in the initial crisis years, but since 2011 this trend has reversed with a current unemployment rate of 6.5% (December 2016). This is below the EU-average of 8.3% and far below the rate of countries hardly hit by the crisis like Italy (11.9%), Spain (19.1%) and Greece (23.1) (Eurostat 2017). Youth unemployment is around 10% and thus significantly lower than in other European countries where it even doubles the unemployment rates for all ages (*ibid.*). The youth unemployment rate is also decreasing, indicating the quick recovery of the labour market. Over the last years, Denmark has, in fact, offered job opportunities for young adults from all over Europe with an increasing influx of both high-skilled and low skilled mobile EU citizens who escaped economic hardship in their countries of origin.

In the field of immigration, an important change is marked by the more recent arrival of refugees in 2015. The number of asylum seekers increased dramatically from 2,409 in 2008 to 21,316 in 2015, but dropped again considerably in 2016. Over the same period, the number of incoming non-EU working migrants (not asylum seekers) has dropped steadily (from 21,440 in 2007 to 11,682 in 2015), while the number of EU migrants increased significantly (from 14,620 in 2007 to 37,366 in 2015).³ There has thus been a shift from non-EU to intra-EU immigration, which – according to Jørgensen and Thomsen (2013) – is reflected in an increasing negative tone in the media towards both groups: the EU and Non-EU migrants.

In the field of disability, Danish disabled people, who according to Christoffersen et al. (2014, 86) includes up to 25 % of the population, are provided with a variety of measures to apply for public funding. However,

1 <http://www.dst.dk/da/Statistik/nyt/NytHtml?cid=19280> and <http://www.dst.dk/da/Statistik/nyt/NytHtml?cid=22577>.

2 <http://www.skm.dk/skattetal/statistik/generel-skattestatistik/skattetryk-en-international-sammenligning-i-2013>.

3 <https://www.nyidanmark.dk/NR/rdonlyres/6460D4F5-F48B-4724-9ED6-0BCD97683104/0/StatisticalOverview2015.pdf>.

the terms for these funding schemes have been bureaucratised since the structural reform of 2007 and the crisis in 2008. Furthermore, even though it seems that disabled people are met with a high degree of solidarity regarding employment matters, they are less protected from discrimination outside the labour market.

This chapter aims to place the Danish Welfare State into context and to trace more recent legislative and policy changes with regard to these three areas. We begin, first, with a brief introduction to the Danish legal system, hereunder judicial reviews, the role of the courts and intermediary complaint board, ‘The Danish Parliamentary Ombudsman’. We then go on to discuss the three areas separately. Within each area, we disclose the main legislation and discuss relevant case law from the Supreme Court of Denmark and the Ombudsman. Finally, we include reactions and experiences from civil society to the changes after 2008.⁴

The Danish Judiciary System and the Tradition of Conflict Mediation beyond the Courts

The Danish Judiciary System is a hybrid of civil law and public law (Lund-Andersen 2015) and has no separate constitutional court (see Wahlgren 2007).⁵ Relevant cases within our areas of interest are thus dealt with by ordinary courts, the Supreme Court of Denmark being the highest appeal instance. To consider the specifics of the judicial review system in Denmark, it is however important to keep in mind the cultural and democratic self-understanding of a country that strongly trusts in the role of representative government and parliament. According to Marlene Wind (2014, 18-19), in the Nordic part of Europe, there is “a broad but unspoken consensus that democracy equals the will of the majority in parliament and that this majority should be more or less unconstrained by other powers”, including the judiciary. There is, thus, a consensus approach to judicial and political matters, which – it is argued by Wind – works best “in homogenous societies with few violent conflicts and little ethnic diversity”. Denmark is indeed one such society which imagines itself just like a

4 We do this through our 30 research interviews performed with transnational solidarity organisations (TSOs) working within disability, immigration, and unemployment.

5 Overview of the Danish Courts and judicial system is found in Wahlgren (2007).

‘big family’ or a ‘tribe’ (Olwig and Paerregaard 2011, 2). Furthermore, Danish citizens have a high level of trust in institutions, and national authorities are considered to be your ‘friend’, one whose advice you take, and against whom you do not press charges (Wind 2009; Christoffersen et al. 2014, 139, 174-177).

Judicial reviews are rare in legal systems based on parliamentary supremacy, such as Denmark’s. This is different from states with strong constitutional protection such as Germany and Italy, where the Constitutional Court is a primary place for the protection of the rights of the citizens. People in majoritarian democracies can even be said to be afraid of the strong role of courts to restrict the sovereignty of the people (Wind 2014). Thus, Denmark like the other Nordic countries does not have the tradition of using the judicial review by courts, since it prefers that rights should be the product of legislative proposals (Wind 2009).

In light of this democratic self-understanding, laws (especially constitutional law) enforced by courts only play a minor role in the protection of citizen rights in Denmark. The general disregard for courts is also reflected in the attitude of the Danish people who often prefer alternative procedures of conflict settlement instead of opening court cases. The affected parties thus usually call in intermediary bodies and complaint boards to sort out these conflicts, such as The Ombudsman, *Ankestyrelsen* and *Udlændingenævnet*.⁶ In the Danish system, there is, in short, no strong tradition to appeal to courts for conflict resolution in private and public law cases.

The concept and role of the Ombudsman is a rather unique Scandinavian institution. In short, it allows individuals, groups or enterprises who feel that their rights have been violated by public administration to settle their conflicts outside the courts. The Ombudsman is not only a proactive institution, it also has an active Inspection Division, which annually visits and monitors a large number of public institutions, such as psychiatric institutions, social care homes, refugee asylums, etc. The office of the Ombudsman writes annual reports, which includes selected cases, an overview of the types of complaints received, and what cases were reopened or transferred to relevant parties. Especially within the area of im-

6 *Ankestyrelsen* is a complaint board related to social and employment matters. *Udlændingenævnet* is a complaint board related to immigration matters.

migration and unemployment we have selected cases from these reports to illustrate the work of the Ombudsman.

Disability

Background and Main Legislation

In 2007, Denmark underwent a major structural reform. Besides limiting the number of municipalities and regions drastically, the distribution of tasks underwent changes, especially within the area of disability. The most prolific change was that the municipalities, to a much higher extent than before, were given the responsibility of the disability sector. Before 1980, this was the responsibility of the state (the so-called “Special Care”), and between 1980 and 2007, of the regions. The Danish Disability Council, a government-funded body founded in 1980, re-accentuated the four principles, also created in 1980, on which the disability sector should be grounded. These are: 1) the anti-Discrimination principle, 2) the Sector Responsibility Principle, 3) The Welfare Compensation Principle, and 4) The Solidarity Principle (Wiederholdt 2005, 6-8). Combined with the UN Convention on Rights for Persons with Disabilities, these lay the foundation for main legislation on disability in Denmark.

The Solidarity Principle is defined in relation to the public taxation of the Danish Welfare State in the sense that “most welfare benefits – also within the area of disability – are financed through taxation, and it is in principle freely available to the disposal of citizens, who are in need of help” (The Danish Ministry of Children and Social Affairs 2017). In practice, this suggests that disabled people in Denmark are eligible for a variety of state-funded social services ranging from free healthcare, reimbursement of medical expenses, access to assistive devices, and home help. Furthermore, patient associations have the possibility of applying for a multitude of state (e.g. ‘the Disability Fund’ and ‘Udlovningsmidler’, hereunder the so-called ‘Activity-’ and ‘Administration-’ fund), regional and municipal funds (e.g. funding to voluntary work, the so-called ‘§ 18-funds’). Those who qualify can apply for these for different purposes such as administration and activities. Close to all respondents in our interviews with 10 civil society patient organisations can confirm that they in fact apply for public funding, and that this is considered to be the main part of their income. One interviewee stresses that these funds have been much

harder to access recently, here specifically referring to the state funds ‘The Activity Fund’ and ‘The Disability Fund’:

“The demands to get funding have been sharpened. They have become bureaucratic to apply for. Often you need to apply a very long time in advance. And the information you give has to be very precise.”

(Interview No. 19)⁷

When asked about the implications of this “sharpened” and more “bureaucratic” process, the respondent specifies that this has created inequality between the bigger organisations with sufficient resources to cope with bureaucracy who are thus able to secure funding, and smaller patient organisations which work under financial constraints and have difficulties meeting the new bureaucratic requirements:

“This heightened demand of documentation makes it difficult. [...] Especially if you are a small patient organisation, you might feel that this is brutal.”
(ibid.)

In conclusion, a prospering civil society support network in the field of disabilities was built with the purpose of supporting state welfare (and not replacing it), while remaining heavily dependent on state-funding. While these funds are vital for civic activism in the field, they have become harder to access in recent years.

Case law: Disability Discrimination inside the Employment Area

In relation to anti-discrimination, we will discuss an important act with wide-reaching consequences that has been tested in the Danish Courts in support of the rights of disabled.⁸ This is the Act on prohibition against discrimination with respect to employment (Act No. 1349 of 16/12/2008).⁹ This act prohibits any kind of discrimination regarding employment, whether related to ethnicity, race, religion, sexuality, and/or, most relevantly in this context, disability (§ 1). It should be mentioned that an equivalent act, where disability discrimination is prohibited outside of

7 Interview conducted on September 29, 2016.

8 Cases related to this act –which from now on we will refer to as the Discrimination Act – are typically dealt with through the complaint board *Ligebehandlingsnævnet* (The Board of Discrimination) in *Ankestyrelsen*.

9 <https://www.retsinformation.dk/forms/r0710.aspx?id=122522>.

employment, does not exist. In both cases, the courts (in the first case, the Supreme Court; in the second, the District Court of Kolding) ruled in favour of the disabled.

In Case No. 104/2014, an employee in a supermarket was laid off by the employer due to physical disability.¹⁰ The employer claimed that this should be seen in relation to the so-called '120-days rule' (i.e. Act on the Salaried Employees, § 5, stk.2). This law states that an employer can lay off an employee, if the employee has had more than 120 sick days within the last 12 months, unless it is not in conflict with the Discrimination Act, more specifically § 2a. This states that an employer should make appropriate arrangements in relation to employees with disabilities. The Supreme Court ruled in favour of the employee, and the employer was asked to pay compensation and legal costs of approx. € 65,000. This clearly suggests that the rights of persons in need of special protection (in this case, the disabled) is given priority over the application of labour law provisions. It is without precedent in Danish legal history that an employer has been sentenced to pay compensation to an employee for not respecting the Discrimination Act.

The second case (C-354/13) went directly from the District Court of Kolding to The European Court of Justice (ECJ) in Luxembourg.¹¹ This case concerns principles of discrimination in relation to disability, but more specifically to obesity as a disability. A public employee was laid off as a children's day-care worker in 2010. In this context, his obesity was discussed. This, he claimed, was an example of discrimination related to disability. In 2014, the District Court of Kolding provided four preliminary questions to the ECJ regarding whether obesity discrimination is in conflict with EU law and whether obesity can be regarded as a disability. Later that year, the ECJ answered that obesity discrimination (e.g. dismissal of somebody because of obesity) is different from discrimination due to religion, disability, and skin-colour. However, they also decided that a serious degree of obesity can be a disability and in such cases, obesity discrimination should be equated with other forms of discrimination.

Even though cases like these are rarely tested in Danish Courts, both cases show that the rights of disabled people are to some extent protected by the Danish (and the European) Legal System. However, this protection

10 <http://domstol.fe1.tangora.com/media/-300016/files/104-2014.pdf>.

11 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160935&pageIndex=0&doclang=DA&mode=req&dir=&occ=first&part=1&cid=65750>).

is only guaranteed when it comes to disability discrimination in relation to employment because as we shall see in the next section, the principle of discrimination and the Solidarity Principle in relation to the private life of the disabled is contested in civil society.

Case Law: Disability Discrimination outside the Area of Employment

Support action in the field of disability has also suffered in more general terms from the financial cuts that were imposed on the public sector in Denmark. Mainly, this is experienced as a retrenchment of social benefits (which could also relate to the formerly discussed “sharpened bureaucracy”), but also in a very specific sense that it has become much more difficult to get access to e.g. assistive devices. This can be said to contradict the Solidarity Principle, where welfare benefits should be “freely available to and at the disposal of citizens who are in need of help” (The Danish Ministry of Children and Social Affairs 2017). One interviewee discusses this in the following:

“The crisis has made it more difficult. And I say this because now people have begun to discuss the economy in relation to medicine [...] Before, this was not the case here in Denmark, legally speaking. I think this discussion is caused by the time we live in.”

(Interview No. 15)

Several of our respondents have pointed out that the increasingly complex administrative processes have made it more difficult to apply for and receive public funding. For disabled people, this often implies insufficiencies in receiving personal assistance (e.g. disability friendly cars, oxygen machines), but also more restrictive access to early retirement pensions or other benefits:

“It is my impression that it has become more difficult for members of my association to get access to the specific help tools that they need. For instance, when can you get home help because you cannot do your own cleaning? This has become more difficult to get access to. [...] You apply through a social worker and get a rejection.”

(Interview No. 15)¹²

12 Interview conducted on September 26, 2016.

In February 2017, the Danish Minister for Children and Social Affairs reacted to such complaints about discrimination related to non-unemployment matters. She thus began to develop legislation inspired by the Discrimination Act to correct this inequity (The Danish Ministry for Children and Social Affairs 2017). In summary, this retrenchment of funds and specific support are experienced as dissatisfactory by the affected Civil Society Organisations. The Danish government is accused of restricting the rights and worsening the living conditions of disabled people living in Denmark. Even though this situation is perceived rather negatively by many of the informants, they also discuss the Danish situation in a European context and acknowledge that the financial crisis has struck harder in Southern and Eastern European countries than in Denmark.

Immigration

Background

In a Danish context, the narrative of solidarity concerning immigration goes back to the “booming years” (primo-1970s), where Denmark’s – similar to other Northern European countries like Germany, the Netherlands or Sweden – recruitment policies opened the borders to a large number of migrants. At that time, there was a high demand for a (temporary) work force on the labour market, but this situation was not perceived as integration per se: the migrants were considered as “guest workers”. In the wake of ‘the oil crisis’ in 1973, causing the first massive rise of unemployment in Danish post-war history, the recruitment policies were abruptly ceased. Similar to countries like Germany, this resulted in a situation where migrants continued to stay. This was partly because a return to their home countries was not an option and partly because living in Denmark for a variety of reasons, mainly the supportive welfare state, was considered preferable. This created a division in Danish society concerning immigration. On the one hand, immigration was embraced as promoting the vision of a more tolerant and diverse society; on the other, immigration was defined as a ‘social problem’.

Around the financial crisis of 2008, the public discourse on immigration followed this very pattern. This should also be seen in the context of the comprehensive immigration from the new Eastern European EU members. On the one hand, governmental sources emphasised the need to re-

cruit foreign labour in order for the Danish economy to boom.¹³ The Danish industry as well supported labour mobility arguing that it would increase possibilities for Danish business exports. Recruitment thus took place within the common market framework of free movement and labour mobility, allowing workers, especially from the new member states (both low- and highly-skilled) to come to Denmark and apply for jobs. In line with neoliberal logic, the labour market was seen as self-regulating and not in need of governmental intervention.

On the other hand, there was a strong resistance against this logic, which was expressed in terms of social justice and cultural protectionism. These counter-frames were mainly promoted by the trade unions, who raised a solidarity issue – reminiscing about the early twentieth century. It was argued that the Eastern European migrants were creating an unequal competition for jobs, as they tended to work for substantially lower salaries, and were stigmatised as ‘people who scrounged off the government’ and ‘wage dumpers’.¹⁴ From the perspective of trade union solidarity, the critique was turned towards the employers (Danes and non-Danes) who recruited “cheap labour” and exploited the situation. The negative tone was reflected in the media as an “invasion from the East” (Jørgensen and Thomsen 2013, 256). Especially during the first crisis years, unemployment went up in the construction and building sectors, where Eastern Europeans predominantly worked, and in 2007, claims for social benefit increased 16 times (ibid., 257). As a consequence of these developments, the debate surrounding Danish welfare shifted from a universalistic model based on equal rights to differentiated rights, which had to be earned/deserved. Solidarity thus became more conditional and dependent on contributions and pay-backs.

The hostile frame against immigration was stressed in particular by the Danish People’s Party, a partner to the governing party, Venstre. They

13 Venstre – The Liberal Party of Denmark – was the most prolific governing party from 2001-2011 and again in 2015-2017.

14 On the discourse of the trade unions and their framing of labour mobility in terms of solidarity and fairness see Jørgensen and Thomsen (2013: 256): “*The trade unions’ argument is no longer based on protecting the workers – national or non-national – but on being competitive in a time of economic crisis [...] Struggles over the prognosis are in this debate based on either creating better forms of production and protecting Danish workers, which are central issues for the trade unions, whereas the use of cheaper and more flexible labour to reduce the cost of production is the prognosis of neo-liberal positions*”.

were against free labour mobility and considered immigration a threat to national homogeneity. They were also the driving force behind the most restrictive rules of family reunification in the European Union and the lowering of welfare support to non-EU migrants. These hostile attitudes also extended to EU migrants, raising claims against ‘welfare tourism’ from Southern and Eastern Europe.

Concerning non-EU migrants in Denmark, their labour market participation is lower than Danish people. The difference between these two groups has decreased over time, but it is still significant, and the financial crisis hit the non-EU migrants harder than the natives (Baadsgaard 2012). This has rekindled the old debate of the 1970s on whether immigration is a resource or a cost burden to Danish society. On the one hand, studies have focused on the negative impact of predominantly low-skilled migrants on tax income of municipalities (Bregenvold-Pedersen 2012; Christoffersen et al. 2014, 230-231), or on wage-dumping and losses of wage income that increasingly affect low-skilled Danish workers, especially women (Malchow-Møller et al. 2006). Furthermore, non-EU migrants and their children were found to be overrepresented among the beneficiaries of the welfare state. On the other hand, non-EU migrants are often selected for their high skills or for their contributions to the service sectors in areas with labour shortages. They often arrive without a family, start working upon arrival, pay taxes and leave the country again prior to retirement (see Christoffersen et al. 2014, 233). As such, they can be considered as a resource, contributing to the receiving country by creating a producer surplus, having a positive effect on the age distribution, providing alternative goods and services, and creating new jobs (Christoffersen et al. 2014, 229).

Retrenchment of Welfare Benefits

In our civil society-interviews with immigration organisations, concerns were repeatedly expressed with regard to the more recent restrictions of Danish immigration law introduced by the current Liberal and the previous Social Democratic (2011-2015) governments. One grassroots’ activist mentioned three main concerns: 1) the law of family reunification, and in particular, the fact that the waiting time for a family reunion had been extended from one year to three years (and now recently, seven years); 2) the cutting down of money allowance (cash benefits) for refugees; and 3) the

adjustment of citizenship rules with a new requirement of work for seven out of eight years in Denmark to qualify for citizenship (with times for study and education excluded). With this complexity of legal issues, the role of grassroots' organisations is increasing in providing information about legal changes and assistance in dealing with Danish "bureaucracy". When asked about the state of solidarity in Europe during the so-called refugee crisis, the same interviewee responded:

"I think the whole problem with refugees is that it is not a good idea that each [European] country is making their own policy."
(Interview No. 2).¹⁵

She went on to criticise Denmark and other European countries as being too protective of their own countries and hoped also for solidarity to expand beyond the borders of Europe:

"When we heard about all these refugees drowning, I think Denmark and all the other countries should have been much more eager to show we can't accept that just outside European borders, children and people are drowning in their thousands!"
(ibid.).

Other interviewees were highly critical of the decision made by the Danish government in 2015 about the retrenchment of development support.

"We are highly concerned with the retrenchment of development support [...] And the story about parts of this being relocated to refugees coming to Denmark... I shake my head in disbelief. If you want to decrease the number of refugees in Denmark, then you should increase support where they come from."
(Interview No. 19)¹⁶

Main Legislation

Main legislation regarding immigration in Denmark is found in the Aliens Act (No. 416 of 09/05/2016).¹⁷ This act sets the conditions for visas, entry

15 Interview conducted on August 16, 2016.

16 Interview conducted on August 5, 2016.

17 <https://www.retsinformation.dk/Forms/R0710.aspx?id=180093>. The main legislation regarding foreigners can be accessed in English on the webpage of Danish ImmigrationService: https://www.nyidanmark.dk/da-dk/Lovstof/ophold_love.html.

and stay of residents (Scandinavian, EU/EEA, Schengen countries, Non-EU), foreign workers, residence and work permits (family reunification, asylum, refugees), different rules for residency, expulsion and refusal, competence and complaint procedures and expenses. Another important piece of legislation here is the Consolidated Integration of Aliens Act in Denmark (Act No. 1094 of 07/10/2014).¹⁸ It specifies how to integrate aliens into Danish society, and the rules for entrance, stay and work of foreigners in Denmark. Most recent law changes concern the regulation of border controls and the acceptance of asylum seekers. In 2015, a new chapter dealing with the so-called 'refugee crisis' was added to the Aliens Act (Act No. 1021 of 19/09/2014).¹⁹ It is called 'Handling of mass in-rush of refugees and immigrants to Denmark'. Under this act, the police and the Immigration Service are allowed to take different drastic measures, e.g. closing down cross-border transportation.

In the beginning of 2016, yet another amendment to the Aliens Act (Act No. 192 of 03/02/2016) received negative international attention mainly due to the so-called 'Jewelry article'. This introduced the possibility to force asylum-seekers' to use their personal assets and belongings to pay for their reception during the asylum procedure in Denmark. The police can, for this purpose confiscate asylum seekers' belongings over a value of 10.000 DKK, however not valuables with personal or sentimental value.²⁰ In the same amendments, also rules for family reunification and permanent residence were restricted. Recognized refugees now need to wait three years before they can apply to be reunited with their families.

Case Law

Case law regarding immigration is very limited. Instead of the Danish courts, most cases of conflict are dealt with by the aforementioned complaints' board, the Ombudsman and Udlændingenævnet. Still, a few cases were judged by the Supreme Court, all of them backing administrative practices and not finding any violation of existing Danish legislation (e.g. the Aliens Act).

18 <https://www.retsinformation.dk/Forms/R0710.aspx?id=163323>.

19 <https://www.retsinformation.dk/Forms/R0710.aspx?id=164258>.

20 <https://www.retsinformation.dk/Forms/R0710.aspx?id=177348>.

In Case No. 243/2014, an EU citizen, who was born and raised in Denmark, claimed that his potential deportation was in conflict with the Aliens' Act (specifically § 26, stk. 2). Furthermore, he claimed that the deportation was in conflict with Denmark's international obligations, more specifically, the EU residence directive Article 28, and the European Convention on Human Rights, Article 8. The Supreme Court stated that the severity of the criminal activity gave them permission to deport the citizen without breaching any of the above-mentioned directives and conventions. The same result was reached in Case No. 478/2007.²¹ A non-EU citizen, from Ghana, had been living in Denmark since 1993 and had had Danish citizenship since 2002. In 2003, A married B, another non-EU citizen, and applied for family reunification. In 2004, this was refused with reference to the 28-year-rule (spouses who apply for family reunification have to be Danish citizens for longer than 28 years or living in Denmark legally for the same period). In 2007, A and B initiated a lawsuit against the Ministry of Refugees, Immigrants, and Integration, claiming that the refusal violated the European Convention on Human Rights Articles 8 and 14. On January 13, 2010, the Supreme Court found that neither article had been violated.

The same tendency is found in immigrationGinicoefficient complaints cases in the office of the Ombudsman. Case 14/04861 concerned the observation of a forced deportation of a non-EU male, his wife and teenaged son. Such observations are monitored in the case that there should be any complaints regarding the use of police force. In this specific case, it was concluded that the police did not use problematic forcible measures.²² In Case 2014-42, the Ombudsman conducted a monitoring visit to the asylum centre "Center Sandholm" together with the Institute for Human Rights and DIGNITY, the Danish Institute against Torture. This was carried out in order to assess the conditions of the people under tolerated residence status. Here, 25 people were reported to have "overall stressful and restrictive living conditions".²³ In the report, their living conditions are described as follows:

"Among other things, they have to live at the centre (often in rooms with one or two other people), they have a duty to report regularly to the police (typically every day), they cannot take on paid work, and they receive a limited

21 <http://domstol.fe1.tangora.com/media/-300016/files/478-2007.pdf>.

22 <http://beretning2014.ombudsmanden.dk/english/ar2014/> – pp. 54.

23 <http://beretning2014.ombudsmanden.dk/english/ar2014/> – pp.68, 123-124.

cash allowance (a maximum of 31 DKK a day). They get meal coupons for the centre's cafeteria. They can in principle cook their own food, but the reality is that this is very difficult for them because of the limited financial resources available to them. There is no limit to the duration of tolerated residence."

After this observation, the Ombudsman stated the conditions to be poor, but not in conflict with the UN Convention against Torture and the European Convention on Human Rights. Nonetheless, he raised a concern about the stressful and restrictive conditions of people with tolerated status.

Another similar case involved a 15 year-old non-EU girl, who applied for a residence permit to live with her mother, who had moved to Denmark some years earlier. Her application was rejected on the basis that the mother had left the child behind and had decided to move to Denmark, that the child was currently living with her father, had lived there almost her entire life, attended school there, spoke the native language, and had all her relatives, siblings and friends there. In turn, the Ombudsman received a complaint about the rejection from a legal aid bureau. He asked the Ministry of Justice to explain the case, which had been considered by the UN Human Rights Committee and the European Court of Human Rights. The Ministry responded and the Ombudsman considered the case on the basis of the relevant international rules. He concluded that there were no grounds to criticise the authorities in this specific case.²⁴

These examples show how the Ombudsman considers the European Human Rights Convention and decisions by the European Court of Human Rights as putting to the test the application of restrictive national legislation, e.g. concerning family reunification. European and international law thus plays a role for the Ombudsman and is used as a reference point for envisaging a more inclusive approach towards migrants. The examples above also show however that such considerations based on international law have thus far not been effective to mitigate the restrictive practices based on national legislation. Decisions concerning complaints by foreigners affected by these restrictions were mostly ruled in favour of the state.

24 <http://beretning2012.ombudsmanden.dk/english/ar2012/> – pp.21.

Unemployment

Background and Main Legislation

As within the areas of disability and immigration where people have been affected by the financial crisis, the area of unemployment has also undergone changes. As we shall see in the following, this has come with a substantial lowering of unemployment benefits. The main point here is that welfare has become workfare (Jöhncke 2011), meaning that to a higher extent than before, people are pushed to work in order to earn access to unemployment benefits.

In order to approach the specifics of solidarity in the field of unemployment, it is useful to unfold the two meanings that are commonly associated with the concept of solidarity in Denmark. The first one, as mentioned in the introduction, associates solidarity with welfare and refers to the general principle of reciprocal and equal distribution through taxation – whereas the second meaning is more contextual and related to the socialistic worker and trade union movement of the late nineteenth and early twentieth century. Here, solidarity refers to being part of a community of workers “where the individual affiliates with and adapts itself to the community, its organisational form being the trade union...” (Kaspersen and Christiansen 2017). When the solidarity principle is evoked in public discourse, most Danes would be reminded of this second, more specific meaning of worker solidarity, and not think about ‘reciprocal solidarity’ as welfare. This also needs to be borne in mind when interpreting our interviews, as many of our respondents would talk about solidarity in the more narrow sense of the Danish trade union tradition and not apply this concept automatically to other fields of welfare or global justice.

Throughout the twentieth century, the trade unions and their affiliated ‘A-kasser’ (unemployment insurance funds) have played an important part in worker-employers’ agreements. The system is extremely complex, but its main details are secured and explained in the Act on Unemployment Insurance (No. 128 of 31/07/2017).²⁵ By being part of an ‘A-kasse’, people can receive the so-called daily allowance (dagpenge) for a maximum of two years, which can amount to up to 90% of the previous income. To

25 <https://www.retsinformation.dk/Forms/R0710.aspx?id=186332#idec7cd264-8b84-4a3b-8114-fd1cf36bc6a7>.

receive this, you must agree to actively seek employment and be prepared to accept job offers as long as you are unemployed. Most employed Danes contribute to the unemployment insurance funds, which at a relatively low fee often goes hand in hand with trade union membership. These unemployment insurances are highly subsidised by the government, which encourages people to sign up (Christoffersen et al 2014, 193). If you are not a member of an unemployment insurance fund, you are still eligible to other kinds of unemployment benefits, e.g. cash benefit (kontanthjælp), but this and other subsidiaries are substantially lower than the daily allowance.

Such traditions and legislation have – among other things – resulted in the fact that the welfare state of today is generally considered to take good care of unemployed people living in Denmark. It provides generous maternity and paternity leaves, different schemes of unemployment benefits, active labour market and family policies, which are all aimed at encouraging the Danes to return to work, and yet provides them with the necessary security when faced with unemployment (Christoffersen et al 2014).

Welfare and labour market policies are combined in what is called the *Danish flexicurity model*. *Flexicurity* refers to an employment-welfare policy, which combines *flexibility* for the employers in hiring and firing employees, and social *security* for the employees in providing them with unemployment benefits and income insurance when they lose their jobs. It also refers to an active labour policy that offers training for skills development in order to get access or return to the labour market. In contrast to other countries, especially the UK, where the flexicurity model has been held responsible for the emergence of a new social class, the precariat (Standing 2011), the Danish case combines labour flexicurity with relatively high standards of welfare state protection. Flexible labour is safeguarded by the existing schemes of unemployment benefits (e.g. the above-mentioned ‘A-kasser’) and active labour market policy by providing skills and training (Duru and Trenz 2017; Alves 2015, 11). This model is generally considered a success: Danish workers can easily lose their job, but they will also be quickly reemployed. In the period from 1990 to 2010, 41% were unemployed for longer than six months, which is low compared to EU-15 countries, where the average is 54% (Christoffersen et al. 2014, 47). Over the last decade, we have observed however that a neo-liberal market logic prevails. Labour market flexicurity has become more employer-friendly and less protective of social rights. Welfare benefits have become less compensatory and more integrationist, meaning that rather

than providing benefits unconditionally, these are now first and foremost aimed at getting people back into employment (see also Østergaard Møller and Stone 2013, 588). This aligns with the tendency seen in other areas: that solidarity has become more conditional than universal.

As we shall also see here, there are legislative overlaps with the area of disability just as the formerly discussed Discrimination Act was related to discrimination in employment. Probably one of the most relevant pieces of legislation within this area is the Act on Active Social Policy (No. 1460 of 12/12/2007), which basically grants the right to social welfare.²⁶ Its aim is to prevent unemployment while simultaneously enforcing the social obligation to work (Chapter 1, § 1), and it is (in principle) applicable to all citizens residing in Denmark, who have had employment difficulties due to disability (Chapter 2, § 3). Second, there is the Act on Sickness Benefits (Act No. 563 of 09/06/2006).²⁷ This is applicable to e.g. persons who have acquired a disability that is covered by the law of industrial injury – and gives them the right to unemployment benefit. Basically, these acts sketch the framework of how unemployed people residing in Denmark have the right to claim social welfare and benefits in the case of health issues.

Case Law

Again, it is rather exceptional for the courts in Denmark to sort out conflict regarding employment matters because affected parties would usually call in intermediary bodies and complaint committees. As representative of the Danish way of conflict intermediation, we have therefore selected two cases from the Ombudsman. They both concern principles of solidarity where people have been denied unemployment and sickness benefits. In both cases the Ombudsman found in favour of the claimants.

In Case No. 2015-57, a woman complained to the Ombudsman, because the Employment Committee of the National Social Appeals Board had found that she was not entitled to receive supplementary unemploy-

26 <https://www.retsinformation.dk/Forms/R0710.aspx?id=113596>. Its current version: <https://www.retsinformation.dk/Forms/R0710.aspx?id=180043>.

27 <https://www.retsinformation.dk/Forms/R0710.aspx?id=30746>. Its current version: <https://www.retsinformation.dk/Forms/R0710.aspx?id=182048>.

ment benefits.²⁸ For a period of time, she had received these benefits while being self-employed as a musician in a band. The Employment Committee ruled that this musical occupation could have been practiced outside normal working hours, meaning that she was not entitled to the benefits. She therefore had to pay back a substantial amount of money to the state (approx. € 21,500). The ombudsman however found that this was not the correct decision and that the woman was entitled to the benefits. He therefore recommended that the Appeals Board change their decision so that she could receive the benefits in the future, and did not have to repay the above-mentioned figure.

In Case No. 13/00228, a woman filed a complaint to the Ombudsman because she had been denied special unemployment and sickness benefit when she moved from one municipality to another.²⁹ She received these benefits and was on the so-called flexible job scheme. The woman wanted to move and had applied for a flex job (and the benefits) in advance. She then resigned and moved, but the new municipality did not grant her a new job and benefits with the reasoning that her unemployment was voluntary. The Ombudsman passed the case to the then newly opened National Social Appeals Board, and they arrived at the conclusion that her new municipality had not given her the satisfactory guidance. As a consequence of the woman's complaint and the action of the Ombudsman, the National Social Appeals Board stated that the municipality was obliged to grant the woman her previous received benefits.

Besides illustrating that the complaint board-system plays an important part in being an intermediary between Danish citizens and the courts, these cases also exemplify that unemployment schemes have been increasingly harder to access and, in many cases, do no longer provide a substantial living. Precisely this concern is also expressed in our interviews with representatives from unemployment organisations, most of them trade unions. Respondents mention, above all, the cutting down of unemployment benefits, which following new rules is only paid for a maximum period of two years (formerly four years) (Interview No. 26).³⁰ Another radical change concerns the so-called 'Kontanthjælpsloft' (daily benefit maximum) adopted in October 2016. According to another interviewee from a

28 http://beretning2015.ombudsmanden.dk/english/annual_report_2015/ – pp. 152-53, 195.

29 <http://beretning2014.ombudsmanden.dk/english/ar2014/> – pp. 19.

30 Interview conducted on September 26, 2016.

trade union, this makes it much harder for unemployed persons to uphold decent life conditions – and in turn reintegrate them onto the labour market:

“It has been discussed in the media that 13 % [affected by this law] cannot pay their rent and many cannot stay in their recent housing. [] It has a major significance for many of the people we are aiming to help. In our official politics, we are openly against this. [] It is very hard to convince people to get a job or get better if you don’t have a place to live”.
(Interview No. 29).³¹

It seems clear that both the traditional concept of labour solidarity and the more general welfare principle of solidarity are under pressure, when unemployed people experience severe retrenchments. Still, in a European context, unemployment benefits are substantially higher in Denmark than in other countries and unemployment rates are at a historical low, which explains why labour solidarity has thus far not been a highly contested issue.

Conclusions

The Danish case is illustrative of the constraints which the established system of universal welfare and social security is currently facing, both internally with the introduction of new conditionality and an emphasis on criteria of deservingness to decide about the distribution of welfare provisions, and externally with regard to the negative effects of the economic and financial crisis on economic growth and unemployment. The Danish case is however also unique as the Danish economy, despite the continuing recession in many parts of Europe, is performing well with some stagnation in the initial crisis years but with fast and immediate recovery rates and generally low rates of unemployment.

Denmark like other Nordic countries has a universal social-democratic welfare state-tradition with a high level of trust in the state and its institutions. However, increased individualism, the inflow of refugees and asylum seekers, and the increasing intra-EU mobility have created tension between transnational solidarity principles and the particularities of the welfare state.

31 Interview conducted on September 20, 2016.

Denmark has been further affected by the financial crisis of 2008 and the so-called refugee crisis of 2015. The impact of these has been experienced specifically in retrenchments of welfare benefits with regard to unemployment and disability (e.g. unemployment insurance benefit from four years to two years, harder access to public welfare benefits, and more emphasis on trying to get the disabled and the sick back to work) and immigration (trying to reduce the intake of (EU and non-EU) migrants and refugees, by e.g. restricting social benefits).

The change of government in June 2015 from a social-democratic-left coalition to a liberal-right coalition has implied a couple of legislative changes but not a radical redirection of the Danish solidarity regime. With regard to general welfare and employment policies the new government will continue the flexicurity policies with a stronger emphasis on individual responsibility and initiative. The new government has taken some precautions against so-called ‘welfare tourism’. Freedom of movement and labour shall be supported, but access to welfare for foreign workers will be restricted, if necessary through a change in EU rules. With regard to immigration policies and the integration of migrants, the new government continues to apply restrictive measures of control and deterrence. The new (and old) slogan is “firm and fair on immigration” and this presupposes strict limits on immigration (quoted in Lægaard 2013, 180). In terms of integration, the new government explicitly takes up a strong ‘anti-multiculturalism agenda’ approaching issues of diversity from an immigration, not an integration perspective, as a social problem that needs to be combatted. Problems of integration are thus addressed by way of more restrictive immigration policies and full legal entitlements or even citizenship are considered as a “prize for successful integration, not as a means of fostering integration” (ibid.).

Still, Denmark continues to accommodate migrants, other EU citizens and refugees and, to a large extent, relies on foreign work forces. To EU citizens, the benefits of the Danish Welfare State are the same as for Danish citizens, whereas non-EU citizens are denied some benefits (e.g. free education, student loan, unemployment benefit for Green Card holders). There is thus an inbuilt communal-universal tension in the Danish Welfare State-model, which seeks the difficult balance between the protection of social cohesion of the community and the principles of universal rights and equality.

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