UNHCR Observations on the Refugee (Amending) Laws No.2 & No. 3 of 2013

Introduction

These observations are submitted by the Representation of the United Nations High Commissioner for Refugees ("UNHCR") in the Republic of Cyprus in relation to the Cyprus Refugee (Amending) Laws No.2 & No. 3 of 2013. UNHCR has a direct interest in this matter, as the agency entrusted by the United Nations General Assembly[1] with the mandate to provide international protection to refugees and, together with Governments, to seek permanent solutions to the problems of refugees. According to its Statute[2], UNHCR fulfils its mandate *inter alia* by "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]" UNHCR"s supervisory responsibility has been reflected in European Union law, including by way of a general reference to the 1951 Convention relating to the Status of Refugees[3] in Article 78 (1) of the Treaty on the Functioning of the European Union ("TFEU")[4], as well as in Declaration 17 to the Treaty of Amsterdam, which provides that "consultations shall be established with the United Nations High Commissioner for Refugees … on matters relating to asylum policy".[5]

The proposed amendments aim in the main to transpose the provisions of the recast Qualification Directive 2011/95/EU. UNHCR welcomes the alignment of rights between refugees and subsidiary protection beneficiaries. This approach recognizes that distinguishing between the rights and obligations of international protection beneficiaries may not be justified in terms of the individual"s flight experience, protection needs or ability to participate and contribute to society.

[1] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, available at: http://www.unhcr.org/refworld/docid/3be01b964.html.
[2] UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628 ("UNHCR Statute").
[3] According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of th[e 1951] Convention".
[4] European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: http://www.unhcr.org/refworld/docid/4b17a07e2.html.
[5] European Union, Declaration on Article 73k of the Treaty establishing the European Community, OJ C 340/134 of 10.11.1997, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML.

Despite the approximation of rights between refugees and subsidiary protection beneficiaries, the proposed amendments aim at excluding beneficiaries of subsidiary protection status from the right to family reunification. Moreover, the proposed amendments intend to restrict family reunification rights of refugees to the absolute minimum, with the adoption of most of the optional provisions of the Family Reunification Directive which derogate from the general standards. UNHCR expresses its concern over the deprivation of this right for subsidiary protection beneficiaries and its restriction for beneficiaries of refugee status, ten years after the initial transposition and implementation of the Family Reunification Directive. Following separation caused by forced displacement, such as from persecution and war, family reunification is often the only way to ensure respect for a refugee‟s right to family unity. At the moment of flight, persons have to make difficult decisions about leaving their family behind to find safety in another country, but are forced to leave often without ensuring or knowing if their families are safe. Separation of family members during forced displacement and flight can have devastating consequences on peoples‟ well-being and ability to rebuild their lives. Restoring families can ease the sense of loss that accompanies many refugees who, in addition to family, have lost their country, network and life as they knew it.

The following are UNHCR‟s Observations on the proposed amendments to the Cyprus Refugee Law, in a numerical order:

Refugee Amending Law No. 2 of 2013:

Proposed amendment to Section 2: Definitions

"Unaccompanied minor": The proposed definition is inconsistent with the term envisaged in Article 2 (l) of the recast EU Qualification Directive of 2011 (2011/95/EU), which, per the Explanatory Memorandum, the Draft Amending Law No. 2 aims to transpose. The proposed new definition makes reference to an unaccompanied child being considered the child who is not accompanied by an adult responsible *by law or custom*, as opposed to Article 2(l) of the recast Qualification Directive, which refers to an adult responsible for the child *by law or by the practice of the Member State concerned.*

Although the two definitions appear to be similar, there are significant implications by virtue of a vague reference to "custom" which may leave children at risk. A child may indeed arrive accompanied by an adult, who, however, may be ill-equipped to be "responsible" for the child, or may even be a trafficker bringing the child to a third country for the purposes of exploitation. The Immigration Police officers, who would, under Section 10 of the Cyprus Refugee Law, be called to define whether a child should be considered "unaccompanied" or "accompanied" by an adult responsible for him or her, and subsequently refer the unaccompanied child to the Asylum Service to be placed under the care of the Social Welfare Services, need to be guided and indeed be bound by the relevant law of Cyprus in making this determination.

The Children‟s Act, CAP 352, provides that a child is considered as in need to be placed under welfare care, when "… (a) he has neither parent nor guardian or has been and remains abandoned by his parents or guardian or is lost[6]" and defines as "guardian[7]" a person appointed by a will or by order of a Court of competent jurisdiction to be guardian of a child. A reference to an adult responsible for a child by custom would be incompatible with these provisions of the Children‟s Act. The new definition of an "unaccompanied child", contained in the recast Qualification Directive, purposefully abolishes the reference to "custom" and replaces it with the reference to the law or practice of the Member State, aiming at bringing clarity to the parameters within which a child shall be determined to be unaccompanied[8]. To ensure consistency and harmonisation, this new definition is repeated in all recast asylum instruments[9].

Recommendation: UNHCR recommends that the proposed definition be amended to reflect the wording of Article 2 (l) of the recast Qualification Directive.

"Family members": The proposed new definition of Section 2 does not reflect accurately the relevant definition contained in Article 2 (j) of the recast Qualification Directive, insofar as *(i)* it does not refer to its relevance to the application for international protection; *(ii)* refers only to the female spouse of a beneficiary of international protection; and *(iii)* fails to refer to the *practice* of the Member State, in this case the Republic of Cyprus, in relation to the comparable treatment of unmarried couples to married couples, and in the determination of an adult responsible for the beneficiary of international protection when that beneficiary is a minor and unmarried.

(i) As regards the lack of specific reference to the relation of the term "family members" to the application for international protection, Article 2(j) of the recast Qualification Directive, from where this definition derives, clearly provides that this definition is made in relation to the "application for international protection". By contrast, the proposed new definition makes reference only to the "application", risking to be erroneously applied in relation to the application for family reunification. As will be analysed below, the definition of family members in relation to the Family Reunification procedures differs from the one of the recast Qualification Directive, which, per its Article 1, aims to define who qualifies to be granted international protection and the rights that are to be given to persons qualifying as such, as well as their family members who are already on the territory of the Member State which granted protection[10]. It should further be noted that

[6] Children‟s Act, CAP. 352, Section 3 (1) (a)
[7] Children‟s Act, CAP. 352, Section 2
[88] COM(2011) 320 Final ANNEX, Detailed Explanation of the Amended Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast), Brussels 1.6.2011, page 1, Article 2: *"(e) In the definition of an unaccompanied minor, the reference to "custom" is replaced with "the national practice of the Member State concerned" for reasons of clarity".*
[9] Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), Article 2(e); Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), Article 2(m).
[10] Directive 2011/95/EU of the European Parliament and of the Council on standards for qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

the term "application", has been repealed in the relevant asylum instruments and replaced by the term "application for international protection", for the sake of clarity[11].

(ii) As regards the sole reference to a female spouse of a beneficiary of international protection, the Greek text of the recast Qualification Directive in the corresponding to Article 2(j), Article 2 I, makes clear reference to both the male and the female spouse of the beneficiary of international protection, which the proposed new definition of Section 2, fails to reflect. This omission may constitute an undue restriction of the definition of the eligible family members and may lead to the discriminatory treatment of male spouses or partners of female beneficiaries of international protection.

(iii) As regards the lack of reference to the *practice* of the Member State in relation to the comparable treatment of unmarried couples to married couples and in the determination of an adult responsible for the beneficiary of international protection, when that beneficiary is a minor and unmarried, this is at variance with the relevant definition of Article 2 (j) of the recast Qualification Directive and may be considered in violation of these mandatory provisions of the Directive.

Recommendation: UNHCR recommends that the proposed definition be amended to reflect fully and accurately the wording of Article 2 (j) of the recast Qualification Directive.

"Family reunification": The proposed new definition conflicts with the relevant definition contained in the Council Directive 2003/86/EC on the right to family reunification, insofar as it refers only to "family members with whom the refugee created a family relationship prior to his entry to the Republic", whereas Article 2(d) of the Family Reunification Directive provides for family members "whether the family relationship arose before or after the resident's entry". Article 2 (d) of the Family Reunification Directive constitutes a mandatory provision that would be infringed in case the wording of the proposed new definition of Section 2 be maintained.

As it will be analysed below, in relation to the provisions of the proposed new Section 25 of the Refugee Amending Law No. 2 relating to family reunification and family unity, the European Court of Human Rights, in its very recent decision, *Hode and Abdi v. The United Kingdom*[12], found that the different treatment accorded to refugees with respect to the reunification of post-flight spouses lacked objective and reasonable justification and

---

(recast), Recital 12: "*The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and on the other hand, to ensure that a minimum level of benefits is available for those persons in all Member States;* Recital 16: *"(...) In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members (...)";* Recital 36: *"Family members, merely due to their relation to the refugee will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status".*

[11] Directive 2011/95/EU, Article 2(h); Directive 2013/32/EU, Article 2(b); Directive 2013/33/EU, Article 2(a).

[12] Application No. 22341/09, Date of decision 06.02.2013

therefore constituted a violation of Article 14 (non-discrimination) read together with Article 8 (right to family life).

Recommendation: UNHCR recommends that the proposed definition be amended to reflect fully and accurately the wording of Article 2 (d) of the Family Reunification Directive.

Proposed new Section 5: Exclusion from refugee and subsidiary protection status

Reference to the term "offense" instead of the term "crime"

The proposed new Section 5 regulates the exclusion of persons considered not to be deserving of international protection. The exclusion clauses are foreseen in Article 1F of the 1951 Geneva Convention relating to the Status of Refugees, and contain provisions which oblige States to deny the benefits of refugee status to certain persons who would otherwise qualify as refugees. The rationale for the exclusion clauses is that certain acts are so grave as to render their perpetrators undeserving of international protection and their purpose is to deprive those guilty of heinous acts from abusing the institution of asylum in order to avoid being held legally accountable for their acts. Therefore, given the serious consequences of exclusion, the application of the exclusion clauses should be scrupulous and their interpretation restrictive.

In this regard, Article 1F of the 1951 Geneva Convention excludes from refugee status those persons who have (i) committed war crimes, (ii) serious non-political crimes or (iii) acts contrary to the purposes and principles of the United Nations. However, the proposed new Section 5 makes alternative and repeated reference to the commission of *offenses* rather than *crimes.* The terms "offense" and "crime" have different connotations in different legal systems, with "crime" denoting offences of a serious character. In the present context, a "serious" crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences would not be grounds for exclusion under Article 1 F.

Reference to *offenses* is made in the proposed new Section 5 (1) (c) (ii); new Section 5 (2) (b); and new Section 5 (2) (f), aiming at transposing Article 12 (2) (b)[13]; Article 17 (1) (b); and Article 17 (3) of the recast Qualification Directive, respectively. The text of the corresponding Articles of the recast Qualification Directive also makes consistent reference to "*crimes"* and not *"offenses".* In this regard, the text of the proposed new Sections 5 (1) (c) (ii); 5 (2) (b); and 5 (2) (f) would also be at variance with the provisions of Articles 12 (2) (b); 17 (1) (b); and 17 (3) of the recast Qualification Directive.

[13] Directive 2011/95/EU, Article 12 (2) (b): "(…) he has committed a serious non-political *crime* outside the country of refuge (…); Article 17 (1) (b): "(…) he or she has committed a serious *crime* (…)"; Article 17 (3): " (…) Member States may exclude a third-country national or a stateless person from being eligible for subsidiary protection if he or she, prior to his or her admission to the Member State concerned has committed one or more *crimes* (…)".

Recommendation: UNHCR recommends that reference to the term "offense(s)" in the proposed new Sections 5 (1) (c) (ii), 5 (2) (b), 5 (2) (f) be omitted and replaced with the term "crime(s)" to reflect accurately the text of Article 1F of the 1951 Geneva Convention relating to the Status of Refugees as well as the text of Articles 12 (2) (b); 17 (1) (b); and 17 (3) of the recast Qualification Directive.

Proposed new Section 5 (1) (c): Exclusion clauses

Furthermore, the proposed new Section 5 (1) (c), which aims at transposing Article 12 (2) of the recast Qualification Directive, restates the exclusion criteria of Article 1 F of the 1951 Geneva Convention relating to the Status of Refugees. Article 12 (2) of the recast Qualification Directive offers in addition a partial interpretation of two criteria, relating to persons considered as having committed a serious non-political crime, and persons who incite or otherwise participate in the commission of the crimes mentioned in this Article.

The term "prior to admission as a refugee"

In this regard, the proposed new Section 5 (1) (c) (ii) interprets the term "prior to admission as a refugee" to mean the time of issuing a residence permit based on the granting of refugee status. Given that the recognition of refugee status is a declaratory act[14], the expression "admission as a refugee" in Article 12 (2) (b) should be understood as the physical arrival of the asylum seeker in the host country. The exclusion clause contained in this provision should therefore only cover "serious non-political crimes" committed outside the host country. Acts committed by the refugee during his stay in the host country, prior to grant of any residence permit, should be dealt with through criminal procedures and, where applicable, in the context of the exception to the *non-refoulement* principle.

Recommendation: UNHCR suggests that Section 5 (1) (c) should be amended to reflect the wording of 1951 Convention, and that the sentence "which means the time of issuing a residence permit based on the granting of refugee status" should be deleted

Persons who incite or otherwise participate in the commission of crimes

The proposed new Section 5 (1) (c) (iv), transposing Article 12 (3), could lead to a violation of Article 1F of the 1951 Geneva Convention. This is insofar as it foresees that the exclusion clauses shall apply also to persons who incite or otherwise participate in the commission of the crimes, who however may lack the intent to commit crimes, and thus not be deemed individually responsible under international criminal law.

For exclusion to be justified, individual responsibility must be established in relation to a crime covered by Article 1F of the 1951 Geneva Convention. In general, individual responsibility flows from the person having committed or made a substantial contribution to the commission of the criminal act, in the knowledge and with the intent that his or her

[14] Directive 2011/95/EU, Recital 21: *"The recognition of refuge status is a declaratory act".*

act or omission would facilitate the criminal conduct[15]. Where the mental element is not satisfied, individual criminal responsibility is not established.

Recommendation: UNHCR suggests that Section 5 (1) (c) (iv) should be deleted, to reflect the wording of 1951 Convention.

Proposed amendment to Section 8: Right to remain

The proposed amendments to Section 8 paragraph (2), by virtue of which the transposition of the optional Article 11 (2) (c) of the Asylum Procedures Directive 2005/85/EC is aimed, foresee that the place of residence of an applicant shall be defined on the Confirmation of Submission of an Asylum Application (hereinafter, the "Confirmation Letter"), and that applicants are required to inform the competent authorities of any changes of the place of residence within three days. Furthermore, the proposed new Section 8 paragraph (3) provides that, in case of non-compliance with the requirement of Section 8 (2), the procedures of Section 16 A for the closure of the asylum file and discontinuation of the examination procedure shall apply.

The obligation to register a change of address within three days

At first it should be noted that the requirement to report a change of place of residence within three days may be at variance with the provisions of Article 20 paragraph 1 intent 2 (b), insofar as the latter permits an assumption of abandonment or implicit withdrawal of an application when any reporting duties are not complied with within reasonable time. The envisaged requirement of reporting within maximum three days may not be compliant with the requirement of „reasonable time" and would not justify an assumption of abandonment of an asylum application.

Recommendation: UNHCR recommends that the three-day time limit within which a change of address shall be registered to be extended to a reasonable timeframe of at least two weeks.

[15] Contemporary guidance on the nature of individual criminal responsibility can be found in the jurisprudence of the ICTY, in particular the judgment in the case of *Kvocka et al* (Omarska and Keraterm camps), Case No. IT-98-30/1, Trial Chamber judgment, 2 November 2001; and ICTY Appeal Chamber in *Tadic*, Case No. IT-94-1, 15 July 1999 where grounds for individual responsibility were discussed under four headings – instigation, commission, aiding and abetting, and participation in a joint criminal enterprise. "Instigating" was described as the prompting of another person to commit an offence, with the intent to induce the commission of the crime or in the knowledge that there was a substantial likelihood that the commission of a crime would be a probable consequence. "Commission" of a crime, the most obvious form of culpability, was considered to arise from the physical, perpetration of a crime or from engendering a culpable omission in violation of the criminal law, in the knowledge that there was a substantial likelihood that the commission of the crime would be the consequence of the particular conduct. "Aiding or abetting" requires the individual to have rendered a substantial contribution to the commission of a crime in the knowledge that this will assist or facilitate the commission of the offence.

Registration of change of address as condition for the right to remain: Confirmation Letter

The different types of Confirmation Letters, foreseen in Schedules III – V of the Cyprus Refugee Law, are issued pursuant to Article 6 of the Reception Conditions Directive 2003/9/EC. In accordance with Article 6, they constitute the documentation certifying the asylum seekers" status and testifying that they are allowed to stay while their application is being examined. The Confirmation Letters mention in detail the terms and conditions under which the applicant has the right to remain during the examination of the asylum application. However, they do not make reference to the condition of registering any change in the place of residence and the consequent discontinuation of the examination procedure and cessation of the right to remain.

Although the proposed new Section 8 (2) provides that the place of residence shall be mentioned on the Confirmation Letter, no such provision is made for the requirement of reporting any change of address within three days to be also mentioned on that document. In light of the serious consequences of non-compliance with this requirement, UNHCR suggests that further provision be made for this requirement to be clearly mentioned on the Confirmation Letter.

Recommendation: UNHCR recommends that further provisions are adopted to foresee that the requirement of reporting of a change of place of residence within the time-frame to be set in Section 8 be also explicitly mentioned on the Confirmation Letter.

Registration of change of address as condition for the right to remain: Implicit withdrawal

The proposed new Section 8 paragraph (3) provides that, in case of non-compliance with the requirement of Section 8 (2), the procedures of Section 16 A for the closure of the asylum file and discontinuation of the examination procedure shall apply.

Application of the provisions of Section 16A in case of failure to report a change of address within three days would not be consistent with the mandatory provisions of the Asylum Procedures Directive 2005/85/EC, Article 20 (2) intent 1 and 3. Article 20 provides that the determining authority shall take a decision to discontinue the examination when the applicant has implicitly withdrawn or abandoned his/her application for asylum, in particular, among other instances, when s/he has not complied with reporting duties within a reasonable time. It also provides in its paragraph (2) intent 1 that Member States shall ensure that the applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 is taken, is entitled to request that his/her case be reopened; and in intent 3 that Member States shall ensure that such a person is not removed contrary to the principle of non-refoulement.

By contrast, Section 16A, does not regulate the procedures for the implicit withdrawal of the application and makes no reference to the provisions of Article 20 (2). Moreover, the applicable Section 16 B, which indeed foresees the procedures in case of implicit

withdrawal of an asylum application, also fails to make reference to the mandatory safeguarding provision of Article 20 (2) intent 3. Although the possibility to request a re-examination of the asylum claim, in line with Article 20 (2) intent 1, is foreseen in the relevant Section 16D regulating the procedures for subsequent applications, and allows for such an examination in relation to decisions taken under Section 16B (implicit withdrawal) and 16C (explicit withdrawal), no reference is made to the mandatory requirement of Article 20 (2) intent 3 to ensure that no such person is removed contrary to the principle of non-refoulement.

Recommendation: UNHCR recommends that reference to the application of Section 16A in case of failure to report a change of address within three days be omitted; and replaced with the appropriate Section 16B, which should be amended to transpose the mandatory provisions of Article 20 (2) intent 3.

Proposed new Section 9: Rights of asylum seekers

The proposed new Section 9 (1) (b) provides that asylum applicants shall enjoy access to the material reception conditions, as provided for in the Refugee (Reception Conditions) Regulations. By virtue of amendments to Regulation 14 (3), introduced in July 2013, applicants are afforded the right to submit an „application for material reception conditions"; however reference to immediate access to assistance upon application for international protection is no longer foreseen due to the abolition of the relevant Regulation 14 (4). In the absence of any provision facilitating immediate access to assistance upon application for international protection, the proposed new Section 9 may be at variance with the provisions of Article 13 (1) of the Reception Conditions Directive 2003/9/EC (Article 17 (1) of the recast EU Reception Conditions Directive 2013/33/EU) whereby Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection. The Court of Justice of the European Union in its judgment on the *Case C-179/11, Cimade and GISTI v Ministre de L'Intérieur*[16] found that that the obligation of the State to guarantee the minimum reception conditions for asylum seekers applies from the moment the application is lodged.

Recommendation: UNHCR strongly recommends that further provisions are adopted to ensure that material reception conditions are available to applicants when they make their application for asylum, in line with the mandatory provisions of Article 13 (1) of the Reception Conditions Directive 2003/9/EC.

[16] Judgment of the Court of Justice of the European Union (Fourth Chamber) of 27 September 2012, http://curia.europa.eu/juris/document/document.jsf?text=&docid=127563&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4940292

Proposed Amendments to Section 19: Subsidiary protection status

Proposed New Section 19 (6A): Social Welfare

The proposed new Section 19 (6A) limits the social assistance that is to be granted to beneficiaries of subsidiary protection status to „core benefits", and provides that these should cover at least minimum income support, assistance in the case of illness, or pregnancy, and parental assistance, in so far as those benefits are granted to nationals under national law, which are to be provided at the same level and under the same eligibility conditions as nationals. The proposed new Section aims to transpose Article 29 (2) of the recast Qualification Directive[17], which derogates from the general rule of access to social welfare by all beneficiaries of international protection at the same level as nationals of the Member State.

In its decision in the case C-571/10[18], issued on 24 April 2012, the Court of Justice of the European Union (hereinafter, the CJEU) determined that the ability of Member States to limit social assistance to core benefits must be understood to be *"with the exception of social assistance or social protection benefits (...) which enable individuals to meet their basic needs such as food, accommodation and health[19]"*. In reaching this conclusion, the CJEU recalled that "*according to Article 34 of the Charter, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources[20]"*.

Article 34[21] of the Charter of Fundamental Rights of the European Union (hereinafter, the „Charter") safeguards the right to social security and social assistance and prescribes that

[17] Article 29(2) provides that, *"By way of derogation from the general rule laid down in paragraph 1, Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same level and under the same eligibility conditions as nationals"*. In relation to this Article, Recital 45 of the recast Qualification Directive provides that *"Especially to avoid social hardship, it is appropriate to provide beneficiaries of international protection with adequate social welfare and means of subsistence, without discrimination in the context of social assistance. With regard to social assistance, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary protection status should be determined by national law. The possibility of limiting such assistance to core benefits is to be understood as covering at least minimum income support, assistance in the case of illness, or pregnancy, and parental assistance, in so far as those benefits are granted to nationals under national law"*.

[18] CJEU (Grand Chamber), 24 April 2012, in Case C-571/10, Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano. In this case, the Court was called to called to define the meaning and the scope of „core benefits" in relation to the derogation contained in Article 11(4) of the Long-term residence Directive 2003/109/EC, by virtue of which Member States may limit social assistance and social protection provided to long-term residents to „core benefits". Similarly to Recital (45) of the recast Qualification Directive, Recital (13) of Directive 2003/109/EC provides that "With regard to social assistance, the possibility of limiting the benefits for long-term residents to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care".

[19] C-571/10, para.91.

[20] C-571/10, para. 92.

[21] "Article 34, Social security and social assistance: 1. The Union recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness,

the [European] Union respects the entitlements to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and loss of employment, and, in order to combat social exclusion and poverty, recognizes and respects the right to social and housing assistance so as to ensure a decent existence to all those who lack sufficient resources. Article 21 of the Charter prohibits discrimination on any ground[22]. With regard to the principle of non-discrimination and in relation to child benefits, the European Court of Human Rights has held in two cases that differentiating social benefits according to type of residence permit amounts to discrimination. The European Court of Human Rights interpreted in recent case law[23] that a difference of treatment between aliens who were in possession of an unlimited residence permit and those who were not constituted a violation of Article 14 of the European Convention on Human Rights, on non-discrimination, in conjunction with Article 8, on the right to family life, insofar as it lacked objective and reasonable justification.

Recommendation: UNHCR recommends that the provisions of the proposed new Section 19 (6A) be omitted. In the case that these would be retained, UNHCR recommends that the term core benefits be defined as including at least adequate social welfare, and means of subsistence without discrimination in the context of social assistance, housing assistance, as well as social assistance in cases of accidents, dependency or old age and in the case of loss of employment, in addition to the current

---

industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices".

[22] Article 21, Non-discrimination: "1. Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

[23] In the *Niedzwiecki* decision, the applicant, who was issued with a limited residence permit for exceptional reasons after his asylum application was rejected, was denied child benefits on account of his limited residence title and the lack of an unlimited residence permit, as was required by the national law. According to the ECtHR"s ruling, 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 Court considered that by granting child benefits the States are able to demonstrate their respect for family life within the meaning of Article 8 of the ECHR and found that there has been a violation of Article 14 in conjunction with Article 8 as the Court if not discern sufficient reasons justifying the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit and those who were not. See *Niedzwiecki v. Germany*, 58453/00, Council of Europe: European Court of Human Rights, 25 October 2005, at: http://www.unhcr.org/refworld/docid/4406d6cc4.html, and *Okpisz v. Germany*, 59140/00, Council of Europe: European Court of Human Rights, 25 October 2005, at: http://www.unhcr.org/refworld/docid/4406d7ea4.html.

wording of the proposed new Section 19 (6A), in line with Recital (45) of the recast Qualification Directive, and Article 34 of the Charter.

Proposed amendment to Section 19 (7): Abolition of application paragraph (7) to subsidiary protection beneficiaries

The proposed amendment to Section 19 (7) foresees abolition of the application of Section 4 and Section 25 of the Refugee Law to subsidiary protection beneficiaries. Section 4 provides for the basic principles governing the treatment of refugees. Section 25 regulates family unity and family reunification. Comments on the abolition of the right to family reunification are provided below in relation to Section 25.

Abolition of application of Section 4 to subsidiary protection beneficiaries

Section 4 provides for the basic principles governing the treatment of refugees; (i) the principle of *non-refoulement*, (ii) non-discrimination, (iii) fair treatment, (iv) family unity, and (v) access to information.

The applicability of the principle of non-refoulement will be extensively analyzed below.

As regards the general principles of equality and non-discrimination is a fundamental element of international human rights law and apply to every person. The right to non-discrimination is recognised in Article 2 Universal Declaration of Human Rights and is enshrined in all major international human rights instruments, such as Articles 2 and 26 of the UN Covenant on Civil and Political Rights, Article 2(2) of the UN Convention on Economic, Social and Cultural Rights, Article 2 of the Convention on the Rights of the Child, Article 1(1) of the UN Convention on the elimination of racial discrimination and Article 1 of the Convention on the Elimination of Discrimination against Women. It is furthermore contained in Article 14 the European Convention on Human Rights, and is reinforced by its Protocol 12, which provides for a free-standing right to equal treatment. The recast Qualification Directive provides in Recital 17 that ”With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party, including in particular those that prohibit discrimination”. In view of the above, the principle of non-discrimination is applicable to beneficiaries of subsidiary protection.

As regards family unity, this is ensured for both refugees and subsidiary protection beneficiaries by virtue of Article 23 of the recast Qualification Directive. Article 23 is part of Chapter VII of this Directive, which, by virtue of Article 20 (2) applies both to refugees and subsidiary protection beneficiaries. Article 23 (1) provides that Member States shall ensure that family unity can be maintained. As mentioned below under the comments on Section 25, this mandatory provision has not been transposed, and further abolition of the applicability of family unity for subsidiary protection beneficiaries will infringe the provisions of the Directive.

As regards access to information, this is provided for by Article 22 of the recast Qualification Directive. According to this, Member States shall provide beneficiaries of international protection, as soon as possible after refugee status or subsidiary protection status has been granted, with access to information, in a language that they understand or are reasonably supposed to understand, on the rights and obligations relating to that status. Therefore, this principle applies also to subsidiary protection beneficiaries and abolition of the relevant Section 4 as regards subsidiary protection beneficiaries would be in contravention with Article 22 of the Directive.

Abolition of the application of the principle of non-refoulement to subsidiary protection beneficiaries

Protection from refoulement is foreseen in Article 21 of the recast Qualification Directive, which falls under Chapter VII of the Directive, regulating the content of international protection. The Directive explicitly provides that Chapter VII shall apply both to refugees and persons eligible for subsidiary protection, unless otherwise indicated[24]. Article 21(1) provides that Member States shall respect the principle of non-refoulement *in accordance with their international obligations*.

With regard to refugee status, the principle of non-refoulement is enshrined in Article 33(1) of the 1951 Convention relating to the Status of Refugees which provides that "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Art 33(1) therefore protects refugees, and asylum-seekers pending a determination of their claim, from being returned to a place where their life or freedom would be threatened. The fundamental nature of the principle requires that both direct and indirect refoulement are prohibited. The protection of refugees from „refoulement", however, is not absolute. Under Art 33(2) the benefit of the non-refoulement principle may not be claimed by a refugee of whom there are reasonable grounds for regarding as a danger to the security of the country in which he or she is or who having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

As regards applicants and persons granted subsidiary protection status, international obligations in relation to respect of the principle on non-refoulement, i.e. protection from return or expulsion to a place where the person and the person's rights would be at risk, shall therefore be seen in relation to the rights protected under subsidiary protection status. Subsidiary protection status is to be granted on account of risk of serious harm, as defined in Article 15 of the recast Qualification Directive, which consists of: (a) the death penalty or execution; (b) torture or inhuman or degrading treatment or punishment; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. In this regard, such

[24] Article 20 (2).

international obligations stem from the European Convention of Human Rights[25], the UN Convention Against Torture[26], the International Covenant for the protection of Civil and Political Rights[27] as well as the 1949 Geneva Convention on Protection of Civilians in Time of War.

With regard to a risk to be subjected to the death penalty or execution, the European Court of Human Rights found in a number of cases that Article 2 of the Convention and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there (see Al-Saadoon and Mufdhi v. the United Kingdom, no. 61498/08, 2 October 2010; Hakizimana v. Sweden ,

---

[25] European Convention for the Protection of Human Rights, Articles 2, 3 and Protocol 13. Article 2 § 1 provides: "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." Article 3 provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Protocol No. 13 provides: "Preamble: The Member States of the Council of Europe signatory hereto, Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings; Wishing to strengthen the protection of the right to life guaranteed by the Convention (...)Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war; Being resolved to take the final step in order to abolish the death penalty in all circumstances, Have agreed as follows: Article 1: Abolition of the death penalty The death penalty shall be abolished. No one shall be condemned to such penalty or executed. Article 2: Prohibition of derogations No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention."

[26] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3:1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

[27] International Covenant for the protection of Civil and Political Rights: Article 6: 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.
Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

no. 37913/05, 27 March 2008; *Soering v. the United Kingdom*, 7 July 1989, *Öcalan v. Turkey* [GC], no. 46221/99; S.R. v. Sweden (dec.), no. 62806/00, 23 April 2002; Ismaili v. Germany (dec.), no. 58128/00, 15 March 2001; Bader and *Kanbor v. Sweden*, no. 13284/04; Kaboulov v. Ukraine, no. 41015/04, 19 November 2009).

In relation to a risk to be subjected to torture, inhuman or degrading treatment or punishment, it is the Court‟s settled case-law that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country (see Saadi v. Italy, 37201/06, Soering v. the United Kingdom, 7 July 1989; Vilvarajah and Others v. the United Kingdom, 30 October 1991, Ahmed v. Austria, 17 December 1996, H.L.R. v. France, 29 April 1997; Jabari v. Turkey, no. 40035/98, Salah Sheekh v. the Netherlands, no. 1948/04, 11 January 2007).

Furthermore, the Court reiterated in a number of cases that Article 3 prohibits in absolute terms torture and inhuman or degrading treatment or punishment as it makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation (see Ireland v. the United Kingdom, 18 January 1978, Chahal v. the United Kingdom, 15 November 1996; Selmouni v. France [GC], no. 25803/94, Al-Adsani v. the United Kingdom [GC], no. 35763/97, Shamayev and Others v. Georgia and Russia, no. 36378/02). As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim‟s conduct (see Chahal, § 79), the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see Indelicato v. Italy, no. 31143/96, 18 October 2001, and Ramirez Sanchez v. France [GC], no. 59450/00). Beyond the jurisprudence of this Court, international and comparative standards are enshrined in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment the International Covenant on Civil and Political Rights, and the 1949 Geneva Conventions for the protection of civilians in time of war, all of which have emphasized the absolute, non-derogable and peremptory nature of the prohibition of torture and ill-.treatment.

As regards serious risk in relation to indiscriminate violence, the European Court of Human Rights in N.A. v. the United Kingdom the Court concluded if an applicant could show that the general situation of violence in the country of destination was of a sufficient level of intensity, this would create a real risk that removal to that country would violate Article 3 of the Convention (N.A. v. the United Kingdom, no. 25904/07, 06/08/2008). In the case of Sufi and Elmi v. The United Kingdom, No. 8319/07 and No. 11449/07, 28 June 2011, the European Court of Human Rights discussed the relationship between Article 3 of the Convention and Article 15(c) of the Qualification Directive the Court and found that Article 3 of the Convention, as interpreted in N.A., offers comparable protection to that afforded under the Directive. In particular, it notes that the threshold set by both provisions may, in exceptional circumstances, be attained in consequence of a situation of general violence of such intensity that any person being

returned to the region in question would be at risk simply on account of their presence there. As regards international standards, Article 45 of the 1949 Geneva Convention on Protection of Civilians in Time of War protects people from becoming victims of war and general violence, in particular in situations where the State is unable or unwilling to provide adequate protection. In case a situation of general or indiscriminate violence may be serious enough to invoke the prohibition on refoulement under 6(1) of the International Covenant for the protection of Civil and Political Rights.

Given the absolute character of the provisions of Article 2, 3 and Protocol 13 of the European Convention for the protection of Human Rights, the protection afforded to persons who would risk treatment in violation of the above-mentioned articles in case of return or expulsion goes beyond the provisions of Article 33 of the 1951 Geneva Convention relating to the Status of Refugees. In the Chahal case, the Court states that "[t]he protection afforded by Article 3 is thus *wider* than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees" (para. 80, emphasis added). The Court further stated that whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is *of the individual in question, however undesirable or dangerous, cannot be a material consideration*. (paras. 79–80, emphasis added)

As mentioned above, protection from „refoulement" is foreseen in Article 21 of Chapter VII of the recast Qualification Directive, which provides that it shall apply both to refugees and persons eligible for subsidiary protection, unless otherwise indicated[28]. Therefore, in accordance with the Directive, the principle of non refoulement applies to both refugees and subsidiary protection beneficiaries. This interpretation is clearly provided in the Summary Note on the Qualification Directive 2004/83/EC[29], which notes as the first right bestowed by virtue of ***both*** refugee and subsidiary protection status to be the right of non-refoulement. It should be noted that Article 21 has not been subjected to any amendments by virtue of the recast Qualification Directive and its text remains identical to the text of Article 21 envisaged in the Directive 2004/83/EC.

Article 21(1) provides that Member States shall respect the principle of non-refoulement *in accordance with their international obligations*. The content of this protection from refoulement has been analyzed above in relation to the rights protected by refugee and subsidiary protection status. Exemption from protection from refoulement, per Article 21(2), is foreseen only in relation to refugees, as this would be permissible only under the conditions of Article 33(2) of the 1951 Geneva Convention relating to the Status of Refugees. Exemption from protection from refoulement is not foreseen for beneficiaries of subsidiary protection, as the relevant protection afforded by Articles 2,3, and Protocol 13 of the European Convention for the protection of Human Rights, as well as Article 3

[28] Article 20 (2).
[29] Conditions governing eligibility for refugee status or international protection, Council Directive 2004/83/EC, http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33176_en.htm

of the UN Convention Against Torture, Articles 6 and 7 of the International Covenant on Civil and Political Rights and Article 45 of the 1949 Geneva Convention for the protection of civilians at times of war is absolute and is not subject to any derogation.

Recommendation: UNHCR recommends that reference to the applicability of Section 4 be maintained, in line with Cyprus" international obligations.

Abolition of Section 19A: Humanitarian Status

By virtue of the proposed amendment Section 19A is to be abolished. Under the current Law, Section 19A provides that an asylum seeker whose claim for refugee and subsidiary status cannot be granted, may be entitled to a humanitarian status if, inter alia, the *deportation of that person is impossible either in law or fact.* Although the Aliens and Immigration Law foresees the possibility of issuance of a special residence permit for humanitarian reasons, the provision does not prescribe that this may be issued when deportation is impossible by law or fact. In the case that Section 19A be abolished, the Aliens and Immigration Law would be called to address that gap, through a separate application and an additional procedure, which will then bear additional administrative costs and time.

Lacking adequate provisions envisaging clearly the possibility of being granted an adequate residency status in case the deportation is in law or fact impossible, may lead to a violation of Article 3 of the European Convention of Human Rights if the consequences of this situation reach the threshold of inhumane and degrading treatment. In the case of *Ahmed v. Austria, No. 25964/94* , the applicant was not deported to his country of origin on the basis of the absolute prohibition of return or expulsion in case a of a risk of torture, inhuman or degrading treatment or punishment. However, the successful applicant was left without status in Austria and he consequently committed suicide 15 months after the ruling[30]. Persons protected under the provisions of Articles 2 or 3 of the European Convention for Human Rights may nevertheless not be entitled to refugee or subsidiary protection status due to exclusion. In the case of *Chahal v. United Kingdom*, the UK government decided to expel the applicant, who was a political activist, on grounds of national security because of his conviction for assault and affray and his alleged involvement in terrorist activities. The Court stated that it was well aware of "… the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, *even in these circumstances*, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, *irrespective of the victim's conduct (…*). In these circumstances, *the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration* (paragraphs 79 – 80.

[30] See Council of Europe, Committee of Ministers, Resolution ResDH(2002)99, concerning the Judgement of the European Court of Human Rights of 17 December 1996 in the case of Ahmed against Austria. The Resolution noted amendments to the Austrian Aliens Act providing: "Refusal of entry, expulsion or deportation of an alien to another state are unlawful if they would lead to a violation of Articles 2 or 3 of the European Convention Human Rights or of its Protocol No. 6 on the abolition of the death penalty."

Moreover, this provision has been used to address the protection needs of a particular group that is of concern to UNHCR, namely stateless persons. UNHCR was entrusted with the identification, prevention and reduction of statelessness and the protection of stateless persons under ExCom Conclusions 78 and 106, which were endorsed by the General Assembly in relevant Resolutions of 1995 and 2006, respectively. In the framework of Refugee Status Determination, persons who do not possess the nationality of any State may be identified. Although at times the reasons they left their country of habitual residence may be linked to one of the reasons of the refugee or subsidiary protection definitions, and thus be granted the corresponding status, on occasions their situation may not be linked to such reasons, nevertheless be in law or fact unable to return to the country of their former habitual residence. Although the situation of stateless persons is addressed in two international law instruments, namely the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, Cyprus is not signatory to any of these two instruments, and the situation of stateless persons is not addressed by virtue of domestic law. Moreover, the Aliens and Immigration Law lacks provisions or procedures to determine whether an individual would qualify as a stateless person, leaving such persons at risk of lack of identification or appropriate assessment of their needs.

UNHCR believes that there is a strong link between the humanitarian status and international refugee law, and it should therefore be examined within the existing single asylum procedure.

Recommendation: UNHCR strongly recommends that Section 19A be retained.

Proposed amendment to Section 21 (c) (iii): Freedom of movement

The proposed amendment restricts the freedom of movement of international protection beneficiaries within the areas under the effective control of the government of Cyprus. If this restriction were to be maintained it would clearly be in violation of Article 26 of the 1951 Geneva Convention relating to the Status of Refugees. Article 26 of the 1951 Geneva Convention relating to the Status of Refugees provides that States "shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances".

This provision of the 1951 Geneva Convention is fully reflected in the recast Qualification Directive, which in its Article 33 provides that Member States shall allow freedom of movement within their territory to beneficiaries of international protection, under the same conditions and restrictions as those provided for other third-country nationals legally resident in their territories.

In the Explanatory Note, it is provided that this restriction would be permissible; on the basis of Article 1(1) of Protocol No. 10[31] of the Act concerning the conditions of accession of Cyprus, which suspends the application of the *EU Acquis* in the areas of the Republic of Cyprus in which the government does not exercise effective control. With regard to the suspension of the *EU Acquis* in the areas outside the effective control of the government under Article 1 (1) of Protocol 10, Article 2 of the Protocol 10 provides that the Council shall define the terms under which the provisions of the EU law shall apply with regards to the movement of persons and goods across the Green Line. Subsequently, by virtue of Article 2 of the Protocol, the Council adopted the Council Regulation 866/2004[32] (hereinafter, the "Green Line Regulation"). Article 2 (3)[33] of the Green Line Regulation allows the movement of third country nationals across the Green Line, when they possess a residence permit issued by the Republic of Cyprus and do not represent a threat to public policy or public security.

International protection beneficiaries possess a residence permit issued by the Republic of Cyprus. Therefore, in UNHCR"s view, the proposed differentiated treatment of this group of third country nationals, on the sole basis of having been granted international protection, risks not to be in line with the provisions of the 1951 Geneva Convention and the recast Qualification Directive, in as far as no such restrictions are imposed on the freedom of movement of legally residing third country nationals. In line with the provisions of Article 2 of the Green Line Regulation, any restriction of the freedom of movement over the Green Line of third country nationals, including persons granted international protection, would only be permissible if they individually represent a threat to public policy or public security.

Recommendation: UNHCR recommends that reference to the "areas under the control of the government of the Republic" be omitted to ensure respect for the freedom of movement of beneficiaries of international protection.

---

[31] The Treaty of Accession 2003, Protocol No. 10 on Cyprus, OJ 23.09.2003

[32] COUNCIL REGULATION (EC) No 866/2004 of 29.4.2004 on a regime under Article 2 of Protocol No 10 of the Act of Accession as amended by Council Resolution (EC) No 293/2005 of 17 February 2005

[33] TITLE II, CROSSING OF PERSONS, Article 2, Check on Persons:

1. The Republic of Cyprus shall carry out checks on all persons crossing the line with the aim to combat illegal immigration of third country nationals and to detect and prevent any threat to public security and public policy. Such checks shall also be carried out on vehicles and objects in the possession of persons crossing the line.
2. All persons shall undergo at least one such check in order to establish their identity.
3. Third country nationals shall only be allowed to cross the line provided they:
(a) possess either a residence permit issued by the Republic of Cyprus or a valid travel document and, if required, a valid visa for the Republic of Cyprus, and
(b) do not represent a threat to public policy or public security.

Proposed new Section 25: Family unity and family reunification

As a preliminary comment it should be noted that the proposed new Section 25 of Draft Law No. 2 is conflicting with the proposed new Section 25 of Draft Law No. 3[34]. As both Drafts have been submitted to the Parliament simultaneously, there is lack of clarity as to which provisions are to be considered to prevail.

Recommendation: UNHCR recommends that provisions of Draft No. 2 and Draft No 3 be consolidated to allow certainty as to the scope and extent of the intended amendments.

Proposed new Section 25 (1): Family unity

The proposed new Section aims at regulating family unity and family reunification. Family Unity is foreseen in Article 23 of the recast Qualification Directive, while family reunification is regulated by the Council Directive 2003/86/EC on the right to family reunification.

Section 25 aims at transposing Article 23 of the recast Qualification Directive. However, it does not foresee the provisions of Article 23 (1), which sets out a positive obligation for the Member States to ensure that family unity is maintained. Given that the provisions of Article 23(1) of the recast Qualification Directive are mandatory, Section 25 is clearly at variance with the Directive insofar as it fails to transpose Article 23(1).

Recommendation: UNHCR recommends that Section 25 be amended to reflect the mandatory provisions of Article 23(1).

Proposed new Sections 25 (5) – (19): Family reunification

The proposed new sub-sections (5) – (19) of Section 25 relate to family reunification. Per these provisions beneficiaries of subsidiary protection status are excluded from the right to seek family reunification.

Beneficiaries of subsidiary protection are not included in the scope of the Family Reunification Directive pursuant to Article 3(2)(b). However, the European Commission, in its report to the European Parliament and the Council on the application of the Directive clearly states that the Directive should not be interpreted as obliging Member

[34] This is insofar as Section 25 (1) of Draft Law 2, does not confer to family members of international protection beneficiaries who do not qualify individually for such protection the rights under the [new, under Draft Law No.3] Section 21 A, relating to access to employment, while the proposed new Section 25 of Draft Law No. 3 does not confer to these family members the rights under Section 19 (5), relating to the freedom of movement and residence, access to education, access to employment and access to integration facilities, as well as Section 21 (v) relating to social security.

States to deny beneficiaries of temporary or subsidiary protection the right to family reunification[35].

UNHCR considers that the humanitarian needs of persons benefiting from subsidiary protection are not different from those of refugees and differences in entitlements are therefore not justified in terms of the individual‟s flight experience and protection needs. It should be noted that the Family Reunification Directive 2003/86/EC was adopted in 2003, prior to the adoption of the Qualification Directive 2004/83/EC in 2004 which introduced the concept of "international protection status", and the definition of "subsidiary protection status". According to its Article 3(1) third-country nationals are eligible as sponsors for family reunification if they legally reside in a Member State, have a residence permit valid for at least one year, irrespective of the title of residence, and have reasonable prospects of obtaining the right of permanent residence. In light of the provisions of the recast Qualification Directive 2011/95EU, which the current Draft Law in the main aims to transpose, which provides that subsidiary protection beneficiaries shall be issued with a renewable residence permit of a duration of at least one year, and upon renewal of at least two years[36], read in conjunction with the recast Long–Term Residence Directive 2011/51/EU[37], which extends the provisions of the Long-term residence Directive to international protection beneficiaries, allowing them to acquire in Cyprus permanent residence status, beneficiaries of subsidiary protection would now qualify as "sponsors" as any other third country national.

The European Court of Human Rights, in the case of *Tuquabo-Tekele and others v. The Netherlands, No 665/00,* the Court stated that even though Article 8 of the European Convention on Human Rights did not impose a positive obligation on the Netherlands to provide family reunion in its territory, it must examine whether refusing to do so the Government can be said to have struck a fair balance between the applicant‟s interests and its own interest in controlling immigration. The applicant, who had been granted a residence permit on humanitarian grounds in Norway, having fled indiscriminate violence in Eritrea, and then a residence permit in the Netherlands in order to join her husband, lodged a request for family reunification with her daughter, an Eritrean national, to join her in the Netherlands. The Court concluded that the best way for the applicants to develop family life together was the daughter living in Eritrea to settle in the Netherlands.

Recommendation: UNHCR recommends that the provisions on family reunification be extended to all beneficiaries of international protection, in light of the evolving asylum *acquis* and the jurisprudence of the European Court of Human Rights, as analyzed above.

[35] Brussels, 8.10.2008, COM(2008) 610 final, Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, page 4, footnote 11.
[36] Recast Qualification Directive 2011/95/EU, Article 24, Residence Permits
[37] Recast Long-Term Residence Directive 2011/51/EU. Article 1

Proposed new Section 25 (5) (a): Family members

The proposed definition of Section 25 (5) (a) is at variance with the definition of Article 4 of the Family Reunification Directive, insofar as it provides only for the female spouse of a refugee. The Greek text of Article 4 of the Family Reunification Directive makes clear reference to both the male and the female spouse of the beneficiary of the sponsor, which the proposed new definition of Section 25 (5) (a) fails to reflect. This omission may constitute an undue restriction of the definition of the eligible family members and may lead to the discriminatory treatment of male spouses or partners of female beneficiaries of international protection.

The European Court of Human Rights in the case *Abdulaziz, Cabales, and Balkandali v U*[38]*K* unanimously found a violation of Article 14 (prohibition of discrimination), together with Article 8 (right to family life) on the basis that there had been discrimination on the grounds of sex, opining that the State"s reasons for disparate treatment were not justified, particularly when taking into account the attempts to achieve gender equality. The applicants, three lawfully and permanently settled residents of the UK, sought to challenge the Government"s refusal to permit their husbands to join or remain with them on the basis of the 1980 immigration rules in force at the time. The rules applied stricter conditions for the granting of permission for husbands to join their wives than vice versa. The Government claimed this measure had been put in place in order to protect the domestic labor market and maintain "public tranquility". These conditions did not apply to the wives of male permanent residents. The applicants claimed discrimination on the grounds of race and sex, and birth.

Section 25 (5 (a) confines its application, and consequently the ability of refugees to apply for family reunification, to family relationships which predate the refugee"s entry in the Republic. As mentioned above under the comments on the definition of "family reunification" of the proposed Section 2, this definition is at variance with the mandatory definition of Article 2 (d) of the Family Reunification Directive, which explicitly provides that it shall apply "whether the family relationship arose before or after the resident"s entry".

Although Article 9 (2) of the Family Reunification Directive provides that "Member States may confine the application of this Chapter to refugees whose family relationships predate their entry", as clearly stated, this restriction applies only in relation to the application of Chapter V, which makes no derogation from the definition of family reunification, and its application irrespective of whether the family relationship arose before or after the resident"s entry. Recital (8) of the Family Reunification Directive stipulates that *"Special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification".*

[38] Application nos. 9214/80; 9473/81; 9474/81, Date of decision 28.05.1985

It follows that Chapter V can not be read in any way as introducing more restrictive provisions for refugees than any other third country national. Indeed Chapter V adopts by way of derogation more favourable provisions as regards the requirements and conditions under which refugees may apply for family reunification. The provision of Article 9(2) can therefore only be interpreted to mean that the more favourable provisions of Chapter V may be granted only in relation to family relationships which predate the refugee"s entry in the country of asylum, while for family relationships established after the refugee"s entry in the country of asylum the general, less favourable, provisions of the Directive shall apply, without precluding the possibility of family reunification with them.

As mentioned above under the comments made in relation to the definition of family members of the proposed Section 2, the European Court of Human Rights, in its very recent decision, *Hode and Abdi v. The United Kingdom*[39], found that the different treatment accorded to refugees with respect to the reunification of post-flight spouses lacked objective and reasonable justification and therefore constituted a violation of Article 14 (non-discrimination) read together with Article 8 (right to family life).

Recommendation: UNHCR recommends that the Section 25 (5) (a) be amended to reflect both the male and the female spouse of the refugee; and reflect the ability of family reunification with family members irrespective of whether the family relationship arose before or after the refugee"s entry to the Republic.

Proposed new Section 25 (12) (a): Application of a three-month time limit

The proposed new Section 25 (12) (a) transposes the derogation of Article 12(1) last indent, by virtue of which Member States may require refugees to meet the same conditions as other third country nationals if the application for family reunification is not submitted within three months after the granting of their status.

UNHCR considers that this limitation does not take sufficiently into account the particularities of the situation of beneficiaries of international protection or the special circumstances that have led to the separation of refugee families, and may prove to be a serious obstacle to family reunification for refugees. Refugees may not be aware if their family members are still alive, or of their whereabouts if they were separated during flight. Tracing of family members is a lengthy process which exceeds three months in many cases. Refugees also face more difficulties in providing the documentation required for family reunification 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.

Recommendation: UNHCR recommends that the proposed new Section 25 (12) (a) be omitted.

[39] Application No. 22341/09, Date of decision 06.02.2013

Proposed new Section 25 (13): Rejection of family reunification on grounds of public security, public policy or public health

The proposed new Section 25 (13) transposes the discretionary provision of Article 6, whereby Member States may reject an application for entry and residence of family members on grounds of public policy, public security or public health. However, it does not define what might constitute a threat to public policy and public security or public health grounds.

Recital 14 of the Family Reunification Directive provides guidance as to what might constitute a threat to public policy and public security: *"The notion of public policy may cover a conviction for committing a serious crime. In this context it has to be noted that the notion of public policy and public security covers also cases in which a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations"*. It follows therefore that public policy and public security issues shall be sufficiently serious to be considered as outweighing the right to family life, in line with the general principle of proportionality.

Article 8 ECHR guarantees the right to respect for private and family life. Although it does not contain a right to family reunification, the European Court of Human Rights provides for a limitation of states" discretionary powers to interfere in a person"s private and family life, firstly in the event of entry of foreign nationals onto the territory of a state for the purpose of family reunification, and secondly in the case of deportation of foreigners, leading to the break-up of the family. Such interference may only be justified if "necessary in a democratic society". Furthermore, member states must comply with the absolute right set forth in Article 3 (prohibition of torture or inhuman or degrading treatment or punishment) as well as with the provisions of Article 12 (Right to marry), Article 13 (Right to an effective remedy), Article 14 (Prohibition of discrimination) ECHR and Protocol No. 12 to the ECHR (General prohibition of discrimination).

In a number of cases relating to the applicants" conviction for criminal offenses, the Court found that interference with the right to family life was disproportionate to the public order considerations. Such was the finding in the case of *Maslov v. Austria*[40], *Boultif v. Switzerland*[41], *and Nunez v. Norway*[42].

[40] Maslov v. Austria (Grand Chamber), No 1638/03, 23.6.2008. In *Maslov*, the applicant was convicted for a series of aggravated burglaries, extortion and assault. The Court observed that the applicant had his main social, cultural, linguistic and family ties in Austria, where his family lived, and found that the imposition of an exclusion order, even for a limited duration was disproportionate to the legitimate aim pursued pf preventing disorder and crime and accordingly was contrary to Article 8.

[41] Boultif v. Switzerland, No. 54273/00, 2 August 2001. In *Boultif,* the applicant was sentenced to two-year imprisonment and the Swiss authorities refused to renew his residence permit. He complained that this resulted in him being separated from his wife, who did not speak Algerian and could not be expected to follow him to Algeria. The Court considered that the applicant had been subjected to a serious impediment to establish family life, since it was practically impossible for him to live with his family outside Switzerland. The interference was, therefore, not proportionate to the aim pursued. The Court held, unanimously, that there had been a violation of Article 8.

Recommendation: UNHCR recommends that the public policy and public order considerations be defined as covering conviction for serious crimes, in line with Recital 14 of the Directive and the relevant jurisprudnece of the European Court of Human Rights as regards the right to family life.

Proposed new Section 25 (14) (f):

The proposed new Section 25 (14) (f) subjects renewal of the one-year residence permit granted to family members pursuant to family reunification on the condition that the family member submits a certificate of successful oral examination on knowledge of the Greek Language at level A2 and on the basic political and social elements of the host society. Article 7 (2) of the Family Reunification Directive provides that Member States may require third country nationals to comply with integration measures, in accordance with international law.

The optional clause of Article 7(2) enables Member States to require third-country nationals to comply with integration measures. The objective of such measures is to *facilitate* the integration of family members. Their admissibility, however, under the Directive depends on whether they serve this purpose and whether they respect the principle of proportionality and subsidiarity. Their admissibility can therefore be questioned on the basis of the accessibility of such translated material, courses or tests, how they are designed and/or organized (test materials, fees, venue, etc.), accessibility in terms of location and fees and whether such measures or their impact serve purposes other than integration (e.g. high fees excluding low-income families). In the absence of such arrangements, integration requirements may hinder rather than facilitate the integration of family members.

In light of the fact that the proposed provision requires family members to gain such knowledge and pass such a test only one year after arrival, while such classes are not widely organized and the relevant test is only carried out twice a year, these provisions may not be compliant with the principles of proportionality and subsidiarity.

Recommendation: UNHCR recommends that additional measures be taken to ensure that these tests are based on achievable attainment levels, that the tests and learning processes are financially supported, and that alternatives to testing are available (to reflect the fact that not everyone has the same linguistic capabilities or needs).

---

[42] Nunez v. Norway, No. 55597/09, 28.6.2011. In *Nunez,* the applicant was fined for shop-lifting and deported from Norway with a two-year ban on her re-entry into the country. However, Ms Nunez had breached the re-entry ban, intentionally giving misleading information about her identity, previous stay in Norway and earlier convictions, and managed to obtain residence and work permits. The Directorate of Immigration revoked her permits and decided that she should be expelled and prohibited from re-entry for two years. However, she would thus be separated from her two children who would continue to live in Norway with their Norwegian father. The Court found that the authorities had not struck a fair balance between the public interest in ensuring effective immigration control and Ms Nunez's need to remain in Norway in order to continue to have contact with her children, in violation of Article 8.

Section 25A: Unaccompanied minors beneficiaries of refugee or subsidiary protection status

The proposed amendment of Section 25A of the Refugee Law establishes an obligation of family tracing after international protection has been granted, although reference is made to the possibility that the process may have been initiated prior to recognition. As key decisions relating to the protection of the child should take into account the outcome of family tracing, the tracing process shall start as soon as the unaccompanied child is identified.

Recommendation: UNHCR recommends that Section 25 A be amended to ensure that family tracing processes are initiated as soon as it is ascertained that a child applicant for international protection is unaccompanied.

Proposed amendment to Section 29: Deportation of international protection beneficiaries

The proposed amendment to Section 29 (1) provides for the possibility of deportation of international protection beneficiaries pursuant to the provisions of Article 21 of the recast Qualification Directive, relating to the exemption from the non-refoulement principle. As in the case of the exclusion clauses by virtue of the amendments to Section 5, the proposed new Section 29 (1) makes reference to "offense" rather than "crime" per the relevant provisions of Article 33 (2) of the 1951 Geneva Convention and Article 21 (2) of the recast Qualification Directive.

As mentioned above, the terms "offense" and "crime" have different connotations in different legal systems, with "crime" denoting offences of a serious character. In the present context, a "serious" crime must be a grave punishable act. Reference to offense instead of crime risks being at variance with the provisions of Article 33 (2) of the 1951 Geneva Convention and Article 21 (2) of the recast Qualification Directive.

Recommendation: UNHCR recommends that the term "offense" is replaced with the term "crime" to reflect accurately the text of Article 33 (2) of the 1951 Geneva Convention and Article 21 (2) of the recast Qualification Directive.

Refugee Amending Law No. 3 of 2013:

Proposed new Section 3B: Actors of protection

UNHCR continues to have serious concerns over the provisions of the Qualification Directive which seem to equate national protection provided by States with control over territory by some quasi-State entities and international organizations. There are indeed situations where quasi-State authorities control parts of a country"s territory. There have also been cases of an international organization exercising a certain administrative authority and control over territory on a transitional or temporary basis (e.g. Kosovo, East Timor). But such control and authority exercised by quasi-State entities or international

organizations cannot be interpreted to substitute for the full range of measures and actions normally attributed to the exercise of State sovereignty. Under international law, neither non-State actors nor international organizations have the attributes of a State and thus the ability to effectively enforce the rule of law.

Recommendation: UNHCR recommends removing the sentence "and which are willing and able to enforce the rule of law" and its replacement by a general sentence at the end of the Section stating *"When the actors of protection set out in (a) and (b) are willing and able to enforce the rule of law"*. Furthermore, UNHCR recommends deletion of the phrase *"including international organizations"*.

Proposed amendments to Section 3D: Reasons for persecution

UNHCR welcomes the proposed improvements to Section 3D(b) of the basic law on the basis of the revised Qualification Directive. Gender is a clear example of a social subset of persons who are defined by innate and immutable characteristics and who are frequently subject to differentiated treatment and standards. Courts and administrative bodies in a number of jurisdictions have found that women, for example, can constitute a particular social group within the meaning of Article 1 A(2) of the 1951 Convention. This does not mean that all women in the society qualify for refugee status. A claimant must demonstrate a well-founded fear of being persecuted based on her membership in the particular social group.

In the same vein, UNHCR would also suggest that provisions be made for age-related refugee claims. The range of potential refugee claims where age is a relevant factor is broad, including forcible or under-age recruitment into military service, (forced) child marriage, female genital mutilation, child trafficking, or child pornography or abuse. Some claims that are age-related may also include a gender element and compound the vulnerability of the claimant.

Recommendation: UNHCR recommends the adoption of age-sensitive definition.

Proposed amendments to Section 6A: Revocation of refugee status

There is a need to clearly differentiate between two distinct legal concepts which seem to have been confused in Section 6A(a)(1) and other provisions of the refugee law: cancellation and revocation of refugee status or subsidiary protection. Cancellation is about invalidating a decision by which a person"s refugee status was previously recognized when it has subsequently been ascertained that the person should never have been recognized as a refugee in the first place; for example, it was later established that the refugee status was obtained by a misrepresentation of material facts or that evidence justifying the person"s exclusion from international protection has become known. Revocation, on the other hand, concerns the withdrawal of refugee status in situations where a person properly determined to be a refugee subsequently engages in conduct which brings him or her within the scope of Article 1 F(a) or 1 F(c) of the 1951 Convention.

The proposed Section 6A(1)(a) is therefore more about cancellation of refugee status than revocation. Section 6A(1)(b)and (1)(c), on the other hand, concern the two situations where the 1951 Convention provides for an exception to the obligation of non-refoulement under its Article 33(2): (i) where there are "reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he is"; and, (ii) where the refugee, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." Refugees who put themselves in such situations are not entitled to the benefit of the *non-refoulement* obligation of Article 33 of the 1951 Convention and may be removed.

Article 33(2) applies to refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them. It aims to protect the safety of the country of refuge and hinges on the assessment that the refugee in question poses a major actual or future threat. For this reason, Article 33(2) has always been considered as a measure of last resort, taking precedence over and above criminal law sanctions and justified by the exceptional threat posed by the individual – a threat such that it can only be countered by removing the person from the country of asylum. In other words, sending the refugee back into the hands of his or her persecutors must be the only available means to eliminate the danger to the security of the country. If there are less restrictive and equally effective means available, such as prosecution in the country of refuge, restrictions on freedom of movement, or removal to a third country, then *refoulement* cannot be justified under article 33(2).

Any decision to deport a beneficiary of international protection on the basis of Article 29(a)(1) must also take into account the absolute nature of Article 3 of the European convention on Human Rights. Article 3 is listed in Article 15(2) of the Convention as a non-derogable provision of the Convention and must, therefore, be upheld even "in time of war or other public emergency threatening the life of a nation"[43].

Recommendation: UNHCR would highly recommend a re-drafting of Section 6A (1) to ensure the proper use of the terms revocation and cancelation.

Proposed amendments to Section 19: Serious harm

The proposed article 14(a)(2)(c) seem to require a showing of "individual" threat of serious harm in order for a person to qualify for subsidiary protection. This imposes, in effect, a higher standard of proof for persons fleeing situations of generalized violence and armed conflict which are characterized precisely by the indiscriminate and unpredictable nature of the risks civilians may face. Another concern with this article is its apparent restriction of the harm qualifying for subsidiary protection to situations of "international or internal armed conflict." In UNHCR"s view, there could be no valid justification for not extending subsidiary protection to any persons fleeing indiscriminate violence and gross human rights violations more generally.

[43] European Convention on Human Rights, Article 15(1).

Conclusion

As is evident from the foregoing comments, there are, in UNHCR‟s view, a number of important aspects of the two Bills which need to be revised in order to ensure the desired full conformity with international protection principles and best practice. It is in the spirit of its on-going, close co-operation with the government and the legislature that UNHCR has offered these observations and suggestions. UNHCR trusts that they will be duly taken into consideration and will be appropriately reflected in the final text of the revised legislation.

UNHCR Cyprus
Nicosia, February 2014