

## UNHCR Observations on the Legislative Proposal “Inhibition of enforcement – a new order for certain foreigners in cases of temporary obstacles to enforcement”

Inhibition av verkställigheten – en ny ordning för vissa utlänningar vid tillfälliga verkställighetshinder  
Ds 2024:68

### I. Introduction

1. The United Nations High Commissioner for Refugees (“UNHCR”) Representation for the Nordic and Baltic Countries (“RNB”) would like to thank the Government of Sweden for the invitation to provide observations on the legislative proposal (inquiry), “Inhibition of enforcement – a new order for certain foreigners in cases of temporary obstacles to enforcement [of removal or expulsion]” (“Inhibition av verkställigheten – en ny ordning för vissa utlänningar vid tillfälliga verkställighetshinder” Ds 2024:68) – hereafter referred to as 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 (hereafter collectively referred to as “1951 Convention”) oblige State Parties 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. 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>6</sup> UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting the protection and durable solutions of its persons of concern.
4. The scope of UNHCR’s observations only extends to asylum-seekers, refugees and beneficiaries of subsidiary protection.

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<sup>1</sup> Government of Sweden, Inquiry on Inhibition of enforcement – a new order for certain foreigners in cases of temporary obstacles to enforcement, Ds 2024:23, published 4 November 2024, (in Swedish), <https://www.regeringen.se/rattsliga-dokument/departementsserien-och-promemorior/2024/11/ds-202423/>.

<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) <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, pp. 7–8, October 2002 <http://www.refworld.org/docid/4fe405ef2.html>.

<sup>4</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189 <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 reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the EU.

<sup>6</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/1P/4/ENG/REV. 4 <https://www.refworld.org/docid/5cb474b27.html>.

## II. Scope of the Proposal

5. The aim of the Proposal is to create a more efficient system for managing situations where a temporary obstacle<sup>7</sup> barring immediate removal or expulsion of certain categories of foreigners has ceased. This concerns foreigners issued with a removal or expulsion order because they have committed serious crimes and/or pose a threat to national security and public order because of their conduct. When a temporary obstacle bars the execution of a removal or expulsion order, the Proposal suggests, as a general rule, replacing the issuance of a temporary residence permit (usually issued for 12 months) with a postponement (inhibition) decision which must be reassessed within a maximum period of one year. Postponement (inhibition) decisions are easier to lift when the temporary obstacle has ceased to exist. The Proposal foresees issuance of a temporary residence permit only in exceptional cases.<sup>8</sup>
6. Under the Swedish Aliens Act, foreigners who receive the type of temporary residence permit described above, have access to work and receive social benefits. By replacing the temporary residence permit with a postponement decision, the proposal aims to significantly restrict access to these rights and benefits. According to the Proposal, it is considered unreasonable that a foreigner who has been issued a removal or expulsion order due to their criminal actions, or suspicions about their involvement in certain activities or behaviours, continues to have access to the same benefits as others in Sweden.<sup>9</sup>
7. The categories of foreigners covered under the scope of the proposal include 1) persons excluded from refugee or subsidiary protection status,<sup>10</sup> 2) persons who meet the refugee definition but are rejected due to criminal activities,<sup>11</sup> 3) security cases under the Swedish Aliens Act,<sup>12</sup> and 4) cases of expulsion due to commission of a crime after a served prison sentence.<sup>13</sup> It should be added that postponement decisions will also be issued to persons whose residence permits have been revoked under the provisions of the Swedish Aliens Act which relate to any of these four categories.<sup>14</sup>
8. The proposal also considers a new fifth category of foreigners for whom it is deemed unreasonable or inappropriate to grant a temporary residence permit, referred to as public order and security

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<sup>7</sup> “Temporary obstacle” to enforcement of a removal or expulsion order to any country as per the Proposal: risks of death, serious bodily harm, torture and inhuman or degrading treatment, or persecution. It can also include other practical obstacles such as serious medical conditions.

<sup>8</sup> Proposal, pp. 35-38.

<sup>9</sup> Proposal, pp. 35-36 and pp. 38-41

<sup>10</sup> Exclusion cases (‘Uteslutandeärenden’): exclusion from refugee or subsidiary protection status due to crimes falling under the scope of the exclusion provision of the Swedish Aliens Act Chapter 4 §§2b and 2c (Article 1F of the 1951 Convention) or for whom there is particular reason to assume they constitute a threat to national security. See the Proposal, p. 36 and section 2.3.1.

<sup>11</sup> Refusal cases (‘Vägransärenden’): rejection, but not exclusion, from refugee status even though they meet the refugee definition because they have committed an exceptionally serious crime that would pose a threat to public order and security should they remain in Sweden or who have engaged in activities that pose a threat to Sweden’s security and there is reason to believe they will continue such activities in Sweden. Regulated in the Swedish Aliens Act Chapter 4 §3 second paragraph and Chapter 5 §1 second paragraph. See the Proposal, p. 37 and section 2.3.2.

<sup>12</sup> Security cases under the Aliens Act (‘Säkerhetsärenden enligt Utlänningslagen’): security cases under the Swedish Aliens Act where Säpo has concerns related to national security or other factors affecting public safety. Regulated in the Swedish Aliens Act Chapter 1 §7; Chapter 4 §2c first paragraph, point 3; Chapter 4 §3 second paragraph, point 2 and Chapter 5 §1 second paragraph, point 2. See also the Proposal, p. 36 and section 2.3.3.

<sup>13</sup> Cases regarding expulsion due to crime (‘Ärenden om brottsutvisade’): persons for whom there is an expulsion order due to commission of a crime which carries a stricter penalty than a fine, and it can be assumed that there is a risk of continued criminal behaviour, or the crime has a penalty value corresponding to imprisonment for at least six months, or is otherwise of such a nature that the foreigner should not be allowed to stay in Sweden. This includes those who have not applied for asylum and those who applied for asylum and were granted refugee or subsidiary protection status before conviction of the crime or during the time they served their prison sentence. It also includes those who applied for asylum after a served prison sentence and those who previously had a residence permit based on asylum or family reunification. Regulated in the Swedish Aliens Act Chapter 12 §9 first paragraph and Chapter 8a §1 first paragraph. See also the Proposal, p. 36 and section 2.3.4.

<sup>14</sup> Proposal, p. 255.

disturbance cases (hereafter referred to as “the fifth category”). It includes persons who constitute a threat to public security or for whom there are special circumstances related to the foreigner’s way of life.<sup>15</sup> The stated rationale for including the fifth category in the Proposal is that there are other persons for whom it would be unreasonable or inappropriate to grant temporary residence permits in the event of a temporary obstacle to a removal or expulsion order.

9. Under Chapter 12 of the Swedish Aliens Act, removal or expulsion to any country is prohibited if the person risks death, serious bodily harm, torture and inhuman or degrading treatment, or persecution, including to a country where there is a risk of chain refoulement. The Proposal distinguishes between temporary and enduring obstacles to removal or expulsion, while noting that neither Swedish nor EU law defines what is meant by temporary and enduring. According to the Proposal, temporary obstacles are assessed on a case-by-case basis, but can include obstacles in the form of respect to the principle of *non-refoulement* and risk of ill-treatment.<sup>16</sup>

### III. Specific observations

#### a. The scope of acts and crimes considered under the fifth category of persons (“public order and security disturbance cases”)

10. UNHCR is concerned about the expansion of list of categories that will be covered by the Proposal with the newly included fifth category of foreigners (“public order and security disturbance cases”). The main concern of UNHCR is that it remains unclear from the Proposal whether this category may extend to persons in need of international protection, such as refugees, asylum-seekers and holders of subsidiary protection, in which case the scope of the acts and crimes described may mean a substantive departure from the scope of exclusion clauses under Article 1F of the 1951 Convention. This may also mean a conflation of exclusion clauses under Article 1F with the provisions in Articles 32 and 33(2) of the 1951 Convention.
11. The fifth category of persons in the Proposal (“public order and security disturbance cases”), encompasses a) foreigners who are deemed to pose a threat to public order and security and b) foreigners for whom there are special circumstances attributable to their way of life. To help define the term ‘threat to public order and security’, the Proposal leans on examples from jurisprudence of the Swedish Migration Court of Appeal where for instance recidivism and attempted murder were found to constitute a threat to public order. It can also include situations where a foreigner works in Sweden without a work permit.<sup>17</sup> UNHCR finds it difficult to discern how cases of persons who pose a threat to public order and security under the fifth category differ from those defined in the first four categories.
12. On the matter of ‘way of life’, UNHCR understands that the Proposal draws its inspiration from another Swedish inquiry from November 2023 titled “*Stricter requirements for an honest way of life and increased possibilities for the revocation of residence permits*”,<sup>18</sup> which remains under consideration. The Proposal also draws parallels from the requirements for permanent residence

<sup>15</sup> Public order and security disturbance cases (‘Ordnings- och säkerhetsstörningsärenden’). See the Proposal, p. 37 and section 2.3.5.

<sup>16</sup> Proposal, pp. 147-151. On p. 153, the Proposal clarifies that obstacles are not considered temporary when the obstacle is enduring for such a long time that the foreigner is deemed to have a special attachment to Sweden. The foreigner’s health, attachment to Sweden and their situation in the country of origin forms part of the assessment.

<sup>17</sup> Proposal, pp. 250-254.

<sup>18</sup> Government of Sweden, Stricter requirements for an honest way of life and increased possibilities for the revocation of residence permits, (Dir. 2023:158), 20 November 2023, <https://www.regeringen.se/rattsliga-dokument/kommittedirektiv/2023/11/dir.-2023158>.

permits in the Swedish Aliens Act<sup>19</sup> and citizenship requirements in the Citizenship Act.<sup>20</sup> On this basis, a (dis)honest way of life may include social benefit fraud, abuse of the social welfare system, debts to private individuals and the public sphere, association or participation in criminal networks, violent or extremist organization or environments which threaten fundamental Swedish values, a dishonest way of livelihood, and substance abuse.<sup>21</sup>

13. While the explanatory notes of the memorandum in section 2.3.5 on page 118 of the Proposal provide that *“These types of cases concern other foreigners who, after entering [Sweden], applied for residence permits on other grounds than asylum, for example on the basis of work, studies or based on a relationship with a resident of Sweden”*,<sup>22</sup> the actual text of the proposed amendments to the legislation does not provide for this distinction. The proposed amendments merely provide that *“§17a If there is an obstacle, that is not enduring, to a removal or expulsion order, [the determining authority] will make a postponement decision, if (...) [point] 4. The foreigner constitutes a threat to public order and security or there are other special circumstances attributable to the foreigner’s way of life that motivate such a decision.”* Thus, based on the current text of the proposed amendments, there is no indication that the so-called fifth category provisions would not apply to asylum-seekers, refugees and holders of subsidiary protection. Further, the Proposal does not rule out the possibility that the fifth category provisions would apply to foreigners who apply for asylum at a later stage during their stay in Sweden.
14. UNHCR is therefore concerned that the scope of acts and crimes described above that may amount to ‘threat to public order and security’ or ‘way of life’ as defined in provisions relating to the fifth category included in the Proposal may inadvertently extend to persons in need of international protection and who should otherwise not be subject to expulsion or removal according to Article 32 of the 1951 Convention on expulsion, or Article 33(2) on the exception to the principle of *non-refoulement*.
15. In this regard, UNHCR wishes to recall its previous observations to the EU Qualification Directive<sup>23</sup> and the EU Commission Proposal for a Qualification Regulation<sup>24</sup> where it cautioned against expanding the exclusion clauses of the 1951 Convention, by adding exclusion grounds which are not foreseen in international refugee law through provisions which are based on the exceptions to the principle of *non-refoulement*, and consequently create a legal basis for expulsion and removal from the host country. However, the Court of Justice of the European Union (“CJEU”) has determined in *M v Ministerstvo vnitra (C-391/16)*, *X and X v Commissaire général aux réfugiés et*

<sup>19</sup> *Swedish Aliens Act*, Chapter 5 §7 states that a permanent residence may be granted only if the foreigner can support themselves. With regard to their way of life there should be no doubt that a permanent residence permit can be granted. The preparatory works to the Aliens Act state that the decision to grant permanent residence should be based on a holistic assessment of the individual’s circumstances, including any crimes committed abroad, taking into account how they would be sentenced in Sweden. The misconduct, even if less severe, can raise doubts about granting permanent residence, but minor offenses alone are not enough. The evaluation should consider both the nature of the misconduct and the time elapsed, without the need for specific waiting periods.

<sup>20</sup> §11 of the *Swedish Citizenship Act* lists an honest way of life as one of the requirements for acquisition of Swedish citizenship. A forward-looking assessment of the person’s way of life should be made. In the preparatory works to the Citizenship Act it was not deemed necessary to specify what type of misconduct would form the ground for a rejection and is rather determined through jurisprudence.

<sup>21</sup> Government of Sweden, *Stricter requirements for an honest way of life and increased possibilities for the revocation of residence permits*, (Dir. 2023:158), 20 November 2023, p. 6.

<sup>22</sup> Proposal, p. 118.

<sup>23</sup> *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, <https://www.refworld.org/legal/intlegcomments/unhcr/2010/en/74359>).

<sup>24</sup> *UNHCR Comments on the European Commission Proposal for a Qualification Regulation* – COM (2016) 466, February 2018, p. 22, <https://www.refworld.org/legal/intlegcomments/unhcr/2018/en/120341>.

*aux apatrides (C-77/17 and C-78/17)*,<sup>25</sup> Article 14(4) and (5) of the EU Qualification Directive do not provide for exclusion from refugee status within the meaning of the 1951 Convention.

## **b. Relevant provisions under the 1951 Convention**

16. The Proposal has been careful to highlight the Government of Sweden's compliance with international law, which includes the 1951 Convention. UNHCR would therefore like to briefly clarify the scope and application of the relevant articles and concepts in the sections below, to illustrate the gravity of crimes and situations foreseen under the 1951 Convention, that may allow expulsion and removal from the host country.
17. UNHCR recognizes the legitimate security concerns of States and the need to uphold the rule of law in its society. These concerns were foreseen by the drafters of the 1951 Convention, and is precisely why they established that, in exceptional situations, some individuals do not deserve international protection and may be expelled. In line with Article 2 of the 1951 Convention, refugees must conform to the laws and regulations of the country of asylum and to measures taken for the maintenance of public order.<sup>26</sup> While Article 2 does not strip refugees of their status or rights under the 1951 Convention, it does not preclude sanctions which may be applied by virtue of other Articles, for example Articles 26, 32 and 33(2).<sup>27</sup>
18. Under the 1951 Convention, the exclusion clause in Article 1F, expulsion under Article 32 and the exception to the principle of *non-refoulement* in Article 33(2) serve different purposes. Article 1F exhaustively enumerates the grounds for exclusion based on certain acts considered so grave that they render their perpetrators undeserving of international protection. Crimes falling on the lower end of the scale may not lead to the same conclusion. By contrast, Articles 32 and 33(2) deal respectively with the expulsion of, and the withdrawal of protection from *refoulement* from, recognized refugees who pose a danger to the host State (for example because of serious crimes they have committed there). UNHCR has detailed the scope, restrictive application and procedural safeguards of each of these provisions in its Handbook, guidelines and interventions before the courts. In particular, UNHCR wishes to recall the very narrow interpretation of the concepts of "national security" and "public order" under Article 32 and "danger to national security" and "danger to community" under Article 33(2).<sup>28</sup>

<sup>25</sup> Court of Justice of the European Union (CJEU), Joined Cases *M v Ministerstvo vnitra (C-391/16)*, *X and X Commissaire general aux réfugiés et aux apatrides (C-77/17 and C-78/17)*, 14 May 2019, <https://www.refworld.org/jurisprudence/caselaw/ecj/2019/en/149208>.

<sup>26</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, <https://www.refworld.org/docid/5cb474b27.html> (UNHCR Handbook), para. 154.

<sup>27</sup> See A. Grahl-Madsen, *Commentary on the Refugee Convention*, Articles 2-11, 13-37, published by UNHCR (1997), Commentary to Article 2, at (3) <https://www.refworld.org/docid/4785ee9d2.html>. (Grahl-Madsen, Commentary on the Refugee Convention).

<sup>28</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, <https://www.refworld.org/docid/3f5857d24.html>; UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at: <https://www.refworld.org/docid/3f5857684.html>; UNHCR, *Note on the Cancellation of Refugee Status*, 22 November 2004, <https://www.refworld.org/docid/41a5dfd94.html>; UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, <https://www.refworld.org/docid/438c6d972.html>; UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, August 2006, <https://www.refworld.org/docid/44dc81164.html>; UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, <https://www.refworld.org/docid/53e1dd114.html> see Article 33 commentary, starting at p. 220; For an analysis of the "danger to the community" exception under Article 33(2) of the 1951 Convention, see also UNHCR, Ahmed Ali v. Deborah Achim, Michael Chertoff, Secretary of the Department of Homeland Security, and Michael Mukasey, United States Attorney General. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner, No. 06-1346, 28 November 2007, available at: <http://www.unhcr.org/refworld/docid/47503a952.html>; UNHCR intervention before the Supreme Court of Canada in the case of *Manickavasagam Suresh (Appellant) and the Minister of Citizenship and Immigration, the Attorney General of*

19. UNHCR would like to emphasize that even in cases where an individual is excluded from refugee status or where protection against *non-refoulement* has been removed, the individual still benefits from an absolute protection against return to a country where they are at risk of ill-treatment by virtue of other international instruments, most notably Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>29</sup> (“CAT”). Other international and regional instruments contain similar provisions.

#### **IV. Conclusions and recommendations**

20. Based on the observations provided, UNHCR recommends that the Government of Sweden clearly and explicitly define in the text of the Proposal that the fifth category of persons in the Proposal (“public order and security disturbance cases”) does not apply to asylum-seekers, refugees and subsidiary protection holders. This would prevent the risk of expulsion or removal of these individuals on the grounds that would contravene the scope and principles of 1951 Convention Relating to the Status of Refugees.
21. UNHCR stands ready to discuss these recommendations with the Swedish authorities.

**UNHCR Representation for the Nordic and Baltic Countries**  
**19 February 2025**

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*Canada (Respondents)*, 8 March 2001, paras. 74-84, <https://www.refworld.org/jurisprudence/amicus/unhcr/2001/en/23298>. See also Lauterpacht and D. Bethlehem, *The scope and content of the principle of non-refoulement: Opinion*, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003), paras. 177-179, available at <http://www.unhcr.org/refworld/docid/470a33af0.html>.

<sup>29</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841-English.pdf>.