

UNHCR Comments on the Inquiry (SOU 2006:6, Swedish Government Official Report) on the implementation in Swedish law of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereafter the Qualification Directive)

Introduction

The Swedish Inquiry (law commission) is proposing amendments to the Swedish New Aliens Act (2005:716) (hereafter the Aliens Act), in line with its position on the implementation in Sweden of the Qualification Directive.

UNHCR has a direct interest in national legislation of signatory countries that regulates the application of the 1951 Convention relating to the Status of Refugees (hereafter the 1951 Convention), in line with the supervisory responsibility which the UN General Assembly has entrusted UNHCR for providing international protection to refugees worldwide and for seeking permanent solutions for them.¹ The Office therefore appreciates the opportunity to provide comments on the draft amendments to the Swedish New Aliens Act (2005:716) (hereafter the Aliens Act).

UNHCR notes that the Qualification Directive aims to set minimum standards only, which leave EU Member States free to retain or introduce higher standards of protection if they so choose. UNHCR appreciates that this understanding appears to underlie the amendments to the Swedish law as proposed by the Inquiry.

UNHCR limits itself to comment on selected chapters of the Inquiry's proposal, namely Chapters 3 (criteria for determining refugee status), 4 (criteria for determining subsidiary protection status), 5 (assessment of facts and circumstances), 6 (information), 7 (maintaining family unity), and 8 (travel document). In its comments below UNHCR has tried to follow the order of these chapters as they appear in the Inquiry's proposal.

Criteria for determining refugee status

Refugee definition

UNHCR notes that the refugee definition in Chapter 4, Section 1 of the Aliens Act basically replicates the precise wording of Article 1 of the 1951 Convention without, however, making a specific reference to the latter. UNHCR therefore recommends that such a reference to the 1951 Convention be included in this section. UNHCR notes with appreciation that the Inquiry states that the refugee definition in the current Aliens Act is based on the Convention definition, and that the UNHCR Handbook and Executive

¹ Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly Resolution 428(V), 14 December 1950. Article 35 of the 1951 Convention relating to the Status of Refugees contains a corresponding obligation for States Parties, which undertake to: '*co-operate with the Office of the United Nations High Commissioner for Refugees in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention.*'

Committee Conclusions constitute internationally recognized interpretative guidance when applying the 1951 Convention. In this connection, UNHCR would like to recall that the Qualification Directive itself clarifies that it does not intend to replace, change or supplement the 1951 Convention but to provide guidance for its interpretation.

Sur place claims

UNHCR notes that the Inquiry proposes that the optional provisions on international protection needs arising *sur place* contained in Article 5(1) and (2) of the Directive reflect an interpretation of the 1951 Convention that is established in Swedish and international practice, and that the facultative scope provided by this provision can be used without statutory support. UNHCR would nevertheless welcome the mentioning of *sur place* claims in the Swedish law.

Internal relocation or flight alternative

UNHCR welcomes the Inquiry's proposal not to implement Article 8(3) of the Directive into Swedish law. UNHCR welcomes and shares the Inquiry's view that the applicability of an internal relocation or flight alternative in cases where return to the proposed part of the country is not possible due to 'technical obstacles to return' is not consistent with Article 1 of the 1951 Convention.²

Acts of persecution

UNHCR welcomes that the Inquiry recommends that the Swedish law reflect the 1951 Convention as closely as possible, and that the interpretation of what constitutes persecution be flexible and sufficiently open to accommodate its changing forms. UNHCR furthermore welcomes the Inquiry's clarification that the interpretation of what constitutes persecution in Swedish law and practice is guided by the UNHCR Handbook.

Reasons for persecution

UNHCR welcomes that the Inquiry proposes, for the purpose of the interpretation of the persecution grounds, that the legislation reflect the Convention refugee definition as closely as possible. UNHCR also welcomes that it cautions against a conclusive or exhaustive interpretation of the Convention grounds.

UNHCR welcomes that the Inquiry clarifies that the freedom to change one's religion, in Swedish law (and Article 9 of the ECHR), is included in the concept of religion or conviction as outlined in the Qualification Directive, Article 10(b). UNHCR welcomes that the Inquiry notes that it may give rise to a *sur place* claim.

² See also UNHCR Guidelines on International Protection: 'Internal Flight or Relocation Alternative' within the context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (HCR/GIP/03/04, 23 July 2003).

UNHCR encourages Sweden to provide in its legislation for examples of social groups which can qualify for refugee status – beyond the example of sexual orientation and gender – for example, age, disability, and health status.³

UNHCR stresses that, while gender-related claims have often been analyzed within the parameters of ‘membership of a particular social group’, the emphasis given to this ground has meant that other applicable grounds, such as religion or political opinion, have been overlooked. UNHCR reiterates, therefore, that the interpretation given to membership of a particular social group cannot render the other four Convention reasons superfluous. UNHCR is concerned that the wording of Chapter 4, Section 1 of the Aliens Act appears to regulate that claims in which gender is a relevant consideration in the determination of refugee status can solely be within the ambit of the social group category.⁴

Cessation

UNHCR notes that the Aliens Act contains a provision on cessation which basically reflects Article 1C of the 1951 Convention without, however, making a specific reference to the exception to the ‘ceased circumstances’ cessation clauses in Articles 1C(5) and (6) of the 1951 Convention relating to ‘compelling reasons arising out of previous persecution’. UNHCR believes that this proviso should be interpreted to extend beyond the actual wording of the provision and to apply to refugees under Article 1A(2) of the Convention. As noted in the UNHCR Handbook⁵ it reflects a general humanitarian principle that is well grounded in State practice. UNHCR therefore recommends that it be included in Swedish legislation. In this connection, UNHCR welcomes the Inquiry’s clarification that, according to well established Swedish practice, changes in circumstances (Article 1C(5) and (6) of the 1951 Convention) must be fundamental and durable. UNHCR would nevertheless recommend that this be specified in the Aliens Act.

Exclusion

UNHCR notes the Inquiry’s proposal to spell out and link the grounds of exclusion in Article 1F (and 1D and 1E) of the 1951 Convention, which currently can limit the right to obtain a residence permit (Chapter 5, Section 1 of the Aliens Act), to the granting of refugee status in the Aliens Act.⁶

³ See UNHCR Guidelines on International Protection: ‘Membership of a Particular Social Group’ within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02, 7 May 2002).

⁴ See also UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/01, 7 May 2002).

⁵ See also UNHCR Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the ‘Ceased Circumstances’ Clauses) (HCR/GIP/03/03, 10 February 2003).

⁶ See proposed Chapter 4, Section 1, fourth paragraph and Section 2a, first and second paragraphs. See generally UNHCR Guidelines on International Protection on application of the exclusion clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (HCR/GIP/03/05, 4 September 2003) and accompanying Background Note.

While Article 12(1)(a) of the Directive actually reproduces the wording of Article 1D of the 1951 Convention and also refers specifically to the Convention, UNHCR notes that the proposed Chapter 4, Section 2a, second paragraph, point 1 leaves out the wording of paragraph 2 of Article 1D (automatic inclusion). UNHCR recommends that the whole text of Article 1D of the Convention be introduced in Swedish law.⁷

UNHCR welcomes that the proposed Chapter 4, Section 2a, second paragraph, point 2 reflects the exact wording of Article 1E of the 1951 Convention.

Revocation etc of refugee status

UNHCR notes that the Inquiry finds that the Directive's optional provisions in Articles 14(4), (14(5)) and 21(3) are already implemented in Swedish law. UNHCR notes the Inquiry's reference to 'refugee status' (understood as refugee status granted according to the 1951 Convention) in relation to Article 14(4). UNHCR recalls that the Qualification Directive refers to 'status' only, a differentiation between 'refugee status' or refugeehood in the sense of Article 1 of the 1951 Convention and the 'status granted to a refugee' understood to refer to the asylum ('status') granted by a State.

UNHCR notes that the Inquiry states that Article 14(6) on refugees maintaining access to the rights of the 1951 Convention which do not require a lawful residence, is already implemented in Swedish law so that such rights are due to persons covered by Articles 14(4) and (5). UNHCR recalls that whereas Article 14(6) of the Directive does not cover all rights, Sweden is obliged to grant all rights not requiring lawful residence under the 1951 Convention.

Criteria for determining subsidiary protection status

Sur place claims

With respect to the optional provisions on international protection (here: subsidiary protection) needs arising *sur place* contained in Article 5(1) and (2) of the Directive UNHCR would welcome the mentioning of *sur place* claims in the Swedish law.

UNHCR notes the Inquiry's clarification that the facultative provision in Article 5(3) is not applied in Swedish law and practice. UNHCR welcomes that the Inquiry proposes not to introduce Article 5(3) of the Directive into Swedish law.

Agents of serious harm

UNHCR fully supports the firm rule in Article 6 of the Directive which guarantees the recognition of subsidiary protection status irrespective of the source or agent of persecution, hence including serious harm emanating from non-State actors. UNHCR therefore welcomes the Inquiry proposal to introduce a detailed provision in the text of law.⁸

⁷ See UNHCR's 'Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees' (October 2002).

⁸ See proposed Chapter 4, Section 2, second paragraph.

Internal relocation or flight alternative

Also with respect to subsidiary protection, UNHCR welcomes the Inquiry's proposal not to implement Article 8(3) of the Directive into Swedish law. UNHCR welcomes and shares the Inquiry's view that the applicability of an internal relocation or flight alternative in cases where return to the proposed part of the country is not possible due to 'technical obstacles to return' is not consistent with Article 1 of the 1951 Convention.⁹

Serious harm

The Inquiry notes that the subsidiary protection provision in Article 15(c) of the Directive is limited to such situations of conflict where there is 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence'. UNHCR welcomes the Inquiry's clarification that it is not excluded that Convention refugee status may be granted in such a situation. UNHCR notes the Inquiry's proposal to implement the exact wording of Article 15(c) by introducing a new detailed provision, which includes the added wording, 'serious and individual threat to life or health by reason of indiscriminate violence'.¹⁰

UNHCR welcomes the Inquiry's proposal to keep the current Chapter 4, Section 2, first paragraph, point 2 (becomes a new point 3). UNHCR welcomes, furthermore, that the Inquiry proposes, in the same new point 3, to provide for the subsidiary protection category of those who 'because of other severe hostilities in the home country would risk being subjected to serious abuse'. UNHCR welcomes that this provision is not restricted to cases where the threshold of an 'external or internal armed conflict' is reached. UNHCR understands this provision as covering persons fleeing indiscriminate violence and gross human rights violations more generally.

Cessation of subsidiary protection

UNHCR notes that the Inquiry proposes to introduce the exact wording of Article 16(1) of the Directive into a new Chapter 4, Section 5a in the Aliens Act. However, UNHCR notes that the Inquiry chooses not to transpose the provision in Article 16(2) of the Directive, with a reference to well established Swedish practice on cessation of refugee status, according to which changes in circumstances must be fundamental and durable. UNHCR would nevertheless suggest that this be reflected in the Aliens Act.

UNHCR recommends that the 'compelling reasons' exception of Article 1C(5) and (6) of the 1951 Convention be equally applied to the cessation of subsidiary protection and that it be included in Swedish legislation.

Exclusion from subsidiary protection

⁹ See also UNHCR Guidelines on International Protection: 'Internal Flight or Relocation Alternative' within the context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (HCR/GIP/03/04, 23 July 2003).

¹⁰ See proposed Chapter 4, Section 2, first paragraph, point 2.

UNHCR notes the Inquiry's proposal to spell out and link the grounds of exclusion, which currently can limit the right to obtain a residence permit (Chapter 5, Section 1 of the Aliens Act), to the granting of subsidiary protection in the Aliens Act.¹¹

Whereas the Inquiry sees no reason to regulate in detail Article 17(3) of the Directive in Swedish law, UNHCR notes with concern that the Inquiry finds that the scope given to Member States, on this basis, to exclude an individual from subsidiary protection is intrinsic in the proposed Chapter 4, Section 2a, third paragraph and suggests it be clarified that this is not the case.

Revocation etc of subsidiary protection

UNHCR notes the Inquiry's proposal to introduce a provision on when subsidiary protection status is to be revoked.¹² Given the close linkages between refugee status and subsidiary forms of protection, in so far as they cover persons under UNHCR's mandate, similar concerns as those expressed above with regard to Article 14 (4-6) of the Directive apply.

Assessment of facts and circumstances

With respect to Article 4(1), first sentence, of the Qualification Directive UNHCR notes the Inquiry's conclusion that the 'duty... to submit... all elements needed to substantiate the application for international protection' is rather a duty of information (assertion) than a general burden of proof, and that this duty is an already established principle in Swedish law. The Inquiry concludes that the facultative scope provided by the regulation can be used without statutory support.

Further, as to the Directive's provision in Article 4(3)(c) for the taking into account of the individual position and personal circumstances, UNHCR recalls that the fact that family members or close associates of the applicant have been exposed to persecution may be an important element in the assessment of a well-founded fear of persecution of the applicant.

UNHCR welcomes the Inquiry's clarification that any general references to changed circumstances cannot constitute the 'good causes' referred to in Article 4(4) of the Directive. UNHCR also welcomes the emphasis by the Inquiry that the burden is on the Member State, in each individual case, to show why past persecution or harm will not entail renewed persecution or harm after rejection and removal. UNHCR would advocate for an inclusion in Swedish law of the principle that even where the assessment concludes that serious harm will not be repeated, compelling reasons arising out of previous persecution or harm may still warrant the granting of refugee or subsidiary protection status.

¹¹ See proposed Chapter 4, Section 2, fourth paragraph and Section 2a, third paragraph.

¹² See proposed Chapter 4, Section 3a, second paragraph.

With respect to the general alleviating evidentiary rule in Article 4(5) of the Qualification Directive, UNHCR welcomes the Inquiry's clarification that the principle of the benefit of the doubt should apply in the case of a generally credible asylum-seeker.

Information

UNHCR welcomes that the Inquiry proposes that, in order to implement Article 22 of the Directive, a new provision on information on the rights and obligations relating to the status granted be introduced in a new Chapter 3, Section 1a of the Aliens Ordinance (1989:547). UNHCR notes that this provision is proposed with the proviso 'to the extent possible', and recommends that this be taken out from the proposal.

Maintaining family unity

UNHCR welcomes the Inquiry's clarification that respect for family unity is not made conditional on whether the family was established before flight from the country of origin, but that families which have been founded during flight or upon arrival will also be taken into account.

UNHCR welcomes that the Inquiry proposes that a provision be introduced in the Aliens Act, new Chapter 5, Section 1a, stating that a spouse, partner, or unmarried child of a refugee or person with subsidiary protection status, and who is or would not be excluded from refugee or subsidiary protection status pursuant to relevant provisions, is entitled to a residence permit, unless reasons of national security or public order otherwise require.

UNHCR acknowledges that the current Swedish law stipulates that other close relatives than those mentioned above, according to a facultative provision may be given a residence permit (Chapter 5, Section 3, Aliens Act).

Residence permits

UNHCR notes that the Inquiry, in order to transpose Article 24(1) of the Council Directive, proposes an amendment to Chapter 5, Section 1 of the Aliens Act to the effect that a residence permit for a refugee must be permanent or be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require.

UNHCR would like to stress that refugees require a secure status to be able to achieve self-reliance and to integrate more easily into the society of the host country, including into the labour market. UNHCR therefore suggests that they be granted permanent residency either immediately – as is the current practice in Sweden – or, at the latest, following expiry of the initial permit. Similar rights to long-term residence should also be accorded to family members.

UNHCR notes that the Inquiry proposes a similar amendment to Chapter 5, Section 1 relating to persons granted subsidiary protection by introducing the wording of Article 24(2) of the Directive. UNHCR holds that there is no reason to expect the need for

subsidiary protection to be of shorter duration than the need for protection under the 1951 Convention. In recognition of this, UNHCR would recommend that the residence permit provided to beneficiaries of subsidiary protection be for the same period as that of Convention refugees. The same holds true for family members of persons under subsidiary protection.

Travel document

With respect to Article 25(2) of the Directive on travel documents for beneficiaries of subsidiary protection, UNHCR notes that the Inquiry finds that at present an alien's passport may be issued for this purpose, but there is no obligation to do so. In order to implement this part of the Directive provision, the Inquiry therefore proposes that the provision concerning an alien's passport in the Aliens Ordinance (1989:547) Chapter 1, Section 11 should be supplemented by an obligation for the Swedish Migration Board to issue an alien's passport to a beneficiary of subsidiary protection status on the same conditions as laid down in the Directive.

UNHCR
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