The migrant's right to family life during proceedings on family reunification in the Czech Republic

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Abstract:

Is the obligation to protect the family reflected only in the already issued long-term residence permit for the purpose of family reunification? The focus of this article is on the family reunification proceedings before the Czech Ministry of the Interior. The author argues that the right to family life should be respected from the moment of lodging the application for family reunification.

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Everyone has the right to have his or her family life respected. This right is enshrined in Article 8 of the European Convention on Human Rights ("Convention") and becomes especially important in the context of rising immigration levels into the Czech Republic. Many immigrants are long-settled in the Czech Republic. Some permanently reside here and contribute to the economic development of the country. However, most of them have left an essential part of their lives in their country of origin – their families.

The Council of Europe plays an important role in the field of migrant family reunification. Besides the Convention and the jurisprudence of the European Court of Human Rights, the Council of Europe in 2002 already adopted the Recommendation of the Committee of Ministers to member states on the legal status of persons admitted for family reunification.[i] As of 2003, the European Union also became an important actor in this field by adopting the Directive 2003/86/EC on the right to family reunification ("Directive"). Although the Directive can be criticized in many ways, the Czech Republic did not use its broad scope of competences given to the Member States when implementing the Directive.[ii]

I consider the current legal regulation of family reunification satisfactory,[iii] despite the fact that some provisions in the Act No. 326/1999 Coll. on the Residence of Foreign Nationals in the Czech Republic ("Act on the Residence of Foreign Nationals") make the practice of family reunification more difficult[iv]. In this article, however, I would like to focus on the proceedings following the application for the long-term residence permit for the purpose of family reunification. I dare to claim that these proceedings should not only comply with the

principles of administrative procedure (such as the principle of expediency under Section 6 of the Act No. 500/2004 Coll., Administrative Procedure Code), but should also pursue the aim of the application, *i.e.* the desire for family reunification and the right to have family life respected.

Procedural delays and violation of the right to a fair trial

In my practice I have met many clients whose family members applied for residence permits in their country of origin for the purpose of family reunification. Besides meeting statutory requirements demanded of the family sponsor, most of the clients face undue procedural delays[v], although the actual assessment of the application is not too difficult[vi]. The administrative body has 270 days to process the application, the longest possible time limit according to the Directive. This time limit cannot be extended.

However, in practice, the authorities often fail to meet the statutory time limit, sometimes even without informing the applicants about the reasons for the delays. Therefore by way of example, a married couple could, after fulfilling the mandatory 15 months sponsor's residency (necessary before applying for reunification[vii]) and waiting the 270 days' time limit for processing the application, expect reunification after another unspecified period of time. As a consequence, the reunification procedure may simply exceed two years.

To illustrate I can mention one case of a migrant from Moldova permanently residing in the Czech Republic, whose Ukrainian wife and two children applied for family reunification via the embassy. The applications of the children were decided earlier because the time limit for processing these applications was shorter. (They applied for permanent residence permits under Section 66 of the Act on the Residence of Foreign Nationals.) However, their mother has been waiting for her residence permit for more than 20 months, *i.e.* 11 months longer than is the statutory time limit. Meanwhile, their father, who was responsible to materially secure the family and prove sufficient income, was not able to take care of his children without his wife being present in the country. At the same time, it was unbearable for the children to be separated from their mother, so they stayed with her in Ukraine. Working obligations did not allow their father to visit his family regularly. During the reunification proceedings the family was practically separated for 20 months, an experience which affected the family substantially. The family complained about delays to the Commission for deciding matters of residency of foreign nationals[viii]. The Commission confirmed the delays of the administrative body and ordered it to issue the decision within 30 days. However, the administrative body remained silent for another 6 months.

Another case worth mentioning is the case of the Ukrainian parents with permanent residency who applied for reunification with their three children. Delays occurred in all three applications but one application had been approved several months after the other two siblings were granted the residence status. Of course, this affected the family reunification substantially. Such cases happen quite regularly and, therefore, a number of questions should

be asked not only in connection with procedural delays but also in connection with the approach of the authorities towards applications for family reunification.

The right to a trial within reasonable time or without unnecessary delay is part of the right to a fair trial guaranteed in Article 38 paragraph 2 of the Charter of Fundamental Rights and Basic Freedoms. The delays in the reunification proceedings occur when the proceedings last longer than the statutory time limit of 270 days. In other words, the right of an applicant to a fair trial is already violated by exceeding the statutory time limit. Therefore, it is not necessary to assess the individual circumstances of the case when assessing the reasonable length of the proceedings[ix].

According to the Czech Supreme Administrative Court, the length of proceedings and its exceeding of time limits can directly or indirectly fall within the scope of Article 8 of the Convention[x]. Particularly in cases when the applicants have a legal claim to family reunification after fulfilling statutory requirements, the unreasonable and unlawful extension of the time limit constitutes a violation of their right to have their family life respected. The uncertainty, in which the family is forced to live, creates a frangible and tense environment where the very relationship among family members and the family unit as a whole are put in jeopardy.

Generally, migrants are not aware of the possibilities to contest procedural delays. Often, they are afraid to push the administrative body which has the wellbeing of their family in its hands. When they decide to seek recourse against delays and file a complaint, they ask themselves whether it was a good decision, especially when the administrative body remains silent even after the intervention of the Commission. In this context it is valid to ask whether the Commission's intervention against delays can be considered as an effective remedy. Usually, the situation improves after the applicant turns to the court.

Nevertheless, migrants have another option how to fight maladministration and claim at least a partial compensation at the same time. They can file a compensation claim for procedural delays of the administrative body. In such case, they claim the compensation for non-pecuniary damage caused by the uncertainty, in which the family was forced to live while awaiting the decision[xi]. The compensation claim is not bound to the legal claim to the applicant's residence status, as the administrative body incorrectly maintains[xii], but to the fact that the administrative body failed to deliver a decision within the statutory time limit.

Inconsistent assessment of applications within one family and other shortcomings

Another shortcoming of the Ministry of the Interior in its approach towards family reunification is its failure to adjudicate the applications of a single family as a whole (e.g. mother and child, or more children). In practice, the applications of each individual are assessed by different officers. As a consequence, even applications with identical submitted documents could end up with different decisions. This occurs in particular with regard to the

confirmation of accommodation and documenting monthly income of sponsor. While in the proceedings of one child it is sufficient to establish the actual housing costs by submitting the rental contract, in the proceedings of another child, the housing costs are calculated according to the Government regulation. Inconsistent adjudicating causes procedural delays with subsequent negative impact on the family life of the applicants.

The assessment of family ties should reflect the best interests of the child. The absence of a blood bond between the adoptive parent and the adopted child does not mean that they do not form a family in the true sense. The blood bond is not the sole indicator of the existence of family life, in particular when a child is fully dependent on the adoptive parent, with whom he/she has lived for several years, and the biological parents living in the country of origin have no interest in him/her. Therefore, the Ministry of the Interior should take into account the real family life of the child when assessing the impact of its decision. The fact that the biological mother or father lives in the country of origin should not enter into the decision of a child's residency application. Separating him or her from his adoptive parents is a violation of his right to have his family life respected. [xiii]

In closing I would like to emphasize, that although the Convention does not directly guarantees the right to family reunification or the state obligation to allow for family reunification, measures regarding family reunification should always be adopted in accordance with the obligation to protect the family and respect family life, as stated in the Preamble of the Directive. The proceedings on family reunification should respect this obligation and should be lead in the light of the principles enshrined in international and European law. The biggest weakness of the current practice is that the proceedings are missing the spirit and aim of the family reunification. The authorities should consider the family as a whole during the entire proceedings on family reunification. Furthermore, authorities should respect the best interest of the child and consider the applications of individual family members together and within the statutory time limit in order to fully respect the family life of the applicants. If the practice looks different it is necessary to ask whether the efforts of the Czech Republic to enable integration of third countries foreigners are genuine or whether they are only enacted as an obligation imposed by the Directive. The current approach as well as the proposed new Aliens Act suggest the latter.

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[i] Committee of Ministers of the Council of Europe, *Recommendation Rec(2002)4 of the Committee of Ministers to member states on the legal status of persons admitted for family reunification*, 26. 3. 2002

[ii] According to the Migrant Integration Policy Index (MIPEX) evaluating the politics in 31 countries (EU 27, Norway, Switzerland, USA and Canada), the Czech Republic was ranked 13 in the area of family reunification, *i.e.* it belonged to the countries where reunification and integration of migrants families is more favourable.

[iii] This is my personal opinion I arrived to during my professional experience with regard to the individual cases of foreigners seeking legal advice. In most cases they had problems with procedural delays.

[iv] Minimal age of spouses, requirement of certain length of sponsor's residency on the territory, change of the residency purpose, independence of the applicant on the original family tie or the time limit to process the application.

[v] According to the data of the Czech Ministry of the Interior, the number of proceedings where the statutory time limit has been exceeded, in March 2013 reached outside Prague: long-term residence -1 605 files, permanent

residence -542 files; in Prague: long-term residence - 16 800 files, permanent residence - 7 600 (data available at: http://www.rozhlas.cz/radiowave/crossings/_zprava/crossings-boj-za-vlastni-rodinu--1218889). Considering that in 2011 the most common purpose of applications for a long-term residence was family reunification (46.2 %), procedural delays affect primarily families. Data from the 2011 Status Report on Migration and Integration of Foreigners in the Czech Republic, Ministry of the Interior of the Czech Republic 2012, available at: http://www.mvcr.cz/clanek/migracni-a-azylova-politika-ceske-republiky-470144.aspx?q=Y2hudW09NA%3D%3D.

[vi] The applicant is strictly questioned when lodging the application and in the subsequent proceedings the administrative body only assesses the fulfilment of the statutory requirements, proof of sufficient income in particular.

[vii] This requirement is set in Section 42a para. 7 letter a) of the Act on the Residence of Foreign Nationals. A foreigner, with whom a reunification should be allowed, must reside in the territory of the Czech Republic for at least 15 months on the bases of a long-term or permanent residence permit. If the period of residency is shorter, the application for reunification with the spouse or children is denied.

[viii] The Commission is part of the Ministry of the Interior and at the same time it is the superior administrative organ to the Ministry in cases where the Ministry decides in the first instance and other cases stipulated by law. The Commission decided in appeals against decision of the Ministry of the Interior in residency cases. As a superior body, it also issues the administrative remedy against delays (Sections 170a and 170b of the Act on the Residence of Foreign Nationals).

[ix] Reasonable length of the proceedings is assessed on the basis of criteria established in the case-law of the European Court of Human Rights: the complexity of the case, behaviour of the victim as well as the competent authorities, and the importance of the subject of proceedings for the victim.

[x] The opinion of the Supreme Administrative Court of 13 April 2011, case no. Cpjn 206/2010, on liability for damage caused in the exercise of public authority; Collection no. 58/2011, page 4.

[xi] *Ibid*, page 15 et seq.

[xii] This opinion of the administrative body has been expressed in its response to the proceedings on the compensation claim. The administrative body wrote that "*the Aliens Act does not guarantee a legal claim for long-term residence permit in the Czech Republic when statutory conditions are met; it only guarantees a possibility to get such a residence permit*." Although it is true that there is no legal claim for a long-term *visa* for the purpose of family reunification, in case of long-term *residence*, the status of applicant is strengthened by the legal claim in case of meeting the statutory requirements. This legal claim is reflected also in the Directive. The standpoint of the administrative body suggests that even after the migrant fulfills statutory requirements and even when there is no reason to deny his application, it is within the administrative discretion to grant or deny the residence permit.

[xiii] In this case the application for permanent residence for a child under Section 66 para. 1 letter d) of the Act on the Residency of Foreign Nationals has been denied on the ground that his adoptive mother failed to prove sufficient financial means. When assessing the adequacy of such decision, the Ministry concluded that the child can live with his biological mother in the country of origin and his family life will therefore not be affected.