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The Qualification Directive and its Transposition into Swedish Law

Gregor Noll*

1. Introduction

What is the impact of the Qualification Directive¹ on the Swedish legal system? At the time of writing, a conclusive answer cannot be provided, while the contours of legislative changes have become apparent.

A governmental inquiry (hereinafter “the Inquiry”) had been assigned to draw up a comprehensive report on legislative changes necessary to transpose the Directive, and delivered a 494-page report on 19 January 2006, including detailed legislative proposals.² According to standard procedure, this report will eventually result in a governmental proposal to parliament, on the basis of which the Swedish parliament will adopt the necessary changes. By summer 2006, ministerial civil servants had advanced quite far in their work on the government proposal. Further progress was hampered by the upcoming general election on 17 September 2006. A new government was elected, and a new migration minister took office.

When the transposition period elapsed on 9 October 2006, Sweden had failed to notify the European Commission of its transposition measures on, thereby joining the majority of Member States.³ The incoming government decided to handle the transposition of the Qualification Directive and the Draft Directive on Asylum Procedures⁴ in one and the same process, which provided for further delay. There are

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¹ Council Directive 2004/83/EC (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, OJ L204/24, 30 September 2005 [hereinafter “Qualification Directive”, abbreviated QD].

² *Skyddsgrundsdirektivet och svensk rätt. Betänkande av Skyddsgrundsutredningen*. Statens Offentliga Utredningar 2006:6, 19 January 2006. Available at <http://www.regeringen.se/sb/d/108/a/56440> (accessed on 20 January 2007) [hereinafter “the Inquiry Report”]. Please note that the report contains an eight-page English summary. The Inquiry was created by governmental decree of 16 September 2004 (Government Ordinance 2004:114) and chaired by Judge Erik Lempert.

³ Only six Member States had done so when the deadline of 9 October 2006 had elapsed. European Commission, *Entry into force of key asylum law creating a “level playing field” in asylum policies throughout Europe hampered by failure of timely transposition by most Member States*, Press Release of 10 October 2006.

⁴ Council of the European Union, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, ASILE 64, Annex I, 9 November 2004.

reasons to assume that a governmental proposal will be finalised in spring 2007 and new legislation might enter into force later that year.⁵

Against this backdrop, the report of 19 January 2006 delivered by the governmental Inquiry must be seen as the only document available offering indications on what course the Swedish transposition process might take. It should be emphasised from the outset that the present author was a member of the Inquiry. Therefore, all that can be done in the framework of the current text is to present the main proposals in the Inquiry Report without purporting to offer a detached critique.⁶

Unsurprisingly, the Inquiry's work was largely inspired by a minimalist approach towards transposition. It had to relate to a major revision of the Swedish Aliens Act, which was bound to enter into force on 31 March 2006, and featured *inter alia* a shift from an authority-based appeal system to a court-based appeal system.⁷ The content of the Qualification Directive had been well known at the preparatory stage of the 2006 Aliens Act, which might limit the need for comprehensive transposition measures in the future.

2. Defining Refugees

The Directive offers an opportunity to rectify known problems with the refugee definition of the Swedish Aliens Act. The most important correction related to the question of gender and persecution, and it engaged the Inquiry as well as a parallelly ongoing legislative reform process. In 1997, a special provision for aliens having a well-founded fear of persecution on account of gender or sexual orientation had been introduced in the Aliens Act⁸ This *lex specialis* had relegated its beneficiaries to subsidiary protection and therewith effectively precluded such persons to be recognised as refugees. This, in turn, denied them the benefits associated with refugee status (as a travel document, more favourable family reunification rules under the Dublin Convention and Regulation, and earlier access to naturalization). In its bill "Refugee status and persecution on grounds of sex or sexual orientation" (Government's Bill 2005/06:6), the Government has proposed that persons who feel a well-founded fear of persecution on grounds of gender or sexual orientation should instead receive protection as refugees. The Inquiry saw strong reasons for supporting this alteration in articles 9.2.f and 10.1.d QD.⁹

⁵ Telephone interview with Mr. Niklas Kebbon, Swedish Ministry of Justice, 9 January 2007.

⁶ Nonetheless, the positions expressed in this text are that of the author. Please note that all translations from Swedish to English are by this author and have no official standing whatsoever.

⁷ Aliens Act (2005:716).

⁸ See K. Folkelius and G. Noll: "Affirmative Exclusion? Sex, Gender, Persecution and the Reformed Swedish Aliens Act", 10 *International Journal of Refugee Law* (1998), p. 607-636.

⁹ See in particular p. 111-112 of the Inquiry Report, pointing out that the understanding of a particular social group according to the refugee definition in existing Swedish law normally does not encompass groups constituted by gender or sexual orientation.

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As of 31 March 2006, a new provision in line with the Government's Bill and the position of the Inquiry has been adopted. In a literal translation, Chapter 4 Section 1 of the Aliens Act now defines a refugee as

“an alien being outside the country in which that alien is a citizen, because he or she feels a well-founded fear of persecution for reasons of race, nationality, religious or political opinion or for reasons of gender, sexual orientation or other membership of a particular social group.”¹⁰

Another proposal put forward in the Inquiry Report concerns the forward-looking character of the refugee definition. Article 4.4 QD implies that refugee status determination ultimately assesses future risks. Presently, a key phrase on persecution by non-state agents in Chapter 4 Section 1 of the Swedish Aliens Act relates to a refugee as an alien *having been exposed* to persecution. The Inquiry proposes this wording to be altered to define a refugee as an alien *risking to be exposed* to persecution.¹¹

Otherwise, the Inquiry Report states that Swedish law is well in line with the prescriptions of the Qualification Directive in a number of areas (actors of persecution, actors of protection, cessation). On the issue on protection needs created by the applicant *sur place* in Article 5.3 QD, the Inquiry Report highlights a lack of clarity in article 5.3 QD, which states that an applicant “shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin.” The Inquiry emphasised the need to assess all *sur place* cases under the 1951 Convention. It suggested that this particular provision “*shall not entail any legislative changes*”.¹²

The Inquiry believes that Swedish procedures for cessation of refugee status comply with the requirements of the Qualification Directive. The Inquiry Report puts forward the proposal to As domestic norms reflecting Article 1D, E and F of the 1951 Convention are merely limiting the right to obtain a residence permit under current law, the Inquiry report suggests that they should also bar an applicant from access to refugee status.¹³ The Inquiry proposes that a provision be introduced in the Aliens Act that a residence permit for a refugee must be permanent or be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require.¹⁴

¹⁰ “[E]n utlänning som befinner sig utanför det land som utlänningen är medborgare i, därför att han eller hon känner välgrundad fruktan för förföljelse på grund av ras, nationalitet, religiös eller politisk uppfattning eller på grund av kön, sexuell läggning eller annan tillhörighet till en viss samhällsgrupp”.

¹¹ Inquiry Report, p. 107-108.

¹² Inquiry Report, p. 96. Emphasis by the author.

¹³ Inquiry Report, p. 127-139.

¹⁴ Inquiry Report, p. 132-133.

3. Subsidiary Protection

Subsidiary forms of protection were introduced in Swedish law and practice already in the 1970s. By comparison to Southern neighbours as Germany, the Swedish variety was relatively advantageous, and entailed permanent residence permits with a stable set-up of rights. During the past decade, the definition was successively adapted to international human rights law and thus became less discretionary. Articles 2.e and 15 QD would reinforce this trend further¹⁵, if the Inquiry proposal for reform is followed.

In order to transpose the Directive, it is suggested that Chapter 4, Section 2 of the Aliens Act be supplemented by a provision covering 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 defining beneficiaries of subsidiary protection in its article 2.e, the Qualification Directive employs objective formulations of risk ("substantial grounds for believing" and "real risk of suffering serious harm"). These criteria may be considered more favourable for the individual than the criterion "well-founded fear" presently used when defining subsidiary protection beneficiaries in the Aliens Act. The Inquiry Report suggests, therefore, that the language of 'well-founded fear' is swapped for language reflecting objective risks (the alien being "in danger" or "running the risk" of certain specified forms of harm).¹⁶

The proposed definition has grown into an extraordinarily complex provision. Its central elements merit quoting in full:

A person in need of alternative protection according to this law is an alien who, in other cases than those covered by Section 1 [i.e. the refugee definition, GN], is outside the country in which the alien is a citizen, but where there are reasonable grounds to assume that the alien upon return

1. would be in danger of being exposed to the death penalty or to corporal punishment, torture or other inhuman or degrading treatment or punishment,
2. would as a civilian run a serious and individual risk to life or person by reason of indiscriminate violence in situations of international or internal armed conflict,
3. would otherwise be in need of protection due to international or internal armed conflict, or would risk to be exposed to serious violations due to other grave conflicts in the alien's home country, or
4. would be in danger of being persecuted on account of his or her gender or homosexuality

and that alien is unable or, owing to such risk, unwilling to accord himself or herself of the protection of that country.

¹⁵ Jane McAdam sketches the emergence of a subsidiary protection regime and explores its codification in the Qualification Directive in J. McAdam, "The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime", 17 *International Journal of Refugee Law* (2005) pp. 461-516. See also R. Piotrowicz and C. van Eck, "Subsidiary Protection and Primary Rights", 53 *International and Comparative Law Quarterly* (2005), p. 107-138.

¹⁶ See the wording of proposed amendments to Chapter 4 Section 2 of the Aliens Act on p. 44-45 of the Inquiry Report.

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It is immaterial to application whether the authorities of the home country are responsible for exposing the alien to the risk mentioned in the first paragraph, subparagraphs 1-4, or whether the authorities are unable to protect the alien from such actions by individuals.¹⁷

Notably, the Inquiry committee believed that article 15.1.c QD might be so narrow in scope that the pre-existing Swedish protection clause for persons fleeing armed conflict should not be swapped for it. Therefore, article 15.1.c QD is replicated in subparagraph 2 above, while the pre-existing clause is to be found in subparagraph 3 to provide a catch-all for those cases not falling under subparagraph 2.

The Inquiry further suggested that the Aliens Act be complemented with a provision prescribing that a beneficiary of subsidiary protection be declared as having the status of subsidiary protection.¹⁸ A residence permit for a person with subsidiary protection status should be permanent, or valid for a period of at least one year, and renewable unless compelling reasons of national security or public order otherwise require. The Inquiry also proposed the introduction of a provision on the ending and revocation of subsidiary protection status.¹⁹

4. Assessment of Facts and Circumstances

In its article 4, the Qualification Directive offers a messy combination of mandatory and optional rules on how to assess applications for international protection.²⁰ The current Swedish system for assessing applications for international protection is a one-stop shop, where applications for asylum are dealt with in the same manner as applications for subsidiary protection. It rests on the principle of free evaluation of evidence. The Inquiry believed that it currently meets the requirements raised by the Directive, obviating active transposition.²¹

5. Information Duties on the Content of the Status Granted

In Swedish practice, refugees and beneficiaries of subsidiary protection status are informed of their rights and obligations. However, there is no written norm underpinning that practice. With a view to article 22 QD, the Inquiry proposes that a new provision on information concerning the rights and obligations relating to refugee or subsidiary protection status be introduced in the Aliens Ordinance (1989:547).²² It

¹⁷ Please note that subparagraph 4 has already been deleted in Chapter 4 Section 2 of the Aliens Act as currently in force for reasons explained above (see text accompanying note 9).

¹⁸ Inquiry Report, p. 188-189.

¹⁹ Inquiry Report, pp. 191-193.

²⁰ For an extensive analysis, see G. Noll, "Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive", 12 *European Public Law* (2006), p. 295-317.

²¹ Inquiry Report, p. 218.

²² Inquiry Report, p. 241-243.

states explicitly that, “[t]o the extent possible, such information shall be delivered in a language which the alien can understand”.²³

6. Maintaining Family Unity

In Swedish law, the principle of family unity applies to families of refugees. To a large extent, the unity of families of individuals with subsidiary protection status is also maintained. In general, family members will be granted the same status as the person they wish to join in Sweden.

In the light of articles 23 and 24, the Inquiry proposes that a provision be introduced in the Aliens Act stating that a spouse, partner or unmarried child of a refugee or person with subsidiary protection status is entitled to a residence permit. The residence permit is to be permanent, or valid for a period of at least one year, and renewable unless reasons of national security or public order otherwise require.²⁴ Otherwise, existing provisions in the Aliens Act on the revocation of residence permits of family members are deemed compatible with the Directive.

Providing family members of beneficiaries of refugee or subsidiary protection status with permanent residence permits or temporary residence permits valid for at least one year opens their access to residence-based benefits in Chapter VII of the Directive. With regard to the level of benefits to be provided to family members of beneficiaries of refugee or subsidiary protection status, existing Swedish law matches the requirements of the Directive.

7. Travel Documents

Existing Swedish law provides that refugees are entitled to a travel document in accordance with the 1951 Convention. Hence, there is no need of active transposition of article 25.1 QD. The Inquiry proposes that the Swedish Migration Board should be obliged by a provision in the Aliens Ordinance to issue an aliens passport to a beneficiary of subsidiary protection status where this is necessary for serious humanitarian reasons.²⁵ At present, there is merely a competence for the Migration Board to do so, but no obligation.

8. Unaccompanied Minors

In its analysis of existing Swedish law, the Inquiry noted that article 30.5 QD would need to be transposed. It is suggested that the Swedish Migration Board be given the

²³ Inquiry Report, p. 243.

²⁴ Inquiry Report, p. 260-272.

²⁵ Inquiry Report, p. 277.

task of tracing an unaccompanied child's family members after a child has been granted a residence permit.²⁶

9. Other Issues

With regard to

Access to the labour market;

- Education;
- Access to accommodation;
- Right to free movement within the Member State;
- Access to integration facilities;
- Repatriation;
- Administrative cooperation within the EU, and
- Staff,

the Inquiry deems Swedish law to be fully in line with the obligations of the Qualification Directive. No legislative amendments are proposed in these areas.

²⁶ Inquiry Report, p. 333-340.