



REGERINGSKANSLIET

Stockholm, 14 June 2013 UF2013/30477/UD/FMR

**Ministry for Foreign Affairs
Sweden**
Director-General for Legal Affairs

Special Rapporteur on the promotion and protection of
the right to freedom of opinion and expression;
Special Rapporteur on the situation of human rights
defenders;
Special Rapporteur on extrajudicial, summary or
arbitrary executions; and
Special Rapporteur on torture and other cruel, inhuman
or degrading treatment or punishment
Office of the High Commissioner
for Human Rights
United Nations
CH-1211 GENEVA 10
Switzerland

Communication from Special Procedures: Joint Urgent Appeal

**Reference: UA G/SO 214 (67-17) G/SO 214 (107-9) G/SO 214 (33-27)
G/SO 214 (53-24) SWE 2/2013**

Madam and Sirs,

1. I wish to refer to the Government's letter of 24 May 2013 in which certain observations were submitted in response to your letter of 2 May 2013 regarding the situation of Mr Saif Ur Rahman Shirzad, a national of Afghanistan, currently staying in Sweden. More specifically, the Government informed you that the migration authorities would examine whether there is reason to grant Mr Shirzad a residence permit in Sweden pursuant to Chapter 12, Section 18 of the Aliens Act, and that the Government would provide information about the outcome of the Migration Board's assessment and would be prepared to provide a more extensive reply to the questions put forward in your letter of 2 May 2013.

2. Initially, the Government would like to draw your attention to the following. In cases concerning asylum seekers, the personal circumstances are generally of a sensitive nature and for that reason, much of the information regarding an asylum seeker's case is confidential under domestic law. This case is no exception. For that reason, the Government would like to suggest that Mr Shirzad is not mentioned by his full name in your official report to the Human Rights Council for its consideration of this Joint Urgent Appeal. Furthermore, the Government requests that all

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the appendices (i.e., Appendices 1–4) to the present observations are not disclosed to the public since the information therein, in whole or in part, may be confidential under domestic law (e.g., Chapter 21, Section 5 and Chapter 37, Section 1 of the Public Access to Information and Secrecy Act).

3. Turning to the facts of Mr Shirzad's application for asylum and residence permit in Sweden, the Government would firstly like to draw your attention to the following developments in Mr Shirzad's case. As the Government stated in its observations of 24 May 2013 (hereinafter the Government's previous observations), after receiving the current Joint Urgent Appeal the Migration Board initiated a new examination of whether there are any impediments to the enforcement of Mr Shirzad's expulsion order within the meaning of Chapter 12, Section 18 of the Aliens Act. The Migration Board has now concluded its assessment by deciding, on 3 June 2013, not to grant Mr Shirzad a residence permit in Sweden, pursuant to Chapter 12, Section 18 of the Swedish Aliens Act. In summary, the Migration Board found that the Joint Urgent Appeal contained no new information or evidence in support of Mr Shirzad's need for protection in Sweden. Consequently, the Migration Board held that the circumstances had previously been examined and that no new circumstances within the meaning of Chapter 12, Section 18 of the Aliens Act had emerged which constituted impediments to the enforcement of Mr Shirzad's expulsion order. The Migration Board therefore decided not to grant Mr Shirzad a residence permit in Sweden.

4. In addition, the Government has been informed by the Migration Board that Mr Shirzad has appealed against the Migration Board's decision dated 6 May 2013 to reject his request for a re-examination of his case in accordance with Chapter 12, Section 19, first paragraph of the Aliens Act. The appeal is pending before the Migration Court. It may be clarified that in case the applicant's appeal is rejected by the Migration Court, he has the possibility of a further appeal to the Migration Court of Appeal (see the Government's previous observations).

5. As concerns the questions put forward in your letter of 2 May 2013, the Government would like to submit the following.

Are the facts alleged in the summary of the case accurate? (Question no. 1)

6. It is correct that Mr Shirzad, in his application for asylum and a residence permit, has submitted an account which is largely in line with the

summary provided. His application, including the documents he has submitted in support of his application, has subsequently been examined on the merits by the Migration Board as well as by the Migration Court, whereas the Migration Court of Appeal examined whether there were any grounds for granting him leave to appeal. As stated previously, Mr Shirzad's application was rejected by both the Migration Board and the Migration Court, which both held that Mr Shirzad's asylum account was inconsistent and lacked credibility in essential parts, and that the written evidence submitted by him did not support his account. Consequently, both the Migration Board and the Migration Court found that Mr Shirzad, contrary to his claims, was not in need of protection in Sweden. The Migration Court of Appeal found no reason to grant Mr Shirzad leave to appeal and the decision to expel him became final and non-appealable on 25 January 2013.

7. However, it is incorrect that an enforcement of Mr Shirzad's expulsion order is imminent. As the Government stated in its previous observations, the Migration Board has registered Mr Shirzad as having absconded and no enforcement of his decision on expulsion is yet planned.

Provide detailed information concerning the legal grounds for the decision to deport Mr Shirzad and how this decision is compatible with the aforementioned international norms and standards, in particular with the principle of non-refoulement (Question no. 2)

8. As stated in the Government's previous observations, Mr Shirzad's application for asylum and a residence permit has been examined by the Migration Board, the Migration Court and the Migration Court of Appeal. In addition, Mr Shirzad has twice requested the Migration Board to re-examine his application claiming, *inter alia*, that there are lasting impediments to the enforcement of his expulsion order. The decisions and judgments by the Migration Board and the Migration Court contain detailed explanations of how the Migration Board and the Migration Court reached their decisions, as well as the legal grounds for the decision to expel Mr Shirzad or not grant him a new examination of his application. The Government would therefore like to reply to this question by making reference to the Migration Court's judgment and the Migration Board's decisions submitted (as unofficial English translations) as Appendices 1–4.

9. In this context, the Government finds it pertinent to reiterate the following. Before all three instances, Mr Shirzad was assisted by a public counsel, and before deciding on the case, the Migration Board held several

interviews with Mr Shirzad: two short introductory interviews and two longer interviews. All interviews were conducted in the presence of an interpreter, whom Mr Shirzad confirmed that he understood well. Further, Mr Shirzad has been given the opportunity to submit observations on the minutes from the two longer interviews. Moreover, the Migration Court held an oral hearing at which Mr Shirzad and a witness invoked on his behalf were heard before the court.

10. As regards the question of how the decision to expel Mr Shirzad is compatible with international norms, it should furthermore be noted that several provisions in the Swedish Aliens Act reflect the same principles as those laid down in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 7 of the International Covenant on Civil and Political Rights. Thus, the Swedish migration authorities apply the same kind of test when considering an application for asylum under the Aliens Act as the Committee against Torture and the Human Rights Committee apply when examining a complaint. That such a test has been applied in the present case is indicated by the fact that in their rulings, the Swedish authorities make references to Chapter 4, Sections 1, 2 and 2 a of the Aliens Act. When it comes to Mr Shirzad's requests for a re-examination of his application for a residence permit, Chapter 12, Sections 1–3 of the Aliens Act have been considered. For a description of the content of the legal provisions mentioned, the Government refers to the account made below under Question no. 3.

11. With reference to what has been submitted above and in the decisions by the Migration Board and the Migration Court, as well as in the Government's previous observations, the Government is of the opinion that there is nothing to suggest that the decision to expel Mr Shirzad is incompatible with Sweden's responsibility for ensuring the fulfilment of the international norms and standards, in particular the principle of non-refoulement, referred to in your letter of 2 May 2013.

Provide information regarding measures available for the protection of those who claim to be victims of persecution and torture, seeking asylum in Sweden (Question no. 3)

12. In its previous observations, the Government submitted an account of some of the provisions in the Swedish Aliens Act. Here it is relevant to provide a more extensive account so as to illustrate that the Aliens Act contains both procedural and material safeguards for the protection of

those seeking asylum in Sweden and who claim to be victims of persecution and torture.

13. The Aliens Act entered into force on 31 March 2006 and has been partially amended from 1 January 2010, mainly due to two European Union Directives: 'the Qualification Directive' (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) and 'the Asylum Procedures Directive' (Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status). The Aliens Act and the amendments to the Act are available on the internet at: <http://www.sweden.gov.se/content/1/c6/06/61/22/bfb61014.pdf> and <http://www.sweden.gov.se/content/1/c6/06/61/22/94531dbc.pdf>. The Government will therefore confine itself in the following to briefly mentioning a few provisions in the Aliens Act, in its wording after 1 January 2010, that may be of particular interest.

14. Under the Aliens Act (hereinafter 'the Act'), matters concerning the right of aliens to enter and remain in Sweden are normally dealt with by three instances: the Migration Board, one of the three migration courts and the Migration Court of Appeal. Thus, an expulsion order issued by the Migration Board may be appealed to a migration court (Chapter 14, Section 3 of the Act). The Migration Board is obliged, in principle, to review its decision before it forwards an appeal to the court (cf. Chapter 13, Section 13 and Govt. Bill 2004/05:170, p. 159). A judgment or decision of a migration court may in turn be appealed to the Migration Court of Appeal (Chapter 16, Section 9). This instance will, however, only deal with the merits of the case after having granted leave to appeal (Chapter 16, Section 11). Leave to appeal will be granted if (1) it is considered of importance for the guidance of the application of the law that the appeal is examined by the Migration Court of Appeal, or (2) there are other exceptional grounds for examining the appeal (Chapter 16, Section 12).

15. An alien who has applied for asylum in Sweden may only be refused entry or expelled if there has been an oral procedure at the Migration Board (Chapter 13, Section 1). Normally, the proceedings before the courts are in writing although the court may decide that a supplementary oral hearing should be held when it is assumed that this would be advantageous for the examination or facilitate a prompt decision in the case. However, if an alien

so requests, the Migration Court shall hold an oral hearing, provided that a hearing is not deemed unnecessary and there are no special grounds for not holding it (cf. Chapter 16, Section 5). The Migration Board acts as the alien's opposite party in proceedings before the courts (Chapter 16, Sections 6 and 7 a of the Administrative Court Procedure Act).

16. During the asylum procedure the applicant shall be appointed a public counsel as procedural support in cases concerning refusal of entry or expulsion, unless it must be assumed that there is no need for a counsel. Generally, a public counsel is provided in all such cases except when it is obvious to the Migration Board, after a preliminary review of the case, that the applicant will be granted a residence permit, or when the applicant may be sent to a third country for an examination of the alleged grounds for asylum (Chapter 18, Section 1).

17. Chapter 2, Section 5 of the Act stipulates that an alien staying in Sweden for more than three months must have a residence permit unless a visa has been granted for a longer period of time. With certain exceptions, an alien who is considered to be a refugee, a person eligible for subsidiary protection or a person otherwise in need of protection is entitled to a residence permit in Sweden (Chapter 5, Section 1). The term 'refugee' refers to an alien who is outside the country of his or her nationality owing to a well-founded fear of being persecuted on grounds of race, nationality, religious or political beliefs, or on grounds of gender, sexual orientation or other membership of a particular social group, and who is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country (Chapter 4, Section 1). This applies irrespective of whether it is the authorities of the country that are responsible for the alien being subjected to persecution or if those authorities cannot be expected to offer protection against persecution by private individuals (*ibid.*). 'A person eligible for subsidiary protection' is an alien who in cases other than those referred to in Section 1 is outside the country of his or her nationality because there are substantial grounds for assuming that the alien, upon return to the country of origin, would run a risk of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, or as a civilian would run a serious and personal risk of being harmed by reason of indiscriminate violence resulting from an external or internal armed conflict, and who is unable or, owing to such risk, is unwilling to avail himself or herself of the protection of that country (Chapter 4, Section 2). 'An alien otherwise in need of protection' means, *inter alia*, an alien who in cases other than those referred to in Sections 1 and

2 is outside the country of his or her nationality owing to a need for protection because of an external or internal armed conflict or, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses, (Chapter 4, Section 2 a). Moreover, under Sections 2 or 2 a, it is irrelevant for a person in need of protection whether it is the authorities of the country that are responsible for the alien running the risk referred to or whether these authorities cannot be assumed to offer protection against the alien being subjected to such a risk through the actions of private individuals (*ibid.*).

18. Furthermore, pursuant to Chapter 5, Section 4 of the Act, a residence permit shall normally be granted to an alien where an international body that is competent to examine complaints from individuals has found that a refusal-of-entry or an expulsion order in a particular case is contrary to a Swedish commitment under an international treaty.

19. In addition, a residence permit may be issued in cases where an overall assessment of the alien's situation reveals such exceptionally distressing circumstances that he or she should be allowed to stay in Sweden. In making this assessment, particular attention shall be paid to the alien's state of health, his or her adaptation to Sweden and his or her situation in the country of origin (Chapter 5, Section 6).

20. Also when it comes to enforcing a refusal-of-entry or expulsion order, regard must be had to the risk of torture and other inhuman or degrading treatment or punishment. Under a special provision on impediments to enforcement, an alien must not be sent to a country where there is fair reason to assume that he or she would be in danger of suffering the death penalty or of being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment (Chapter 12, Section 1). The same applies where there is fair reason to assume that the alien is not protected in the country from being sent on to a country in which he or she would be in such danger (*ibid.*). In addition, an alien must not, in principle, be sent to a country where he or she risks persecution (Chapter 12, Section 2). A refusal-of-entry or expulsion order for a person eligible for subsidiary protection, in cases of armed conflict, or a person otherwise in need of protection, may not be enforced to the alien's country of origin, if there are exceptional grounds not to do so (Chapter 12, Section 3).

21. Under certain conditions, an alien may be granted a residence permit even if a refusal-of-entry or expulsion order has become final and non-

appealable. Rules regarding lasting impediments to enforcement of refusal-of-entry and expulsion orders that have become final and non-appealable are laid down in Chapter 12, Sections 18 and 19 read together with Chapter 12, Sections 1–3 of the Aliens Act. Hence, an alien may be granted a residence permit if the applicable conditions in Chapter 12, Sections 18 or 19 have been met.

22. Under Chapter 12, Section 18, the Migration Board may issue a residence permit where new circumstances have emerged that constitute an impediment to enforcement of the nature referred to in Chapter 12, Sections 1–3. In addition to this, the Migration Board may also issue a residence permit where there is reason to assume that the intended country of return will not be willing to accept the alien or there are medical or other special reasons why the order should not be enforced.

23. If a residence permit cannot be granted under Chapter 12, Section 18, the Migration Board may instead decide to re-examine the matter under Chapter 12, Section 19. In accordance with that provision, a re-examination shall be carried out where it may be assumed, on the basis of new circumstances invoked by the alien, that there are lasting impediments to enforcement of the nature referred to in Chapter 12, Sections 1–3 (see above), and these circumstances could not have been invoked previously or the alien shows that he or she has a valid excuse for not having done so. If a re-examination is granted, it may result in the alien being granted a residence permit, thus preventing removal to the alien's country of origin. If the applicable conditions under Chapter 12, Section 19 have not been met, the Migration Board shall decide not to grant a re-examination. Such a decision can be appealed to one of the three migration courts with the possibility of a further appeal to the Migration Court of Appeal (Chapter 14, Section 5 and Chapter 16, Section 9). The Migration Court of Appeal will, however, only deal with the merits of the case after having granted leave to appeal (Chapter 16, Section 11).

24. For a comprehensive understanding of the remedy provided when a re-examination is granted, it is also appropriate to clarify the following. A re-examination granted under Chapter 12, Section 19 of the Aliens Act will take into account both the new circumstances which prompted the granting of a re-examination, as well as the reasons for protection invoked by the alien previously in the proceedings. The Migration Court of Appeal has clarified that only such a comprehensive examination allows for an assessment of whether the circumstances invoked constitute a lasting

impediment to enforcement under Chapter 12, Sections 1–3 of the Aliens Act and which may lead to the granting of a residence permit (see MIG 2008:36).

25. It is further pertinent to clarify that it follows from Chapter 12, Section 19, third paragraph of the Aliens Act that a decision to refuse entry or expel an alien may not be enforced until the Migration Board has decided on the question of whether a re-examination is to be granted or, if a re-examination is granted, until the question of a residence permit has been settled by a decision that has become final and non-appealable. Hence, if the Migration Board, after a re-examination has been granted, should find that there is no impediment to enforcing a decision on expulsion concerning an alien, he or she can appeal against the Migration Board's decision to the Migration Court as well as to the Migration Court of Appeal without running the risk of being expelled while his or her appeal is pending.

26. As is clear from above, the Aliens Act contains both material and procedural safeguards. The material safeguards reflect, *inter alia*, the principle of non-refoulement. As concerns the procedural safeguards, it is relevant to reiterate that the Migration Board's decision on applications for asylum and residence permits is subject to appeal to the Migration Court and the Migration Court of Appeal. Furthermore, the Migration Board, as a main rule, makes its decision after having held interviews with the alien. Moreover, upon appeal, an oral hearing is generally held before the Migration Court if the alien so requests. It is further pertinent to clarify that an asylum seeker is generally provided with a public counsel free of charge and, if needed, with an interpreter during the interviews before the Migration Board and, if applicable, at the oral hearing before the Migration Court. These procedural measures certainly enhance the national authorities' ability to adequately assess the asylum seeker's submissions. Furthermore, the Migration Board and the migration courts are specialised bodies with particular expertise in the field of asylum law and practice.

27. In this context, it may be relevant to add that Sweden is one of the main countries of destination in Europe of asylum seekers, both in terms of actual and relative numbers. Last year, more than 100 000 aliens were granted residence permits in Sweden, of which 17 400 were granted residence permits on account of their need for protection or on humanitarian grounds. A large number of the asylum seekers in Sweden are citizens of Afghanistan. In 2012, 4 755 Afghan citizens applied for asylum in Sweden and in the same year,

3 238 Afghan citizens, or almost 70 per cent of the asylum seekers of Afghan origin, were granted residence permits on account of their need for protection in Sweden or on humanitarian grounds. So far this year, the corresponding figure is 75 per cent. It may be clarified that all applications for asylum and/or residence permit are examined individually and considered on its own merits.

28. Finally, the Government would also like to add that Sweden is a member of the Council of Europe and hence a State Party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the European Convention). Consequently, an asylum seeker who considers that an enforcement of his decision on expulsion would violate the European Convention has the possibility to submit an application to the European Court of Human Rights, as well as ask that the Court issue a request for an interim measure to the Government in order to stop the enforcement of the expulsion order while the application is under consideration by the Court. As you are aware, the European Convention contains prohibitions against, *inter alia*, refoulement (Article 3) and extrajudicial or arbitrary executions (Article 2). Judgments by the European Court of Human Rights, as well as its request for an interim measure, are binding for the States Parties.

29. As you are further well aware, Sweden is also a party to the Optional Protocol to the International Covenant on Civil and Political Rights giving the Human Rights Committee the competence to examine individual complaints with regard to alleged violations of the Covenant by States Parties to the Protocol. Sweden has furthermore recognised the competence of the Committee against Torture to receive and consider communications from, or on behalf of, individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention, according to article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment. Both the Human Rights Committee and the Committee against Torture have the possibility to issue requests for interim measures. Hence, an asylum seeker who considers that an enforcement of his decision on expulsion would violate one of these Conventions has the possibility to submit an application to the Committee against Torture or to the Human Rights Committee, as well as request that the Committee issue a request for an interim measure.

30. In this context, it is important to clarify that Chapter 12, Section 12 of the Aliens Act states that “*If an international body that is competent to examine complaints from individuals makes a request to Sweden for suspension of the enforcement*

of a refusal-of-entry or expulsion order, a stay of enforcement shall be ordered unless there are exceptional grounds for not doing so.” The *travaux préparatoires* to this regulation explicitly state that a request from a competent international body for interim measures is not binding for Sweden under international law but that such a request nevertheless shall be respected in order to make the consideration of the communication meaningful. Accordingly, as a main rule, a request in individual complaints against Sweden for suspension of the enforcement of a refusal-of-entry or expulsion order is granted by the Swedish Migration Board.

Please, accept, Madam and Sirs, the assurances of my highest consideration.

A handwritten signature in blue ink, appearing to read 'Anders Rönquist', with a stylized flourish at the end.

Anders Rönquist
Ambassador

Appendices:

1. The Migration Board's decision, dated 14 December 2011
2. The Migration Court's judgment, dated 15 November 2012
3. The Migration Board's decision, dated 12 April 2013
4. The Migration Board's decision, dated 6 May 2013