

UNHCR Observations on the Commission Proposal for a Council Directive Amending Directive 2003/109/EC Establishing a Long-Term Residence Status to Extend its Scope to Beneficiaries of International Protection

Introduction

On 6 June 2007, the European Commission issued its Proposal for a Council Directive¹ amending Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents in an EU Member State (“LTR Directive”²) to extend its scope to beneficiaries of international protection (hereafter: “proposed amendment”). Article 3(2) of the LTR Directive in its current form excludes refugees and beneficiaries of subsidiary protection from its application.

At the time of adoption of the LTR Directive, UNHCR had advocated for inclusion of refugees who are long-term residents in its application. This was not agreed at the time. UNHCR thus welcomes the long-awaited proposed amendment. Once this proposal is adopted, a long-standing gap in the legal framework of the first phase asylum Directives will be closed. Refugees and beneficiaries of subsidiary protection who reside lawfully in Member States for many years will be able to enjoy *at least* the same rights under EC law as other legally residing third-country nationals. The proposed amendment would inter alia enable refugees and beneficiaries of subsidiary protection who are long-term residents to take up residence in a Member State other than that in which they were recognized. In addition, if adopted, the proposed amendment would grant refugees and beneficiaries of subsidiary protection a more secure residence status, which cannot be lost through cessation of refugee or subsidiary protection status. This security of residence status is of utmost importance, as it will enable beneficiaries of international protection to focus unequivocally on a future in the European Union and to work towards integration in their host communities on an equal basis with other legally residing third-country nationals. This aspect is also emphasized in Article 34 of the 1951 Convention, which calls on States to facilitate integration and expedite naturalization of refugees, and could be applied analogously to Member States’ role in facilitating access to LTR-status.

UNHCR particularly welcomes the inclusion of beneficiaries of subsidiary protection in the proposal, together with refugees recognized under the 1951 Convention. In its

¹ *Proposal for a Council Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection (COM(2007) 298 final of 6 June 2007)*, at: <http://eur-lex.europa.eu/eur-lex/lex/LexUriServ/LexUriServ.do?uri=COM:2007:0298:FIN:EN:PDF>.

² *Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents* (hereinafter “LTR Directive”) (OJ L16/44 of 23 January 2004), at: <http://eur-lex.europa.eu/eur-lex/lex/LexUriServ/LexUriServ.do?uri=OJ:L:2004:016:0044:0053:EN:PDF>.

response to the European Commission's "Green Paper on the Future of the Common European Asylum System", UNHCR argues for aligning the entitlements of subsidiary protection beneficiaries with the protection standards applicable to refugees.³ Their inclusion in the proposed amendment acknowledges the fact that the protection needs of beneficiaries of subsidiary protection are as compelling and often as long in duration as those of refugees. Their entitlements should therefore be comparable to those of 1951 Convention refugees.

Another argument in favour of inclusion of subsidiary protection beneficiaries in the LTR Directive lies in current recognition practices in EU Member States. It is apparent that different Member States currently grant different forms of status to applicants from the same country of origin with similar reasons for seeking protection. Research has demonstrated that certain groups, such as Iraqis or Somalis, when recognized as being in need of protection, are given refugee status in some Member States, while receiving subsidiary protection in other Member States.⁴ Their inclusion in the LTR Directive will therefore contribute to a more harmonized residence status for people with recognized international protection needs.

UNHCR's concerns and suggestions

UNHCR encourages Member States to give their full support to the proposed extension of long-term residency rights to refugees and beneficiaries of subsidiary protection. However, UNHCR has a number of concerns. The Office would appreciate if these could be addressed during the negotiation process and the proposed amendments adjusted accordingly.

1) General safeguard clause

In order to ensure compliance with obligations under international law, UNHCR recommends to include in the main body of the Directive, or at least in Recital 7 of the Preamble⁵, that the LTR Directive should not only apply without prejudice to the rights and benefits granted to beneficiaries of international protection guaranteed under Directive 2004/83/EC⁶, but also without prejudice to the 1951 Convention relating to the status of refugees and international human rights law.

³ UNHCR, *Response to the European Commission's Green Paper on the Future of the Common European Asylum System*, paragraph 2.2, page 7, at: <http://www.unhcr.org/protect/PROTECTION/46e53de52.pdf>.

⁴ See: UNHCR, *Asylum in the European Union, A study of the implementation of the Qualification Directive*, November 2007, at: <http://www.unhcr.org/protect/PROTECTION/47302b6c2.pdf>.

⁵ Recital 7 of the Preamble would then read: "The equality of treatment of beneficiaries of international protection in the Member States which granted them international protection should be without prejudice to the rights and benefits guaranteed under Directive 2004/83/EC, the 1951 Convention relating to the Status of Refugees and international human rights law".

⁶ *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* (hereinafter 'Qualification Directive') (OJ L 304/12 of 30 September 2004), at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0012:0023:EN:PDF>.

UNHCR recommends to include a reference in the main body of the Directive (or, at least, in the Preamble) to the fact that the LTR Directive should apply without prejudice to the 1951 Convention.

2) *Calculation of five years legal residence*

UNHCR welcomes the proposed amendment of Article 4 of Directive 2003/109/EC, to take into account the duration of the asylum procedure in the calculation of “five years of legal residence” in a Member State.⁷ This ensures fair treatment in case a third-country national is granted international protection only after a prolonged procedure and is in line with Recital 6, which states that “[t]he main criterion for acquiring the status of long-term resident should be the duration of residence in a Member State. Residence should be both legal and continuous in order to show that the person has put down roots in a country”.

UNHCR suggests that a temporary protection status⁸ should also be taken into account if the person has later been recognized as a refugee or granted subsidiary protection, independently of whether he applied for asylum before, during or immediately after the application of the temporary protection regime. This would not only take into account the continued international protection needs, but also acknowledge the steps towards integration during the temporary protection period in line with the LTR Directive’s Recital 6. In addition, for persons who resided legally in a Member State prior to lodging their asylum claim, any period of legal residence on other grounds should also be included for the purpose of calculating five years of legal residence.

UNHCR welcomes the proposal to commence calculation of the requisite 5-year period from the date of an application for asylum, in line with Recital 6 of the Preamble of the LTR Directive. UNHCR recommends in addition an explicit reference to the inclusion of any period under temporary protection, or prior legal residence on other grounds, in the calculation of the required five years of legal residence.

3) *Inclusion of persons granted other complementary forms of protection*

Duration of residence is clearly singled out as the main criterion for granting LTR status under the proposed amendments. On this basis, the system underlying the LTR Directive appears to indicate that the grounds on or the exact form in which residence is granted should as such not play a role in determining who qualifies for long-term resident status. The Commission’s statement in its explanatory memorandum to the proposed amendment “(...) the situations of all third-country nationals who have

⁷ Article 1(3) of the proposed amendments, amending Article 4 of the LTR Directive, *op.cit.*, footnote 1.

⁸ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L212/12 of 7 August 2001), at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF>.

resided for five years in the host Member State should be covered” appears to confirm this view.

Some Member States have maintained or introduced other forms of protection at national level, other than those covered by Article 15(c) of the Qualification Directive. UNHCR believes that persons with any type of residence status that represents a complementary form of international protection⁹ should have the possibility to acquire LTR-status. Their inclusion would not only ensure that all persons with international protection needs would ultimately enjoy a standardized set of rights, but would also keep intact the integrity of the system underlying the determination of who qualifies for LTR-status.

UNHCR recommends that persons with any type of residence status offering complementary forms of protection¹⁰ are included in the scope of the LTR Directive.

4) Exceptions to economic means requirement

In the Commission’s 2001 proposal for a LTR Directive, refugees were included in the instrument, but exempted from the requirement to demonstrate stable and regular resources and sickness insurance. In the proposed amendment, all refugees and beneficiaries of subsidiary protection must meet an economic means test on the same footing as other third-country nationals who are not in need of international protection.¹¹ UNHCR is concerned that this requirement does not take into account the particular circumstances of people who have had to flee persecution and/or serious human rights violations and may have suffered physical harm or traumatizing experiences and as a consequence suffer from Post Traumatic Stress Disorder or other illnesses. As a result, they may not always be able to meet the economic means requirement. This is also recognized in Article 34 of the 1951 Convention which calls on Contracting States specifically to facilitate the integration of refugees. Furthermore, restrictions to the right to employment applied during the asylum procedure¹² and for subsidiary protection beneficiaries¹³, place beneficiaries of international protection in a situation not comparable to other third-country nationals. It is therefore unreasonable to require from these groups stable and regular resources as a precondition for a long-term residence status.¹⁴

⁹ UNHCR, *Providing international protection including through complementary forms of protection*, Standing Committee of the Executive Committee of the High Commissioner’s Programme, EC/55/SC/CRP.16, 2 June 2005, paragraph 26, at: http://www.unhcr.org/excom/EXCOM_42a005972.pdf.

¹⁰ In accordance with UNHCR’s understanding of this concept, *ibid*.

¹¹ Article 5(1a) of the LTR Directive, *op.cit.*, footnote 2.

¹² Article 11 of *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers* (OJ L31/18 of 6 February 2003), at: <http://eur-lex.europa.eu/LexUriServ/site/en/031/03120030206en00180025.pdf>.

¹³ Article 26 of the Qualification Directive, *op.cit.*, footnote 6.

¹⁴ *Op.cit.*, footnote 7.

UNHCR proposes refugees and beneficiaries of subsidiary protection be exempted from the economic means requirement in view of their specific situation. As a minimum, the provision should foresee an exception for hardship cases so that individual circumstances may be taken into account.

5) *Exceptions to integration requirements*

Recital 4 of the LTR Directive (2003/109/EC) emphasizes that the *integration* of third-country nationals who are long-term residents of Member States is a key element in promoting economic and social cohesion and a fundamental objective of the Community as stated in the Treaty. The LTR Directive therefore requires third-country nationals to comply with integration conditions “in accordance with national law”.¹⁵ Under the proposed amendments, this obligation would extend also to refugees and subsidiary protection beneficiaries. Such integration requirements, determined at Member State level, should not result in unreasonably high obstacles for these groups, taking into account their vulnerability compared to other legal migrants. If, as a result of their backgrounds, which may include traumatizing experiences, their situations are such that they cannot be expected to meet integration requirements, they should be exempted.

UNHCR recommends that Member States critically review the proposed integration requirements for refugees and subsidiary protection beneficiaries in the context of obtaining long-term residency rights, and allow exemptions on an individual basis.

6) *Transfer of responsibility for protection*

The transfer of the responsibility for the protection of a refugee or beneficiary of subsidiary protection from one Member State to another has not been addressed in the proposed amendment. A study commissioned by the Commission in 2004 concluded that a system which facilitated and regulated movement between Member States should be designed so as to ensure (amongst other things) that Member States react to refugees’ movements in a manner which upholds their international obligations.¹⁶

Legal obligations covering the transfer of responsibility for the protection of refugees already exist for all Member States under the Schedule to the 1951 Convention. Paragraph 11 of the Schedule, in connection with Article 28 of that Convention determines the circumstances under which responsibility for providing protection to recognized refugees is transferred from one State Party to another. Although the wording of this provision is restricted to responsibility for issuing a 1951 Convention Travel Document, it has been interpreted as encompassing responsibility for providing 1951 Convention rights more broadly. Paragraph 11 of the Schedule to the 1951

¹⁵ Article 5(2) of the LTR Directive, *op.cit.*, footnote 2.

¹⁶ *Study on the transfer of protection status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum*, 2004, p. 171, at: http://ec.europa.eu/justice_home/doc_centre/asylum/studies/docs/transfer_protection_status_rev_160904.pdf. This study was carried out by the Danish Refugee Council, the Migration Policy Institute and the Institute for Migration and Ethnic Studies on behalf of the European Commission (Directorate General for Justice, Freedom and Security).

Convention requires the establishment of lawful residence for the transfer of responsibility.

In addition, eleven EU Member States are bound by the Council of Europe's European Agreement on Transfer of Responsibility for Refugees.¹⁷

UNHCR recommends to include a reference to the Schedule to the 1951 Convention and to the European Agreement on Transfer of Responsibility for Refugees in the body of the Directive, or, alternatively, at least in the Preamble.

In UNHCR's view, there is a pressing need to elaborate rules clarifying under which circumstances responsibility for a refugee or beneficiary of subsidiary protection would be transferred to another Member State. If the Member States choose not to incorporate these rules in the proposed amendment, they should be part of new provisions on a single European status.

Relevant provisions in an instrument on a single European status would include:

- Clarification of the conditions under which lawful residence is established and responsibility is transferred to another Member State. This should be built on and further develop the rules in the European Agreement;
- Clarification that responsibility for the issuance of a 1951 Convention Travel Document also entails responsibility for providing asylum;
- Extension of Article 25(1) of the Qualification Directive (conferring an entitlement to a 1951 Convention Travel Document) to beneficiaries of subsidiary protection.

7) A standardized written verification procedure

In the absence of a mechanism to regulate the transfer of the responsibility for the protection of a refugee or beneficiary of subsidiary protection from one Member State to the other, the draft amendment includes provisions¹⁸ obliging a Member State to "consult" the Member State which granted protection, when considering an expulsion measure to a third country, to ascertain if the person concerned still benefits from international protection. This measure is intended as a safeguard against *refoulement* by the Member State where the person is residing (the "second" Member State). UNHCR welcomes this provision, which emphasizes the importance of a previous determination by another Member State on international protection needs.

In order to ensure this safeguard is fully effective, it would be important that the person should be presumed to continue to benefit from international protection, unless

¹⁷ European Agreement on Transfer of Responsibility for Refugees (adopted in Strasbourg on 16 October 1980, entry into force 1 December 1980), Council of Europe Treaty Series No. 107, at: <http://conventions.coe.int/Treaty/en/Treaties/Html/107.htm>.

¹⁸ Article 1(6) and (7) of the proposed amendments to the LTR Directive, *op.cit.*, footnote 1, amending Article 12 and 22.

there is confirmation in writing that cessation or revocation¹⁹ was applied by the Member State that originally granted protection, in a fully-fledged procedure which respects all procedural safeguards.

In light of the potentially grave consequences of possible mistakes when verifying whether an individual still benefits from international protection, UNHCR considers it necessary to have a standardized written procedure for this verification, with adequate safeguards.

Final remarks

UNHCR encourages the Council to work towards an agreement on the proposed amendment as soon as possible, to close the gap left by excluding beneficiaries of international protection from the entitlements related to long-term residency status.

The Office urges the Commission to seek to ensure henceforth that people who have been determined to be in need of international protection are included in legislation bestowing rights on legal migrants. Further, UNHCR encourages the European Parliament to follow the proceedings closely and to use its influence to ensure that the entitlements related to long-term residency status are extended to beneficiaries of international protection in an inclusive and protection-oriented manner.

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¹⁹ See Articles 11, 12 and 14 (for refugees) and Articles 16, 17 and 19 (for subsidiary protection beneficiaries) of the Qualification Directive, *op.cit.*, footnote 6.