RECEPTION OF MIGRANTS: SUBSTANTIVE AND PROCEDURAL GUARANTEES FOR SETTLED MIGRANTS

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I would like to focus on some problems that we have encountered lately with regard to settled migrants in the field of family reunion. I will illustrate these problems – and also how we have solved them – with some different cases from my court.

First of all I must explain that the Swedish legislation regarding family reunion has basically remained the same, at least since the nineteen eighties. Accordingly, spouses or partners and children have been granted a residence permit if their partner or parent is living in Sweden.

However, family reunion in those days mainly concerned families from other countries in Europe and some countries in South America. Later on we also had large groups coming from the Middle East.

Common to all these was the fact that they came from countries that had a fairly well-functioning administration and therefore they could easily present passports and other official documents in order to certify their identity and other circumstances of relevance for their application. And our legislation and praxis was founded on this presumption.

But during the last 25 years a large number of people have arrived in Sweden originating from countries where there is no administration at all or where the quality of the administration and the documents they produce are so poor that they cannot be relied on. This has led to cases concerning family reunion which contain completely new problems. Problems that we have tried to solve in our case law.

My first example illustrates this very well. In a number of cases between 2011 and 2016 the problems with the identity of an applicant were dealt with. In a case from 2011 (MIG 2011:11), the Migration Court of Appeal confirmed that according to established practice a residence permit for a family member cannot be granted unless the identity of the applicant has been verified.

However, already in 2012 a modification was made to this principle and it was later revised further. The result of these, so far, three cases (MIG 2012:1, MIG 2014:16 and MIG 2016:16) is that a so-called evidentiary alleviation may be applied in certain situations. When a foreigner applies for a residence permit in order to join his or her spouse in Sweden, and if they have children together, it may be justified to accept that the identity of the foreigner cannot be verified with proper documents. This may be the case if the foreigner comes from a country where it is very difficult to obtain acceptable documents to verify his or her identity and if the spouses or partners had been living together before one of them moved to Sweden and became a settled migrant there. Another condition is that they have children together and that there is a DNA analysis certifying that the spouses are both parents to the child or children in question.

The Migration Court of Appeal underlined that the principle of proportionality requires that the interest of the parent and other members of the family in being united must be weighed against the interest of

the State in controlling the entry and stay of non-nationals on its territory. In a situation where the family has been established already before any of the family members are granted asylum in Sweden, the interest of the family in being reunited is stronger than the interest of the State.

However, the court has also stated that the interest in family reunion cannot be considered more important than the State's interest in control when it comes to a relationship that has been established at a later date; that is to say, when one of the partners, after becoming settled in Sweden as a single person, contracts a marriage with someone from another country. In this situation, the duty imposed by Article 8 cannot be considered as extending to a general obligation to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouse for settlement in our country without proper documentation as to this person's identity. Here a reference was made to the judgment of the European Court of Human Rights in the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94).

I will now turn to another problem, similar to the one I have just described, but this relates only to children whose mother or sometimes father have taken up residence in Sweden. According to the EU Directive on Family reunification, and Swedish law, a child whose mother or father is living in Sweden may be allowed to take up residence here too, if the other parent consents to this.

Now, it is not unusual in these cases for the parent who is living in Sweden to claim to be the only parent because the mother or father is deceased or has disappeared. As I explained before, when the family originates in countries like Somalia or sometimes Afghanistan there is no proper documentation to support such a claim. Very often, therefore, an application to take up residence in Sweden has been declined in these situations. But in a case from 2015 (MIG 2015:8) the Migration Court of Appeal found that even if there are good reasons for having high demands when it comes to proof of a parent's death or disappearance there might be situations when an alleviation could be justified.

If a person comes from a country that lacks a functional administration capable of issuing the necessary documentation in order to prove a person`s death for example, a request for proper documentation might be highly problematic or even impossible to fulfil. If this requirement renders family reunification inconceivable, it must be possible to accept other means of information regarding the other parent`s destiny.

This particular case concerned two young brothers from Afghanistan. Their older brother had been granted a residence permit with subsidiary protection status in 2012, and in 2013 their mother was granted a residence permit as his family member. The application from the two brothers on the other hand was rejected, since they could not present any proper documentation in support of their claim that their father was deceased.

However, the Migration Court of Appeal found that all members of the family had supplied consistent information as to the time and circumstances of the father's death. Thus, this statement was accepted and the two brothers could be allowed to settle in Sweden as well.

Also in this case a reference was made to the requirements of Article 8 of the Convention on Human Rights.

Finally, I would like to present my last problem – a delicate matter of polygamy!

It is a quite recent case from December 2016 (MIG 2016:26), which concerns a man from Syria who was granted permanent residence in Sweden with subsidiary protection status. Shortly thereafter his two wives and their children applied for a residence permit in order to join him. The children were allowed to enter Sweden since their mothers had consented to their settlement in Sweden. So, the matter for my court was what to do with the wives?

The court stated that according to the EU Directive on Family Reunification the right to family reunification should be practised in accordance with the values and principles that prevail in the

member States. In particular the rights of women and children must be considered. Therefore restrictions are justified when it comes to polygamy.

The court also considered whether restrictions on polygamy could be in conflict with the right to respect for family life in Article 8 of the European Convention on Human Rights. A reference was made here to a decision of the Commission on Human Rights from June 1992 in the case of *R.B. v. the United Kingdom* (no. 19628/92) where the Commission concluded as follows.

“In the circumstances of the case the Commission is of the view that the family life circumstances in the present case do not outweigh the legitimate considerations of an immigration policy which rejects polygamy and is designed to maintain the United Kingdom's cultural identity in this respect. It finds, therefore, that the interference with the applicant's right to respect for family life was in accordance with the law and justified as being necessary in a democratic society for the protection of morals and the rights and freedoms of others.”

The Migration Court of Appeal therefore rejected the wives´ applications with reference to the strong interest of the State to prevent polygamy. Neither the principle of the best interests of the child, nor the right to respect for family life, was considered to be violated by this decision.