AEAJ Working Group Asylum and Immigration

Marseille 2021

Collection of Cases

Austrian – Case 1 – The wife who got married after leaving her home country

Facts:

The applicant is an Afghan national and mother of four children, born in 2009, 2011, 2013 and 2015. They reside in Pakistan. The husband of the applicant and father of the children was awarded asylum status in Austria. The couple had married in 2008 in Pakistan. The applicant stated in the course of the proceedings that before the wedding she had lived in Afghanistan and that they also had lived as a couple on and off in Afghanistan before her husband had left for Europe.

The applicant then lodged for herself and her children applications with the Austrian Embassy in Islamabad for entry visa for a family reunion.

As foreseen in the law the Embassy forwarded the applications to the Federal Office for Immigration and Asylum ("FOIA") for its information whether the granting of a protection status to the applicant and the children in Austria as family members was probable or not.

The FOIA then stated in its information to the Embassy that it was probable for the four children to be awarded the same status in Austria after their father and that the visa could be issued for them. However, it was improbable that the applicant herself would be awarded the same status as her husband in Austria, since according to the law only such married partners were considered "family members" if the marriage had taken place in the country of origin.

The Austrian Embassy in Islamabad thus issued the visa for the children of the applicant, but rejected her own application for an entry visa with a pre-printed form, in which the reason for the rejection could be ticked in a box.

The applicant complained against that decision in particular invoking Art 8 ECHR stating that the authority would have been obliged to issue an entry visa to the applicant despite the "negative" information of the FOIA in the light of its obligations under Art 8 ECHR to allow for a respect for their family life. The authority replied to the complaint that it had been bound by the information of the FOIA and could thus not have taken a different decision.

Questions:

- Under what circumstances can Art 8 ECHR be taken into account in the present proceedings?
- If the authority or the court in the complaint proceedings wanted to consider Art 8 ECHR in its decision making process, what would it need to do?
- What factors could be considered under the head of Art 8 ECHR in the present case?

Austrian Case 2 - Inner-European residence

Facts:

A and B are German nationals, C is their adult son, also a German national. C suffers among other things from cognitive restrictions, epilepsy and development deficiencies regarding speech and motor function. A and B are C´s guardians. The family moved to Austria in February 2020 and received certificates of registration in March 2020.

A receives a pension of monthly 1.600 €. He also received a payment of 11.500 € from an insurance. The house in Austria in which the family lives belongs to B; housing costs are approx. 400 €/month. C receives a monthly payment of a German insurance in the amount of 545 €. His care costs amount to approx. 150 – 250 €/month. The Austrian Tax Authority pays monthly 175 € for C to cover the difference between Austrian and German family subsidy (which is not considered a social benefit).

In September 2020, B lodged a "request of professional integration" for her son C in an educational centre. That centre provides support for the professional integration of young people and, if the need arises, housing. The costs for care at the centre range from 59 – 195 € per day. Prerequisite of the acceptance is the grant of a benefit under the Carinthian Equality of Opportunity Act.

Upon receipt of the motion under the Equality of Opportunity Act, the Administrative Authority informed the Federal Asylum Authority ("BFA") of that fact. The BFA then informed the applicants of the opening of expulsion proceedings against the family since the request for professional integration for C had to be considered a request for a welfare benefit, which is why it is plausible that the family no longer had sufficient financial means as foreseen in Art 51 § 1 lit 2 of the "NAG" (Residence Act). Thereupon the applicants lodged a statement with the authority explaining their financial situation.

With decisions of 5 February 2021 the BFA expelled the applicants from Austria based on Art 66 FPG (Foreign Police Act) and Art 55 § 3 NAG and awarded one month suspension on the execution of the measure. It reasoned that because of the irreversible handicap of C the presence of the family in Austria would pose a considerable and permanent burden on the Austrian welfare system. The care of C in the educational centre would lead to yearly costs of 21.000 – 70.000 €, borne by the welfare system. The residency based on Union law had been certified on the assumption that the whole family disposed of sufficient financial means and would not need benefits from social welfare. Those means would not suffice to pay for the envisaged care of C. With the motion of B to receive funds from the Carinthian Equality of Opportunity Act, it had been shown that there were not sufficient financial means available.

The applicants appealed stating that the family could provide for its subsistence after moving to Austria without applying for social benefits there. They had been aware when moving that it was not possible to apply for basic subsidy, either in Austria or in

Germany, for C. The family had tried for a professional inclusion of C, and they had not been informed of the fact that a motion for a grant under the Carinthian Equality of Opportunity Act was considered a motion for social benefits that could be an obstacle of a residency in Austria based on Union law. Otherwise the motion, which had in the meantime been retracted, would not have been lodged. The authorities had failed to inform the applicants of that consequence of the said motion. The applicants acknowledged that it was currently not possible for C to obtain the care in the centre. An expulsion would infringe the applicants' rights under Art 8 ECHR, and B in her right of respect of her property, since the house in Austria was hers. The decision of the authority was further an act of discrimination against C as a person with special needs.

Questions directing the discussion:

- How to calculate the sufficient financial means in the present case – pros and cons for the existence of sufficient financial means for A, B and C:
    - How has the financial situation of the family changed by the motion to apply for the grant under the Carinthian Equality of Opportunity Act?
    - Who are family members to be taken into account in the calculation?
- Is a grant under the Carinthian Equality of Opportunity Act – allowing for the participation in an education centre for profession inclusion - a social benefit within the meaning of Art 51 NAG and Art 7 § 1 lit b of the Directive 2004/38/EC?
    - Check on ECJ, C-140/12, 19.09.2013, Brey, ECLI:EU:C:2013:565, No. 61
- Could C also fall under the regime of relatives of EEA citizens as covered by Art 52 § 1 no. 2 NAG?
    - Check on ECJ, C-423/12, 16.01.2014, Reyes, ECLI:EU:C:2014:16, No. 20 et seq.
- What aspects of the case could trigger an application of Art 8 ECHR, and what interests are to be balanced against each other?
- Under what circumstances would the Convention on the Rights of Persons with Disabilities come into play in the present case?

Law (excerpts):

Art 66 Foreign Police Act (FPG) provides that among others EEA citizens can be expelled if they have no or no longer a right of residency according to Art 55 § 3 Residency Act (NAG).
Art 51 NAG declares the residency based on EU law for EEA citizens for more than three months for lawful if – as far as relevant – they have access to sufficient financial means for themselves and their families and to comprehensive medical insurance, so that they do not need social benefits or a compensation allowance during their stay in Austria.
Art 52 § 1 no. 2 NAG provides that – among others – descending relatives of an EEA citizen (with a right to residency) up to 21 years of age and above in the event of a factual dependency for subsistence have also a right for prolonged residence.
Art 55 § 3 NAG states – as far as relevant – that if a right of residency according to Art 51 NAG not exists because the prerequisites for the residency not or nor longer subsist, the authority has to inform the persons concerned of that fact and that the BFA will be contacted regarding a possible expulsion measure.
According to Art 2 § 1 lit 9 NAG family members are – among others – minor (- 18 years) single children.

Art. 2 and 7 of the Directive 2004/38/EC[1]:

Article 7

Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) —are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

—have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph l(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

Article 2

Definitions

For the purposes of this Directive:

1) "Union citizen" means any person having the nationality of a Member State;

2) "Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

[1] L_2004158EN.01007701.xml (europa.eu)

German Case 1: Family reunification for a proxy married couple

Facts:

A couple of Sudanese nationality is claiming for familiy reunfication in Germany.

The husband left Sudan in 2010 and was granted subsidiary protection in Germany in 2017. In 2019 the wife applied for a visa at the German embassy in Karthoum to retighten to her husband in Germany. She claimed that they got engaged in 2015 without meeting each other in person and the marriage was concluded in Sudan in 2017, where the husband was not present but represented by an agent (proxy marriage).

The application was refused by the embassy with reference to a national German provision, under which a residence permit is regularly excluded when the marriage with a beneficiary for subsidiary protection was not concluded before the flight (Sec. 36a par. 3 no. 1 of the Residence Act).

The Administrative Court of Berlin confirmed the decision argueing the national provision would neither violate Union law nor national fundamental rights under the aspect of protection of marriage and family life (Art. 6 par. 1 German Basic Law, Art. 8 ECHR, Art. 7 FRC) nor under the principle of equality (Art. 3 par. 1 German Basic Law, Art. 14 ECHR, Art. 20 FRC). In her leap frog appeal the wife claimed inter alia that the national provision would discriminate spouses of beneficiaries for subsidiary protection against spouses of recognized refugees (who are eligible for a residence permit). Further on the distinction between marriages concluded before and after the flight would be unjustified.

Questions:

Is a national provision which limits family reunification with a spouse who was granted subsidiary protection only to marriages concluded before the flight compatible with the right to familiy life? Is it compatible with the principle of equality?

How can an unequal treatment of spouses of beneficiaries for subsidiary protection and spouses of recognized refugees be justified?

German Case 2: Family reunification with an unaccompanied minor refugee

Facts:

M was born in January 1999 and is a Syrian national like his family. In 2015, he arrived alone in Germany and applied for asylum, while his parents and siblings stayed in Syria. That same year, the German Federal Office for Migration and Refuges granted him refugee status. In 2016, the German Foreigners` Office issued him a residence permit. At the End of 2016, his parents applied for visas in order to join their unaccompanied child in Germany. In January 2017 M came of age. For this reason, the German embassy rejected the visa applications in March 2017.

The relevant provision of German law is Section 36 (1) of the German Residence Act. Also, of importance are the principles of German administrative procedural law on the relevant point in time for the presence of the conditions of the provision.

This results in the following legal situation:
A parent`s right to join an unaccompanied minor refugee only exists if the child is still a minor at the time of the decision on the application for family reunification. Consequently, under national law the parents have a derived right of residence only until their child turns 18.

In 2018, the ECJ rules in a Dutch case on the interpretation of the Directive on family reunification:

> „Article 2(f) of Directive 2003/86/EC of 22 September 2003 on the right to family reunification, read in conjunction with Article 10(3)(a) thereof, must be interpreted as meaning that a third-country national or stateless person who is below the age of 18 at the time of his or her entry into the territory of a Member State and of the introduction of his or her asylum application in that State, but who, in the course of the asylum procedure, attains the age of majority and is thereafter granted refugee status must be regarded as a 'minor' for the purposes of that provision."
> (cf. ECJ, judgment of 12 April 2018 – C-550/16
> https://curia.europa.eu/juris/document/document.jsf?text=&docid=200965&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1485390)

In 2020, the ECJ decides in a case concerning the reunification of a child with a third-country national parent recognised as a refugee in a Member State. According to this judgment, the date of the submission of the application for entry and residence for the purpose of family reunification for minor children – not that of the decision on that application – is decisive for determining whether the applicant is considered to be a minor child.
(cf. ECJ, judgment of 16 July 2020 – jc C-133/19, C-136/19 and C-137/19
(https://curia.europa.eu/juris/document/document.jsf?text=&docid=228674&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5054438)

The parents of M consider now that in light of these judgments they have a right to family reunification. The German Embassy objects that the parents - in contrast to Dutch law - only had a derivative right and would have to leave again immediately. Furthermore, the facts were different. In the present proceedings, M was (also) still a minor at the time of refugee recognition and could have obtained family reunification

by availing himself of provisional legal protection. After all, the directive did not require family reunification with children of full age.

Question:

What are the implications of the ECJ's case law for German law and for the law of your country?

Lithuanian Case 1: Family reunification with a same sex spouse

Facts:

In the case under review, the dispute arose regarding the legality and validity of the decision of the Migration Department (hereinafter – the Department) refusing to issue the temporary residence permit to the applicant (Belarus citizen) to live in the Republic of Lithuania (hereinafter – permit). The Department based the contested decision to refuse issuing the permit on the fact that the applicant and his spouse (Lithuanian citizen) entered into the same sex marriage in Netherlands, that such marriage is not recognized by the laws in Lithuania and that these circumstances cannot be considered family reunification within the meaning of Item 5 of Paragraph 1 of Article 43 of the Law on Legal Status of Aliens (hereinafter – the Law). The first instance court (Vilnius Regional Administrative court) upheld the decision of the Department.

Applicant applied to the SACL (Supreme Administrative Court of Lithuania) arguing that his marriage is valid, Article 43 (1)(5) of the Law (A temporary residence permit may be issued to an alien by virtue of family reunification if the alien's spouse or the person with whom a registered partnership has been contracted and who is a citizen of the Republic of Lithuania or an alien in possession of a residence permit resides in the Republic of Lithuania) allows him to family reunification.

Question:

Was a national provision applied by the Department and the first instance court correctly?

Lithuanian Case 2: Family reunification in Lithuania when husband works in Germany

Facts:

In the case under review, the dispute arose regarding the legality and validity of the decision of the Migration Department (hereinafter – the Department) revoking the temporary residence permit issued to the applicant (Belarus citizen) to live in the Republic of Lithuania (hereinafter – permit). The Department based the contested decision to revoke the permit issued to the applicant on the fact that the applicant does not live in Lithuania (he worked in Germany), while his spouse (Lithuanian citizen) lived in Lithuania, and that the spouses' residence in different countries cannot be considered family reunification within the meaning of Item 5 of Paragraph 1 of Article 43 of the Law on Legal Status of Aliens (hereinafter – the Law). The first instance court (Vilnius Regional Administrative court) upheld the decision of the Department.

Applicant applied to the SACL (Supreme Administrative Court of Lithuania) arguing that his marriage is not dissolved, Article 43 (1)(5) of the Law (A temporary residence permit may be issued to an alien by virtue of family reunification if the alien's spouse or the person with whom a registered partnership has been contracted and who is a citizen of the Republic of Lithuania or an alien in possession of a residence permit resides in the Republic of Lithuania) could not be interpreted as an alien must live in Lithuania.

Question:

Was a national provision applied by the Department and the first instance court correctly?