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Haut Commissariat des Nations Unies pour les réfugiés

UNHCR Observations on the proposed legislative amendments to the Norwegian Immigration Act¹ and Regulations² of 28 May 2020 concerning residence permit on grounds of subsidiary protection needs in situations of significant increase in the influx of asylum-seekers (hereafter “the Proposal”)³

[Høring – forslag til endringer i utlendingsloven og -forskriften om oppholdstillatelse på grunnlag av subsidiært beskyttelsesbehov ved en betydelig økning i asylsøkertilstrømmingen]

I. Introduction

1. The UNHCR Representation for the Nordic and Baltic countries is grateful to the Ministry of Justice of the Kingdom of Norway for the invitation to submit its observations on the Proposal dated 28 May 2020 to amend the Norwegian Immigration Act and the Immigration Regulations: Høring – forslag til endringer i utlendingsloven og -forskriften om oppholdstillatelse på grunnlag av subsidiært beskyttelsesbehov ved en betydelig økning i asylsøkertilstrømmingen.
2. UNHCR has a direct interest in law proposals in the field of asylum, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.⁴ Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,⁵ whereas the 1951 Convention relating to the Status of Refugees⁶ and its 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as “1951 Convention”) oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application

¹ Norwegian Immigration Act ((lov av 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her (utlendingsloven)): <https://lovdata.no/dokument/NL/lov/2008-05-15-35>.

² Norwegian Immigration Regulations (forskrift 15. oktober 2009 nr. 1286 om utlendingers adgang til riket og deres opphold her: <https://www.regjeringen.no/globalassets/upload/jd/dokumenter/forskrifter/immigration-regulations.pdf>.

³ Law Proposal of 28 May 2020, available at: <https://www.regjeringen.no/no/dokumenter/horing--forslag-til-endringer-i-utlendingsloven-og--forskriften-om-oppholdstillatelse-pa-grunnlag-av-subsidiart-beskyttelsesbehov-ved-en-betydelig-okning-i-asylsokertilstromningen/id2693027/>.

⁴ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at: <https://www.refworld.org/docid/3ae6b3628.html>.

⁵ Ibid, para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR’s supervisory function to one or other specific international refugee convention. The UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, UNHCR’s supervisory responsibility, October 2002, available at: <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

⁶ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention”.



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of the provisions of the 1951 Convention and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol).⁷

3. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection (hereafter "UNHCR Handbook").⁸ UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

II. General Observations

4. In UNHCR's understanding, the Proposal seeks to introduce a contingency provision in the Norwegian Immigration Act to serve as a legal basis for the granting of subsidiary protection.⁹ According to the Proposal, in the context of a significant increase of asylum-seekers, the Norwegian authorities may decide to activate the contingency provision to grant persons who fall within the extended refugee definition in accordance with Section 28 of the Norwegian Immigration Act temporary subsidiary status – rather than refugee status.¹⁰ The preserving of the Norwegian welfare model and possibility to give access to different level of rights associated with the protection status (for example, to social welfare benefits and family reunification) are among the stated reasons for the amendment.¹¹
5. UNHCR acknowledges the complexities of contingency planning and welcomes the development of emergency preparedness plans to manage a possible future influx with due

⁷ UNHCR's supervisory responsibility has also been reflected in EU law, including by way of general reference to the 1951 Convention in Article 78 (1) of the Treaty on the Functioning of the EU. UNHCR recognizes that Norway does not have obligations under EU law. For the purpose of this commentary, it will draw on EU law and jurisprudence for illustration purposes only.

⁸ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, available at: <https://www.refworld.org/docid/5cb474b27.html>.

⁹ The Proposal was prepared as a follow-up to the Norwegian Government's Political Platform (Granavolden Platform of 17 January 2019; summary available in English: <https://www.regjeringen.no/contentassets/7b0b7f0fcf0f4d93bb6705838248749b/granavolden-platform-english.pdf>), according to which the Government committed to design and submit to the Parliament a proposal to introduce a legal basis for the granting of subsidiary protection in the Norwegian Immigration Act.

¹⁰ Currently, Section 28 of the Immigration Act provides for the granting of refugee status not only to refugees recognized under the 1951 Convention according to Section 28, first paragraph, *litra a*), but equally as regards other persons in need of international protection who are at real risk of death penalty, torture or other inhuman or degrading treatment or punishment upon return to a home country as codified in Section 28, first paragraph, *litra b*) of the Act. Hence, both beneficiaries of international protection under the 1951 Convention and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) are recognized as refugees and both categories granted the set of rights and guarantees.

¹¹ The Proposal observes in this regard that the current Norwegian scheme for granting refugee status to persons protected by international law despite falling outside the scope of the 1951 Convention differs from both the EU Qualification Directive's provisions and domestic legislation of other European countries and creates incentives for an influx of asylum-seekers to Norway.



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consideration for international protection standards as well as national resources. The Proposal highlights that Norway's legislation and practice differ from both the EU Qualification Directive's provisions and domestic legislation of other European countries. It would be important, in UNHCR's view, to ensure that the proposed measures remain in line with applicable international and European law standards, which Norway seeks to align itself with according to the Proposal. UNHCR would thus recommend a further assessment on whether the legislative amendments are consistent with Norway's human rights obligations.

6. UNHCR considers that the proposed measures, in particular the amendment to restrict access to family reunification for beneficiaries of subsidiary protection, may hamper the success of the integration policies set out in Norway's Bill on integration, which is currently awaiting Parliamentary approval.¹² UNHCR would also like to point to recent studies, including publicly funded reports commissioned by the Norwegian Directorate of Immigration (hereafter UDI),¹³ which show that domestic policies preventing beneficiaries of international protection from enjoying security of residence and reunite with their family members have a negative impact on their integration and delay their access to work.

Specific Observations

7. UNHCR further wishes to make the following observations on specific aspects of the Proposal.

Criteria for the application of the contingency provision

8. The Proposal highlights that the contingency provision is foreseen to apply in circumstances such as the ones envisaged by Section 32, fifth paragraph of the Immigration Act i.e. in crisis situations when the number of asylum-seekers arriving reaches a level which the immigration authorities are unable to handle. However, the Proposal does not further specify the circumstances and criteria for the activation of the contingency provision.
9. In light of the significant consequences the application of the contingency provision would entail for beneficiaries of subsidiary protection, UNHCR considers that further clarity on the circumstances in which the provision would become applicable would lend more predictability and accountability to the Proposal, in line with the rule of law principle of legal certainty.
10. UNHCR defines mass influx as a concept having some or all of the following elements: (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the

¹² Law on integration (2019-2020): Lov om integrering gjennom opplæring, utdanning og arbeid (integreringsloven), Prop. 89 L (2019-2020), Innst. 389 L (2019-2020): <https://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=79466>.

¹³ Brekke, Jan-Paul; Birkvad, Simon Roland & Erdal, Marta Bivand (2020). Losing the Right to Stay: Revocation of Refugee Permits in Norway. *Journal of Refugee Studies*. See also Brekke, Jan-Paul; Birkvad, Simon Roland & Erdal, Marta Bivand (2019). Losing the Right to Stay: Revocation of immigrant residence permits and citizenship in Norway — Experiences and effects. Rapport – Institutt for samfunnsforskning; A life in Insecurity (Et liv i usikkerhet), 2018, NOAS, Save the Children, The Norwegian Union of Social Educators and Social Workers (FO).



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emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers.¹⁴ Furthermore, the suddenness of movements and the size of the arrivals are defined as distinctive features of a mass influx situation. This definition can offer guidance to clarify the Proposal. UNHCR notes that a *special response* (emphasis added) is not required in every situation of a mass influx, especially if the State can continue to process asylum-seekers in the normal way, including through group (*prima facie*) determination.¹⁵

11. UNHCR considers that the provisions of the EU Temporary Protection Directive (hereafter “TPD”),¹⁶ could be of relevance for clarifying the circumstances around which the contingency provision may be activated. UNHCR notes in this regard that the TPD provides for temporary protection in “mass influx situations”, and defines temporary protection as a procedure of *exceptional character* to provide, *in the event of a mass influx or imminent mass influx* (emphasis added) of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.
12. The TPD further defines mass influx situations as “arrival in the community of a large number of displaced persons, who came from a specific country or geographical area” and specifies that it is only activated once the existence of a mass influx situation has been determined by a Council of the EU decision adopted by qualified majority. This means that the Directive prevents Member States from unilaterally deciding on the existence of a mass influx situation.
13. UNHCR considers that a State’s discretion to unilaterally qualify an increase in asylum-seekers as a mass influx situation may lead to an imbalance of efforts between States in receiving asylum-seekers, contribute to secondary movements¹⁷ and undermine Norway’s agreement with the European Community regarding its participation in the Dublin-cooperation. UNHCR highlights in this respect, that while asylum-seekers do not have an unfettered right to choose

¹⁴ UNHCR, ExCom, Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations No. 100 (LV) - 2004, 8 October 2004, No. 100 (LV), available at: <https://www.refworld.org/docid/41751fd82.html>.

¹⁵ UNHCR, Global Consultations on International Protection/Third Track: Protection of Refugees in Mass Influx Situations: Overall Protection Framework, 19 February 2001, EC/GC/01/4, available at: <https://www.refworld.org/docid/3bfa83504.html>.

¹⁶ EU: Council of the European Union, Council Directive 20 01/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, 7 August 2001, OJ L.212/12-212/23; 7.8.2001, 2001/55/EC, available at: <https://www.refworld.org/docid/3ddcee2e4.html> See also UNHCR, UNHCR Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx, 15 September 2000, available at: <https://www.refworld.org/docid/437c5ca74.html>. The fact that the provisions of the TPD have not been triggered so far may indicate that the asylum arrivals to Europe did not warrant the activation of the Directive.

¹⁷ See *mutatis mutandis* recitals 8 and 9 of the TPD which clarify that the purpose of the Directive is to take measures to promote a balance of efforts between the Member States in receiving and bearing the consequences of receiving such persons. Moreover, they establish that the standards and measures outlined in the Directive are linked and interdependent for reasons of effectiveness, coherence and solidarity and in order, in particular, to avert the risk of secondary movements.



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their country of asylum, some might have very legitimate reasons to seek protection in a specific country, including where they might have family links.¹⁸

UNHCR recommends the Government of Norway to:

- Clarify the circumstances and criteria for the activation of the application of the proposed contingency provision in line with the above recommendations, and in particular, ensure to reserve its activation for grave and exceptional circumstances.
- Prior to the eventual activation, consult with other States in the region to ensure a coherent approach.

Introduction of subsidiary protection with differentiated rights

14. According to the Proposal, beneficiaries of subsidiary protection according to the contingency provision will no longer be considered as refugees under Norwegian law and will, *inter alia*, have to meet more stringent requirements in order to obtain permanent residency in Norway and family reunification than refugees under the 1951 Convention. Moreover, they will not be entitled to invoke particular provisions in the Norwegian social security legislation (“Folketrygden”).
15. While the current legal framework in Europe does not oblige States to grant beneficiaries of subsidiary protection the same status or rights as those granted to refugees, UNHCR recommends that the same or similar rights be granted to both persons holding subsidiary protection status as well as those recognized as Convention refugees, to avoid discrimination and ensure equal treatment.¹⁹ According to international and European standards, a differentiated treatment according to immigration status is only permitted when the grounds therefore are objectively and reasonably justified.²⁰
16. In UNHCR’s experience, refugees and beneficiaries of subsidiary protection have comparable protection needs and face the same integration opportunities and challenges, as well as similar return prospects. Access to similar rights as those of refugees is a significant element in

¹⁸ UNHCR, Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers, September 2019, available at: <https://www.refworld.org/docid/5d8a255d4.html>. See also, Executive Committee Conclusion No. 58 (XL) (1989), para (a). See also Secondary Movements of asylum-seekers in the EU asylum system: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI\(2017\)608728_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI(2017)608728_EN.pdf).

¹⁹ UNHCR, Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466, February 2018, <https://www.refworld.org/docid/5a7835f24.html>.

²⁰ Charter of Fundamental Rights of the EU, Art. 21; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Art. 14. For jurisprudence of the ECtHR, see e.g. Niedzwiecki v. Germany, European Court of Human Rights (ECtHR), 25 October 2005, <http://www.refworld.org/docid/4406d6cc4.html>; Okpiz v. Germany, ECtHR, 25 October 2005, <http://www.unhcr.org/refworld/docid/4406d7ea4.html>; Biao v. Denmark (Grand Chamber), ECtHR, 24 May 2016, <http://www.refworld.org/cases,ECHR,574473374.html>; Hode and Abdi v. The United Kingdom, ECtHR, 6 November 2012, <http://www.refworld.org/cases,ECHR,509b93792.html>. In the latter case, the Court held that the protection conferred by Article 14 of the ECHR (the prohibition of discrimination) is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent, but also relate to the individual’s immigration status.



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facilitating their early participation and contribution to the host community,²¹ including through the labour market. The timely grant of a secure legal status and residency rights are essential factors in the integration process.²² Providing an environment in which beneficiaries of international protection can attain self-reliance will help support the individual's achievement of any of the durable solutions, including voluntary repatriation should this become feasible.²³

17. Protection schemes providing subsidiary protection need to be carefully implemented in order that individuals who fulfil the criteria in the refugee definition contained in the 1951 Convention are indeed granted refugee status, rather than being accorded subsidiary protection.²⁴ Based on the experience in a number of European countries, UNHCR would like to emphasize the importance of following a sequential approach when using different protection categories.²⁵ One area where this approach is particularly important to follow is applications made in the context of armed conflict and violence. Such applicants may in UNHCR's view very well have a well-founded fear of being persecuted within the meaning of Article 1A(2) of the 1951 Convention.²⁶

²¹ UNHCR, UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009), para. 8, 29 July 2010, available at: <http://www.refworld.org/docid/4c503db52.html>.

²² UNHCR Executive Committee, Conclusion No. 104, para (j). UNHCR Executive Committee calls on States with developed asylum systems to support refugee's ability to integrate "through the timely grant of a secure legal status and residency rights, and/or to facilitate naturalization", available at <http://www.unhcr.org/4357a91b2.html>.

²³ UNHCR, Handbook for Self-Reliance, August 2005, First edition, p. 7, available at: <http://www.refworld.org/docid/4a54bbf40.html>.

²⁴ Ibid, para (b).

²⁵ See in this regard UNHCR, Amicus curiae of the United Nations High Commissioner for Refugees in case number UM 1970-17 before the Swedish Migration Court of Appeal (Migrationsöverdomstolen, Kammarrätten) Stockholm, 11 August 2017, available at: <https://www.refworld.org/docid/5b963dde4.html>.

²⁶ UNHCR, Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions, 2 December 2016, HCR/GIP/16/12, available at: <https://www.refworld.org/docid/583595ff4.html>. See also UNHCR, Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa, 20 December 2012, available at: <http://www.refworld.org/docid/50d32e5e2.html>; Forced Migration Review 47, Refugee by association, Blanche Tax, September 2014, available at: <http://www.fmreview.org/syria/tax>. See also, UNHCR Observations on the proposed amendments to the Danish Aliens Act: Lov om ændring af udlændingeloven (Midlertidig beskyttelsesstatus for visse udlændinge samt afvisning af realitetsbehandling af asylansøgninger, når ansøgeren har opnået beskyttelse i et andet EU-land mv.), [date], available at: http://www.unhcr-northerneurope.org/fileadmin/user_upload/Documents/PDF/Denmark/UNHCR_comments_on_proposal_to_amend_the_Danish_Aliens_Act_November_2014.pdf; UNHCR, International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update IV, November 2015, available at: <http://www.refworld.org/docid/5641ef894.html>, para. 36: UNHCR considers that most Syrians seeking international protection are likely to fulfil the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention, since they will have a well-founded fear of persecution linked to one of the Convention grounds. For many civilians who have fled Syria, the nexus to a 1951 Convention ground will lie in the direct or indirect, real or perceived association with one of the parties to the conflict. In order for an individual to meet the refugee criteria there is no requirement of having been individually targeted in the sense of having been "singled out" for persecution, or being at risk thereof.



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UNHCR recommends the Government of Norway to:

- Continue to grant beneficiaries of subsidiary protection the same or similar rights as 1951 Convention refugees.
- Ensure a sequential approach to refugee status determination, and the primacy of the 1951 Convention, including in the determination of asylum claims made by individuals fleeing armed violence and conflict in line with UNHCR Guidelines on International Protection No. 12.

Delays in accessing family reunification for beneficiaries of subsidiary protection

18. As UNHCR understands the Proposal, during the application of the contingency provision, the right to family reunification will be postponed for beneficiaries of temporary subsidiary protection by two years. They would only qualify once they are granted “lawful residence in Norway with a residence permit that can provide the basis for a permanent residence permit”, that is, two years after having been granted an initial temporary residence in Norway.
19. UNHCR regrets that the Proposal does not contain an in-depth analysis of the international and regional human rights framework pertaining to the right to respect for family life. UNHCR further notes with concern that the two-year waiting period proposed may in practice mean that beneficiaries of subsidiary protection in Norway will not be able to reunite with their families without undue delay, as follows from the standards established by the European Court of Human Rights (hereafter “ECtHR”). When counting the time it will take to become eligible according to the new criteria plus the processing time of the application, families would have to wait for extended periods of time, thus significantly prolonging the separation of families. To illustrate, the processing time of family reunification applications in cases concerning Somali, Eritrean and Afghan refugees is 20 months from the moment of submission of the application in-person and all relevant accompanying documentation.²⁷ The time period between the lodging of the application on-line and in-person application comes in addition to the 20 month processing time.²⁸
20. In the EU context, UNHCR has welcomed the adoption of more favourable rules for refugees in the EU Family Reunification Directive,²⁹ including the possibility for refugees to reunite with their family as soon as they have been granted international protection status.³⁰ The

²⁷ See in this regard statistical data published by the Norwegian Directorate of Immigration: <https://www.udi.no/ord-og-begreper/guide-til-saksbehandlingstid-i-familieinnvandringssaker/?gf=1&gs=1&go=asa&c=eri>.

²⁸ In order to be exempted from the maintenance requirement, family reunification applications must be submitted and the application fee paid within six months after the reference person was granted a residence permit in Norway. In addition to the six-month requirement, applicants must meet the requirement of applying in person at a Norwegian representation abroad. and submit all necessary documentation. The application must be lodged within one year after the reference person was granted a residence permit in Norway. See for more details NOAS report commissioned by UNHCR: Realising Refugees’ Right to Family Unity, https://www.noas.no/wp-content/uploads/2019/11/Realizing_Refugees_Right_to_Family_Unity.pdf.

²⁹ EU: Council of the European Union, Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC, available at: <http://www.refworld.org/docid/3f8bb4a10.html>.

³⁰ UNHCR, Refugee Family Reunification. UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC), February 2012, p. 4, available at: <http://www.refworld.org/docid/4f55e1cf2.html>.



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European Commission similarly “considers that the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees, and encourages Member States to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection”.³¹ The Council of Europe Committee of Ministers has also adopted a Recommendation on family reunion, which equally applies to refugees and “other persons in need of international protection”.³² UNHCR highlights that most EU Member States do not apply time limits for the family reunification of beneficiaries of subsidiary protection.³³

21. UNHCR would thus strongly urge against a differentiation in the right to family reunification between refugees and beneficiaries of subsidiary protection. As noted above, the two categories have the same protection needs, face the same integration opportunities and challenges, and also share similar return prospects. In this respect, UNHCR wishes to draw attention to the case law of various regional and national courts which supports UNHCR’s views:

- In *Tuquabo-Tekle v. the Netherlands*,³⁴ the ECtHR found an Article 8 ECHR violation in the case of a subsidiary protection beneficiary whose family reunification application was denied. Therefore, it is not the status of the applicant that is determinative, but the gravity of the interference with the applicant’s right to family life. The ECtHR has also concluded that preventing a temporary residence permit holder of five years from family reunification was in breach of Articles 8 and 14 of the ECHR.³⁵
- The Proposal contains no reference to *M.A. v Denmark* which is currently pending before ECtHR’s Grand Chamber. As the case will have a bearing on the eligibility of beneficiaries of subsidiary protection to family reunification, including the legality of waiting times, it would be important to take into account the forthcoming considerations of the Court in this case when finalizing the Proposal.

³¹ Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, Brussels, 3.4.2014, COM(2014) 210 final, para. 6.2, available at: http://ec.europa.eu/dgs/homeaffairs/e-library/documents/policies/immigration/familyreunification/docs/guidance_for_application_of_directive_on_the_right_to_family_reunification_en.pdf.

³² Council of Europe: Committee of Ministers, Recommendation N° R (99) 23 of the Committee of Ministers to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection, 15 December 1999, Rec(99)23, available at: <http://www.refworld.org/docid/3ae6b39110.html>.

³³ See in this regard page 43 of the European Migration Network (EMN), Family Reunification of Third-Country Nationals in the EU plus Norway: National Report: EMN Synthesis Report, 13 April 2017, available at: <https://www.refworld.org/docid/5bc4aaa04.html>. The report clearly shows that there is European consensus to afford beneficiaries of subsidiary protection a similar level of right to family unity and reunification as to refugees.

³⁴ *Tuquabo-Tekle and Others v. the Netherlands*, 60665/00, Council of Europe: European Court of Human Rights, 1 December 2005, available at: <https://www.refworld.org/cases,ECHR,43a29e674.html>.

³⁵ *Hode and Abdi v. The United Kingdom*, (Application no. 22341/09), Council of Europe: European Court of Human Rights, 6 November 2012, available at: <http://www.refworld.org/docid/509b93792.html>.



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- The Court of Justice of the European Union (hereafter “CJEU”) held in *Ayubi v Bezirkshauptmannschaft Linz-Land*³⁶ that the needs of protection holders are the same (for social security benefits, in that case), irrespective of length of residence permits and a difference in situation between the two categories of persons cannot therefore be established in that regard.³⁷ The decision confirms the principle of non-discrimination in EU law, according to which difference in treatment is only permissible if, and to the extent of which, protection status holders are not in an objectively comparable situation as the relevant reference group, as regards the objective pursued by the rules in question. What is true for social benefits, must be a fortiori true for the fundamental right to family life which, in the case of subsidiary protection holders, cannot be realized on the protection holder’s own motion, since returning to the country of origin would pose an insurmountable obstacle for him or her. The CJEU has also found that the duration of residence in the EU Member States is only one of the factors that must be taken into account when considering an application for family reunification, and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors, while having due regard to the best interests of minor children.³⁸
- The Swedish Migration Court of Appeal, in a judgment of 13 November 2018, ruled that a three-year waiting period imposed on a Syrian child granted subsidiary protection violated Sweden’s obligations under Article 8 ECHR. It found that the aim pursued by Sweden to limit the number of asylum-seekers could not justify the refusal to issue family reunification permits. The restrictions on the child’s right to family life were therefore disproportionate.³⁹

22. In view of the above, UNHCR is concerned that the prolongation of access to family reunification procedures for beneficiaries of subsidiary protection by imposing a two-year waiting period may be disproportionate and at variance with international and regional law. UNHCR is concerned that the proposed restrictions may leave families in a prolonged state of uncertainty and separated from one another over long periods of time, which may impede the successful and rapid integration and labor market participation of subsidiary protection holders in their host societies.

UNHCR recommends the Government of Norway to:

- Refrain from introducing further restrictions to family reunification since the application of differential rules to persons granted subsidiary protection with regard to their access to

³⁶ Ahmad Shah Ayubi v Bezirkshauptmannschaft Linz-Land (C-713/17) (request for preliminary ruling), ECLI:EU:C:2018:929, European Union: Court of Justice of the European Union, 21 November 2018, available at: <https://www.refworld.org/cases,ECJ,5bf82e4d4.html>.

³⁷ *Ibid.* See also Kreis Warendorf v. Ibrahim Alo & Amira Osso v.Region Hannover, C-443/14 and C-444/14, EU: Court of Justice of the European Union, 1 March 2016, available at: <http://www.refworld.org/cases,ECJ,56e67d9f4.html>.

³⁸ Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, Brussels, 3.4.2014, COM(2014) 210 final, p. 17.

³⁹ Ayed and others v. Swedish Migration Board, UM 5407-18, Swedish Migration Court of Appeal, 13 November 2018, available at: <http://www.kammarrattenistockholm.domstol.se/Om-kammarratten-/Vagledandeavgoranden/Migrationsoverdomstolen-20171/UM-5407-18/>.



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family reunification, and in particular subjecting them to a waiting period, may be at variance with human rights law;

- Proactively facilitate access to family reunification for all beneficiaries of international protection under the same favorable rules as those applied to Convention refugees to ensure non-discrimination and equal treatment.

Unaccompanied children's right to family life and family reunification

23. UNHCR notes in particular that the Proposal does not provide for exceptions in cases concerning right to family life and family reunification of unaccompanied children. As UNHCR understands the Proposal, unaccompanied children from 16 years of age at the time they will be holding a residence permit counting towards the acquisition of permanent residence status in Norway Act (i.e. after the initial temporary two-year permit) will no longer be eligible for family reunification as children, including, for example, the non-discretionary right to be reunited with their parents.
24. UNHCR notes that the proposed restrictions may raise issues under the ECHR and the Convention on the Rights of the Child, including the right to non-discrimination as they will differentiate between children holders of subsidiary status and refugee children. Moreover, UNHCR is of the view that in cases concerning children, the national authorities must give due consideration to the applicants' specific circumstances. As illustrated above, the ECtHR has through its extensive case law established that family reunification procedures failing to offer the requisite guarantees of flexibility, promptness and effectiveness breach the right to respect for their family life codified in Article 8 ECHR.⁴⁰
25. Further, in *A and S v the Netherlands*,⁴¹ the CJEU stated that unaccompanied children who attain the age of majority during the asylum procedure retain their right to family reunification and that States do not have a margin of appreciation to limit the right to family reunification of children with their parents, if the former entered the State as children. The CJEU took a similar approach in *B.M.M. and Others v. Etat Belge*,⁴² where it held that the test whether an applicant is a minor for family reunification purposes must be governed by the *age at the date*

⁴⁰ *Mugenzi v France* (Application No. 52701/09), *Tanda-Muzinga v France* (Application No. 2260/10), *Senigo Longue and Others v France* (Application No. 19113/09), see also European Court of Human Rights, "Family reunification procedure: need for flexibility, promptness and effectiveness." ECHR 211, Press release, 10.07.2014, available at: <http://www.google.no/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB0QFjAA&url=http%3A%2F%2Fhudoc.echr.coe.int%2Fwebsiteservices%2Fcontent%2Fpdf%2F003-4817913-5875206&ei=gQZfVbLGI8KtsgHd8oG4DA&usg=AFQjCNHZx5rQRNeOu0ieyaRVPLb-bvomUg&sig2=QeEySs-SXPB0ibmKjJs2bw&bvm=bv.93990622,d.bGg>; *Hode and Abdi v. The United Kingdom*, (Application no. 22341/09), Council of Europe: European Court of Human Rights, 6 November 2012, available at: <http://www.refworld.org/docid/509b93792.html>

⁴¹ *A.S. v the Netherlands*, CJEU Grand Chamber, 12 April 2018 http://curia.europa.eu/juris/document/document_print.jsf?docid=200965&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=13426332.

⁴² *Joined cases B. M. M. (C-133/19 and C-136/19), B. S. (C-133/19), B. M. (C-136/19), B. M. O. (C-137/19) v Belgium*, CJEU, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=228674&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13426572>.



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of the application (emphasis added).⁴³ The CJEU has further held that the duration of residence in the EU Member States is only one of the factors that must be taken into account when considering an application for family reunification, and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors, while having due regard to the best interests of minor children.⁴⁴

UNHCR recommends the Government of Norway to:

- Facilitate family reunification in a flexible and prompt manner for all unaccompanied child beneficiaries of international protection, including those granted subsidiary protection, who entered Norway as children.

Delays in obtaining permanent residence

26. According to the Proposal, a temporary residence permit granted on subsidiary protection grounds under the contingency provision will lead to a residence permit allowing for accrual of permanent residency after two years of continuous residence in Norway. This means that holders of subsidiary protection will only qualify for a permanent residence permit after *five years* of continuous residence in Norway, while refugees will continue to acquire permanent residence in Norway after *three years* of continuous residence.
27. With regard to the nature and length of residence permits for persons recognized as in need of international protection, UNHCR recalls that the ultimate goal of international protection is to achieve durable solutions for persons in need of international protection. UNHCR thus recommends Norway to consider maintaining its well-established practice of granting a secure status to persons in need of international protection – both refugees and beneficiaries of subsidiary protection.⁴⁵ Such a measure would support integration and ensure a stable and sustainable foundation for all beneficiaries of international protection and their families. Studies show that temporary permits tend to have a negative impact on integration and health.⁴⁶ It would also reflect the increasing length and complexity of today's conflicts where the average duration of protracted refugee situations is 17 years. In light of the foregoing, UNHCR recommends that the period of validity of residence permits provided to beneficiaries of subsidiary protection be the same as that for 1951 Convention refugees.

⁴³ While Norway is not bound by the Charter of Fundamental Rights, UNHCR notes that Article 52(3) of the Charter spells out that the rights corresponding to rights guaranteed by the ECHR have the meaning and scope as the latter.

⁴⁴ Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, Brussels, 3.4.2014, COM(2014) 210 final, p. 17.

⁴⁵ UNHCR, ExCom Conclusion on local integration, No. 104 (LVI) – 2005, <https://www.refworld.org/docid/4357a91b2.html>.

⁴⁶ Brekke, Jan-Paul; Birkvad, Simon Roland & Erdal, Marta Bivand (2020). Losing the Right to Stay: Revocation of Refugee Permits in Norway. *Journal of Refugee Studies*. See also Brekke, Jan-Paul; Birkvad, Simon Roland & Erdal, Marta Bivand (2019). Losing the Right to Stay: Revocation of immigrant residence permits and citizenship in Norway — Experiences and effects. Rapport – Institutt for samfunnsforskning; A life in Insecurity (Et liv i usikkerhet), 2018, NOAS, Save the Children, The Norwegian Union of Social Educators and Social Workers (FO). See also Swedish Red Cross, Humanitarian Consequences of the Swedish Temporary Aliens Act, October 2018, available at: <https://www.rodakorset.se/om-oss/fakta-och-standpunkter/rapporter/konsekvenser-av-tillfalliga-utlanningslagen/>.



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UNHCR recommends the Government of Norway to:

- Abstain from differentiating between beneficiaries of subsidiary protection and refugees under the 1951 Convention in terms of when they may acquire permanent residence in Norway.

UNHCR Representation for Northern Europe

Stockholm, 31 August 2020