

Families know no borders I – Who is a family in Slovakia?

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Abstract:

Forms and compositions of family have become quite variable over the past decades. In Slovakia more and more families nowadays include family members who are foreign nationals. The article outlines who is considered a family member in different situations for purposes of family reunification in the territory of the Slovak Republic. Paradoxically, the family members of Slovak nationals do not enjoy the same level of rights in the Slovak Republic as family members of EU citizens of other member states. In many cases, definition of a family is too narrow compared to demands of the real life. The article argues that children born out of the wedlock to a parent who is a third country national are discriminated against, since parenthood of a Slovak child is not considered a sufficient reason to claim residence in Slovakia. The article also describes some of the measures adopted to prevent fraud and abuse of family reunification claims by foreign nationals, e.g. marriage of convenience. At last, the text deals with the positive practice where Slovak Republic facilitates access to family reunification of beneficiaries of international protection, including of subsidiary protection.

Family as a Slovak traditional value

Traditionally, in the Slovak Republic, family is considered a basic element of protection in society which is highlighted also in the Slovak Constitution¹. The Act on Family² reiterates the importance of marriage as a unique contractual relationship possible only between a man and a woman on which a family is based. The main purpose of the marriage according to Slovak legislation shall be foundation of a family and proper upbringing of children.

Although family is legally and strictly understood as a nuclear family, family relationships recognised by law are much broader. Family includes relatives in direct ascending and descending lines, indirect relatives, such as siblings and their children regardless of whether they are whole- or half-blooded, spouses, and other persons in a family or family-like

¹ Art.41 of the Constitution of the Slovak Republic No. 460/1992 Coll.

² Basic Principles – Articles 1 – 4 of the Act No.36/2005 Coll. on Family.

relationship where a loss suffered by one would be objectively suffered by another as his/her own loss.³

The Constitution and the Act on Family presume that society shall provide for broad protection of all forms of family and of marriage. According to Article 41 of the Constitution children born inside or outside of the wedlock have equal rights.

In fact, even in such a traditional society, such as in Slovakia, families are nowadays quite often formed based on partnership other than marriage which factually provides equal basis for the foundation of a family. However, Slovak legislation does not define partnership; it neither provides for the possibility of its official registration. On the other hand, legislation recognises a partner as a person in family or family-like relationship if a loss suffered by one would be objectively suffered by another as his/her own loss. Partnership of unmarried couples is therefore not protected by law in Slovakia equally as a marriage, due to lack of any registration procedure and lack of single methodology for proving its existence.⁴

Families with a foreign element

Since families grow out of their traditional definitions, they also do not limit themselves to the territory of a single country. Many families consist of members who have different state citizenship. In order for family members to effectively enjoy their right for family life, their physical unity is normally required. The presence of foreigners on the territory of a certain country is regulated by law; therefore, life of families with a foreign element is conditioned by legal immigration rules. In the following chapters, I will briefly discuss the legal regulation influencing family life in the territory of the Slovak Republic.

As of the end of 2012 there were 25.0195 third country nationals⁶ residing in the Slovak Republic. Although the precise breakdown of this number according to residence reasons is not yet available, taking into account numbers from previous years, it can be estimated that foreigners residing for family reasons presented about one third of this number. In 2011 there were 7.1227 third country nationals residing in Slovakia for reasons of family reunification. Most frequent countries of origin represented were Ukraine, Vietnam, Russian federation, China, South Korea, United States of America, Serbia, Macedonia and Croatia.⁸

³ Definition of persons of the same kinship is contained in the Section 116 of the Civil Code No. 40/1964 Coll.

⁴ Practice varies in form – in some cases civic registry at municipal office issues a document certifying a partner relationship and their living in the same household, in other cases civic registry office (in this case also office of notary) only verifies the authenticity of the signatures on their declaration on oath about their partnership.

⁵ Statistical Overview of Legal and Illegal Migration 2012 – Presidium of the Police Force - Bureau of Border and Alien Police, pg. 12.

⁶ Third country national refers to a foreigner who is not a citizen of EU member state.

⁷ Eurostat: All valid permits by reason, length of validity and citizenship as of 31 December of each year – annual data (migr_resvas). <http://appsso.eurostat.ec.europa.eu/nui/setupModifyTableLayout.do> The overall number of valid permits for third country nationals in Slovakia as of end 2011 is 23.425, out of this number 7.122 were reported as permits for family reasons.

⁸ Statistical Overview of Legal and Illegal Migration 2012 – Presidium of the Police Force - Bureau of Border

Definition of a family

The broadest definition of the reasons for family reunification is contained in the section of the law actually regulating the tolerated residence. Tolerated residence shall be basically granted to any family member of a Slovak citizen, EU citizen, or a foreigner if it is necessary for respect of his/her right for privacy and family life. As explained above, this form of residence is meant for those foreigners who cannot fulfil conditions for being granted permanent or temporary residence, yet their family life requires presence on the territory of the Slovak Republic. Quite often the reason for not fulfilling conditions for obtaining higher form of residence is the lack of documentation. On the other hand, as I will later reveal, it may also be the result of the fact that they fall out of the strict definitions of family members.

If sponsor is a Slovak citizen with permanent residence on the territory of the Slovak Republic, his spouse, children and dependent relatives in direct line shall be granted permanent residence.⁹ If a sponsor is a third country national with permanent residence in the Slovak Republic, only his minor children shall be granted permanent residence. The same applies if a sponsor is not directly a parent but a person entrusted with personal care for a child. However, for acquisition of permanent residence children shall be younger than 18 years of age and unmarried. Children of a sponsor older than 18 years of age can acquire permanent residence only under the condition that they are dependent and unable to take care of themselves due to long term unfavourable health conditions.

Other family members of the third country nationals with temporary residence or with permanent residence in the territory of the Slovak Republic may, for the purpose of family unity, acquire temporary residence. The definition of family members for this reason includes a sponsor's spouse, children and parents of the sponsor or of his/her spouse. Certain limitations are nevertheless presumed by the legislation. Married couples shall be at least 18 years of age. Children shall be unmarried and younger than 18 years of age or dependent and unable to take care of themselves due to long term unfavourable health conditions. Dependency is also a precondition in case of parents who lack appropriate family support in the country of origin. Third country nationals with temporary residence for the purpose of studying cannot act as sponsors for their parents.

Family members of EU citizens

As I have already mentioned, residence regime of family members of the European Union citizens is regulated separately. For this purpose, law also provides for a separate and more inclusive definition of family members. A family member shall be understood as the third country national who is (a) a Union citizen's spouse; (b) his/her child younger than 21 years of age, his/her dependent child and dependent children of his/her spouse; (c) his/her dependent direct relative in descending or ascending line and such a person of his/her spouse; (d) any

and Alien Police, pg. 12.

⁹ Note: A child born to a Slovak citizen acquires Slovak citizenship by birth.

other family member who is a dependent person in the country of his/her origin; (e) any other family member who is the member of his/her household; (f) any other family member who depends on his/her care due to serious health reasons; (g) his/her partner with whom the Union citizen is in a permanent, duly certified relationship.¹⁰

This broader definition of family members is the result of the transposition of the mandatory provisions of the Directive 2004/58/EC¹¹. The Directive indeed regulates the right for family reunification of family members of the EU nationals more favourably. However, it only applies to family members of Union citizens who move to or reside in a Member State other than that of which they are a national. Family members of EU nationals are entitled to reside together with an EU national on the territory of the Slovak Republic, and provided that they fulfil other conditions presumed by law after five years of this residence, they can acquire permanent residence.

This more inclusive definition of family members, however, does not automatically apply to family members of Slovak citizens. It is only applicable under the condition that a third country national has had a previous right of residence in another Member State in which also a Slovak citizen has had the right of residence, and the third country national is returning to reside in the territory of the Slovak Republic or joining the Slovak citizen in his/her residence back on the territory of the Slovak Republic. If a Slovak citizen and his/her family member did not previously have the right of residence in the same member state, this more favourable definition cannot be applied. The definition of family members, which is applicable in these cases, is the one which enumerates only spouses or dependent relatives in direct line as those entitled to be united with their Slovak family members. Many other family members of Slovak citizens, e.g. parents and children who are not dependent, registered partners or other family members who live with Slovak citizen in the same household, are thus excluded from the right to family reunification with the Slovak citizen. The only applicable institute foreseen by law for them remains the tolerated residence.

The conclusion is that the Act on Residence of Foreigners regulates the conditions for residence of family members of EU nationals more favourably compared to family members of Slovak citizens. Such legal regulation is discriminatory towards Slovak citizens and their family members who cannot establish their family life in the Slovak Republic because their relationship falls out of the narrow definition of family members. This situation may even lead them to formally settle down and acquire right of residence first in another Member State and then return to Slovakia in order to evade restrictive Slovak immigration rules and to invoke an application of more favourable rules of the Directive 2004/58/EC in the territory of the Slovak Republic.

¹⁰ Section 2 paragraph 5 of the Act on Residence of Foreigners.

¹¹ Directive 2004/58/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Quite often this situation is applicable to a third country national who is a parent of a child who is a Slovak citizen. Since a child is born out of wedlock, this parent is neither a spouse nor a dependent relative in a direct line of a Slovak citizen. It is actually the child who is dependent in this case, but his/her parent who is a third country national will not find any provision in the Act on Residence of Foreigners which would entitle him/her to legal residence in the territory of the Slovak Republic in order to exercise his/her parental rights and duties. Thus, children who are Slovak citizens born out of wedlock are discriminated against regarding their right for parental care of a parent who is a third country national. The fact that parenthood of a Slovak child is not defined as a sufficient legal ground for acquiring residence is sometimes explained by fear of abuse of these grounds by foreigners.

Family of convenience?

Slovak immigration rules contain provisions which aim to prevent also the abuse of provisions establishing marriage as the legal ground for residence. This negative phenomenon is referred to as a marriage of convenience. Marriage of convenience¹² is defined in the law as a marriage concluded with the purpose of obtaining the residence in the territory of the Slovak Republic. The Family Reunification Directive¹³ leaves it open for Member States to adopt measures to fight against abuse of rights or fraud, notably against marriages of convenience contracted for the sole purpose of enjoying the right of free movement and residence.

On the contrary to the definition contained in the Directive, the Slovak definition of the marriage of convenience leaves out the requirement that the purpose of obtaining the residence shall be the sole purpose of the marital arrangement. Leaving out this requirement may lead to a more extensive application of the concept of the marriage of convenience; therefore, it cannot be understood as an intention of the legislator. The interpretation in conformity with the EU Directive requires that it contains a sole purpose. In my opinion, one of the purposes why a couple, which involves a third country national, decides to marry is the fact that partnership of unmarried couples is not recognised by law as a reason for granting residence. Thus, one of the purposes for concluding marriage is actually obtaining a residence which enables a couple to lead a normal family life in Slovakia. All circumstances of individual cases must be considered and taken into account with great caution when concluding that the exclusive reasons for concluding marriage were fraudulent.

If a police authority believes that the marriage is of convenience, it may refuse to grant, renew the residence or revoke the residence already granted. It may even lead to the removal of a third country national who fraudulently acquired residence in this manner. Of course, not all marriages which involve a third country national shall be investigated in order to establish that they are not of convenience. In practice, law presumes that marriage is genuine unless proved otherwise. In order for police authority to start an examination of the genuineness of

¹² Section 2 Subsection 1 letter o) of the Act on Residence of Foreigners.

¹³ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

the marital relationship, there must be some good reasons for suspicion that it is of convenience.

In immigration case fraud is usually suspected on the side of the third country national who marries a sponsor. He/she is suspected to lack a genuine intention to lead marital life, and desires solely to acquire a residence. When examining whether a marriage is of convenience, the purpose for concluding the marriage shall be investigated with both spouses. In my opinion, fraudulent intentions of one the spouses are not enough to define as a marriage of convenience. If at least one of the spouses took his/her marital vows with the genuine desire to marry, it may not be concluded as a marriage of convenience. The legal regulation of marriage of convenience shall be understood as a measure for fighting against abuse of immigration law. Marriage is a bilateral contractual relationship which is regulated by the institutes of the family law. If one of the spouses has been tricked into marriage by fraudulent behaviour, it is up to the spouses to decide what they wish to do about the situation.

In practice, there were several cases where marriage has been scrutinised by the police authority and questioning was insensitively directed merely towards the sexual life of spouses. Based on the interviews with both spouses it was concluded that the marriage has been concluded of convenience and spouses were refused family reunification.

Families of beneficiaries of international protection

Beneficiaries of international protection and their family members are not excluded from benefits of the Family Reunification Directive.¹⁴ They are provided with more advantages in accessing their right to family unity in the Slovak Republic. What is noteworthy in the case of the Slovak Republic is the fact that it does include beneficiaries of subsidiary protection and their family members and provides them with the treatment comparable to recognised refugees. Asylum seekers are, of course, excluded from family reunification processes, since they are waiting for the result of the examination of their asylum application and for decision enabling their settlement. Asylum seekers may, however, become reunited with their family members thanks to application of the Dublin II Regulation.¹⁵ Once authorities find out there is a nuclear family whose members are scattered in various states, according to the Dublin policy, family shall be reunited and their asylum claims examined in one responsible Member State.

Provided that they apply for temporary residence within three months from recognition as a refugee, his/her family members (a spouse and children) shall submit only their valid travel documents and documents certifying their family relationship with a sponsor. They shall be excluded from the need to certify their financial coverage, accommodation and integrity. They

¹⁴ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

¹⁵ Council Regulation (EC) No [343/2003](#) of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

are exempted from these obligations also in situation when applying for a national visa in order to arrive to the territory of the Slovak Republic in order to reunite with a sponsor. In other respects, the residence of family members of beneficiaries of international protection is governed by the same legal rules as in case of family members of foreigners with permanent (recognised refugees) or temporary residence (beneficiaries of subsidiary protection).

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