



Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the draft law proposal on restrictions of the possibility to obtain a residence permit in Sweden (“Begränsningar av möjligheten att få uppehållstillstånd i Sverige – utkast till lagrådsremiss”)

I. Introduction

1. The United Nations High Commissioner for Refugees (hereafter “UNHCR”) Regional Representation for Northern Europe (hereafter “RRNE”) is grateful to the Government of Sweden for the invitation to provide observations on the draft law proposal on restrictions of the possibility to obtain a residence permit in Sweden, “Begränsningar av möjligheten att få uppehållstillstånd i Sverige – utkast till lagrådsremiss, (hereafter “the Proposal”).
2. 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,¹ UNHCR has a direct interest in law and policy proposals in the field of asylum. According to its Statute, UNHCR fulfils its mandate inter alia by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”² UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention³ and in Article II of the 1967 Protocol relating to the Status of Refugees⁴ (hereafter collectively referred to as the “1951 Convention”).⁵ It has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (hereafter “TFEU”).⁶
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 (“UNHCR Handbook”) and subsequent Guidelines on International Protection.⁷ UNHCR also fulfils its supervisory responsibility by

¹ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html> (hereafter “UNHCR Statute”).

² *Ibid.*, para. 8(a).

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

⁴ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>

⁵ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

⁶ European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

⁷ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at:

providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

4. The following comments are based on international refugee protection standards, set out in the 1951 Convention, conclusions of the UNHCR Executive Committee (hereafter “ExCom”), UNHCR guidelines, and precedent setting decisions by higher courts as well as on European standards. While neither the ExCom Conclusions on international protection nor UNHCR’s guidelines are binding on States, they contribute to the formulation of *opinio juris* by setting out standards of treatment of approaches to interpretation which illustrate States’ sense of legal obligation towards asylum-seekers and refugees.⁸ As a member of the UNHCR Executive Committee since its inception in 1958, Sweden has contributed extensively to the development of the Conclusions on International Protection⁹, adopted unanimously by the ExCom.

II. General Observations

5. Sweden has a long tradition of providing sanctuary to persons in need of international protection, and is a strong supporter of the international protection regime and the work of UNHCR. UNHCR welcomes and fully acknowledges the efforts made by the Government of Sweden, in this time of unprecedented refugee movements, to adhere to its obligations under international and European, including European Union (hereinafter “EU”) law. In doing so, Sweden has taken responsibility and shown humanitarian leadership and solidarity with persons in need of international protection, and the countries hosting the majority of the world’s refugees. The way in which the Government, the authorities and the Swedish society at large led by example and responded to the large movements and consequent challenges, set a positive example for the rest of Europe.
6. UNHCR notes that the aim of the present Proposal is to reduce the number of asylum-seekers arriving to Sweden, and, during a limited period of time, align the Swedish legal framework with the common EU standards. The Proposal adds that a decreased number of asylum-seekers in Sweden should contribute to a more even and fair distribution of asylum-seekers among the EU Member States.¹⁰ To achieve this aim, the Proposal presents a number of restrictions on the rights of aliens to obtain residence permits in Sweden, *inter alia* through providing for temporary residence permits for persons in need of international protection and restricting the right to family reunification and making the right to permanent residence permits during the duration of the temporary law dependent on self-sufficiency in Sweden. In addition, the law removes the right to protection as a person “otherwise in need of protection”, which is a domestic provision intended to encompass persons who do not qualify for refugee status or subsidiary protection under the EU *acquis*, but would yet have protection needs.
7. UNHCR fully recognizes that Sweden, in a European context, has received a comparatively large number of asylum-seekers during the past couple of years, when the number of persons seeking international protection in Europe has been greater than at any time since the Second World War. In particular, UNHCR recognizes that the reception of approximately 163,000 asylum applicants in 2015 placed a heavy strain on the asylum and reception system in Sweden. While Sweden has managed the situation due to the dedicated efforts of the authorities,

<http://www.refworld.org/docid/4f33c8d92.html>.

⁸ Goodwin Gill/McAdam, *The Refugee in International Law*, Oxford University Press, 2007, p. 217.

⁹ As of January 2015, 111 Conclusions on International Protection have been adopted by the ExCom.

¹⁰ Proposal, p. 1. The Proposal further elaborates on the underlying reasons on p. 18, and points out that the Swedish asylum-process needs a breathing space.

civil society and private individuals, the Proposal notes that the asylum system needs “breathing space” in order to cope.¹¹

8. In the context of the European refugee situation, UNHCR has repeatedly called on States to demonstrate the principles of international solidarity and responsibility-sharing, set out in the preamble to the 1951 Convention and in UNHCR ExCom Conclusions.¹² Sweden has supported the approach of UNHCR, and similarly promoted a fairer distribution of responsibility amongst the EU Member States. UNHCR has in the same context called for the creation of credible legal pathways to dangerous irregular movements; such pathways may include enhanced resettlement opportunities, humanitarian admission programmes, greater access to family reunion options, student and employment visas for refugees and other forms of legal admission to Europe.¹³ UNHCR therefore appreciates the inquiry into legal pathways to Europe that the Swedish Government recently introduced.¹⁴
9. Regrettably however, instead of implementing - in a spirit of solidarity and equal sharing of responsibility - the various decisions made by the EU in 2015, European States rather appear to be competing to restrict their national asylum systems in a ‘race to the bottom’. In this respect, UNHCR wishes to refer to the Vienna Convention on the Law of Treaties,¹⁵ which offers guidance concerning the interpretation of international treaties. Relevant to the present European situation are particularly Articles 26 and 31, which explicitly state that the obligations of a convention must be performed by the parties “in good faith” and “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Thus, UNHCR notes that the restrictive measures undertaken by States individually in Europe is in stark contrast to the Preamble of the 1951 Convention, which contains strong human rights language and recognizes the importance of burden sharing and international co-operation in finding a satisfactory solution to the humanitarian nature of the problem of refugees.
10. UNHCR deeply regrets that the Swedish Government’s efforts to promote solidarity, maintain the European asylum space and safeguard the international protection regime has not resulted in a more equitable sharing of responsibility amongst the EU Member States. It is thus with concern that UNHCR notes that the Swedish Government, due to the continued inability of the European countries to respond to the current refugee situation with unity and solidarity, is finding itself compelled to restrict its asylum laws and policies to the lowest common standards permissible by the EU *acquis* on asylum.

¹¹ Proposal, p. 18.

¹² See e.g., ExCom Conclusion Nos. 52 (on International solidarity and refugee protection), 77 (general conclusion), 85 (conclusion on international protection) and 90 (general conclusion), available at: <http://www.unhcr.org/pages/49e6e6dd6.html>

¹³ See e.g., UNHCR, *Stabilizing the situation of refugees and migrants in Europe - Proposals to the Meeting of EU Heads of State or Government and Turkey on 7 March 2016*, 3 February 2016, where UNHCR made renewed calls for European States to urgently seek an efficient management of the situation within Europe, in a spirit of solidarity, and proposed six means of achieving a solution, including the creating of legal pathways, available at: <http://www.refworld.org/docid/56cda9a34.html> ; see also UNHCR, *Syrian Refugees in Europe: What Europe Can Do to Ensure Protection and Solidarity*, 11 July 2014, available at: <http://www.refworld.org/docid/53b69f574.html> p. 12, and UNHCR, *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update III*, 27 October 2014, available at: <http://www.refworld.org/docid/544e446d4.html> paras. 33–36; UNHCR, *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update IV*, November 2015, para. 44, available at: <http://www.refworld.org/docid/5641ef894.html>

¹⁴ For more information, please see Government webpage, at: <http://www.regeringen.se/rattsdokument/kommittedirektiv/2016/01/dir.-20168/>.

¹⁵ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> (hereafter the “VCLT”), Articles 31-33 and the specific obligation of “good faith” in Article 26.

11. Regarding the proposed restrictions, UNHCR is particularly concerned about the signal they will send to other States, especially the major refugee hosting countries in the world, and European States that need to strengthen their asylum and integration capacity in order to receive higher numbers of refugees, including those in the close vicinity of Sweden. UNHCR considers that there is a risk that, contrary to what the Government hopes to achieve, the proposed measures may contribute to other States' introduction of similar restrictions. The proposed measures, in particular when coupled with the earlier measures on ID controls and carrier sanctions,¹⁶ could reduce asylum-seekers' access to territory and procedures in Europe, resulting in persons in need of international protection being forced to undertake life-threatening journeys in order to exercise their right to seek asylum.
12. UNHCR therefore appeals to the Government of Sweden to reconsider its intention to restrict the national asylum space and urges Sweden to instead use its standing as a global advocate for human rights, democracy and solutions to continue focusing on promoting and building a coordinated European response and a unified European migration policy. This would, in UNHCR's view, be a more effective, positive, and humanitarian way of reaching a sustainable solution to the unequal distribution of refugees in Europe, than by introducing restrictions that challenge the international protection regime that Sweden has been such a strong supporter of for decades. Specifically, a sustainable solution would be achieved through the full implementation by all EU Member States of the prevailing international and European, including EU, legal standards, and of fully-functional hotspots, an internal relocation scheme and the opening-up of more credible legal pathways, including expanded resettlement and family reunification programmes; it also needs to be achieved through support to European countries in need to further develop the capacity of their asylum and integration systems.¹⁷
13. Should the Government nonetheless proceed with the Proposal, UNHCR wishes to make the following specific observations on particularly concerning elements of the Proposal.

III. Specific Observations

a. Temporary law

14. According to the Proposal, the restrictions will be introduced in a new temporary law, that will be valid for a maximum of three years, i.e. an initial period of two years which can be extended for a third year following a review of the need to maintain the temporary law for a third year.¹⁸ UNHCR appreciates that the Government has chosen to place the proposed restrictions in a temporary law, instead of in the Swedish Alien's Act,¹⁹ signalling that the restrictions are not intended to

¹⁶ Comments by the UNHCR Regional Representation for Northern Europe on the Law Proposal Prop. 2015/16:67 concerning particular measures in situation of serious threat to the public order or the internal security of the country (Särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet), available at: http://www.unhcr-northerneurope.org/fileadmin/user_upload/Documents/PDF/Sweden/Prop_2015-16_67_comments-UNHCR.pdf

¹⁷ See further the proposals presented by UNHCR ahead of the high-level meeting between the EU and Turkey, UNHCR, *Stabilizing the situation of refugees and migrants in Europe - Proposals to the Meeting of EU Heads of State or Government and Turkey on 7 March 2016*, 3 February 2016, available at: <http://www.refworld.org/docid/56cda9a34.html>

¹⁸ Proposal, p. 39.

¹⁹ The Swedish Aliens' Act, (Utlänningslag 2005:716), hereafter the "Alien's Act", available (in Swedish only) at: https://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Utlanningslag-2005716_sfs-2005-716/

permanently restrict the national asylum space in Sweden. However, UNHCR would recommend placing this statement in the legal act itself, to further emphasise that the law is enacted with the aim of providing Sweden with “a breathing space”. Furthermore, as the number of asylum-seekers arriving to Sweden has already considerably decreased, following the Government’s introduction of border and ID-controls in November last year, UNHCR recommends that the Government undertakes a review of the continued need for the temporary law, preferably within one year of its entry into force.

15. UNHCR understands that once the proposed temporary law expires, on 30 May 2019 latest, the Alien’s Act will be applicable again. UNHCR trusts that there will be no further extensions of the proposed temporary law, and that the intention of the Swedish Government, and the majority in the Swedish Parliament, is to limit the Swedish asylum space temporarily only. UNHCR would nonetheless recommend the Government to consider including a provision in the proposed temporary law, or in the transitory provisions (“*övergångsregler*”) of the temporary law, that the temporary law cannot be extended for an additional time-period.

Recommendations Concerning the Duration of the Temporary Law

UNHCR recommends the Government of Sweden:

1. To include a provision in the proposed temporary law itself that there will be an assessment of the continued need for the proposed temporary law;
2. To carry out an assessment of the continued need for the temporary law, preferably within one year of its enactment;
3. To consider including a provision in the temporary law that the law cannot be extended for an additional time-period following its expiry, at the latest on 30 May 2019.

b. Removal of the Protection Category “Persons Otherwise in Need of Protection”

16. The Proposal suggests to remove the right to a residence permit for persons “otherwise in need of protection”. The justification is to align the Swedish legislation to the lowest common level permissible under the EU asylum *acquis*.²⁰
17. When Sweden in 2010 transposed the Qualification Directive,²¹ the Government introduced the protection category “persons in need of alternative status”, which mirrors Article 15 of the Qualification Directive (‘subsidiary protection’). In addition, the Government chose to create the national protection category “persons otherwise in need of protection”, as the Government considered the scope of the EU Qualification Directive to be too limited. Persons “otherwise in need of protection” are, according to the Aliens Act, persons who have fled an external or internal armed conflict, or other situations of serious disturbances, and have a well-founded fear of being subjected to serious abuse, or cannot return to their country of origin due to an environmental disaster.²² At the time, the Government argued

²⁰ Proposal, p. 21.

²¹ European Union: Council of the European Union, 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, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC, available at: <http://www.refworld.org/docid/4157e75e4.html>

²² The Aliens’ Act, Chapter 4, Section 2a.

that “all persons in need of protection shall have an equal right to refuge in Sweden.”²³

18. UNHCR notes that 229 persons in 2015, and 43 persons in January and February 2016, benefited from protection as “persons otherwise in need of protection”. Swedish practice has in the past been restrictive regarding persons fleeing armed conflict, resulting in such persons falling within the category “persons otherwise in need of protection”, instead of being recognized as refugees, or as “persons in need of alternative protection”.²⁴
19. The Proposal does not explain how the Government suggests to address the possible protection gap that may arise as a result of removing this protection ground. It is unclear to UNHCR if the Government foresees that persons who have previously been granted residence as “persons otherwise in need of protection” shall be granted residence permits pursuant to the proposed Section 13 of the temporary law, which provides that if a residence permit cannot be granted on any other ground, a permit may be granted under Section 13, if a rejection of the asylum application of the person concerned would be in contravention of Sweden’s international obligations.
20. In UNHCR’s view, it will thus be important to assess the impact the Proposal may have on the categories of persons who at present are considered “persons otherwise in need of protection”, if this element of the Proposal is adopted. This is to ensure that no one in need of international protection is rejected, and put at a risk of *refoulement*, particularly in light of the above mentioned restrictive interpretation in Sweden of the refugee definition and the “persons in need of alternative protection” definition in respect of persons fleeing countries in conflict or violence.
21. Hence, UNHCR recommends that the Government provides interpretative guidance in the *travaux préparatoires* to the temporary law regarding the asylum authorities’ (Swedish Migration Agency and the Courts) responsibility to first undertake a thorough assessment of an asylum-seeker’s eligibility for refugee status and thereafter, of his/her eligibility for “alternative protection” (i.e. the sequential approach,²⁵ acknowledged also in the EU Qualification Directive) , prior to assessing whether the applicant should be granted a right to remain under Section 13 of the temporary law. This is important in order to ensure there is no protection gap for persons in need of international protection.

²³ See the Governments Proposal 2009/10:31, Transposition of the Qualification Directive and the Asylum Procedures Directive, (Regeringens proposition 2009/10:31, Genomförande av skyddsgrundsdirektivet och asylprocedurdirektivet), p. 119.

²⁴ See e.g. Rebecca Stern, “Hur bedöms ett skyddsbehov? Om gränsdragning, konsekvens och förutsägbarhet i svensk asylpraxis” (“How is protection need assessed? About the delimitation, consequences and predictability in Swedish asylum practice”), Svensk Juristtidning, 2012, p. 282, available (in Swedish) at: <http://svjt.se/svjt/2012/282>

²⁵ 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, see e.g. para. 36, available at: <http://www.refworld.org/docid/50d32e5e2.html>. See also UNHCR, *Using the 1951 Convention Relating to the Status of Refugees to protect people fleeing armed conflict and other situations of violence: key legal challenges*, 20 October 2014, available at: <http://www.refworld.org/docid/545b43884.html>

Recommendations Concerning the Removal of the Protection Category “Persons Otherwise in Need of Protection”

UNHCR recommends that the Government:

1. Before the temporary law is adopted, assesses the impact it may have on the categories of persons who at present are considered “persons otherwise in need of protection”, to ensure no one in need of international protection is put at a risk of *refoulement*;
2. To provide elaborate interpretative guidance in the *travaux préparatoires*, to ensure that individuals fleeing conflict and violence are first assessed for eligibility under the refugee definition, and thereafter under the criteria for “alternative protection”, before being considered for stay pursuant to the proposed Section 13 of the temporary law.

c. Introduction of Temporary Residence Permit for Persons Granted International Protection as a General Rule

22. According to the Proposal, Convention refugees and “persons in need of alternative protection”²⁶ will be granted temporary residence permit in Sweden. Refugees will be granted three year permits as a general rule, and “persons in need of alternative protection” will be granted a one year temporary residence permit, which can be renewed for an additional period of two years. The latter will not have the right to family reunification, with some exceptions (see further below at paragraph 36). Persons in need of international protection who are resettled to Sweden will continue to be granted permanent residence permit, which UNHCR welcomes.²⁷
23. Regarding the introduction of temporary residence permits, UNHCR recalls that “the ultimate goal of international protection is to achieve durable solutions for refugees”, as formulated in ExCom Conclusion No. 104 on local integration.²⁸ In this respect, the 1951 Convention foresees a gradual attainment of rights,²⁹ with the end of the continuum being naturalization in the country of asylum, or the cessation of the refugee’s protection needs and voluntary return, for example, as a result of fundamental and durable changes in the country of origin.
24. In UNHCR’s view, “in order to take into account the special position of refugees, permanent residence should be granted to them at the latest at the end of the three year residence period established by the Qualification Directive. UNHCR considers

²⁶ As noted above in para. 17, the Swedish Aliens Act, Chapter 4, Section 2 corresponds to the Qualification Directive. Through the transposition of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast Qualification Directive) Chapter 4, Section 2 of the Alien’s Act now mirrors Art. 15 a-c. of the recast Qualification Directive, available at: <http://www.refworld.org/pdfid/4f197df02.pdf> Alternative protection is also referred to as a form of subsidiary protection.

²⁷ Proposal, p. 22.

²⁸ UNHCR, *Conclusion on Local Integration*, 7 October 2005, No. 104 (LVI) - 2005, available at: <http://www.refworld.org/docid/4357a91b2.html> (hereafter “ExCom Conclusion on local integration No. 104”).

²⁹ See e.g. the 1951 Convention, Article 34, and ExCom Conclusion on local integration No. 104. See also doctrine on “levels of attachment” e.g. in Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp. 160-192.

that the same three year deadline should apply to persons granted subsidiary protection.”³⁰

25. Regarding the differentiation between refugees and persons in need of alternative protection, UNHCR notes that the Proposal seeks to align the Swedish legislation with the standard of the recast EU Qualification Directive.³¹
26. While UNHCR acknowledges that the recast EU Qualification Directive does not oblige EU Member States to grant beneficiaries of subsidiary protection residence permits of the same duration as refugees, UNHCR has repeatedly urged States to grant – to the extent possible – Convention refugees and beneficiaries of subsidiary/complementary protection the same rights, based on a recognition that they have the same protection needs. In the comments to the proposal for a recast Qualification Directive, UNHCR observed that there is no reason to expect the protection needs of subsidiary protection beneficiaries to be of shorter duration than those of refugees.³² UNHCR further stated at that time, that access for subsidiary protection beneficiaries to similar rights as those of refugees would be a significant element in facilitating their early participation and contribution to the host community. Affording beneficiaries of subsidiary protection similar rights would support social cohesion, and play an important role in ensuring that protection is effective for refugees and beneficiaries of subsidiary protection alike.
27. Regarding the differentiation of rights depending on status, UNHCR further wishes to recall that the European Court of Human Rights (hereafter “ECtHR”) has held that a difference of treatment in “analogous, or relevantly similar, situations”, is discriminatory if it has no objective and reasonable justification, “in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”³³ The protection conferred by Article 14 of the ECHR (the prohibition of discrimination)³⁴ 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.³⁵
28. Furthermore, as noted in paragraph 18 above, UNHCR has found that there are reasons to believe that in Sweden, individuals UNHCR would consider as refugees pursuant to the definition in the 1951 Convention, are instead granted subsidiary protection status – as “persons in need of alternative protection” or protection as

³⁰ UNHCR, *Note on the Integration of Refugees in the European Union*, May 2007, para. 20, available at: <http://www.refworld.org/docid/463b24d52.html>.

³¹ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, available at: <http://www.refworld.org/docid/4f197df02.html>

³² 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)*, 29 July 2010, p. 9, available at: <http://www.refworld.org/docid/4c503db52.html>

³³ *Hode and Abdi v. The United Kingdom*, (Application no. 22341/09), European Court of Human Rights, 6 November 2012, para. 45, available at: <http://www.refworld.org/docid/509b93792.html>

³⁴ Article 14 states: “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

³⁵ *Hode and Abdi v. The United Kingdom*, (Application no. 22341/09), European Court of Human Rights, 6 November 2012, paras. 46–47, where the Court found that the rejection of the application of a wife to join her husband in the UK based on the husband’s immigration status had been in breach of Article 8 in conjunction with Article 14 ECHR, as the difference in treatment was neither objectively or reasonably justified by the UK.

“persons otherwise in need of protection”. A case in point is that while almost all Syrian asylum-seekers are granted international protection in Sweden, the absolute majority (89 per cent) of Syrian applicants are granted subsidiary protection. In comparison, the overall refugee recognition rate of Syrian asylum-seekers in the EU was 87% in the 4th quarter of 2015.³⁶ In its latest update on the protection consideration for persons fleeing Syria, UNHCR states 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.³⁷

29. In view of the above, UNHCR is concerned by the Government’s proposal to introduce significant differences in the rights accorded to persons granted refugee status as compared to those granted “alternative status”, specifically in regard to the duration of residence permits and the right to family reunification (see further below). In light of the differences in rights the temporary law will accord to beneficiaries of refugee status as opposed to “alternative status”, it will be of even greater importance to ensure that asylum claims made by individuals fleeing countries in conflict and violence are properly assessed in line with international and European law and standards, as noted above in paragraphs 20-21.

30. Hence, UNHCR recommends the Government to refrain from providing differential rights to different categories of persons in need of international protections. In any case, UNHCR recommends the Government to pronounce itself clearly on the objective and reasonable justification for the proposed differentiated treatment.

Recommendations Concerning the Introduction of Temporary Residence Permit for Persons Granted International Protection as a General Rule

UNHCR recommends that the Government of Sweden:

1. Refrains from the proposed differentiation of rights depending on status, which may not be objectively justifiable;
2. To grant also beneficiaries of subsidiary protection a minimum of three years residence permit, followed thereafter by the possibility for permanent residency.

Specific Considerations Concerning Children

31. UNHCR observes that the Proposal does not make any exemption for children in families or unaccompanied or separated children in regard to the temporary residence permits. However, children and their families, as well as unaccompanied or separated children, who applied for asylum prior to 24 November 2015,³⁸ will be exempted from the application of the proposed temporary law.³⁹

³⁶ Collected from Eurostat: http://ec.europa.eu/eurostat/statistics-explained/index.php/File:First_instance_decisions_in_the_EU-28_by_outcome_selected_citizenships_4th_quarter_2015.png

³⁷ UNHCR, *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update IV*, November 2015, p. 22, available at: <http://www.refworld.org/docid/5641ef894.html>

³⁸ This is the date when the Government of Sweden announced the agreement to introduce restrictions, see <http://www.regeringen.se/artiklar/2015/11/regeringen-foreslar-atgarder-for-att-skapa-andrum-for-svenskt-flyktingmottagande/>

³⁹ Point 2 of the provisional regulations on p. 7 of the Proposal.

32. UNHCR wishes to emphasize that children, just as adults, are entitled to a stable and secure legal status, which should not be subject to regular review.⁴⁰ In the case of children, this is further supported by a number of rights in the Convention on the Rights of the Child (hereafter the “CRC”),⁴¹ which recognizes children’s right to development and the right of refugee children and children deprived of their family environment to special protection and assistance.⁴² Article 20 of the CRC specifically provides that “when considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing”. Finding durable solutions for young children, that will allow them to integrate into communities, should be central in determining the best interests of children. The UN Committee on the Rights of the Child, which provides guidance on the interpretation of the CRC, has in its General Comment No. 6,⁴³ found that efforts to find durable solutions for unaccompanied or separated children should be initiated and implemented without undue delay and, wherever possible, immediately upon the assessment of a child being unaccompanied or separated.⁴⁴
33. UNHCR is concerned that unaccompanied or separated children who are granted temporary residence permit in Sweden would be subjected to regular reviews of their protection status, which could be detrimental for their development into adulthood. Further, UNHCR is concerned that unaccompanied or separated children granted residence permit as refugees or beneficiaries of alternative protection, based on the fact that they as children would face child-specific forms of persecution, or based on other child-specific grounds for residence permit, could be denied continued residence permit once they reach the age of majority. This could happen if - at the time of review of the protection status - the child has reached the age of majority, and the child-specific protection risks no longer apply. Such a situation would not constitute a durable solution for the child and would most likely have a significantly negative effect on the well-being of the child.
34. Moreover, UNHCR is concerned that the Proposal would have a detrimental effect on the well-being and integration of unaccompanied or separated children granted alternative protection who would not have the right to family reunification until their status becomes permanent, normally after three years (see further below at paragraphs 59-64). Three years in a child’s life is a significant time period, to live in uncertainty and without parents or other care-takers, and could have far-reaching consequences for the child’s development into adulthood. In addition, the risk that the child will reach the age of majority, and lose the right to reunite with his/her parents and family would be particularly distressing for the child.
35. In UNHCR’s view, granting children temporary residence permits could thus be at variance with the best interests of the child principle and the recommendations by the UN Committee on the Rights of the Child.

⁴⁰ UNHCR, ExCom, *Conclusion No. 104*, para. (j). See also observations above concerning cessation of refugee status.

⁴¹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>

⁴² The CRC, Articles 6, 20 22, and 27.

⁴³ UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: <http://www.refworld.org/docid/42dd174b4.html> para. 79.

⁴⁵ Proposal, pp. 27-31. The 24 November 2015 was when the Government at a press conference announced the intention to introduce the restrictions put forward in the present proposal.

Recommendations Concerning the Granting of Temporary Residence Permit to Children

UNHCR recommends that the Government of Sweden:

1. Provide children, be they unaccompanied or separated or in families, a secure residence status that supports their attainment of a durable solution which is long-term and sustainable and ensures that the child is able to develop into adulthood, consistent with the child's needs and rights according to the CRC, and more specifically the principle of the best interests of the child.

d. Restrictions Concerning Family Reunification for Refugees and Beneficiaries of Subsidiary Protection

36. According to the Proposal, persons granted refugee status will have the right to family reunification with their spouse and unmarried children under the age of 18 years, but not with any other person outside of the nuclear family. The person granted refugee status will only enjoy the right to family reunification if it is assessed that he or she has reasonable prospects of being granted a permanent residence permit. Persons granted residence permit as "persons in need of alternative protection" will not have the right to family reunification unless a) the sponsor already cohabits with one or more of his/her under-aged children in Sweden and applied for asylum latest on 24 November 2015; or b) the sponsor cohabits with one or more of his/her under-age children in Sweden, and at least one of the children applied for asylum latest 24 November 2015 (even if the sponsor him/herself applied for asylum later); or c) the sponsor has obtained a permanent residence permit by becoming self-sufficient.⁴⁵
37. The Proposal also introduces a sufficient resource requirement for refugees, and those beneficiaries of alternative protection who – exceptionally – will be entitled to family reunification. The Proposal mentions that when the limited sufficient resource requirement in place according to the Alien's Act was introduced in 2009, the Government argued that the sufficient resource requirement would promote the integration of third country nationals by increasing the sponsor's responsibility for his/her family's income. In the present Proposal, the reason stated to further increase the sufficient resource requirement, is to align the Swedish asylum legislation with the common EU standards.⁴⁶ The sufficient resource requirement will not apply in situations when an application for family reunification has been submitted latest on 31 May 2016, the expected date of entry into force of the proposed law.
38. As UNHCR understands, the sufficient resource requirement encompasses the conditions set out in Article 7 of the EU Directive concerning the Right to Family Reunification,⁴⁷ including that the sponsor holding the residence permit in Sweden must be able to support him/herself, as well as his/her family members, and have an accommodation of sufficient size to allow space for him/herself and his/her family members. In UNHCR's understanding, the requirement applies to refugees, if their family members do not apply for family reunification within three months of the sponsor obtaining refugee status in Sweden. In situations when persons

⁴⁵ Proposal, pp. 27-31. The 24 November 2015 was when the Government at a press conference announced the intention to introduce the restrictions put forward in the present proposal.

⁴⁶ Proposal, p. 32.

⁴⁷ European Union: 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> (hereafter "Family Reunification Directive").

granted alternative protection status are eligible for family reunification, the sufficient resource requirement applies to them on the same premise.

39. In addition, if the sponsor or one of the family members has a strong tie to another country outside the EU, in which the family reunification is possible, the sufficient resource requirement will apply regardless of whether the application or family reunification was submitted within the three-month rule. This is also the case when the spouses have not cohabitated for a longer period of time in a third country, or it is otherwise evident that the relationship is not well established. The Proposal also provides that the Government, or the authority which the Government instructs, can provide details about how the prerequisites in the regulation about sufficient resource requirement shall be interpreted. Consequently, there are no details in the Proposal on how the prerequisites in the regulation shall be interpreted.
40. Unaccompanied or separated children are exempted from the sufficient resource requirement.⁴⁸

The right to family unity and family reunification in international and European law

41. UNHCR wishes to point out that the family is the fundamental unit of society entitled to protection by society and the State.⁴⁹ While the 1951 Convention is silent on the question on family reunification and family unity, the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons recommends that Member States “take the necessary measures for the protection of the refugee's family, especially with a view to (...) [e]nsuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.”⁵⁰ Also, the UNHCR Executive Committee has adopted numerous Conclusions that refer to the right to family, including ExCom Conclusion No. 85, which calls on States to implement measures to facilitate family reunion of refugees in a positive and humanitarian spirit and without undue delay, and, where necessary, to consider developing the legal framework to give effect to a right to family unity for all refugees.⁵¹ Furthermore, family unity is a fundamental and important human right contained in a number of international and regional instruments to which Sweden is a State party. These are the Universal Declaration of Human Rights,⁵² (Article 16(3)); the International Covenant on Civil and Political Rights,⁵³ (Article 17); the International Covenant on Economic, Social and Cultural

⁴⁸ Proposal, pp. 31-33.

⁴⁹ See, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 16(3) available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> ; and UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 23(1), available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>

⁵⁰ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <http://www.unhcr.org/refworld/docid/40a8a7394.html>.

⁵¹ UNHCR, *Conclusion on International Protection*, 9 October 1998, No. 85 (XLIX) - 1998, paras. (u) to (x), available at: <http://www.refworld.org/docid/3ae68c6e30.html>.

⁵² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>

⁵³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>

Rights,⁵⁴ (Article 10); the CRC,⁵⁵ (Article 16); as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms⁵⁶ (Article 8).

42. Following separation caused by forced displacement, such as from persecution and war, family reunification is often the only way to ensure respect for a refugee's right to family unity. At the moment of flight, persons are forced to leave often without ensuring or knowing if their families are safe. Once in safety, refugees are in many cases unaware of the whereabouts of their family. Others have to make difficult decisions about leaving their family behind to find safety in another country.⁵⁷
43. Separation of family members during forced displacement and flight can have devastating consequences on peoples' well-being, as well as on their ability to rehabilitate from traumatic experiences of persecution and war and focus on learning a new language and adapting to the environment in their country of asylum⁵⁸. The family plays an essential role in helping persons rebuild their lives and can provide critical support to adapt to new and challenging circumstances, and overcome traumatic experiences. Restoring families can also ease the sense of loss that accompanies many refugees who, in addition to family, have lost their country, network and life as they knew it. Family support in this sense goes beyond any traditional and cultural understanding of a family but will include those who rely and depend on each other. It is with this in mind that UNHCR advocates for family reunification mechanisms which are swift and efficient in order to bring families together as early as possible.⁵⁹
44. The case law of the ECtHR, has also affirmed that family unity is an essential right and a fundamental element in allowing persons who have fled persecution to resume a normal life, and that refugees should benefit from a family reunification procedure which is more favourable than other foreigners, due to their vulnerabilities. In this context, the ECtHR finds it essential that the national authorities process the request for family reunification without undue delay.⁶⁰
45. In analysing the right to family unity and life in international law, Professor James Hathaway has noted that the duty of States to act reasonably in taking measures to ensure the reunification of families does not compel an immediate right of all refugees to family reunification; rather "delay in allowing refugees to access family reunification facilities must be based in rational substantive considerations, rather than simply on the basis of the formal status assigned to them."⁶¹ In other words, delaying a holder of temporary subsidiary status the right to reunite simply due to his or her status would be inconsistent with international law. More generally on delays, Hathaway notes that "In some cases, delays may defeat the very possibility

⁵⁴ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html>

⁵⁵ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>

⁵⁶ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>

⁵⁷ 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. 3, available at: <http://www.refworld.org/docid/4f55e1cf2.html>

⁵⁸ UNHCR, *A New Beginning: Refugee Integration in Sweden - It's about time!*, September 2013, available at: <http://www.refworld.org/docid/5295a60e4.html>.

⁵⁹ See footnote. 57 above, p. 3-4.

⁶⁰ *Tanda-Muzinga c. France*, Requête no 2260/10, Council of Europe: European Court of Human Rights, 10 July 2014, available at: <http://www.refworld.org/docid/53be80094.html> para. 75.

⁶¹ Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p.559.

or logic of reunification, as children reach the age of majority, and are no longer eligible (for family reunification or) parents die”.⁶²

Limiting reunification to the nuclear family

46. As stated above, while there is no single, universally agreed definition of what constitutes a family, UNHCR promotes cultural sensitivity and underlines that flight may lead to separation and loss of extended family members in close relationships of dependency. Accordingly, UNHCR encourages States to adopt a more inclusive definition, beyond what is known as the traditional “nuclear family”, including for the purpose of family reunification. UNHCR’s ExCom Conclusion No. 24 notes in this respect that: “It is hoped that countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.”⁶³
47. UNHCR considers that a nuclear family is generally accepted as consisting of spouses and, their minor or dependent, unmarried children and minor siblings. This would include adopted children, whether adopted legally or on a customary basis. Moreover, not only legally-recognized spouses (including same-sex spouses), but also individuals who are engaged to be married, who have entered a customary marriage (also known as “common-law” marriages), or who have established long-term partnerships (including same-sex partners), are to be considered as spouses.⁶⁴
48. Besides this notion of the nuclear family, UNHCR stresses that the element of dependency⁶⁵ among family members, physical and financial, as well as psychological and emotional, should find its appropriate weight in the final determination: “Dependency may usually be assumed to exist when a person is under the age of 18 years, but continues if the individual (over the age of 18) in question remains within the family unit and retains economic, social and emotional bonds. Dependency should be recognized if a person is disabled and incapable of self-support, either permanently or for a period expected to be of long duration. Other members of the household may also be dependents, such as grandparents, single/lone brothers, sisters, aunts, uncles, cousins, nieces, nephews, grandchildren; as well as individuals who are not biologically related but are cared for within the family unit.”⁶⁶

Denying beneficiaries of alternative status the right to family unity and family reunification

49. UNHCR is aware that according to Article 3(2)(c) of the Family Reunification Directive, beneficiaries of subsidiary (i.e. alternative) protection are not included in the scope of the Directive. UNHCR, however, considers that the humanitarian

⁶² Ibid, p. 538.

⁶³ UNHCR, *Family Reunification*, 21 October 1981, No. 24 (XXXII) – 1981, available at: <http://www.unhcr.org/3ae68c43a4.html>

⁶⁴ 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, see footnote 57 above; UN High Commissioner for Refugees (UNHCR), *UNHCR Resettlement Handbook, 2011*, July 2011, p. 271, available at: <http://www.refworld.org/docid/4ecb973c2.html>

⁶⁵ Dependency infers that a relationship or a bond exists between family members, whether this is social, emotional or economic. The relationship or bond between the persons in question will normally be one which is strong, continuous and of reasonable duration. Dependency does not require complete dependence, such as that of a parent and minor child, but can be mutual or partial dependence, as in the case of spouses or elderly parents.

⁶⁶ UNHCR, *Resettlement Handbook*, p.178 and p. 273, available at: <http://www.refworld.org/docid/4ecb973c2.html> See also: UNHCR, *Note on Family Reunification*, 18 July 1983, available at: <http://www.refworld.org/docid/3bd3f0fa4.html>

needs of individuals granted subsidiary protection are not different from those of refugees, and that differences in entitlements are therefore not justified in terms of the individual's flight experience and protection needs. There is also no reason to distinguish between the two as regards their right to family life and access to family reunification.

50. The European Commission also 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 subsidiary protection.⁶⁷ This is justified by the fact that the convergence of both protection statuses is also confirmed in the recast Qualification Directive.⁶⁸
51. Furthermore, the Court of Justice of the European Union (hereafter "CJEU") has 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.⁶⁹
52. The ECtHR has also concluded in several cases that since national authorities had not given due consideration to the applicants' specific circumstances, the family reunification procedure had not offered the requisite guarantees of flexibility, promptness and effectiveness to ensure compliance with their right to respect for their family life. For that reason, the State had not struck a fair balance between the applicants' interests on the one hand, and its own interest in controlling immigration on the other, in violation of Article 8.⁷⁰ More generally, the ECtHR has 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.⁷¹
53. Moreover, UNHCR wishes to refer to the ECtHR, which, as stated above in paragraph 27, has held that a difference of treatment in "analogous, or relevantly similar, situations", is discriminatory if it has no objective and reasonable justification. The Council of Europe Committee of Ministers have also adopted a Recommendation on family reunion,⁷² which equally applies to refugees and "other persons in need of international protection".

⁶⁷ *Ibid.*

⁶⁸ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L 337/9-337/26; 20.12.2011, 2011/95/EU, p. 9, available at: <http://www.refworld.org/docid/4f197df02.html>

⁶⁹ 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.

⁷⁰ *Mugenzi c. France*, Requête no 52701/09, Council of Europe: European Court of Human Rights, 10 July 2014, available at: <http://www.refworld.org/docid/53be81784.html>), *Tanda-Muzinga c. France*, Requête no 2260/10, Council of Europe: European Court of Human Rights, 10 July 2014, available at: <http://www.refworld.org/docid/53be80094.html> , *Senigo Longue et autres c. France*, Requête no 19113/09, Council of Europe: European Court of Human Rights, 10 July 2014, available at: <http://www.refworld.org/docid/53be7dc94.html> , 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://hudoc.echr.coe.int/webservices/content/pdf/003-4817913-5875206?TID=lwyqpbzdr>

⁷¹ *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>.

⁷² 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>

Applying the sufficient resource requirement to refugees (and to those beneficiaries of alternative protection who exceptionally will have the right to family reunification) where the application is not made within three months of the recognition

54. When the Family Reunification Directive was introduced, UNHCR welcomed the adoption of more favourable rules for family reunification in the Directive and has called on all Member States not to apply time limits to the more favourable conditions granted to refugees.⁷³
55. UNHCR is concerned that applying a sufficient resource requirement for family reunification, where the application for family reunification is not submitted within three months after the granting of the status, as suggested in the Proposal, does not take sufficiently into account the particularities of the situation of refugees and other persons in need of international protection, or the special circumstances that have led to the separation of their families. This may prove to be a serious obstacle to family reunification for them. Refugees and other persons in need of international protection may not be aware if their family members are still alive, or of their whereabouts if they were separated during flight. Tracing of family members is a lengthy process which exceeds three months in many cases. In addition, family members may be required to travel – sometimes across several countries – in order to reach an Embassy at which they can submit an application for family reunification. They may also face difficulties in providing the documentation required, as documents may have been lost or destroyed during flight, and family members are unable to approach the authorities of their country of origin for documents due to risks of persecution.
56. In this respect, UNHCR refers to the European Commission guidance on the application of the Family Reunification Directive, where it is recommended that refraining from applying Article 12(1) third subparagraph is the most appropriate solution.⁷⁴ The Commission adds that “if Member States opt to apply this provision, the Commission considers that they should take into account objective practical obstacles the applicant faces as one of the factors when assessing an individual application.”⁷⁵ In addition, the European Commission, in its guidance on the application of the sufficient resources requirement, refers to the Chakroun case, in which the CJEU held that, since authorisation of family reunification is the general rule, this faculty must be interpreted strictly. The margin which EU Member States are recognised as having must therefore not be used in a manner that would undermine the objective and the effectiveness of the Directive⁷⁶. The CJEU also specified that this faculty must be exercised in the light of Articles 7 and 24(2) and (3) of the Charter, which require the Member States to examine applications for family reunification in the interests of the children concerned and with a view to promoting family life.⁷⁷
57. Hence, UNHCR recommends that the Government of Sweden refrains from applying the sufficient resource requirement as a blanket provision, to beneficiaries

⁷³ 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. 6, available at: <http://www.refworld.org/docid/4f55e1cf2.html>

⁷⁴ European Commission, *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*, 3 April 2014, p. 23, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/legal-migration/family-reunification/docs/guidance_for_application_of_directive_on_the_right_to_family_reunification_en.pdf

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, p. 12, which refers to Case C-578/08, *Chakroun*, 4 March 2010, para 43; Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 74.

⁷⁷ *Ibid.*, which refers to Cases C-356/11 and C-357/11, *O. & S.*, 6 December 2012, para 82.

of international protection, in order not to undermine the right to achieve family unity. As a minimum, time-limits should only apply to the initial application for family reunification and should not require that the applicant and family member provide all the documents needed within the three month period.⁷⁸

58. In regard to the requirement to assess that the person granted refugee status has reasonable prospects of being granted a permanent residence permit in order for him/her to benefit from the right to family reunification, UNHCR wishes to recall that refugee status should, in principle, not be subject to frequent reviews; such may be to the detriment of the refugee's sense of security, which international protection is intended to provide.⁷⁹

Applying the sufficient resource requirement where family reunification is possible in a third country

59. Regarding the possibility to apply conditions for family reunification where family reunification is possible in a third country, suggested in the Proposal, UNHCR wishes to draw attention to the guidance of the European Commission, which has clarified that:

"this option requires that the third country be a realistic alternative and, thus, a safe country for the sponsor and family members. The burden of proof on the possibility of family reunification in a third country lies on the Member State, not the applicant. In particular, the relocation to such a third country should not pose a risk of persecution or of *refoulement* for the refugee and/or his family members and the refugee should have the possibility to receive protection there in accordance with the 1951 Convention relating to the Status of Refugees. The 'special links' imply the sponsor and/or family member have family, cultural and social ties with the third country."⁸⁰

Particular concerns in respect of children

60. UNHCR would like to recall that according to Article 3 of the CRC, the best interests of the child shall be a primary consideration in all actions affecting children, and applies in all family reunification cases involving children, whether the child is in Sweden, in the country of origin or in a third country.
61. A child's right to family life is specifically protected under Articles 9, 10 and 16 of the CRC, which, *inter alia*, provides that a family reunification application involving a child should be dealt with in a positive, humane and expeditious manner, and that the child has the right to maintain a regular and direct contact with both parents. The UN Committee on the Rights of the Child has reminded States parties of their obligations in this respect, noting that "Whenever family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best-interests-based balancing test has decided against

⁷⁸ 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. 6, available at: <http://www.refworld.org/docid/4f55e1cf2.html>.

⁷⁹ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, para. 135, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

⁸⁰ European Commission, *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*, 3 April 2014, p. 23, see footnote 31 above.

return, the obligations under article 9 and 10 of the Convention come into effect and should govern the host country's decisions on family reunification therein".⁸¹

62. In addition, UNICEF has highlighted that all judicial and administrative processes concerning children need to be pursued as quickly as possible. Delay and uncertainty can be extremely prejudicial to children's healthy development. From the child's perspective, any period of time is significantly longer in the life of a child than in that of an adult.⁸²
63. UNHCR also wishes to refer to the ECtHR, which has made the point that due consideration should be given to cases where a parent has achieved settled status in a country and wants to be reunited with his/her child who, for the time being, finds him/herself in the country of origin.⁸³ The ECtHR has also noted that it may be unreasonable to force the parent to choose between giving up the position which she has acquired in the country of settlement or to renounce the mutual enjoyment by parent and child of each other's company, which constitutes a fundamental element of family life.⁸⁴
64. Consequently, delaying, or in some cases denying,⁸⁵ the right of children to reunite with their parents, guardians and other family members, whether it is the child who is the sponsor, or the applicant for family reunification, would be at variance with the obligations of Sweden under international and regional law.
65. UNHCR would submit that in some cases, reunification with parents or guardians traced in the country of origin or in a third country may be in the best interests of the child. In other cases however, such reunification will not be in the best interests of the child, for example if the child has international protection needs vis-à-vis that country and/or risks abuse or neglect from his or her parents (or other caregivers being considered).⁸⁶ Further to the comments above, UNHCR thus recommends that unaccompanied or separated children who cannot reunite with family members in their country of origin or in a third country be given the right to, as promptly as possible, seek family reunification in Sweden with their parents or guardian, as well as with siblings.⁸⁷ UNHCR also recommends, as part of the examination of the best interest of children, to consider and provide the possibility for refugee children to be reunited with other family members or guardians where their parents in direct ascending line cannot be traced. Children and adolescents are in particular need of a stable family environment to ensure the development of their personal and social skills. Recognizing that there may be tensions and dysfunctional family situations with the potential for abuse and neglect, it is important to ensure, in all cases, that the "best interest" of the child is promoted.⁸⁸

⁸¹ See CRC, General Comment No. 6, para. 83.

⁸² UNICEF, Implementation Handbook for the Convention on the Rights of the Child: Fully Revised Third Edition, September 2007, available at: http://www.unicef.org/publications/index_43110.html See also, UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, para. 60, available at: <http://www.refworld.org/docid/51a84b5e4.html>

⁸³ *Ebrahim and Ebrahim v. the Netherlands*, European Court of Human Rights, 18 March 2003.

⁸⁴ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, European Court of Human Rights, Judgment of 28 May 1985, Series A no. 94, para. 68.

⁸⁵ This could for example be the case if a child has been granted alternative status and the child turns 18 while to become eligible for family reunification.

⁸⁶ UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para 81, available at: <http://www.refworld.org/docid/42dd174b4.html>.

⁸⁷ UNHCR, Note on Family Reunification, July 1983, para. 5(a)(iii), available from: <http://www.refworld.org/pdfid/3bd3f0fa4.pdf>. CRC, Articles 9, 10 and 16.

⁸⁸ UNHCR, Protecting the Family: Challenges in Implementing Policy in the Resettlement Context, June 2001, available at: <http://www.refworld.org/docid/4ae9aca12.html>, para. 22.

The importance of family reunification for successful integration

66. In UNHCR's view, the ability to reunify with one's family supports the integration process, which States are requested to facilitate as far as possible, pursuant to Article 34 of the 1951 Convention. Separation of family members during forced displacement and flight can have devastating consequences on peoples' well-being, as well as on their ability to rehabilitate from traumatic experiences of persecution and war and inhibit their ability to learn a new language, search for a job and adapt to their country of asylum. As mentioned above, the UNHCR ExCom Conclusion No. 104 on local integration, notes the potential role of family members in promoting the smoother and more rapid integration of refugee families given that they can reinforce the social support system of refugees. Research consequently shows that, in most cases, family reunification is the first priority for refugees upon receiving status.⁸⁹
67. In a study on the integration of refugees in Europe, UNHCR documented that family reunification was a cross-cutting issue which impacted on other integration indicators, including employment, due to the stress, distraction and anxiety family separation causes.⁹⁰ Facilitating family reunification will therefore have a positive effect on integration.
68. UNHCR, however, notes with concern that refugees and others beneficiaries of international protection may not be able to fulfil the sufficient resource requirement in the initial years. As a result, family reunification would be delayed. Since family reunification impacts positively on integration, UNHCR considers that the proposed measures could hamper integration, to the detriment of the individual as well as the State.

Family reunification as a legal pathway

69. Finally, UNHCR regrets that the family reunification mechanism, as a legal pathway, will be restricted and is concerned that this may lead to more individuals, including women and children, having to resort to smugglers and risky journeys to Europe. Given the fact that most asylum-seekers are compelled to pay human smugglers large sums of money to reach Europe in order to exercise their right to seek asylum, many families are unable to travel together, and rely on legal family reunification procedures being available once a member of the family has been granted international protection.

⁸⁹ UNHCR, A New Beginning: Refugee Integration in Europe, September 2013, available at: <http://www.refworld.org/docid/522980604.html>; and UN High Commissioner for Refugees (UNHCR), A New Beginning: Refugee Integration in Sweden - It's about time! September 2013, available at: <http://www.refworld.org/docid/5295a60e4.html>.

⁹⁰ *Ibid.*

Recommendations Regarding Family Reunification for Refugees and Beneficiaries of Subsidiary Protection

UNHCR recommends that the Swedish Government:

1. Allow equal access to family reunification for refugees and beneficiaries of subsidiary protection.
2. Allow children, including unaccompanied children, to reunite with their family members, regardless whether the child is the sponsor, or is seeking reunification with a family member in Sweden, pursuant to the CRC, and according to which applications for family reunification should be dealt with in a positive, humane and expeditious manner.
3. Extends the right to family reunification to encompass a broader range of family members who are dependent on each other, including elderly parents and unmarried adult children.
4. Do not impose a sufficient resource requirement for family reunification of beneficiaries of international protection.

UNHCR Regional Representation for Northern Europe

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