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Juridiska fakultetsstyrelsen vid Lunds universitet, som anmodats att yttra sig över rubricerat betänkande, får härmed avge följande yttrande, som utarbetats av docent Vladislava Stoyanova och postdoktor Eleni Karageorgiou.

Temporary residence permits for persons granted international protection

The Cross-party Committee of Inquiry on Migration proposes that, as a general rule, residence permits granted to persons in need of protection should be temporary at the time of the initial decision.

Refugees

For individuals recognized as refugees, as a general rule, the initial residence permit should be three years. After the expiration of the three-year period, the refugee can apply for an extension. The extended permit should be valid for two years. Any other extension permits are, as a general rule, also going to be temporary, and thus valid for two years.[1]

The Committee's report correctly notes (page 193) that international law and EU law do not require that beneficiaries of international protection receive upon recognition of their international protection needs, permanent residence permit. The main argument submitted in the report to support the change in the Swedish policy and legislation from the initial extension of permanent permits to temporary permits, is that for the Swedish migration policy to be long-term and sustainable it has to be harmonized with the regulations in the other Nordic countries and in the EU (page 193). It is relevant, however, to consider that the type of the permit granted plays a crucial role for the integration of the beneficiaries of protection (a fact also acknowledged in the report) and the issue of integration is within the competence and responsibility of each individual EU Member State. In this sense, international law and EU law do recognize the significance of local integration as one of the

[1] In this respect, the Committee's proposal deviates from the standards set in Article 26(1)(a) of the proposed EU Regulation that stipulates that '[f]or beneficiaries of refugee status, the residence permit shall have a period of validity of three years and *be renewable thereafter for periods of three year* [emphasis added]'. The proposed Regulation can be accessed here https://eur-lex.europa.eu/resource.html?uri=cellar:6d976705-4a95-11e6-9c64-01aa75ed71a1.0001.02/DOC_1&format=PDF

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durable solutions for refugees[2], yet they leave it up to each individual State to determine what national measures would be appropriate in this respect. In light of this, EU law and international law cannot be invoked to hamper these measures. The discretion left by international law and EU law should not be used to undermine an objective (i.e. integration) whose regulation and implementation fall within national competence.

According to the report, the objective of harmonization with the minimum standards as required by EU law is to serve the wider objective of making Sweden less attractive for asylum-seekers by sending a 'message' that the Swedish standards are not more favorable. At the same time, the report indicates (e.g. pages 195 and 200) that in any case the approval of extension permits is almost 100 percent. Therefore, the change in the legislation as proposed in the report, ultimately, not only risks creating an administrative burden for the Swedish authorities (page 411) and uncertainties (page 414), but it also in practice might not serve its intended objective.

Even if its intended objective is served (i.e. making Sweden less attractive),[3] there seems to be a 'price' to be paid (i.e. hindering the willingness of those extended temporary permit to integrate). On a more general note, the report seems to understand the objective of long-term sustainable migration policy in a very narrow way, as limited to reducing the numbers. The report does not seem to place sufficient emphasis on an understanding of sustainability that also includes integration.

A refugee can, however, apply for a permanent residence permit upon the fulfillment of certain conditions. The first important condition refers to the duration of his/her previous permit – he/she should have had a temporary permit for at least three years. This means that, as a general rule, refugees will fulfill this condition after the expiration of the initial temporary permit that, as indicated above, is valid for three years. The possibility to apply for a permanent permit after the expiration of the very first permit is positive.

Yet, according to the proposal of the Committee, a refugee will need to fulfill *additional* conditions upon the expiration of the three-year period, to be eligible for a permanent permit. These are (1) having Swedish language skills and civic knowledge, (2) being able to support himself/herself and (3) having a certain way of life.[4] These three additional conditions have general applicability since they apply to

[2] See e.g. UN High Commissioner for Refugees (UNHCR), Framework for Durable Solutions for Refugees and Persons of Concern, May 2003, available at https://www.refworld.org/docid/4124b6a04.html ; European Commission, Communication from the Commission to the Council and the European Parliament on the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin "Improving Access to Durable Solutions" Brussels, 4.6.2004 COM(2004) 410 Final.

[3] The ultimately objective, as the report suggests, is reducing the numbers of asylum seekers that come to the country. However, it need to be also highlighted that these numbers are in practice contingent on other factors that have nothing to do with how attractive and favorable the legal standards in Sweden are. Such factors are predominantly the existence of risks in countries of origin, the possibilities for travelling to Europe, the existence of diasporas, and the arrangements for the distribution of asylum-seekers within the EU. The Committee's report (page 499) itself acknowledges that it is very uncertain whether the restrictions introduced with the temporary law in Sweden have contributed in any way to the reduction of the number of individuals who sought protection in Sweden.

[4] Certain aliens are exempted from these three requirements. However, as a general rule, refugees and individuals eligible for subsidiary protection, are not exempted.

all aliens (page 216). In this way, one can doubt whether the Committee's proposal is sufficiently sensitive to the special situation of the beneficiaries of protection. Paragraph 41 of the preamble of the Qualification Directive 2011/95 specifically indicates that 'it is necessary to take into account their [beneficiaries' of international protection] needs and the particular integration challenges with which they are confronted'. It would be reasonable if the national legislation makes explicit allowances and is better and more clearly adjusted to the special situation of beneficiaries of international protection. More specifically, it might be more difficult for them to independently support themselves without social assistance.

The requirement of 'having a certain way of life' begs special attention due to its ambiguity. The report indicates (page 220) that an overall assessment needs to be made and that its precise meaning will be an object of development in the practice of the courts. The report also indicates that final judgments as to commission of any criminal offences are *not* necessary for an assessment that the requirement of 'having a certain way of life' is *not* fulfilled. This creates uncertainty allowing for various and possibly conflicting interpretations by authorities, which essentially contravenes the principle of legal certainty described as one of the new Swedish migration policy's main pillars (Rättssäkerhet pages 359-371).

Beneficiaries of subsidiary protection

For individuals eligible for subsidiary protection, as a general rule the initial residence permit should be also temporary – it should be valid for 13 months. After the expiration of this period, the person can apply for a new permit. The new extended permit should be also temporary – it should be valid for two year. Any other extension permits are, as a general rule, also going to be temporary, and thus valid for two years.

It follows from the above that a difference is made between refugees and individuals eligible for subsidiary protection in regard to the duration of the initial residence permit, but *not* in regard to the subsequent duration of the extension of any temporary permits. This divergence (the approach as to the duration of the initial permit for the two groups of beneficiaries is different in comparison with the approach as to the extension of the permits) remains unexplained in the reported submitted by the Committee.

The report does note, however, that the shorter initial permit (13 months) for beneficiaries of subsidiary protection is justifiable given that the reasons for their protection are not individual, but are rather linked to the general situation in the country of origin (page 203). Indeed, according to the minimum requirements under EU law, the EU Member States are allowed to extend a permit valid for at least one year to beneficiaries of subsidiary protection. However, these are the minimum EU law requirements. They have nothing to do with fact that *in practice* risks due to the general situation in the country of origin can be as lasting as the risks due to more individual circumstances. This fact can also explain why in practice in Sweden applications by beneficiaries of subsidiary protection for extension of permits have almost 100 percent approval rate (page 204).

Identically to refugees, persons who have been granted subsidiary protection can apply for a permanent residence permit upon the fulfillment of certain conditions. The first condition refers to the duration of the previous permits – beneficiaries of subsidiary protection should have had temporary permits for at least three years. This condition can be fulfilled only after the expiry of the initial permit and the second permit. Identically to refugees, all the other three requirements regarding language,

maintenance and having a certain way of life, will have to be fulfilled so that a person granted subsidiary protection might be also granted a permanent permit. Similarly to what was mentioned above in regard to refugees, the proposed national legislation does not make explicit allowances in the possibility for extension of permanent permits for beneficiaries of subsidiary protection in light of their special situation in comparison with all other aliens.

The absence of a possibility to apply for a permanent permit *any time* after the fulfillment of all the formal conditions (at least three year duration of the previous permits, language, maintenance and certain way of life) also raises some concerns. A person might fulfill the requirements regarding language, maintenance and having a certain way of life earlier than the expiry of his/her current temporary permit. Yet, he or she cannot apply for a permanent residence permit. Instead, he or she has to wait for the examination by the Swedish Migration Agency as to whether the current temporary permit should be extended with another two years. In practice, this implies that a person might have to wait for two years before having the chance to apply for a permanent permit, despite fulfilling the formal requirements.

Family reunification for persons granted international protection

The three-month timeframe

According to the Committee's proposal, more favorable conditions regarding the possibility for family reunification are ensured for refugees and persons eligible for subsidiary protection. These more favorable conditions (i.e. lifting of the maintenance requirement) are, however, triggered only under certain circumstances. One of them concerns the timeframe – the application for residence permit for the family member has to be submitted within three months after the sponsor was 'granted a residence permit, as *or* was declared, a refugee or person eligible for subsidiary protection [emphasis added].'

On a technical note, the 'or' in the above formulation creates uncertainty that should be avoided. It is thus better if the legislation is clearer as to the point in time from which the three-month timeframe is counted. Is it counted from the point in time when a permit is extended or from the point in time when the sponsor is recognized as eligible for international protection?

More generally, the application of a rigid timeframe (i.e. submission of the application with three months) is disturbing since, for various reasons, beneficiaries of international protection might miss the deadline. If this happens, they can still benefit from family reunification, but have to fulfill the maintenance requirement, which in turn can be also very difficult. Thus, ultimately, family reunification might, in practice, turn out to be impossible. This can be contrary to Sweden's international obligations under Article 8 (the right to family life) of the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR). In accordance with the Court's practice, compliance with Article 8 implies a careful balancing between the individual interests to reunite with family members and the state interests to exercise immigration control by limiting the number of migrants. This balancing is very much fact-specific and in light of the individual circumstances of each person. This is crucial since it implies flexibility in the assessment.

Admittedly, at the time of writing the ECtHR is yet to make a concrete pronouncement on the compatibility of the Swedish legislation (in particular the

maintenance requirement) with Article 8 ECHR. Relevant guidance can be expected from the Court in the pending case of *Dabo v Sweden* Application no 12510/18 lodged on 6 March 2018.[5] However, it is important to note that in general individual assessment and flexibility that takes due consideration of the specific situation of the beneficiaries of international protection, are essential for compliance with Article 8 ECHR. [6] This needs to be reflected in the national legislation.

It is therefore important for the legislation to ensure flexibility in the procedure rather than rigidity. For example, although the three-month period can remain as a requirement, the procedure might be formed in such a way that the person can initially apply without the need to submit all requisite documents and poofs of their authenticity.[7] In this way, the lapse of time will be stopped with this initial application.

Flexibility is required not only under Article 8 ECHR, but also under EU law. The Court of Justice of the EU (CJEU) has clarified that although EU law allows the imposition of the three-month timeframe for refugees, the Member States have to allow flexibility in the procedure. The reason is that late submissions of family reunification requests might be 'objectively excusable.'[8]

Possibility for family reunification in another country

According to the Committee's proposal, three circumstances need to be *cumulatively* fulfilled so that the maintenance requirement is lifted and persons granted international protection can benefit from the right to family reunification under the more favorable conditions. The first one, as mentioned in the previous section, concerns the three-month period. The second one is that family reunification is not possible in a country outside the EU to which the family has special ties. This circumstance is a reflection of the second paragraph in Article 12 of the Family Reunification Directive. However, the latter also explicitly stipulates that this circumstance has to be applied 'without prejudice to international obligations.' Such international obligations arise for Sweden from human rights law treaties, such as the European Convention on Human Rights. Accordingly, the above submitted

[5] The case concerns a denial of family reunification for a refugee with permanent residence permit since he did not meet the maintenance requirement under the Swedish legislation. See https://hudoc.echr.coe.int/eng#{"itemid":["001-187169"]}

[6] When performing the balancing between the competing interests under Article 8, it needs to be considered that the interests of beneficiaries of international protect to reunite with family members, are afforded special weight (in comparison with the same interests of migrants more generally), for the following reasons. Family reunification is important for the beneficiaries of international protect to resume normal life. At the same time, they cannot be returned to their countries of origin and should not be held responsible for the disruption of the family life. For a confirmation of these specificities see *Tanda-Muzinga v France* Application No 2260/10, 10 July 2014 and *Mugenzi v France* Application No 52701/09, 10 July 2014.

[7] Such flexibility might be necessary since individuals might face difficulties tracing family members, collecting all the required documents to prove family relationships, ensuring that family members can reach consulates and embassies. For such difficulties, see Council of Europe Commissioner for Human Rights, Realising the right to family reunification of refugees in Europe, June 2017, 41 and 44 < https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0 >; UNHCR Summary conclusions of the Expert Roundtable on the Right to Family Life and Family Unity in the Context of Family Reunification of Refugees and Other Persons in Need of Protection, 4 December 2017, para 29 < https://www.refworld.org/docid/5b18f5774.html >.

[8] *K and B v Staatssecretaris van Veiligheid en Justitie*, Case C-380/17, 7 November 2018, para 66.

arguments regarding flexibility are also of relevance to the application of this circumstance.

Cohabitation and well-established relationship

The third circumstance that needs to be fulfilled so that the maintenance requirement is lifted and persons granted international protection can benefit from the right to family reunification under the more favorable conditions, is that the alien and the sponsor have cohabited for a long time in another country and it is clear in some other way that the relationship is well established. The inclusion and the formulation of this third requirement does raise some concerns. These concerns are at least two.

First, it appears that the sponsor needs to demonstrate both – long cohabitation *and* well-established relationship. Is it rather the case that long cohabitation is an indication/proof of a well-established relationship? At the same time, a well-established relationship might be possible to exist without a long cohabitation. Overall, the logical operation of 'and' in the formulation needs to be clarified and considered with better care.

The second concern is that the prerequisite that the alien and the sponsor have cohabited for a long time in another country and it is clear in some other way that the relationship is well established, is *not* provided for in the Family Reunification Directive 2003/86 as a precondition for lifting the maintenance requirement for refugees so that family reunification is allowed. Article 9 of the Family Reunification Directive 2003/86 stipulates that 'Member States may confine the application of this Chapter to refugees whose family relationships *predate their entry* [emphasis added].' However, this is different from the prerequisite, as proposed by the Committee, that the alien and the sponsor have cohabited for a long time in another country and it is clear in some other way that the relationship is well established. Specifically, the Family Reunification Directive does not envision any timeframe and stability of the relationship. All that is required is that the family relationship predates the entry into Sweden of the sponsor.

Much more importantly, given the current migration patterns, persons in need of international protection transit through other countries and family members might reside for a prolonged period in other countries and, thus, be separated. This reality should not be an obstacle for family reunification. Such an obstacle can arise with the application of the requirement for long-cohabitation in another country.

The 'exceptional grounds' exception

Finally, we would like to note that the proposal that 'the maintenance requirement should not be applied if there are exceptional grounds not to do so' is welcomed. Such a possibility should remain open in the legislation. This may ensure some degree of flexibility in the legislation and due consideration of the individual circumstances of each alien granted international protection. As already mentioned above, such flexibility is in fact required under EU law and Article 8 ECHR.

The concern here is that the scope for such flexibility, as reflected in the standard of 'exceptional grounds' is very narrow. The threshold of 'exceptional grounds' appears to be very high and it might be difficult to meet. It is therefore doubtful whether this exception can ensure the flexibility required by the ECHR and EU law, as already clarified above. It is, thus, advisable to reframe the expression 'exceptional grounds' and instead the legislation to refer to, for example, 'special grounds' or 'specific individual circumstances'.

Residence permits on humanitarian grounds

We would like to applaud the Committee for taking into consideration the criticism by various institutions in Sweden and abroad against the highly vague formulation of the relevant provision in the Temporary Law. It is indeed the legislator's task to ensure that Sweden's international obligations are observed through domestic legislation instead of deferring to domestic courts and their decisions on a case-by-case basis (p. 312-313).

In view of the objective for a sustainable migration policy, the Committee proposes that in case a residence permit cannot be granted on other grounds, a permit may be granted to an alien if, on an overall assessment of the alien's situation, such exceptionally distressing circumstances are found to exist that they should be allowed to remain in Sweden. Pursuant to the Committee, when this assessment is made, particular attention is to be paid to the alien's state of health, their adaptation to life in Sweden and their situation in the country of origin.

Medical cases

Citing the ECtHR jurisprudence on medical cases, the Committee highlights the maintenance of an exceptionally high threshold for the expulsion of critically ill non-nationals under Article 3 ECHR. In particular, it contends that the high threshold laid down in the *N v UK* case should be maintained (page 296). It appears, though, that the Committee has not paid due attention to the nuanced approach taken by the Court in its latest case law. In particular, the Committee refers to the recent *Paposhvili v Belgium* case, without explaining the extent to which the Court's reasoning in this case has introduced any changes to well established standards until then.

As it has been argued in the literature,[9] *Paposhvili* has introduced a slight -but not insignificant- modification to the threshold of the 'very exceptional' standard maintained in health cases: from risk of imminent death to risk of 'a serious, rapid and irreversible decline' in health 'resulting in intense suffering or to a significant reduction in life expectancy' upon removal.[10] Arguably, the judgment clarifies the limiting effect of the high threshold of "very exceptional circumstances" which may potentially render rights under Article 3 "theoretical and illusory". This proves that the distinction between those who are already dying and those whose medical condition is such that their life expectancy will be significantly reduced upon return is untenable. In addition, it is not sufficient that proper treatment is available in the receiving country but that it is also accessible to the migrant in question.

The aforementioned nuanced guidance provided by the ECtHR is, unfortunately, not reflected in the Committee's report where the nature of the health condition in question as 'life-threatening' is highlighted. In particular, the Committee refers to pre-Paposhvili domestic case law, which seems to maintain a restrictive approach to what could constitute "very exceptional circumstances".

Along these lines, it is advisable that the Committee revisits the notion of 'exceptionally distressing circumstances' requiring a more thorough and nuanced consideration of the individual circumstances of the migrant in question. This may entail the adoption of the term 'särskilt ömmande omständigheter' (particularly distressing circumstances) previously used in cases implicating children (pages 314-315) as more suitable for the purposes of this provision.

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[9] See amongst others, Vladislava Stoyanova, 'How Exceptional Must 'Very Exceptional' Be? Non-Refoulement, Socio-Economic Deprivation, and Paposhvili v Belgium' (2017) 29(4) International Journal of Refugee Law, p 580–616.

[10] ECtHR *Paposhvili v Belgium*, Appl. No. 41738/10, 13 December 2016 (GC) par. 183.

Adaptation to life in Sweden

This ground reflects the obligation imposed on Sweden under international law (e.g. Article 8 ECHR) to protect not only family relations but also a 'network of personal, social and economic relations that make up the private life of every human being'.[11] In the words of the ECtHR 'Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity'.[12]

Such an expansive understanding of ties with the host country that might impair removal, does not appear to be embraced by the Committee. Instead, the Committee refers to domestic case law that adopts a narrow understanding of 'relations' with the host country, primarily determined by the length of stay in the host country.[13]

In light of this, we suggest the Committee replace the term 'anpassning till Sverige' (adaptation to life in Sweden) with the term 'särskild anknytning till Sverige' (special connection with Sweden) as more suitable for the purposes of this provision, in line with the wording used by other Nordic countries (pages 309-310).

Finally, we consider the differentiation between adults and children in this provision as a step to the right direction and in accordance with international and regional standards. However, we do suggest that the provision include direct reference to the principle of the best interest of the child. The modified provision would read as follows: 'Furthermore, the Committee proposes that children may be granted residence permits under the proposed provision based on the best interest of the child, even if the circumstances that emerge do not meet the severity required for permits to be granted to adults'.

Persons otherwise in need of protection

Maintaining the rationale permeating the Temporary Law, the Committee proposes that the category of 'persons otherwise in need of protection' is expunged from the Aliens Act.

In what follows, we outline the reasons why a reconsideration of this exemption is necessary.

First of all, the Committee refers to the low numbers of individuals who have benefited from this status through the years to justify the limited significance of the provision. To put it simply, the Committee seems to be arguing that there is no point in offering a status for which there is no 'demand'. However, there is no explanation of the reasons why these protection grounds have not been prominent in asylum claims in Sweden. The fact that these forms of protection have not been granted so far might, for instance, be attributed to misapplication of relevant rules by the authorities or by scarce information on the side of the applicants who might not be

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[11] See ECtHR *Slivenko et al. v. Latvia*, App. No. 48321/99, 9 October 2003 (GC) par. 96.

[12] ECtHR *A.W. Khan v. the United Kingdom*, App. No. 47486/06, 12 January 2010, par. 31. For an extended analysis see D Thym, 'Residence as De Facto Citizenship? Protection of Long-term Residence under Article 8 ECHR' in R Rubio-Marin (ed) *Human Rights and Immigration* (OUP, 2014) pp 107-143.

[13] Based on ECtHR case law, the application of rigid time-limits for determining whether a special connection with the host society has been established, regardless of the circumstances of an individual case, may impair the very essence of the right to respect for private life under Article 8. See Council of Europe, European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence*, updated 31 August 2020, available at https://www.echr.coe.int/documents/guide_art_8_eng.pdf

aware that such grounds may serve as the basis for their application.[14] In this context, undermining the significance of this protection status by reference to its non-application is contested.

As a matter of fact, the value of regulating climate change and disaster displacement is increasingly recognized by international and regional institutions. The Global Compact on Refugees, adopted by an overwhelming majority in the UN General Assembly in 2018, addresses explicitly this growing concern, stating that 'climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements.'[15] Equally, according to the European Commission, 'there is growing evidence that climate change, climate-induced events and environmental disruptions are likely to assume greater importance in influencing migration movements.[16]

Second, the Committee admits that no legal framework specifically addresses such grounds. Indeed, the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol definition of 'refugee' do not cover the situations of persons fleeing conflicts or environmental degradation. On this basis, the definition has been criticized as not capturing the reality of human experience. Therefore, we submit, the need to regulate these matters at national and regional levels is necessary.[17]

Through its early understanding of the practical need to regulate conditions covered by this provision, Sweden has played a pioneering role in raising awareness about contemporary drivers of displacement. Considering that such circumstances are likely to persist, if not increase in the coming years, it is in Sweden's interest to continue regulate them with explicit reference to its reformed migration legislation.

A final comment relating to the generalized violence ground is due. The Committee expresses its ambivalence (page 323) as to whether regulating harm caused in the context of conflicts in more than one provisions of the Aliens Act (i.e. in the context of subsidiary/alternative protection and in this case) is legally sound. In our view,

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[14] A research project launched recently by the Raoul Wallenberg Institute in Sweden, reviews 850 Swedish cases relating to disasters and displacement before domestic courts. Its preliminary findings have shown that there is a prominence of disaster in claims for protection, and that despite the legal challenges raised by the absence of a coherent understanding of disaster-related displacement, the need for more guidance on the matter is an imperative. See ClimMobil: Judicial and policy responses to climate change-related mobility in the European Union with a focus on Austria and Sweden, available at https://rwi.lu.se/climmobil-judicial-and-policy-responses/ .

[15] Global compact on refugees (A/73/12 (Part II)) adopted by the UN General Assembly on 17 December 2018 (A/RES/73/151) paras 8 and 12. See, also, UN Human Rights Committee (HRC), *Teitiota v New Zealand*, 7 January 2020, CCPR/C/127/D/2728/2016.

[16] European Commission, Commission Staff Working Document 'Climate Change, Environmental Degradation and Migration' Brussels, 16.4.2013 SWD(2013) 138 final, p. 3.

[17] At the EU level, although the Qualification Directive, does not include generalized violence as such and climate change amongst the types of serious harm which can lead to granting subsidiary protection, a number of EU Member States have included in their legislation provisions concerning those who may be unable to return home owing to such circumstances. For example, the Finnish example, where both natural and human-induced disasters fall within its scope has been welcomed as less restrictive than the Swedish one which was not clear as to whether slow onset processes in relation to climate change and disaster are covered (prop 1996/97:25 s. 101, p. 100). Other States have granted temporary protection on an *ad hoc* basis after natural disasters (e.g. for victims of the Indian Ocean tsunami in 2004). Nevertheless, *ad hoc* measures, particularly in cases when the underlying environmental or conflict processes and consequences are not temporary, have not proved appropriate.

the existence of two different provisions addressing harm in conflict is warranted based on the distinct scope of each provision. As suggested by the Committee, the alternative protection status, that corresponds to Article 15c of the Qualification Directive, imposes a high threshold as to which situations may qualify as 'conflicts'. Furthermore, this provision imposes a requirement for the existence of 'indiscriminate violence'. Although the reasoning in *Diakite* might have loosened the criteria required for the existence of an armed conflict, this does not automatically bring less severe circumstances under the ambit of the subsidiary protection provision. In this sense, harm caused in situations that do not qualify as conflicts in the context of subsidiary protection, warrant further regulation. This, we argue, justifies the need for a distinct rule targeting 'persons otherwise in need of protection'.

In light of the above, we strongly recommend that the category of 'persons otherwise in need of protection' is included in the reformed Aliens Act. This would ensure that the Swedish legislation captures new trends in human mobility and displacement.[18] A vision of a sustainable migration policy in accordance with the principle of legal certainty requires that cases covered by this provision are maintained in the new legislation and, also, that its scope is reassessed based on latest research findings and standards.

Safe and legal channels

Sweden's role in ensuring safe and legal channels through national law

The Committee acknowledges the need for the availability of safe and legal channels into Sweden for people in need of protection. In its analysis, the Committee enumerates various initiatives adopted at the European level in this direction, such as resettlement through voluntary pledges. It also goes through measures adopted unilaterally by different EU Member States in cooperation with the UNHCR, such as humanitarian admission and private sponsorships. Nevertheless, the Committee suggests that the possibilities for Sweden to adopt national measures to ensure that a greater proportion of people coming to Sweden do so through safe and legal channels, are limited. In light of this, the Committee concludes that Sweden should strive to ensure the further development of regional (EU) and international cooperation for the resettlement of quota refugees. However, the Committee makes no particular reference to the adoption of concrete national initiatives.

We applaud the Committee's support to EU-wide resettlement programme, which is indeed a tangible demonstration of international solidarity with third countries and a tool that provides a safe and legal alternative to irregular and often life-threatening ways to access protection. However, it should be noted that the development of resettlement activities at the EU level in no way diminishes the continuing need for States, in this case Sweden, to strengthen their national systems and try to identify protection seekers as early in the asylum journey as possible through different means. In light of this, we contend that the Committee's reference to 'limited' capacity to undertake further initiatives in this direction, is not only ill-substantiated but also at odds with recent state practice on the matter.

First of all, it is an established principle of international law that the primary responsibility for protection lies with States themselves. This means that a State, in this case Sweden, cannot shy away from its obligations under international law by

[18] See e.g. UN Human Rights Committee (HRC), *Teitiota v New Zealand*, 7 January 2020, CCPR/C/127/D/2728/2016.

reference to its membership in intergovernmental organizations, such as the EU, and to the EU's initiatives in this context.[19] As a matter of fact, the new EU pact on Migration and Asylum invites the EU Member States to consider alternative legal and safe pathways to their territories, such as humanitarian admission and private sponsorships.[20] Given the importance of employment and engagement with local communities for integration purposes, such programmes appear to have broader positive side effects both for refugees and host societies.[21] In its analysis, the Committee does not offer convincing reasons as to why the possibilities for Sweden to engage with such activities are 'limited'.

In addition, the Committee seems to suggest that the European Commission's plan to propose common rules for the issuance of humanitarian visas across the EU, excludes the possibility for Sweden to, unilaterally, offer safe pathways to protection seekers by issuing humanitarian visas through its embassies abroad. It is worth noting here that the CJEU has applied a narrow understanding of the division of competence between Member States and the EU in relation to the issuance of humanitarian visas. Pursuant to *X and X. v Belgium* case, Members States enjoy a wide margin of appreciation when deciding on a humanitarian visa application. The Court contented that since no measure has been adopted, to date, by the EU legislature on the basis of Article 79(2)(a) TFEU (long-term visas and residence permits on humanitarian grounds), the issuance of humanitarian visas fell solely within the scope of national law. This means that despite the Court's contention that Member States are not obliged under EU law (EU Visa Code) to issue humanitarian visas, Member States remain competent to issue humanitarian visas under national law.

The above lead us to conclude that international and regional initiatives rely and benefit from the promotion of national integrated approaches which protect refugees and are, simultaneously, attentive to the legitimate concerns of host societies. This is why States enjoy discretion in developing national initiatives on safe and legal pathways, based on national contexts, priorities, capacities and levels of development.[22] It is, thus, unfortunate that the Committee has not clarified how Sweden could contribute to the creation of safe and legal channels to its territory through alternative national schemes, in light of its *limited* capacity.[23]

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[19] The Global Compact on Refugees has recognized the importance of national leadership in relation to facilitating safe routes and access to territory for refugees, stipulating that drawing on good practices relating to resettlement and complementary pathways for admission, national arrangements may be established 'in support of the objectives of the global compact'. See Global Compact on Refugees paras 18, 20, 65, 94-96.

[20] See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final p. 22-24; European Commission, Commission recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, C (2020) 6467 final, Brussels, 23.9.2020.

[21] See Kumin J., (2015), Welcoming engagement; how private sponsorship can strengthen refugee resettlement in the European Union, MPI, December 2015, p. 5.

[22] ECRE, *Protection In Europe: Safe And Legal Access Channels ECRE's Vision of Europe's Role In The Global Refugee Protection Regime: Policy Paper 1*, February 2017, available at https://www.ecre.org/wp-content/uploads/2017/04/Policy-Papers-01.pdf

[23] It is worth noting that Sweden may pursue such national schemes with the support of the European Asylum Support Office and EU funding opportunities. On this, see European Commission, Commission recommendation on legal pathways to protection in the EU:

We propose that the Committee adopts a rule on the basis of which Sweden can establish national schemes of complementary pathways to protection, including the issuance of humanitarian visas, educational opportunities for refugees through grant of scholarships and student visas in partnership with academic institutions, and labour mobility opportunities in consultation with private sector, municipalities and civil society.

Treatment afforded to individuals in need of protection in Sweden

The Committee introduces a bold distinction between the rights of individuals in need of protection who have been accepted in the country through regular means, on the one hand, and the rights of individuals who have entered Sweden through irregular means, on the other (page 357). This distinction is maintained under the assumption that offering higher protection to the former would serve as a disincentive for the latter to use irregular means in pursuit of asylum.

We respectfully argue that such distinction is highly questionable from a human rights point of view. Article 3 of the 1951 Refugee Convention stipulates the principle of non-discrimination between refugees. The same principle is enshrined in international human rights law and regional legislation. In addition, offering lower protection to a person who has used irregular means to seek protection is underpinned by a blame-based rationale not supported by international law.[24] In particular, the discussions reflected in the Refugee Convention's travaux préparatoires indicate an acknowledgement that refugees may have good cause to use irregular methods of entry, and that their flight routes may be far from straight, entailing temporary presence or even failed attempts to seek protection in other countries.[25] Finally, we submit, that the justification behind this distinction is also untenable since it is not grounded on verified facts.

In light of this, we suggest the Committee promotes a more principled approach to the treatment of individuals in need of protection.

Summary of the observations

- Extension of temporary residence permits to beneficiaries of international protection is not as such prohibited by international and EU law. These bodies of law, however, do not cater for the crucial question of integration. Integration of migrants is left to the discretion of States. The absence of standards under EU law and international law cannot be invoked to hamper measures of integration. The discretion left by international law and EU law should not be used to undermine an objective of integration, whose regulation and implementation fall within national competence.

- The conditions so that an alien is granted a temporary residence permit have general applicability since they apply to all aliens. The Committee's proposal is therefore not sufficiently sensitive to the special situation of the beneficiaries of protection.

promoting resettlement, humanitarian admission and other complementary pathways, C (2020) 6467 final, Brussels, 23.9.2020, p. 8 (1).

[24] See, e.g. the non-penalization principle as enshrined in Article 31 of the UN Refugee Convention.

[25] UN High Commissioner for Refugees (UNHCR), The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis, pp. 278–304. For a more detailed analysis see E. Karageorgiou, 'The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity' (2019) 88(3) Nordic Journal of International Law, p. 324.

- The requirement of ‘having a certain way of life’ is ambiguous and open to various, possibly, inconsistent interpretations.

- The distinction between refugees and individuals eligible for subsidiary protection as to the rights granted, remains unexplained and with a doubtful basis.

- The absence of a possibility for a person granted subsidiary protection to apply for a permanent permit *any time* after the fulfillment of all the formal conditions raises concerns.

- The proposed legislation should be clearer as to the point in time from which the three-month timeframe (within which more favorable conditions for family reunification apply) is counted.

- Instead of applying rigid rules, the legislation should allow flexibility as to the possibility for family reunification and the applicable criteria. Such a flexibility and an assessment tailored to the individual circumstances is required under the relevant EU law and European Convention on Human Rights law.

- The prerequisite, as proposed by the Committee, that the alien and the sponsor have cohabited for a long time in another country and it is clear in some other way that the relationship is well established, is *not* provided for in the Family Reunification Directive 2003/86 as a precondition for lifting the maintenance requirement for refugees so that family reunification is allowed.

- The national legislation should take into account the reality of the current migration patterns that imply that migrants transit through many countries and family members might reside for a prolonged period in other countries and, thus, be separated. This reality should not be an obstacle for family reunification. Such an obstacle can arise with the application of the requirement for long-cohabitation in another country.

- The threshold of ‘exceptional grounds’, so that the maintenance requirement is not applied, is very high and not sufficiently flexible. It is, thus, advisable to reframe it and instead refer to, for example, ‘special grounds’ or ‘specific individual circumstances’.

- In the context of residence permits on humanitarian grounds, the notion of ‘exceptionally distressing circumstances’ should be revised in order to reflect a nuanced consideration of the individual circumstances of the migrant in question. The term ‘särskilt ömmande omständigheter’ (particularly distressing circumstances) is considered more suitable in this regard.
- In the same context, the term ‘anpassning till Sverige’ (adaptation to life in Sweden) should be replaced by the term ‘anknytning till Sverige’ (connection with Sweden).
- In cases where humanitarian grounds are applicable to minors, the following modification is suggested: ‘Furthermore, the Committee proposes that children may be granted residence permits under the proposed provision

based on the best interest of the child, even if the circumstances that emerge do not meet the severity required for permits to be granted to adults'.

- The category of 'persons otherwise in need of protection' should be maintained in the reformed Aliens Act.

- The reformed legislation includes a provision on the basis of which Sweden may in the future establish national schemes of complementary pathways to protection, including the issuance of humanitarian visas, educational opportunities for refugees through grant of scholarships or student visas in partnership with academic institutions, and labour mobility opportunities in consultation with private sector, municipalities and civil society.

Enligt delegation

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