

Dear Mr. Chairman,

The Federal Constitutional Court, with its letter from March 2, 2011, has given UNHCR the opportunity to take a position on an issue raised by the Federal Welfare Court about the 1 BvL 3/11 case. The case revolves around a Congolese national with a residence permit pursuant to Section 25 (3) Residence Act and her claim to parental allowance for the care of her children, born in March 2007.

UNHCR is grateful for the opportunity to be able to comment on the case. The organization has repeatedly emphasized that, on the outset, the protection needs of persons with refugee status and persons with subsidiary protection status, in the sense of the provisions of the qualification directive, do not differ significantly in qualitative nor duration-related terms. Therefore, UNHCR has advocated for similar treatment of both groups of persons entitled to international protection. In the following it will be explained, from the perspective of UNHCR, why against the backdrop of the German and European legal framework there is no basis for the justification of differential treatment of these two groups.

The goal of limiting claims to parental allowance by foreigners to persons with expected long-term stays

In the legal regulation in question, claims to parental allowance by persons with specific residence permits are made contingent on criteria which recognized refugees with residence permits per Section 25 (1) or (2) Residence Act are not required to meet. Here is the crux of the unequal treatment which is in need of justification. The above differentiation between people with specific residence permits and recognized refugees was justified during the drafting of the law by the idea that the right to a claim to parental allowance on the part of foreign parents (persons with non-refugee residence statuses) should only exist when these persons can be expected to reside in the country for the long-term.

This rationale already has been recognized by the Federal Constitutional Court, in its corresponding decisions on rights to child benefits and education benefits, as a legitimate basis for differentiating between claimants. It is relevant in this context that the second criterion for differentiating between claimants contained in the BEEG, the entitlement to employment or comparable situation (Section 1 (7) No. 3 b BEEG), is also clearly used by the lawmaker as an indicator of the duration of a claimant's stay in Germany.

The reference to certain residence permits in the BEEG seems to be based on the assumption that the respective residence statuses are of a more temporary nature or which, in stronger terms, imply a proximate end to the stay, compared with other residence statuses in the respective paragraph, especially those granted to refugees.

Justification based on the general, initially temporary nature of residence permits in chapter 5 of the Residence Act?

Chapter 5 of the Residence Act provides, for all of the residence permits regulated therein, for an initial, temporary residence permit – of varying durations – which, per the varied regulations contained in Section 26 Residence Act, can be converted into a permanent residence permit. In this manner, it is arranged such that recognized refugees can under certain circumstances after three years be given a permanent residence permit. For other residence permits regulated in this chapter, a residence of seven years is required for the granting of a permanent residence permit (Section 26 (3), (4) Residence Act).

In this respect, the law may assume the initial temporary nature of the humanitarian residence permits and differentiate according to the type of permit and decide on if and when a permit should go from a temporary residence permit to a permanent residence permit. However, the fact that the legislator made differentiations in the Residence Act in this respect nevertheless does not justify, as such, the differential treatment in terms of rights of residence and rights to parental allowance. The question arises to what extent in the framework of the issuance of a residence title, it can be assumed that the residence, as a rule, will be of a temporary nature.

Some of the actual situations underlying the issuance of a residence title by nature presuppose a foreseeable timeframe. This is how Section 24 Residence Act is involved in the granting of residency titles ‘for temporary protection’ transposing Council Directive 2001/55/EC. This directive is based on a political decision by the Council of the European Union and has been created for the granting of temporary protection in situations involving mass influxes. The protection lasts one year, and - if the protection has not been ended by a Council decision before (Article 6 (1b) Council Directive 2001/55/EC) - is then automatically prolonged for one year. After this, the Council can decide on a further one-year extension given a qualified majority.

Other examples include Section 25 (4) Residence Act, which refers conceptually to the ‘temporary’ need of the person to be physically present in the country, or Section 25 (4a) Residence Act, which provides for a residence permit for the victim of a crime for the duration of the criminal procedure in which it is to testify as a witness.

In contrast, other permits in chapter 5 of the Residence Act are not inherently designed to be granted for a foreseeable timeframe. For instance, one can not expect in the context of people taken in by Germany via resettlement from a first country of refuge, who receive a residence permit pursuant to Section 23 (2) Residence Act (like the Iraqi refugees who have been admitted to Germany from Jordan and Syria in 2009 and 2010), that their stay, from the start, will be temporary. The taking in of someone in such a situation by way of resettlement is precisely about establishing a durable solution which was not available in the first country of asylum.

Ultimately, regarding refugees, the lawmaker works on the premise that as a rule permanent residence will follow. With § 26 paragraph 3 Residence Act, recognized refugees are able, after three years of residence with a temporary residence status, to make a claim for a permanent residence permit, if the criteria for a revocation – especially ones pertaining to the cessation of the circumstances which led to the persecution - are not met. Such a change in circumstances after three years can generally be expected to be the exception and the transition to an indefinite stay the rule. Even if within, the first three years after the issuance of the refugee status-linked residence permit, a regime change in the country of origin were to abolish the position of power of the former persecutors, deeming the cessation of the former persecution conditions could frequently, after less than three years, be problematic. As a consequence, the lawmaker has foreseen that all of the rights of refugees apply as soon as the recognition decision has become final, which implies the initiation of conditions for integration. This also complies with the international and European Union standards.

This leaves the question of whether in terms those persons who were granted subsidiary protection and a residence status per § 25 paragraph 3 Residence Act, one can talk about a temporary nature of the stay or, in any case, a stay of a shorter duration compared to stays expected of those with refugee status.

Justification based on the short-term nature of subsidiary protection?

A closer look at the circumstances, which provide for subsidiary protection under the QD and underlie the residence permit per § 25 paragraph 3 Residence Act, shows that the criteria for a short-term, temporary nature of the stay cannot be assumed a priori. In the field of European subsidiary protection law, there are three situations in which the life, bodily integrity or human dignity could be threatened by a return to the country of origin. Thus, there exists an entitlement to protection when one is threatened by torture, inhuman or degrading treatment (§ 60 paragraph 2 Residence Act, Article 15 b QD), the death penalty (§ 60 paragraph 3 Residence Act, Article 15 a QD), as well as a serious and individual threat to life or person due to indiscriminate violence against civilians in situations of armed conflict (§ 60 paragraph 7 sentence 2 Residence Act, Article 15 c QD). None of the above-mentioned circumstances are, at the outset, of a more foreseeable, temporary nature or of a shorter duration than refugee status.

The threat of the death penalty or of torture, inhuman or degrading treatment, are typical circumstances which also meet the criteria for an act of persecution in the sense of the refugee definition of Article 1 A (2) of the 1951 Convention and Article 9 QD. The sole difference between subsidiary protection and refugee protection regarding these circumstances is that there are no grounds for persecution that would be connected to persecutory treatment if, for example, the inhuman treatment through poor prison conditions isn't based on religious motivation, but in fact affects all prisoners in the country. The lack of a ground for persecution, however, does not imply the transitory nature of the entitlement to protection.

Also with regard to protection from serious individual risk to life and limb due to indiscriminate violence in an armed conflict in the sense of § 60 paragraph 7 sentence 2 Residence Act, it is not to be assumed that the need for protection is of a foreseeable duration. This becomes clear when one looks at the lengths of armed conflicts for which the aforementioned regulations are put into use, such as those in Iraq, Somalia and Afghanistan. The present conflict in Iraq began with the invasion in 2003 (although the opposing forces have changed). Fighting in Afghanistan has been going on since the end of 2001 and in Somalia since the beginning of the 90's.

While per German legal interpretation the standard for receiving protection due only to the generally violent situation in a country is the rare exception, individual danger-increasing factors can, per the jurisprudence of the European Court of Justice and the German Federal Administrative Court, lead to individual protection in accordance with the relevant provisions. This initial situation is in turn very similar to the prerequisites for refugee status.

Armed conflicts are certainly often volatile and can be marked by frequent escalations and de-escalations. In this respect it must be stressed that every lull in the conflict should not lead to terminations of protection. In this regard, specified criteria are to be met in which are of a 'significant and non-temporary nature', as prescribed in Article 16 paragraph 2 QD. The more intense volatility of the circumstances which meet the requirements for the granting of protection [under Art. 15 c QD] does not therefore necessarily lead to a quicker end to the need for protection.

Also in practice, there is no evidence for a foreseeable, temporary nature of subsidiary protection. This is emphasized by the European Commission in their recast proposal for the amendment of the QD which seeks to align the legal status of persons with subsidiary protection with the legal status of refugees.

Conclusion

Without criteria with which one can recognise a need for subsidiary protection to be of a clear cut foreseeable duration, the distinction in applying different prerequisites for the granting of parental allowance is not justified from the perspective of the UNHCR.