



The Pertinent Swedish Legislation in UA SWE 1/2020

1. Introduction

1. Domestic provisions of relevance to the present case are mainly found in the 2005 Aliens Act (*utlänningslagen*, 2005:716), which entered into force on 31 March 2006 and the Act Temporarily Restricting the Possibility to Obtain Residence Permits in Sweden (*Lagen om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige*, 2016:752), which entered into force on 20 July 2016.

2. Under the 2005 Aliens Act (hereinafter referred to as ‘the Act’ or ‘the Aliens Act’), matters concerning the right of aliens to enter and remain in Sweden are normally dealt with by three instances, the Swedish Migration Agency, one of the three migration courts and the Migration Court of Appeal. Thus, an expulsion order issued by the Swedish Migration Agency, which carries out the initial examination of the case, may be appealed to the migration court (Chapter 14, Section 3 of the Act). A judgment or decision of the 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 of the Act). Leave to appeal is granted if it is of importance for guidance in the application of law that the Migration Court of Appeal considers the appeal or if there are extraordinary reasons for such consideration.

3. An alien who has a well-founded fear of being subjected to torture or inhuman or degrading punishment or treatment is entitled to a residence permit in Sweden (Chapter 4, Section 2 and Chapter 5, Section 1 of the Aliens Act). Moreover, there is an absolute prohibition under Swedish law on enforcing the expulsion of an alien to a country where there is fair reason to assume that he or

she would be subjected to such treatment (Chapter 12, Sections 1-3 of the Aliens Act). Hence, Swedish legislation on these matters is compatible with the principle of *non-refoulement*.

1.1 Main provisions

4. According to Chapter 4, Section 1, of the Aliens Act, 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. This applies irrespective of whether the persecution is at the hands of the authorities of the country or if those authorities cannot be expected to offer protection against persecution by private individuals.

5. An asylum seeker who does not qualify as a refugee is eligible for subsidiary protection under Chapter 4, Section 2 of the Aliens Act if there are substantial grounds for assuming that, upon return to the country of origin, the alien 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. The alien must furthermore be unable, or unwilling because of a risk of suffering serious harm as mentioned above, to avail himself or herself of the protection of the country of origin. This applies irrespective of whether it is the authorities of the country that are responsible for the alien running such a risk 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. A person eligible for subsidiary protection is entitled to a residence permit in Sweden pursuant to Chapter 5, Section 1 of the Aliens Act.

6. Moreover, it is absolutely prohibited under Swedish law to enforce the expulsion of an alien to a country where there is fair reason to assume that they would be in danger of being subjected to such treatment there (Chapter 12, Section 1 of the Aliens Act). Hence, Swedish legislation on these matters is compatible with the principle of *non-refoulement*.

7. If a residence permit cannot be granted on any other ground, a residence permit may be issued under Chapter 5, Section 6 of the Aliens Act 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 is to be paid to the alien's state of health, their adaptation to Sweden and the situation in their country of origin.

8. At the end of 2015, on account of a record increase in immigration to Sweden the Government announced that Swedish legislation needed to be changed for a limited period so as to bring Swedish migration law into line with the minimum level stipulated in EU law and international conventions. Consequently, on 20 July 2016, the Act on Temporary Restrictions on the Possibility of Obtaining Residence Permits in Sweden (*lagen (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige*; hereinafter 'the Temporary Act') entered into force. The Temporary Act was initially meant to apply until 19 July 2019. However, in July 2019, the Temporary Act was extended until 19 July 2021, with the amendment that persons eligible for subsidiary protection shall have the same right to family reunification as refugees.

9. Under Section 11 of the Temporary Act, residence permits on grounds of exceptionally distressing circumstances under Chapter 5, Section 6 of the Aliens Act may only be granted if refusing entry to or expelling the person would contravene a Swedish obligation under a convention that has been transposed into Swedish legislation. Such a permit should be temporary and valid for thirteen months (Section 12). If a new permit is granted, it should be valid for two years, with some exceptions.

1.2 Impediments to enforcement

10. Moreover, 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, for instance if new circumstances have emerged that mean that there are reasonable grounds for believing that an enforcement would put the alien in danger of being sentenced to death or of being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment or there are medical or other special reasons why the order should not be enforced (Chapter 12, Section 18 of the Aliens Act). In addition, the provision states that children may be granted a residence permit even if the circumstances that emerge are not as grave as those required for granting adults a residence permit (*ibid.*).

11. The Migration Agency may also decide to re-examine a matter in certain situations, for instance if the alien invokes new circumstances demonstrating that he or she would run the risk of being subjected to such treatment as stipulated in article 1 of the Convention against Torture ("the Convention") if returned to his or her country of origin (Chapter 12, Section 19 of the Aliens Act). This applies if the alien has a valid excuse for not having invoked the circumstances at an earlier point in time. According to recent case-law from the Migration Court of Appeal, severe health-related circumstances may also be considered under Chapter 12, Section 19 of the Aliens Act.

12. After an expulsion order has become final and non-appealable, issues put forward will be examined under the provisions of the Aliens Act on impediments to enforcement of refusal-of-entry and expulsion orders. The purpose of these provisions is to provide the opportunity in certain exceptional cases to take into consideration circumstances that have arisen after the refusal-of-entry or expulsion order was issued. An examination of the impediments to enforcement does not, however, mean a re-examination of previous decisions in the case.

13. Chapter 12, Section 18 of the Aliens Act states, *inter alia*, the following.

‘If, in a case concerning the enforcement of a refusal-of-entry or expulsion order that has become final and non-appealable, new circumstances come to light that mean that

1. there is an impediment to enforcement under Chapter 12, Section 1, 2 or 3;
2. there is reason to assume that the intended country of return would not be willing to accept the alien; or
3. there are medical impediments or other special grounds why the order should not be enforced, the Swedish Migration Agency may grant a permanent residence permit, if the impediment is of a lasting nature.

If there is only a temporary impediment to enforcement, the Agency may grant a temporary residence permit.

14. Thus, 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, for instance if new circumstances have emerged that mean there are reasonable grounds for believing that enforcement would put the alien in danger of being sentenced to death or of being subjected to corporal punishment, torture or other

inhuman or degrading treatment or punishment, or there are medical or other special reasons why the order should not be enforced.

15. A decision not to grant a residence permit under Chapter 12, Section 18 cannot be appealed. However, the Swedish Migration Agency can initiate an examination at several junctures, depending on the circumstances cited.

16. The legislative history of Chapter 12, Section 18 of the Aliens Act (Govt Bill 2004/05:170, p. 226 and p. 299) states, *inter alia*, the following. An examination of impediments to enforcement of an expulsion order is an extraordinary examination procedure. In assessing whether there are 'special grounds' not to enforce a removal order under the first paragraph, point 3, the Swedish Migration Agency has very limited scope for taking account of factors such as frustrated hopes, anxiety about returning to the country of origin, social and financial problems or ties to Sweden that have arisen since a removal order was issued. It must be a matter of wholly exceptional situations, where a removal order seems unreasonable.

17. In a case concerning the enforcement of a refusal-of-entry or expulsion order that has become final and non-appealable, the Swedish Migration Agency must, under Chapter 12, Section 19 of the Aliens Act, decide to undertake a new examination of the issue of a residence permit if an alien cites new circumstances that:

1. can be assumed to constitute a lasting impediment to enforcement as referred to under Chapter 12, Section 1, 2 or 3 and
2. could not previously have been cited by the alien, or the alien provides a valid excuse for not having cited these circumstances previously.

18. According to case-law of the Swedish Migration Court of Appeal (MIG 2008:20), the possibility of obtaining a new examination of the matter of a residence permit in enforcement cases is an extraordinary remedy that is to be applied restrictively. It furthermore follows from the legislative history of the Aliens Act that when it comes to new circumstances cited in an enforcement case, it is not sufficient that these are mere modifications or additions to the circumstances previously cited (see Govt Bill 2004/05:170 p. 227 f.).

19. A decision of the Swedish Migration Agency under Chapter 12, Section 19 of the Aliens Act can be appealed to a migration court. The Migration Court's judgment can in turn be appealed to the Migration Court of Appeal, which first examines whether or not it should grant leave to appeal.