

## UNHCR observations on the proposed legislative amendments to the Swedish Aliens Act – Report by the Cross-party Committee of Inquiry on Migration

### [SOU 2020:54 – En långsiktigt hållbar migrationspolitik Betänkande av Kommittén om den framtida svenska migrationspolitiken]

#### I. Introduction

1. The United Nations High Commissioner for Refugees (“UNHCR”) Representation for the Nordic and Baltic Countries (“RNB”) is grateful to the Government of Sweden for the invitation to provide observations on the legislative amendments proposed in the report “A sustainable long-term migration policy – A report by the Cross-party Committee of Inquiry on Migration” (*En långsiktigt hållbar migrationspolitik - Betänkande av Kommittén om den framtida svenska migrationspolitiken*) - hereafter the “Proposal”.<sup>1</sup>
2. UNHCR has a direct interest in law proposals in the field of asylum, as the agency entrusted by the UN General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.<sup>2</sup> Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,<sup>3</sup> whereas the 1951 Convention relating to the Status of Refugees<sup>4</sup> 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 of the provisions of the 1951 Convention and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol).<sup>5</sup>
3. The UN General Assembly has further entrusted UNHCR with a global mandate to provide protection to stateless persons worldwide and for preventing and reducing statelessness.<sup>6</sup> It has specifically requested UNHCR “to provide technical and advisory

<sup>1</sup> Full Proposal available at: <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2020/09/sou-202054/>.

<sup>2</sup> 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> (“the Statute”).

<sup>3</sup> 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. 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.

<sup>4</sup> 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”.

<sup>5</sup> UNHCR’s supervisory responsibility has also been reflected in European Union (“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.

<sup>6</sup> UN General Assembly Resolution A/RES/50/152, 9 February 1996, available at: <http://www.unhcr.org/refworld/docid/3b00f31d24.html>, reiterated in subsequent resolutions, including

services pertaining to the preparation and implementation of nationality legislation to interested States”.<sup>7</sup> The General Assembly has also entrusted UNHCR with the specific role foreseen in Article 11 of the 1961 Convention on the Reduction of Statelessness (“1961 Convention”).<sup>8</sup> Furthermore, UNHCR’s Executive Committee (“ExCom”) has requested UNHCR to provide technical advice with respect to nationality legislation and other relevant legislation with a view to ensuring adoption and implementation of safeguards, consistent with fundamental principles of international law, to prevent the occurrence of statelessness which results from arbitrary denial or deprivation of nationality.<sup>9</sup>

4. 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 (“UNHCR Handbook”).<sup>10</sup> 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.
5. The following comments are based on international refugee protection standards set out in the 1951 Convention, Conclusions of the UNHCR 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.<sup>11</sup> As a member of the UNHCR ExCom since its inception in 1958, Sweden has contributed extensively to the development of the Conclusions on International Protection, adopted unanimously by the ExCom.<sup>12</sup>

## II. General Observations

6. At the outset, UNHCR would like to express its gratitude for Sweden’s long tradition of providing sanctuary to persons in need of international protection, and for its strong support to the international protection regime and the work of UNHCR. UNHCR

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A/RES/61/137 of 25 January 2007, available at: <http://www.unhcr.org/refworld/docid/45fa902d2.html>,  
A/RES/62/124 of 24 January 2008, available at: <http://www.unhcr.org/refworld/docid/47b2fa642.html>, and  
A/RES/63/148 of 27 January 2009, available at: <http://www.unhcr.org/refworld/docid/4989619e2.html>.

<sup>7</sup> UN General Assembly Resolution A/RES/50/152, para. 15.

<sup>8</sup> UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: <https://www.refworld.org/docid/3ae6b39620.html>. Article 11 provides for the creation of a “body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority”.

<sup>9</sup> UNHCR ExCom in its Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons No. 106 (LVII), 6 October 2006, paras. (i) and (j). See, UNHCR, Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusion No. 1 – 114), October 2017, HCR/IP/3/Eng/REV. 2017, available at: <https://www.refworld.org/docid/5a2ead6b4.html>.

<sup>10</sup> 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/IP/4/ENG/REV. 4, available at: <https://www.refworld.org/docid/5cb474b27.html>.

<sup>11</sup> Goodwin Gill/McAdam, *The Refugee in International Law*, Oxford University Press, 2007, p. 217.

<sup>12</sup> As of January 2015, 111 Conclusions on International Protection have been adopted by the ExCom.

welcomes the efforts made by the Government of Sweden to adhere to its obligations under international and European, including European Union (“EU”) law. UNHCR also appreciates that the Proposal’s starting point is that Sweden’s future migration policy must be humane, legally certain and effective.<sup>13</sup>

7. UNHCR also welcomes several of the important elements in the Proposal, such as the possibility to obtain permanent residency after three years of temporary residence, the proposed improvements for children born stateless in Sweden to acquire Swedish citizenship and more flexible rules on family reunification. UNHCR further appreciates the Proposal’s significant emphasis on the value and importance of legal pathways. In this regard, UNHCR would like to express gratitude to Sweden for its continued commitment and long-standing contribution to meeting global resettlement needs as well as for being a strong supporter of UNHCR and its 3-year strategy on resettlement and complementary pathways. UNHCR looks forward to sustained cooperation with Sweden in working together to find solutions for refugees both in Europe and globally, through resettlement and other complementary pathways, including community sponsorship programs.
8. UNHCR recalls that the aim of the Act on restrictions to obtaining a residence permit in Sweden introduced in 2016 (“Temporary Law”),<sup>14</sup> was to reduce the number of asylum-seekers arriving to Sweden, and to align the Swedish legal framework with the common EU standards. At the time, UNHCR expressed appreciation that the restrictions were not intended to permanently restrict the asylum space in Sweden, but rather as temporary measures to allow Sweden to better cope with the high number of arrivals in 2015 - to be reviewed after three years.<sup>15</sup>
9. While recognizing that Sweden, in a European context, has received a comparatively large number of asylum-seekers, UNHCR notes that the number of asylum-seekers in Sweden has decreased significantly in the past five years, from approximately 163,000 asylum applicants in 2015 to a projected 13,500 applicants in 2020, which is the lowest number of applicants in over 20 years.<sup>16</sup> UNHCR had therefore hoped that Sweden would not have found it necessary to permanently incorporate some of the measures intended as temporary into Swedish asylum policy. As expressed in the “UNHCR Recommendations to Sweden on strengthening refugee protection in Sweden, Europe and globally” (“UNHCR Recommendations to Sweden”), UNHCR recommends Sweden to reconfirm its commitment to an “asylum system that fully respects international standards and provides

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<sup>13</sup> Proposal, p. 25.

<sup>14</sup> Act (2016:572) on temporary restrictions to obtaining a residence permit in Sweden, available at: <https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2016752-om-tillfalliga-begransningar-av-sfs-2016-752>.

<sup>15</sup> UNHCR, Observations by the UNHCR 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”), 10 March 2016, available at: <https://www.refworld.org/docid/56e27d7e4.html>. See also, UNHCR, Observations on the Law Proposal ”Förlänging av Lagen om Tillfälliga Begränsningar av Möjligheten att få Uppehållstillstånd i Sverige – utkast till Lagrådsremiss”, 18 March 2019, <https://www.regeringen.se/495171/contentassets/e96731d263df43c39569a3a9998d6741/unhcr.pdf>.

<sup>16</sup> SMA, ”Lägsta antalet asylsökande sedan millennieskiftet”, 23 October 2020, available at: <https://www.migrationsverket.se/Om-Migrationsverket/Pressrum/Nyhetsarkiv/Nyhetsarkiv-2020/2020-10-23-Lagsta-antalet-asylsokande-sedan-millennieskiftet.html>. The drop in asylum applications in 2020 is in part also due to the impact of the COVID-19, having reduced asylum applications across the region.

the foundation for a welcoming and inclusive society for people fleeing war, conflict and persecution”, as some of the proposed measures raise concern.<sup>17</sup>

10. At the European level, UNHCR encourages all EU Member States, including Sweden, to use the opportunity offered by the EU Pact on Migration and Asylum presented in September 2020 to make progress on issues which have proven challenging in recent years. This is an opportunity for Sweden and like-minded States to make proactive contributions and show the way in moving towards an approach on asylum that is coherent, comprehensive, well-managed, solidarity-based and predictable, at the national, EU and global levels.<sup>18</sup>

### III. Specific Observations

11. In the following sections, UNHCR will highlight specific observations on select elements of the Proposal, that is, a) duration of residence permits, b) family reunification for refugees and beneficiaries of subsidiary protection and c) children born stateless in Sweden.

#### a. Duration of residence permits

12. 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 refugees. While voluntary repatriation is the preferred durable solution for most refugees, it is often not available in safety and dignity. The 1951 Convention thus foresees a gradual attainment of rights, with the end of the continuum being naturalization in the country of asylum. On the other hand, in situations of fundamental and durable changes in the country of origin, the refugee’s protection status may be ceased. There is no time limit set out in the 1951 Convention, and refugee status remains in place until the criteria in the Convention for ending of refugee status are met.
13. UNHCR welcomes that, according to the Proposal, persons in need of international protection who are resettled to Sweden will continue to be granted permanent residence permits at the initial decision. UNHCR also welcomes that beneficiaries of international protection may qualify for permanent residency after a period of at least three years of temporary residence provided certain conditions are met (see further below at paragraphs 21-23). Should temporary residence permits be considered in certain circumstances, UNHCR recommends that they be issued for a minimum period of five years (renewable) for both refugees and beneficiaries of subsidiary protection (*alternativt skyddsbehövande*),

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<sup>17</sup> UNHCR Recommendations to Sweden on strengthening refugee protection in Sweden, Europe and globally, May 2020, available at: <https://www.unhcr.org/neu/wp-content/uploads/sites/15/2020/06/UNHCR-recommendations-to-Sweden-on-strengthening-protection-of-refugees-May-2020.pdf> (“UNHCR Recommendations to Sweden”), p. 2.

<sup>18</sup> UNHCR, EU Pact on Migration and Asylum: Practical considerations for fair and fast border procedures and solidarity in the European Union, August 2020, available at: <https://www.refworld.org/docid/5f8838974.html>; UNHCR and IOM, Call for a truly common and principled approach to European migration and asylum policies, 22 September 2020, available at: <https://www.unhcr.org/news/press/2020/9/5f69deff4/unhcr-iom-call-truly-common-principled-approach-european-migration-asylum.html>; UNHCR, Fair and Fast: UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union, July 2019, available at: <https://www.refworld.org/pdfid/5b589eef4.pdf>.

in line with the practice in a number of EU Member States, and coherent with the time-frames foreseen under the EU Long-Term Residence Directive.<sup>19</sup>

#### *Temporary residence permits as a general rule*

14. UNHCR is concerned that a system with short temporary permits for an extended period of time may undermine the sense of stability and security which international protection is intended to provide.<sup>20</sup> Studies also show that temporary permits tend to have a negative impact on integration and health.<sup>21</sup>
15. As reflected in the UNHCR Recommendations to Sweden,<sup>22</sup> UNHCR thus recommends the Government to consider returning to the previous well-established practice of granting a more stable and secure status to persons in need of international protection. As noted in the Proposal, the system of granting beneficiaries of international protection permanent residence at the initial decision has been in place for a relatively long time and has also been confirmed by the Government and the Parliament on several occasions throughout the years. Such a measure would support integration and ensure a stable and sustainable foundation for all refugees and their families.<sup>23</sup> It would also reflect the increasing length and complexity of today's conflicts and the protracted nature of many of today's refugee situations.

#### *Different duration of permits for beneficiaries of subsidiary protection*

16. With respect to the proposal to maintain the difference in the length of the permits granted to refugees and beneficiaries of subsidiary protection respectively, UNHCR finds that a distinction between beneficiaries of international protection is often neither necessary nor objectively justified in terms of flight experience and protection needs.<sup>24</sup> 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 considers that there is no reason to expect the protection needs of subsidiary protection beneficiaries to be of a different nature or shorter duration

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<sup>19</sup> UNHCR, Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466, February 2018, available at: <https://www.refworld.org/docid/5a7835f24.html>, p. 33. See also UNHCR Recommendations to Sweden, p. 4.

<sup>20</sup> UNHCR observes that according to the Proposal, there is no upper time limit proposed as regards the maximum duration of temporary permits. UNHCR Handbook, para. 135. See also ExCom Conclusion No. 69 (XLIII) 1992, where in the context of applying the cessation clauses ExCom stated that it is important that refugees have the assurance that their status will not be subject to unnecessary review in the light of temporary changes, not of a fundamental character, in the situation prevailing in the country of origin; UNHCR, Note on the Integration of Refugees in the European Union, May 2007, available at: <http://www.unhcr.org/463b462c4.pdf>, para. 18.

<sup>21</sup> See, e.g., 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/>. UNHCR, Comments on the European Commission Proposal for a Qualification Regulation, p. 27.

<sup>22</sup> UNHCR Recommendations to Sweden, pp. 4-5, 9.

<sup>23</sup> UNHCR, ExCom Conclusion No. 104, Conclusion on Local Integration No. 104 (LVI) – 2005, para. (j).

<sup>24</sup> UNHCR, Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence, 27 July 2011, available at: <http://www.refworld.org/docid/4e2ee0022.html>; UNHCR, Comments on the Proposal for a Qualification Regulation, p. 33.

than the need for protection as refugees. In practice, beneficiaries of subsidiary protection are generally not able to return home earlier than refugees.<sup>25</sup>

17. 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.<sup>26</sup> Jurisprudence of the European Court of Human Rights (“ECtHR”) shows that differences in treatment between persons who are similarly situated – such as refugees and subsidiary protection beneficiaries – can only be justified if they pursue a legitimate aim and there is a proportionate relationship between this aim and the means employed to realise it.<sup>27</sup> In the context of duration of permits, the ECtHR has found a violation of the non-discrimination guarantee under Article 14 of the European Convention on Human Rights and Fundamental Freedoms (“ECHR”) in several cases on the grounds of differentiating between different categories of migrants.<sup>28</sup>
18. Against this background, UNHCR recommends the Government to afford the same or similar length of residence permit to all beneficiaries of international protection, to ensure respect for the principle of non-discrimination and equal treatment.

#### *Renewal of temporary permits*

19. As UNHCR understands, a consequence of the temporary nature is that residence permits will be subject to review every time they are to be renewed. The Proposal states that the renewal process ought not be too burdensome for the Swedish Migration Agency (“SMA”), given that it is not a full asylum assessment which is to be carried out when assessing an application for extension, but merely an examination of whether the need for protection remains or if there are applicable grounds for cessation.<sup>29</sup>

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<sup>25</sup> Submission by the Office of the UNHCR in the case of M.A. v. Denmark (Application no. 6697/18) before the European Court of Human Rights, 21 January 2019, available at: <https://www.refworld.org/docid/5c4591164.html>, para. 3.3.4.

<sup>26</sup> Charter of Fundamental Rights of the EU, Art. 21; 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: <https://www.refworld.org/docid/3ae6b3b04.html>, Art. 14. For jurisprudence, 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>.

<sup>27</sup> The ECtHR has found that a difference of treatment is discriminatory for the purposes of Article 14 ECHR if it “has no objective and reasonable justification”, that is 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”. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. See Niedzwiecki v. Germany, 58453/00, ECtHR, 25 October 2005, at: <http://www.refworld.org/docid/4406d6cc4.html>, and Okpiz v. Germany, 59140/00, ECtHR, 25 October 2005, at: <http://www.unhcr.org/refworld/docid/4406d7ea4.html>.

<sup>28</sup> See, for example, Hode and Abdi v. The United Kingdom and Niedzwiecki v. Germany, Okpiz v. Germany. See also Biao v. Denmark (Grand Chamber), Application no. 38590/10, Council of Europe: European Court of Human Rights, 24 May 2016, available at: <http://www.refworld.org/cases,ECHR,574473374.html> (indirect discrimination on grounds of ethnicity). For cases at the national level, see, for example, Decision of the AAC of 7 March 2006; in re: M.D., Egypt, interpreting Article 14 Swiss Federal Constitution (right to marry and to have a family), available at: <http://www.ark-cra.ch/emark/2006/english.htm>, and Arrêt n° 121/2013, Belgium: Cour constitutionnelle, 26 September 2013, available at: [http://www.refworld.org/publisher,BEL\\_CC,,BEL,5270ce364,0.html](http://www.refworld.org/publisher,BEL_CC,,BEL,5270ce364,0.html). See also UNHCR, Comments on the European Commission Proposal for a Qualification Regulation, p. 33.

<sup>29</sup> As stipulated in Chapter 4 Section 5 and 5a in the Swedish Aliens Act.

20. In UNHCR's view, regular reviews may contribute to legal uncertainty for the individual concerned and can also create an unnecessary burden on the asylum authorities and increased costs for the State.<sup>30</sup> In many cases, the permit is likely to be renewed as protection needs are often of a longer duration. Indeed, as also noted in the Proposal, in principle, all beneficiaries of international protection have had their temporary residence permit extended when the initial permit was about to expire under the Temporary Law.<sup>31</sup>
21. UNHCR further notes that the Swedish rules governing the review seem to lack clarity and do not specify under which circumstances cessation may be invoked. UNHCR thus sees a risk that these provisions may lead to premature or incorrect use of cessation. UNHCR thus recommends to clarify what kind of review should be undertaken at the time of renewal and what criteria are to be used. It is particularly important to clarify that an assessment of an extension of a residence permit should *not* automatically include a cessation procedure. Cessation procedures are permitted when the criteria set out in Article 1C of the 1951 Convention are met.<sup>32</sup> In UNHCR's view, there should not be an unnecessary mandatory re-assessment of protection needs.

#### *Conditions for granting permanent residency*

22. UNHCR considers it important to clearly define the conditions for granting a permanent residence permit, including the maintenance requirement as well as the proposed language and civic knowledge requirements. As noted by the Court of Justice of the EU ("CJEU"), such requirements need to take into consideration specific individual circumstances, such as certain specific needs, age, illiteracy and level of education. Furthermore, in accordance with the principle of proportionality, the detailed rules for such requirements must be suitable for achieving the objective of integration and must not go beyond what is necessary to attain them.<sup>33</sup>
23. UNHCR welcomes that children and individuals who are entitled to receive a national pension or guarantee pension should be exempted from the requirements for permanent residence permits with respect to language skills, civic knowledge and maintenance. UNHCR further welcomes that beneficiaries of international protection may also be exempted if there are exceptional circumstances (*synnerliga skäl*). Examples given in this

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<sup>30</sup> UNHCR, Comments on the European Commission Proposal for a Qualification Regulation, p. 27.

<sup>31</sup> Proposal, p. 244.

<sup>32</sup> See UNHCR Handbook, para. 135, UNHCR, Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), 10 February 2003, HCR/GIP/03/03, available at: <https://www.refworld.org/docid/3e50de6b4.html>.

<sup>33</sup> See CJEU, C-257/17, C, A v. Staatssecretaris van Veiligheid en Justitie, 7 November 2018, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=207423&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2104961>, paras. 60-65; and CJEU, C-484/17, K v. v. Staatssecretaris van Veiligheid en Justitie, 7 November 2018, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=207427&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2104852>. The CJEU has specified that the referring court "must ensure, in particular, that the knowledge required to pass the civic integration examination is at a basic level, that the condition imposed by the national legislation does not lead to an autonomous residence permit not being granted to third country nationals who have demonstrated their willingness to pass the examination and have made every effort to achieve that objective, that due account is taken of specific individual circumstances and that the fees relating to that examination are not excessive". paras. 21-23. See also, CJEU, C-579/13, P and S v. Commissie Sociale Zekerheid Breda and College van Burgemeester en Wethouders van de gemeente Amstelveen, 4 June 2015, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164725&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=16641050>, para. 49.

regard are individuals who are close to retirement age and therefore find it difficult to find work, persons with disabilities, illness or other limitations that could result in significant difficulties in meeting the requirements.

24. UNHCR recommends, however, to consider broadening the scope of the provision by using the prerequisite “special circumstances” (*särskilda skäl*) instead of “exceptional circumstances”. As the latter prerequisite is interpreted strictly in Swedish jurisprudence, there may be a risk of excluding categories of persons that cannot meet the requirements due to reasons that are outside of their control. The adoption of an appropriate prerequisite would also be important in light of Sweden’s obligations under the European Convention on Nationality, which stipulates that in establishing the conditions for naturalisation State parties “shall not provide for a period of residence exceeding ten years before the lodging of an application.”<sup>34</sup>

### **Recommendations Concerning Duration of Residence Permits**

UNHCR recommends the Government of Sweden to:

1. Afford beneficiaries of international protection a secure and stable status and avoid regular mandatory review of their protection needs;
2. Grant beneficiaries of international protection, i.e. refugees and subsidiary protection beneficiaries, residence permits of the same or similar length, as a differentiation in treatment may not be objectively justifiable;
3. Clarify the nature of the assessment to be carried out when an application of an extension of a residence permit is being reviewed;
4. Define clearly and comprehensively in the law or in the preparatory works the requirements that apply in order to qualify for permanent residence, and;
5. Slightly broaden the scope of exemptions to the requirements for permanent residence permits by using the prerequisite “special” instead of “exceptional” circumstances.

#### **b. Family Reunification for Refugees and Beneficiaries of Subsidiary Protection**

25. UNHCR strongly believes that supported and well-managed access to family reunification enables many women and children to safely access protection. Effective and prompt family reunification procedures help discourage communities from resorting to irregular means of travel, including criminal smuggling networks, remove the risk of undertaking dangerous journeys, and ensure more gender equity in terms of access to protection. Family reunification is also a strong element in support of successful integration strategies and programs. Research shows that there is a direct link between family reunification, mental health and successful integration.<sup>35</sup>

26. While UNHCR welcomes the removal of some of the restrictions of the Temporary Law, UNHCR remains concerned that the right to family reunification in Sweden, both for refugees and beneficiaries of subsidiary protection, in recent years has become severely restricted with numerous legal, practical and financial obstacles. The Global Compact on Refugees calls on States to put in place effective procedures and referral pathways to facilitate the family reunification of refugees, ensuring that beneficiaries of subsidiary

<sup>34</sup> Council of Europe, European Convention on Nationality, European Treaty Series - No. 166, Strasbourg, 6.XI.1997, available at: <https://rm.coe.int/168007f2c8>.

<sup>35</sup> UNHCR, Better Protecting Refugees in the EU and Globally: UNHCR's proposals to rebuild trust through better management, partnership and solidarity, December 2016, available at: <https://www.refworld.org/docid/58385d4e4.html>, p. 6.



protection also have access to family reunification an avoiding excessive legal requirements which go beyond what is necessary to preserve the right to family unity.<sup>36</sup>

27. UNHCR thus regrets that the family reunification mechanism, as a legal pathway, has been curtailed to such a great extent. The current legal framework in Sweden may infringe on rights enshrined in the Convention on the Rights of the Child (“CRC”),<sup>37</sup> the ECHR and risks negating the positive right to family reunification provided for in the EU Directive on Family Reunification.<sup>38</sup>

#### *The scope of family members entitled to family reunification*

28. UNHCR welcomes that the Proposal, in comparison with the Temporary Law, broadens the scope of family members entitled to family reunification. UNHCR welcomes, in particular, that family members outside of the nuclear family are entitled to family reunification, if they have been a member of the same household and there is a relationship of dependency between the family members that already existed in the country of origin.
29. UNHCR also welcomes that both refugees and beneficiaries of international protection will continue to have the right to family reunification. However, UNHCR notes that a beneficiary of subsidiary protection 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.<sup>39</sup> While refugees are presumed to have such prospects, there is no such presumption for beneficiaries of subsidiary protection. UNHCR would strongly urge against a differentiation of this nature. The two categories have similar protection needs, face the same integration opportunities and challenges, and also share similar return prospects.

#### *Maintenance requirement*

30. As expressed in its earlier law comments and recommendations,<sup>40</sup> UNHCR is concerned that the onerous maintenance requirement in Sweden - which entails strict income and accommodation requirements if the application for family reunification is not submitted within three months from the date of granting of protections status - is impossible for many beneficiaries of international protection to fulfil and does not sufficiently take into

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<sup>36</sup> UNHCR's Recommendations for the European Commission's Proposed Pact on Migration and Asylum, January 2020, available at: <https://www.refworld.org/docid/5e3171364.html>, p. 5.

<sup>37</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, available at: <http://www.refworld.org/docid/3ae6b38f0.html>.

<sup>38</sup> UNHCR, A New Beginning: Refugee Integration in Europe, September 2013, available at: <http://www.refworld.org/docid/522980604.html>; and UNHCR, A New Beginning: Refugee Integration in Sweden - It's about time! September 2013, available at: <http://www.refworld.org/docid/5295a60e4.html>.

<sup>39</sup> 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> (hereafter “EU Family Reunification Directive”).

<sup>40</sup> UNHCR Recommendations to Sweden, p. 5-6. See also, Council of Europe: Commissioner for Human Rights, Realising the right to family reunification of refugees in Europe, June 2017, available at: <https://www.refworld.org/docid/5a0d5eae4.html>, p. 42; Council of Europe, The Commissioner intervenes before the European Court of Human Rights in a case concerning family reunification in Sweden, 3 June 2019, available at: <https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-ap/168094b24f>.

account the particular circumstances of persons who have been forced to flee.<sup>41</sup> In this connection, UNHCR would like to highlight that according to statistics from the SMA, nearly 29,000 applications for family reunification were rejected between 2016 and September 2020, due to the failure of an applicant to meet the maintenance requirement under the Temporary Law. In addition, over 3,300 applications for family reunification were rejected due to the failure of an applicant to meet the maintenance requirement after that an application was not submitted within three months after the granting of protection status.<sup>42</sup>

31. In UNHCR's view, these figures clearly demonstrate the significant obstacle to family reunification that the maintenance requirement poses, delaying or altogether denying family members from exercising their right to family life and without taking into account individual circumstances. UNHCR thus regrets that the maintenance requirement, by and large, remains unchanged according to the Proposal. In this respect, UNHCR also recalls the jurisprudence of the CJEU which has found that the maintenance requirement must not be used in a manner that would undermine the objective and effectiveness of the EU Family Reunification Directive.<sup>43</sup> The granting of family reunification is the general rule, and the faculty of the maintenance requirement must therefore be interpreted strictly.<sup>44</sup>

#### *The three-month deadline*

32. Beneficiaries of international protection may have particular difficulties in submitting their applications for family reunification within three months of being granted protection in order to be exempted from the maintenance requirement. They may not know the whereabouts of their family members, tracing of family members can be a lengthy process which exceeds three months in many cases and 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. Resettled refugees may have even greater difficulties to meet the three-month deadline as they may often not even have arrived in Sweden by that time.
33. UNHCR has for these reasons called on all Member States not to apply the optional time limits for applications of family reunification as set out in the EU Family Reunification Directive.<sup>45</sup> UNHCR recommends Sweden to allow for more flexibility with regard to the time limit and consideration for individual circumstances when assessing applications

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<sup>41</sup> Submission by the Office of the UNHCR in the case of J. K. v. Switzerland (Appl. No. 15500/18) before the European Court of Human Rights, 28 May 2019, available at: <https://www.refworld.org/docid/5dced8884.html>, para. 3.2.5.

<sup>42</sup> Statistics received via e-mail from the SMA, 7 October 2020.

<sup>43</sup> 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](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), 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.

<sup>44</sup> Ibid., which refers to Cases C-356/11 and C-357/11, O. & S., 6 December 2012, para 82.

<sup>45</sup> 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, available at: <http://www.refworld.org/docid/4f55e1cf2.html>, p. 6.

from individuals who were not able to submit within the time limit. For resettled refugees it is recommended that any time limit start from when the refugee arrives in Sweden instead of from the day of the decision regarding the individual's protection status.

34. As a minimum, UNHCR recommends that it be specified in the law that the applicant and family members do not need to provide all the required documents within the three-months period.<sup>46</sup> In this respect, UNHCR refers to the European Commission guidance, recommending to refrain from applying Article 12(1) third subparagraph as the most appropriate solution.<sup>47</sup> 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.”<sup>48</sup> This is also evident from jurisprudence of the CJEU, which has clarified that Member States may not reject family reunification applications, lodged under the EU Family Reunification Directive's more favourable rules for refugees, due to a submission outside the three-months period where “particular circumstances render the late submission of the initial application objectively excusable”.<sup>49</sup> Finally, UNHCR fully endorses the Proposal to invest more efforts in ensuring that the applicant is informed of the right to family reunification, the relevant procedures and possible time-limits to follow for the submission of an application.

### **Recommendations Regarding Family Reunification for Refugees and Beneficiaries of Subsidiary Protection**

UNHCR recommends the Swedish Government to:

1. Refrain from imposing a maintenance requirement for family reunification of beneficiaries of international protection;
2. Not apply or apply with greater flexibility the optional time limits for beneficiaries of international protection in light of their particular situation and vulnerabilities;
3. Prescribe in the legislative text that the starting point for calculating the three-month time-limit is the time of the notification of the decision to the applicant or in the case of resettled refugee the day of arrival to Sweden at the earliest, and;
4. Prescribe in the legislative text that the time-limit does not require that the applicant and family members provide all the documents needed within the three-month period.

### **Children born stateless in Sweden**

35. UNHCR appreciates that the Government has tasked the Inquiry on Nationality<sup>50</sup> to examine key issues relating to the potential reduction of statelessness in Sweden. While looking forward to further engagement with the Inquiry and its outcomes, UNHCR would

<sup>46</sup> Ibid, p. 6.

<sup>47</sup> European Commission, Communication from the Commission on guidance for application of Directive 2003/86/EC on the right to family reunification, p. 23.

<sup>48</sup> Ibid.

<sup>49</sup> CJEU, C-380/17, K, B v. Staatssecretaris van Veiligheid en Justitie, 7 November 2018, available at: <http://curia.europa.eu/juris/document/document.jsf?docid=207426&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=16663565>, para. 62.

<sup>50</sup> Ju 2019:08, Språk- och samhällskunskapskrav för svenskt medborgarskap och andra frågor om medborgarskap, available at: <https://www.regeringen.se/rattsliga-dokument/kommittedirektiv/2019/10/dir.-201970/>.

like to take this opportunity to provide the following observations on children born stateless in Sweden.

36. According to the proposed new second paragraph to Section 6 of the Swedish Citizenship Act, the requirement of a permanent residence permit to be eligible for Swedish citizenship (as the main rule in its first paragraph) would not be applicable to a child who has habitual residence<sup>51</sup> in Sweden for five years or for a total of ten years **and** has been granted a temporary residence permit.<sup>52</sup> In UNHCR's understanding, the Proposal implies that children born stateless in Sweden will be eligible for permanent residence – and Swedish citizenship, after three years with a temporary permit for refugee children; three years and one month for child beneficiaries of subsidiary protection - as children are exempted from all other requirements for permanent residence, as discussed above at paragraphs 22-24.
37. The 1961 Convention on the Reduction of Statelessness and the CRC stipulate that children born stateless in a State Party's territory should be granted nationality either automatically or as early as possible – a child should not be left stateless for an extended period of time.<sup>53</sup> Therefore, instead of amending the Swedish Citizenship Act as set out in the Proposal, UNHCR recommends to align the relevant legislation with the standards of the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention and the CRC so that stateless children born in Sweden are able to acquire citizenship automatically, through the operation of law. If Sweden opts to grant citizenship through notification to otherwise stateless children, the current requirement of permanent or temporary residence for acquiring citizenship through notification should be replaced with that of habitual residence as envisaged by Article 1 of the 1961 Convention. The relevant time period would need to factor in that a child must be able to acquire a nationality at birth or as soon as possible after birth.<sup>54</sup>

### **Recommendation Regarding Children Born Stateless in Sweden**

UNHCR recommends the Swedish Government to:

1. Align the Swedish Citizenship Act with the standards of the 1954 and the 1961 Conventions and the CRC so that children born stateless in Sweden can acquire citizenship automatically, or as soon as possible after birth, regardless whether they are legal residents.

## **UNHCR Representation for the Nordic and Baltic Countries**

*7 December 2020*

<sup>51</sup> UNHCR, Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality, 21 December 2012, <https://www.refworld.org/docid/50d460c72.html>, para. 41, p. 9.

Lag (2001:82) om svenskt medborgarskap, available at: [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-200182-om-svenskt-medborgarskap\\_sfs-2001-82](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-200182-om-svenskt-medborgarskap_sfs-2001-82).

<sup>53</sup> UNHCR recommendations to Sweden, pp. 7-9.

<sup>54</sup> CRC, Articles 3 and 7; UNHCR, Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality, 21 December 2012, <https://www.refworld.org/docid/50d460c72.html>, para. 11, p. 3.



**UNHCR**

United Nations High Commissioner for Refugees  
Haut Commissariat des Nations Unies pour les réfugiés

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7 December 2020

Notre/Our code: 118/RNB/2020

**RE: Ju2020/03215 - UNHCR observations on the proposed legislative amendments to Swedish Aliens Act – Report by the Cross-party Committee of Inquiry on Migration [SOU 2020:54 – En långsiktigt hållbar migrationspolitik - Betänkande av Kommittén om den framtida svenska migrationspolitiken]**

Dear Sir/Madam,

The UNHCR Representation for Northern Europe is pleased to submit to the Swedish Ministry of Justice its observations by the United Nations High Commissioner for Refugees (UNHCR) on the proposed amendments to the Swedish Aliens Act.

As always, UNHCR appreciates the constructive relationship between Sweden and UNHCR, and we remain at your disposal for any clarifications required.

Yours sincerely,

Wilfried Buchhorn  
Deputy Representative

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