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Security of Residence for Refugees and Migrants in Sweden after the Tidö Agreement

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Introduction

A coalition of three centre-right parties backed by the right-wing party Swedish Democrats entered into a non-binding agreement in October 2022 after the general elections, setting out milestones regarding legislative measures to which priority should be accorded. One of the more important parts of the agreement relates to migration, integration and the treatment of refugees. The normal process of a public inquiry (SOU) will be critical to the implementation of the agreements on refugees and migration as the content is too complex to be accommodated by a simple change to existing rules. This is highly problematic as set out here, the compatibility of the proposals in this section with international and European human rights law is questionable and requires careful consideration.

This Policy Brief examines the Tidö milestones which affect security of residence of refugees and migrants in Sweden from the perspective of international and European human rights law. It is comprised of two substantive sections, the first on international and European human rights legal standards regarding residence of refugees, the second regarding migrants. Each section addresses the specific issues which arise in the Tidö Agreement relating to these standards. These sections are accompanied by a short review regarding conditions of residence applicable to both groups. It follows a common methodology, setting out, first, the Tidö Agreement proposal(s) then

examining the points of concern regarding international and European human rights law first as contained in the Refugee Convention, secondly in international human rights law according to the right and, thirdly, in the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR) followed by EU law standards where relevant. It is important to bear in mind that the scope of application of each international or European human rights convention is defined in each instrument. They are cumulative not alternative. States which have voluntarily ratified these instruments have consented to be bound by each one independently in accordance with international law. However, this does not prevent the supra-national courts (and their international counterparts) from having regard to commitments states have made under other conventions for the purposes of interpreting the scope of obligations under the agreement for which they are responsible (*Verein KlimaSeniorinnen Schweiz v. Switzerland* ECtHR 53600/20, 9 April 2023).

Further, national implementation of EU law does not affect the duty on states to ensure that its law and application is also fully compliant with its human rights obligations (see *MB v. the Netherlands* ECtHR 71008/16, 23 April 2024). What this means is that even where Swedish migration and asylum law is compatible with EU law, it may still not be compliant with the standards set by the European Convention on Human Rights and its interpretation by the ECtHR. While in the past, the ECtHR has frequently found that EU law in the field of migration reflects a useful consensus among 27 states regarding migration for the purposes of the correct interpretation of the ECHR, in 2024 it clearly and expressly rejected this approach in the *MB* judgment, finding that EU minimum standards were not compatible with the ECHR.

Security of Residence for Refugees

The Tidö Agreement contains a number of milestones relating to ending residence permits, limiting access of those holding residence permits to social benefits and simplifying expulsion procedures. These take the form of a revision of the approach to application of the existing moral character or conduct ("hederlig vandel") requirement for continued residence and a reduction of access to social benefits on the basis of citizenship to reduce the attractiveness of Sweden for non-nationals. In this section I will examine these milestones as regards their application to refugees and beneficiaries of international protection (protected by international and European law).

The Refugee Convention

The UN Convention on the status of refugees 1951 and its 1967 protocol (the Refugee Convention) forms the international law basis regarding the rights of refugees. A refugee is defined in the convention as a person who, outside his or her home country (or country of habitual residence), has a well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion. A state's recognition of a person as a refugee (the assessment procedure) is declaratory not constitutive. This means that a person is a refugee as soon as he or she fulfils the conditions of the definition and recognition as a refugee by a state confirms that status, it does not grant it.

The Refugee Convention permits states to expel a recognised refugee on grounds of national security or public order (Article 32). Further, states must not expel a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (Article 33). The exceptions permitted under Article 33 are where there are reasonable grounds for regarding the person as a danger to the security of the country or having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country (Article 33). Where a state takes an expulsion decision against a refugee on this ground, the person must have a right of appeal. The proposed new moral character or conduct requirement in the Tidö Agreement as regards refugees will only be compatible with the Refugee Convention if the standard of the conduct or character meets the high threshold of Articles 32 and 33. In the case of both exceptions, it is for the state to justify why and how the refugee constitutes a danger to national security, public order or to security of the community.

These standards apply to all refugees. Even where a refugee may have acquired permanent residence so long as he or she remains a refugee the standard is applicable. They cease where the refugee acquires citizenship (Article 1E). The Refugee Convention protection may also cease to apply to a refugee where he or she has voluntarily returned to his or her country or where the situation has changed so that there is no longer a threat to the individual on return there (Article 1C).

The Prohibition on Torture, Inhuman and Degrading Treatment or Punishment in other International Conventions

Article 6 of the International Covenant on Civil and Political Rights 1966 (ICCPR) protects the right to life, and Article 7 prohibits torture or cruel, inhuman or degrading treatment or punishment. The UN Human Rights Committee, which monitors implementation of the Covenant, has interpreted these provision in light of Article 2 ICCPR as meaning that "[T]he article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed." (General Comment 31 (2004), para 12). This non-refoulement duty allows of no limitation (General Comment 20 (1992) para 3). This means that where there is a risk that a person will be subject to a real risk of irreparable harm in a country to which it is planned to expel him or her, that expulsion must not be carried out. The obligation applies even where the person has committed serious crimes in the host country, or in the language of the Tidö Agreement lacking good character. This means that no national law, for instance one adopted to implement the Tidö Agreement, will be human rights compatible if it provides for the expulsion of a person to any country where there is a real risk of irreparable harm, irrespective of the person's bad behaviour in Sweden.

The UN Convention against Torture 1984 similarly states at 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." Torture is clearly defined in Article 1(1). The CAT Committee charged with supervision of the correct application of the convention stated in its 2021 8th Periodic Review of Sweden that the country needs to implement stronger measures to ensure that people are not expelled to countries where there is a real risk of torture (CAT/C/SWE/CO/8 paragraph 22). In particular, it stated that for Sweden to be compliant with its obligations under the Convention it must "[r]efrain from deporting foreigners to countries of origin in which the presence of armed conflict with widespread civilian casualties and the absence of the rule of law, in practice, strongly indicate that those persons would be subjected to torture or ill-treatment upon their return" (paragraph 22(d)). This obligation is unqualified and is not

dependent on the behaviour of the person in Sweden, no matter how objectionable. Even before the Tidö Agreement was negotiated, a UN Treaty Body was concerned about the consistency of Swedish expulsion policy with international law (CAT/C/SWE/CO/8 paragraph 22).

The Convention against Enforced Disappearances 2006 prohibits expulsion return, surrender or extradition of a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance (Article 16(1)). This duty is also unqualified and applies irrespective of the behaviour of the person whom the state is considering for expulsion.

The European Convention on Human Rights (ECHR) prohibits torture, inhuman or degrading treatment or punishment. Since an ECtHR 1989 judgment (*Soering v. United Kingdom* (1989) 11 EHRR 439), the duty not to subject persons to torture or to inhuman or degrading treatment also imports an obligation not to remove persons to other states where there are substantial grounds for believing that they would be at real risk of such ill-treatment. This is essentially the same approach as is adopted under the CAT test and in relation to the ICCPR. There is no exception possible on the basis of the person's actions (*Chahal v. UK* ECtHR 7215/75 5 November 1981). Any measures adopted in pursuit of the Tidö Agreement milestone to expel persons on the basis of a failure of good character ground can only be applied to migrants who are also refugees if the threshold is as high as that set out in the Refugee Convention. It cannot be applied at all to beneficiaries of international protection whose status is underpinned by the prohibition of torture in international law.

Security of Residence for Migrants and Conditions of Residence

Residence and Expulsion of Migrants who are not also Refugees

Migrants who are not refugees are not entitled to the high threshold in respect of expulsion or the absolute prohibition in respect of the risks or torture, inhuman and degrading treatment or punishment or enforced disappearance. However, this does not mean that states are entitled to deprive migrants who have been admitted to their state of security of residence. Article 17 ICCPR states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." It is for states to make the law but the HRC has

stated in General Comment 16 that "the expression "arbitrary interference" can also extend to interference provided for under the law" (UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, para 4). This means that even if Sweden changes its current rules or adopts new rules on expulsion which expand the grounds for expulsion, those rules must not result in an arbitrary interference with the right to private life. Merely changing the law does not 'legalise' what is an arbitrary interference under international human rights law. In the context of the Tidö Agreement, where a person has security of residence in Sweden, any rule which would deprive that individual of that security of residence (for instance an expulsion decision), must be taken on the facts of the individual case and weighed against the person's entitlement to private life.

The ECtHR has a well-established case law on when the expulsion of a migrant constitutes an interference with the right to protection of private and family life (Article 8 ECHR). As a general principle, the ECtHR has affirmed that a state is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (*Abdulaziz, Cabales and Balkandali v. UK,* 1985, § 67*; Boujlifa v. France*, 1997, § 42). Similarly, there is no ECHR recognition of a right of a foreign national to enter or to reside in a particular country. Nonetheless, the ECtHR has accepted that the expulsion of settled migrants (and even foreigners unlawfully present) may interfere with their right to respect for their private and family life and, in certain circumstances, be incompatible with their rights under Article 8 (*Üner v. the Netherlands, 2006; Maslov v. Austria, 2008; Jeunesse v. the Netherlands* 2014, and *Savran v. Denmark*, 2021).

As a general principle, the ECtHR requires that any decision to expel a migrant from a state must take into account: (1) the nature and seriousness of any offence committed by the applicant; (2) the length of the applicant's stay in the country from which he or she is to be expelled; (3) the time elapsed since the offence was committed and the applicant's conduct during that period; (4) the nationalities of the various persons concerned; (5) the applicant's family situation, such as the length of the marriage and other factors expressing the effectiveness of a couple's family life; (6) whether the spouse knew about any offence committed by the individual at the time when he or she entered into a family relationship; (7) whether there are children of the

marriage, and if so, their age; (8) the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled; (9) the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and (10) the solidity of social, cultural and family ties with the host country and with the country of destination (*Üner v. the Netherlands* 46410/99 18 October 2006). Any good character test to be applied by a state regarding whether a person should be expelled must be consistent with the ECtHR rules on the scope of Article 8. Further, there can be no automaticity of a decision of expulsion, each case must be examined on the facts and merits in accordance with the principles.

All ten of the criteria must be examined in the round, that is, in light of all the circumstances of the individual case. There is no hierarchy of importance among them. So the balancing of the interest of the person to continued residence in the country and the state's interest to protect public policy must give similar weight to all of them. Criterion 10 is closest to the Tidö Agreement ground of failure of good character as a reason for expulsion. But the use of this ground must be compliant with the ECHR standard. All criteria must be assessed as a whole and in the round. Further the person must always have access to a full review by an independent tribunal of any decision so that the judiciary can ensure that the balancing exercise has been correctly carried out. If there is a substantial delay between the assessment of the individual's claim to continued security of residence and the carrying out of an expulsion decision, the state must reassess the facts and circumstances to ensure that there have not been changes of circumstances which render the expulsion decision no longer compliant with human rights law.

Even in very serious cases where a person is subject to a measure based on national security considerations, he or she must not be deprived of all guarantees against arbitrariness. On the contrary, he or she must be able to have the measure in question scrutinised by an independent and impartial body competent to review all the relevant questions of fact and law, in order to determine the lawfulness of the measure and censure a possible abuse by the authorities. Before that review body the person concerned must have the benefit of adversarial proceedings in order to present his or her point of view and refute the arguments of the authorities (*Ozdil and Others v. Moldova*, 2019, § 68).

According to EU directive 2003/109 on status of third-country nationals who are long-term residents, all migrants who have completed five years residence, have stable and regular resources and sickness insurance are entitled to apply for an EU permanent residence status. The Directive is also applicable to refugees and beneficiaries of international protection. States are entitled to apply requirement to comply with integration conditions, in accordance with national law but they may only refuse the status on grounds of public policy or public security. In such cases, states must consider the severity or type of offence against public policy or public security, or the danger that emanates from the person concerned, while also having proper regard to the duration of residence and to the existence of links with the country of residence (Article 6). The status can only be lost through long absence from the state, fraud in its acquisition, and where a state takes an expulsion decision consistent with Article 12. This requires any decision to expel a long-term resident be taken solely where he or she constitutes an actual and sufficiently serious threat to public policy or public security. The facts which must be taken into account to assess this are: (1) the duration of residence in their territory; (2) the age of the person concerned; (3) the consequences for the person concerned and family members; (4) links with the country of residence or the absence of links with the country of origin. This test is at least as high as that of the ECtHR. The test appears to be substantially higher than the Tidö Agreement lack of good character criterion.

In the Commission's review of the Directive (COM(2019) 161 final), it is evident that the majority of persons who obtained the EU long term resident status came from only one Member State, Italy. This is because Italy does not have a national permanent residence status Which has pushed migrants in that country have seek the protection of EU rights. It seems that the value of the EU status becomes more important for migrants where states reduce the security of residence under their national schemes.

Conditions of Residence

The Tidö Agreement proposes that access to maintenance (Swedish welfare) for migrants (including those with a secure residence status) should be subject to fewer exemptions and stricter requirements particularly in the area of family reunification.

As regards migrants who are also refugees, the Refugee Convention requires in respect of access to social benefits that refugees are entitled the same treatment with respect to public relief and assistance as is accorded to own nationals, in this case, Swedish citizens (Article 23). The Convention requires states to undertake, as far as possible, to facilitate the assimilation and naturalization of refugees. They must, in particular, make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings (article 34).

On 22 March 2024, the Economic and Social Committee responsible for monitoring state application of the Convention on Economic Social and Cultural Rights 1966 in its report on Sweden, and in light of information available about the Tidö Agreement stated that "the State party take measures to ensure that any immigration policy does not impede the equal access of migrants, in particular migrant children and undocumented migrants, to services essential for the realization of economic, social and cultural rights, including health care and education." (E/C.12/SWE/CO/7 paragraph 17).

The Committee established under the Convention on the Rights of Persons with Disabilities in its review of Sweden in 2024 stated, again in knowledge of the Tidö Agreement, that "the existing national legislation to address systemic, intersectional and structural barriers experienced by persons with disabilities, in particular women with disabilities, young persons with disabilities, national minorities with disabilities, migrants with disabilities and persons with intellectual and/or psychosocial disabilities, and take measures to increase the number of persons with disabilities in open labour market and review the assessment of reduced capacity to work…" and further that Sweden "[p]rovide access to disability support schemes for asylum-seekers, refugees and migrants with disabilities, including persons with disabilities under temporary protection in order to prevent them from falling into poverty." (CRPD/C/SWE/CO/2-3, 29 April 2024, paragraph 25(d)).

The EU long term residents' directive provides for equal treatment with nationals of the state for those holding the status as regards social security, social assistance and social protection as defined by national law and tax benefits (Article 10(1)(d) and (e)). However, Member States may limit equal treatment in respect of social assistance and social protection to core benefits which covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care (Recital 13).

For the Tido Agreement milestone regarding limiting migrants' access to social benefits, this cannot be applicable to migrants with EU long term residence status at least as regards the defined core benefits. Thus, the milestone, if implemented is likely to have the effect of encouraging migrants in Sweden to apply for the EU status as soon as they are eligible.

Conclusions

The Tidö Agreement milestones regarding security of residence for refugees and migrants will be difficult to implement without breaching international and European human rights law. Most problematic is the objective of the Agreement to make the expulsion of migrants and refugees easier and automatic where there is a failure of good character. This good character ground is irrelevant as regards refugees and beneficiaries of international protection where the place to which they are threatened with expulsion is not safe for them (i.e. there is a real risk of irreparable harm, including torture, inhuman or degrading treatment or punishment or enforced disappearance). As regards migrants who are not at risk of irreparable harm in the destination country, there is a long and consistent case law of the ECtHR regarding the circumstances in which persons with security of residence may lawfully be expelled. This includes judicial interpretation of the seriousness of any offence which the individual may have committed. Sweden cannot lawfully seek to substitute a new and different standard to justify expulsion (moral character or conduct, "hederlig vandel") which is effectively lower than the one to which it is bound in international and European human rights law. As regards the situation of asylum seekers, it is important that Sweden continues to respect its duty in international and European law. Such duty implies to determine their claims on the basis of whether there is a real risk of irreparable harm (persecution, torture, inhuman or degrading treatment or punishment or enforced disappearance) if the person is returned to their country. Only once this issue has been resolved, and only in the case that the authorities have determined that the person will not be at such a risk in their country can the question of good character be brought into the equation as regards the appropriateness of expulsion. It cannot be an element in the determination of the protection claim itself.

As regards EU law, the implementation of the Tidö Agreement may have the effect of driving Swedish migrants to seek the EU long term residents' status in order to protect themselves from harsh measures in national law. If Swedish

national rules permit expulsion of migrants on weaker grounds than are permitted in EU law then migrants in Sweden will have a big incentive to acquire the EU status. Where they enjoy the EU status, the national harsher rules cannot be applied to expel them. This will have the effect of diminishing Swedish control over refugees' and migrants' rights in Sweden.

Recommendations

1. In all circumstances the Tidö Agreement milestones on migration, integration and treatment of refugees should be implemented after a full public inquiry. The human rights consequences are far too important to permit changes to legislation or rules without effective and incisive public scrutiny.

2. Refugees and beneficiaries of international protection benefit from a protection against expulsion to a country where there is a risk of irreparable harm on any ground whatsoever and particularly not on the ground of failure of good character, according to international law. It is important that this characteristic of international and European human rights law including the EU Charter is properly fulfilled.

3. Changes to the grounds on the basis of which migrants (who are not refugees) are placed at risk of expulsion should be made with clear reference to international and European human rights standards and the case law of the ECtHR, recognising the primacy of human rights law over national law.

4. Sweden should publicise and encourage migrants to apply for EU long term residence status as soon as they are eligible. This will enhance Sweden's compliance with EU law (and take into account ECHR law) and provide migrants with clear rules regarding their security of residence which cannot be changed by the Swedish government alone.

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