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Ruling on belonging: transnational marriages in Nordic immigration laws

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Abstract

For migrants, participating in transnational networks and having ties to more than one country often results in the formation of marital unions involving transnational communities. This article examines how transnational marriage migration is regulated in Nordic immigration laws, in particular through the definition of family, income requirements, and integration requirements. Drawing on the idea that constructing and contesting the belonging of individuals to families and political communities in nation states are central struggles in these laws, the article studies the right to respect for family life and freedom from discrimination within the context of immigration as a site of resistance. By claiming rights to equal treatment and respect for family life, individuals with transnational ties can challenge policies that frame their belonging through ethnic, racial or gendered stereotypes.

Keywords: transnational marriage migration; Nordic countries; immigration law; European Court of Human Rights; belonging.

Introduction

"Like a boat sailing against the wild current of populist rhetoric, the Court must today take a coherent stand for the right to family life…"

Judge Pinto de Albuquerque (Paragraph 35 of his separate opinion in Biao v. Denmark, European Court of Human Rights, 24 May 2016)

In the contemporary world, migration is – and will continue to be – a fact of life. In a recent editorial in the OECD's 2016 *Migration Outlook* report, Stefano Scarpetta, the OECD Director of Employment, Labour and Social Affairs, notes that despite the fact that research has demonstrated the medium- and long-term effects of migration to be mainly positive, this evidence is currently largely neglected in political and public debates on migration. Extreme anti-immigration views are on the rise and heard more frequently in public debates, and the general public is increasingly feeling threatened by migration. During the past few decades, family migration has become the dominant mode of legal entry into Europe (Kofman, 2004), with marriage migration being an integral part of the phenomenon (Fernandez & Jensen, 2014). This article focuses on the immigration policies that

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regulate marriage migration in the Nordic countries and the issue of rights within the context of immigration control.[1]

Migrants in Europe often form intimate relationships through transnational networks (Çelikaksoy et al., 2006). The resulting transnational marriages[2] usually entail the migration of one spouse to the country of settlement of the other migrant spouse, and thus such marriages are nearly always – at some point – governed by immigration laws. This article examines the ways in which belonging is constructed and contested within the context of marriage-based immigration control in the Nordic countries. Immigration laws are underpinned by ideas of belonging, which denote relational processes that link together – in diverse ways – individuals, the state and families (van Walsum, 2008; Kostakopoulou, 2010; Mustasaari, 2016). Yuval-Davis (2012) conceptualizes belonging as a dynamic process, which often appears as a naturalized construction of a particular hegemonic form of power relations. In the context of family reunification, these hierarchies are visible, for example, in the ways that conceptions of belonging reflect essentialised ideas about belonging and the perceived naturalness of various types of family units; likewise, they may impact the distinctions made between residents and nationals or nationals by birth and those who are of a migrant background and have acquired nationality later in life. Yet another increasingly significant distinction is the one made between families established prior to migration and those created at a time when the persons involved had migrated and were aware that the immigration status of one of them was irregular.

During recent years, the struggles over belonging have intensified both in political as well as in scholarly fora, and the refugee crisis has highlighted these tensions, causing European states to tighten up their immigration policies. This article maps how Nordic immigration laws regulate marriage-based immigration through a definition of family, income requirement and integration requirements and confirms the finding in previous research that the trend across Europe is clearly towards stricter immigration laws and policies (Borevi, 2015; Staver, 2014; Pellander, 2016). These policies can lead to the rights of individuals being trumped by anything the state claims to be in its interests, and often enough the law seems to be a mere stooge of the state, toothless to fight the violations of rights – and sometimes even the key technique in legitimizing them (Douzinas, 2000). This article, however, examines law as a site of resistance, which denotes the possibility

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[2] In this article, the term transnational marriage refers to unions between spouses where both have an immigrant background and are from separate countries, which results in the migration of one spouse to the country of settlement of the other. In the existing literature, the concept has been broadened to include marriages between couples whose family life is constituted and lived within transnational social fields, even if no migration was involved (Charsley 2012; Al-Sharmani & Ismail in this issue).

of an agent to challenge power on its own terms, and views the battles in the legal field as grounding the law in the reality of society (Hurri, 2014).

As an example of the distinctions that construct and limit belonging, the article studies the Danish attachment requirement, which insists that the couple demonstrate that their connections are stronger to Denmark than to any other country. The Danish attachment requirement was recently debated by the Grand Chamber of the European Court of Human Rights in the case of *Biao v. Denmark*, which makes it also an excellent example of how human rights law can provide a site of resistance beyond the particular legal dispute in question.

Transnational Marriages in Nordic Immigration Laws

Comparable figures on marriage migration are not easily available. As Eggebø (2012: 18–19) notes, marriage migration is often included in other types of family migration statistics. In 2015, a residence permit was granted in Sweden in 43,259 cases to a relative (*anhöriga, nearest*) (Migrationsverket); in Norway, one was granted in 12,600 cases on the basis of family ties (UDI, 2015: 33); and in Denmark, a residence permit was granted in 5,233 family reunification cases (Statistics Denmark 2015). In Finland, more detailed statistics are compiled on marriage migration. The number of residence permits granted on the basis of marriage was 2,570 in 2015 (Maahanmuuttovirasto, 2015). According to a report from 2013, 2,762 residence permits were issued in Iceland in 2012, half of them on the grounds of family reunification (Jònsson, 2013: 16). According to a comparative study commissioned by the Norwegian Directorate of Immigration (UDI), the number of applications for family reunification based on marriage was 11,000 in 2009, which was more than in previous years. Eighty-five per cent of the applications were accepted, which was less than in previous years (Econ Pöyry, 2010: 12–13). According to the same study, approximately 30,000 applicants were granted residence permits to reunite with a spouse or a partner in Sweden in 2009, whereas in Denmark the number was 4.479 for the same year (Ibid.: 79, 87).

Immigration is regulated by national Aliens Acts: in Denmark, by *Udlændingeloven*; in Finland, by *Ulkomaalaislaki*; in Iceland, by *Lög um útlendinga*; in Norway, by *Utlendingsloven*; and in Sweden, by *Utlänningslag*. In all of the Nordic countries, the governance of immigration in general and on the basis of marriage in particular is heavily influenced by the legislation passed by the European Union (EU) and interpreted by its Court of Justice in Luxemburg. There are pressures to harmonise immigration laws across Europe. Even though Norway and Iceland are not members of the EU and Denmark has opted out of EU-wide immigration rules, EU immigration law still has an indirect impact on legislation in these countries. In EU law, primary legislation on the rights of EU citizens to free movement as well as relevant secondary EU laws (EU Directives) define the minimum standards for family reunification. These directives include, for example, Directive 2003/86/EC on the right to family reunification and Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of

the EU. It is worth noting that family reunification regulations in the EU are increasingly complex and vary depending on, for example, whether the sponsor is a national of an EU Member State and whether he or she is residing in the country of his or her nationality or in another EU country (Staver, 2013).

Legally residing non-EU nationals are allowed to bring their spouse, under-age children and the children of their spouse to the EU state in which they are residing. The marriage has to be officially valid and registered and, in some cases, verified by an official authority. Polygamous relationships are not recognised. EU states may also authorise reunification with an unmarried partner, which currently is the case in all Nordic countries. In the case of cohabitation, the required time after which cohabitation is considered permanent varies from 18 months (Denmark) to 2 years (Finland). In addition, a residence permit can be granted for an intended spouse provided that the couple is planning to get married. According to EU rules, family reunification can be refused for spouses who are under 21 years of age. Since Denmark is not legally bound by EU immigration rules, the age limit was set at 24, although the decision was criticised at the time (Fair, 2010).

In addition to the impact of EU legislation, national immigration laws and policies are subject to human rights standards. The most important of these standards are laid out in the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention for Human Rights, ECHR), which are interpreted by the European Court of Human Rights in Strasbourg (ECtHR). The positive and negative obligations of the state to respect the right to family life, provided for by Article 8 of the Convention, form the core of human rights protection with respect to family reunification. The right of family members, for instance a husband and a wife or a child and a parent, to enjoy family life is universally recognised, although it might not be clear where such family life is to take place or which state is to provide the opportunity for family life (Carens, 2003; Costello, 2015). Furthermore, the means of a state to protect family life depends both on the recognition of family status and on the existence of *de facto* family life.

The definition of family used in immigration law determines the nature of a family, stating what a family ought to be in order to be recognised by the law (Mustasaari, 2015). This concept of a legitimate family and marital union as founding rights can be seen, for example, in the case of *Z. H. and R. H. v. Switzerland* (ECtHR, 2015). The applicants were two Afghan cousins who had contracted a religious marriage in Iran at the ages of 14 and 18. During asylum proceedings, the applicants were separated and one of them was removed to Italy. The main question before the Court was whether the Swiss authorities had violated the applicants' right to respect for family life by not recognising their religious marriage and removing the second applicant to Italy while the first applicant was allowed to stay in Switzerland. Despite the fact that 'family life' may encompass *de facto* relationships other than those based on marriage, the Court held that Article 8 of the ECHR cannot be interpreted as imposing on a state an obligation to recognise

a marriage, religious or otherwise, contracted by a child, nor can such an obligation be derived from the right to marry.

Economic Constraints in Family Reunification: Income Requirement

The right to family reunification is subject to restrictions based on the state's interest in protecting public order and security, which may include economic interests and integration goals. The decisions by EU member countries to restrict immigrant admission are often portrayed either as stemming from efforts to enhance social cohesion or as economic necessities. Researchers, however, have argued that rather than being necessities, the normative justifications for restrictions are often based on hierarchies of belonging (Pellander, 2016; Yuval-Davis et al., 2006). For instance, Borevi (2015: 1491) notes that the identity and social existence of migrating family members are increasingly being represented as shaped only by their belonging to a family, which indicates a shift away from seeing family as necessary for integration and towards seeing it as an obstacle to it. In these discourses, migrants are often represented as passive recipients of charity who live on the mercy of the host state, without having any kind of entitlement to the welfare redistribution by the state (see, e.g. Staver, 2014). Central in these discourses are ideas of non-belonging and non-entitlement, which reflect anxieties about the economic security of the host state and justify restrictions in the form of income, maintenance or self-support requirements.[3]

While most European countries seek to protect their economic interests by preventing immigrant families from relying on social welfare, the level, structure and scope of these income requirements vary considerably. All Nordic countries apply income requirements as a condition for family reunification. In Denmark, Norway and Iceland, everyone, nationals and non-nationals alike, have for a long time been subject to an income requirement. Sweden, however, has applied an income requirement as a principal criterion only since July 2016. Sweden's approach had stood out as exceptionally liberal up to that time – until 2010, Sweden had no income requirement whatsoever. Until July 2016, the Swedish maintenance requirement could be characterised as relatively light, as it was both low and limited, requiring only that the sponsor be able to support himself or herself (Borevi, 2015: 1495). Moreover, the requirement did not apply to a sponsor who was a citizen, held a permanent residence permit or had stayed in Sweden for at least four years.

In April 2016, the Swedish Government decided to temporarily restrict family reunification by expanding the maintenance requirement such that it became the main rule in all family reunification cases (Swedish Government, 2015: 44–48). The requirement now covers both the sponsor and the applicant, and it makes no distinction as to whether the sponsor is a citizen or not. Children are exempt from

[3] In this article, the term income requirement is used generally to refer to different types of self-support, maintenance or income requirements.

the income requirement, and in cases of international protection an exemption can be granted if an application for family reunification has been filed within three months of the decision. The new, more stringent, rules on family reunification will be applied for a period of three years (20 July 2016 – 19 July 2019). As to the income requirement itself, the required monthly sum includes housing costs and a standard income amount (*normalbelopp*), which depends on the size of the household (Swedish Government, 4 August 2016). For a family consisting of two adults and two children, the standard amount would be the real living costs plus the estimated standard amount, approximately SEK 13,000 (2016 level, approx. 1,350 euros).

Up until July 2016, Finnish citizens and their family members and recipients of international protection (i.e. refugees and aliens issued a residence permit on the basis of the need for subsidiary protection or humanitarian protection or who have enjoyed temporary protection) and their family members were exempt from the income requirement. In a bill voted on in June 2016, the personal scope of the income requirement was extended to also include refugees, other humanitarian migrants and even children (for more discussion, see Pellander, 2016). The income requirement will not be applied if three conditions are met: 1) the application for family reunification has been filed within three months of the decision concerning the residence permit; 2) the family has been established prior to migration; and 3) the reunion of the family is not possible in a third country, to which the sponsor or a family member has specific ties.

There is variation between countries as to whether one may satisfy the income requirement by, for example, a bank deposit of sufficiently large capital, which sources of income are eligible for satisfying the requirement and whether the previous use of welfare benefits will have an impact on a person's ability to support himself/herself and the family. For example, in Denmark the income requirement is considered to have been met if the sponsor has not received public assistance under the terms of the Active Social Policy Act (*Lov om aktiv socialpolitik*) or the Integration Act (*Integrationsloven*) for three years prior to the application. The sponsor must have DKK 53,224.98 (2016 level, approx. 7,190 euros) in bank-backed collateral to cover any public assistance paid to the applicant after his or her relocating to Denmark. In addition, the cohabiting sponsor must assume full responsibility for supporting the applicant (married couples are automatically under a legal obligation to support one another).

Norway is often mentioned as having the highest income requirement compared to other European countries (e.g. Staver, 2014: 131). Currently, the income requirement is set at NOK 305,200 (approx. 33,000 euros) per year, *pre-tax*. However, a comparison to Finland shows that in some situations, the requirement is stricter in Finland, as the number of family members has a direct impact on the income requirement. For example, for a married couple with no children, the required *net* income (2016) is 1,700 euros per month (20,400 euros per year),

whereas for a family consisting of two adults and two children it is 2,600 euros per month (31,200 euros per year) and for a family consisting of one adult and three children it is 2,200 euros per month (26.400 euros per year). In comparison, in 2013 the OECD's annual median disposable household income per year was NOK 345,581 (approx. 37,000 euros) in Norway and 25,671 euros in Finland (OECD 2013). Pellander (2016: 29) points out that less than half of the Finnish population meets the income requirement, let alone the fact that newcomers are often employed in low-income jobs.

All in all, demands have increased for migrants to integrate as a condition for them being able to apply for the same benefits that 'real', integrated citizens are entitled to (Kostakopoulou, 2010; see also country reports by the OECD, 2016). Kostakopoulou (2010) has called this new integration paradigm 'the thickening of political belonging', according to which the concept of integration functions as a disciplinary mechanism and a process of certification for those persons deemed not worthy of citizenship. Thus, integration is no longer understood as something that stems from the desire for social equality and investment in people. Through the ideology of integration, assumptions of 'true' belonging can be used to distinguish between different classes of citizens (Schmidt, 2011: 269). These hierarchies of belonging can be mobilised to serve nationalist or even tacitly racist policies, as can be found in the example of the Danish requirement that the married couple be firmly attached to Danish society as a condition for receiving a residence permit, which will be examined in the following sections of this article.

Political Belonging and Integration: The Danish Case of Attachment Requirement

The Danish attachment requirement (S9 of *Udlændingeloven*) provides that the combined attachment of the spouses to Denmark must be greater than their combined attachment to any other country (for more on the impact of the attachment requirement, see Skyt Nielsen et al., 2009). It was originally introduced into Danish legislation in 2000 as one of the conditions for granting family reunion with persons residing in Denmark who were not Danish nationals. When assessing whether a couple meets the attachment requirement, the Danish Immigration Service will take a number of factors into consideration, such as how long the sponsor has lived in the country; whether either spouse has family in Denmark; whether they have custody of or visiting rights to a child living in Denmark; whether they have completed an educational programme in Denmark, or have a solid connection to the Danish labour market; how well they speak Danish; how strong their connections are to other countries; whether they have children or another family member in other countries; and whether the sponsor has made extended visits to the foreign spouse's country or lived there previously.

In 2002, the attachment requirement was extended to also apply to Danish nationals. According to the preparatory work for the amendment, this was necessary because some families were incapable of integration despite having acquired Danish nationality, as they 'generation upon generation fetch their

spouses to Denmark from their own or their parents' country of origin' (preparatory work cited in *Biao v. Denmark*, paragraph 33). This 'pattern' was thought to stem from parental pressure and lead to problems of isolation and maladjustment.

However, the tightening of the attachment rule had some unintended consequences, namely it applied also to Danish expatriates. As of 2004, the rules were relaxed so that family reunions in cases where one of the partners had been a Danish national for at least 28 years were no longer subject to the attachment requirement. This begged an important question: was the 28-year rule, which was only a limited relief to the attachment requirement, discriminatory since it so clearly sought to treat Danish expatriates differently than those who had acquired Danish nationality after migrating to Denmark? The Biaos, a couple with Togolese and Ghanaian background, contested the rule before the European Court of Human Rights.

Mr Biao is of Togolese origin, but he migrated to Denmark in 1993 and acquired Danish nationality in 2002. His wife, Mrs Biao, is a Ghanaian national. They married in 2003, but since Mr Biao had spent time in Ghana during his childhood and young adulthood, a residence permit was refused for Mrs Biao, as the attachment requirement was considered not to have been met. The couple currently live in Sweden with their child. The Biaos complained that due to the 28-year rule, they were placed at a disadvantage compared to a Danish-born national who would be exempt from the attachment requirement at age 28, whereas Mr Biao, who had acquired Danish nationality at the age of 31, would not be exempt from the attachment requirement until the age of 59 (in 2030). The applicants claimed that the 28-year rule amounted to indirect discrimination on the basis of ethnic origin, as Danish-born persons would usually be ethnically Danish while those becoming Danish nationals later in life would most often be of a different ethnic origin. In the next and final section of this article, the case will be examined from the perspective of resistance.

Ruling on Belonging: Rights as a Site of Resistance

The European Court of Human Rights had in its previous case law held that granting special treatment to those whose links with a country stem from birth within that particular country can be considered legitimate. However, in this case the Court did not accept the justifications presented by the Danish Government and declared a violation. According to the Court, the 28-year rule clearly favours Danish nationals of Danish ethnic origin, and it places at a disadvantage, or has a disproportionately prejudicial effect on, persons who acquired Danish nationality later in life and who were not of Danish ethnic origin. Furthermore, the Court noted that the Danish Government failed to show that there were compelling or overly weighty reasons not related to ethnic origin that would justify the indirect discriminatory effect of the 28-year rule. For the purposes of this article, however, the case has relevance beyond a legal analysis of antidiscrimination law. Rather, the focus here is on the

aspect of resistance and on the discursive space that the legal practice opens up for the critical agency of individuals.

As Hurri (2014: 87) points out, rights would not exist without the positive enactments of the legislator, but, importantly, none of these enactments establish rights definitively. The agency of private individuals claiming their rights is central. Over the years, several international and European organisations had expressed concerns over the trends and directions of Danish immigration policy. The European Commission against Racism and Intolerance had, for example, noted already in 2001 that restrictive policies 'in the area of family reunification may impact in a discriminatory fashion on certain minority groups, such as Muslims' (ECRI, 2001: paragraph 23). Entering the realm of rights, the Biaos were able to stimulate a broader debate on the legitimacy and lawfulness of Danish immigration policy, as a critique of not only the Biaos themselves but also of these international institutions was raised regarding the practice of the law.

The resistance demonstrated by the Biaos prompted the Court to take a critical stance towards immigration policies based on segregation. In a separate opinion, Judge Pinto de Albuquerque called for the Court to take an even bolder stance against tacitly racist immigration policies. As to whether the Danish Government had, in fact, intended the legislation to be discriminatory, he held that the justifications presented by the Danish Government were arbitrary and based on racialised stereotypes throughout the hearings, such as the argument that Danes by birth have a greater 'insight into Danish society' than persons who settled in Denmark in their youth or as adults and that 'resident foreigners and Danish nationals of foreign origin are helpless, young people, who are either forced to marry persons from their country of origin or tend to engage in an odd, "widespread" marriage pattern of a kind of cultural in-breeding, and later on build "unhappy" families, have "marital problems" and do not integrate well in society' (paragraph 18).

The opinion expressed by Judge Pinto de Albuquerque was not the only separate opinion in the case. According to the dissenting opinions of five other judges, Denmark had not violated its obligations under the Convention. They noted, among other things, that as the Court is called upon to assess the individual circumstances of a case, it is prevented from analysing the attachment requirement. Hence, the consequence of finding a violation would be that the Danish state should abolish the exemption from the attachment requirement so that the requirement would apply equally to everyone. This would mean equality only in terms of equal 'non-enjoyment' of a right. Judge Pinto de Albuquerque, however, pointed out that merely abolishing the 28-year rule, and thus restricting everyone's rights, would not be in the spirit of the Convention. The implementation of the judgement requires an overall reassessment of the legal framework concerning family reunification and the attachment requirement.

What this case demonstrates is not only that these issues may be argued from both sides, but that the pre-established law is subject to change and contestation through the practice of claiming rights. No court is an automat for social justice, but these struggles make it possible for individuals to insert their critiques into the legal system, and by doing so, fight oppression on its own terms. These struggles result in changes, even if only minor ones, to the sets of decisions that form the pre-established law in cases to follow. In this case, the majority of the Court missed an opportunity to challenge the integration paradigm that lies behind the attachment requirement. However, the discussion in the separate opinions shows that the opportunity indeed was there and became articulated – even if only in the separate opinion of one judge.

Conclusion

In this article, Nordic immigration laws were analysed for the purpose of shedding light on the structures that concretely limit transnational marriage migration to the Nordic countries as well as conceptions of belonging that underpin these laws. It was noted that despite broad similarities, the policies adopted by the Nordic countries differ both in detail and with respect to how strict each immigration policy is considered to be (Borevi, 2015). Research has noted that Finnish and Swedish policies tend to follow similar logics, while the policies adopted in Norway and Denmark are far more restrictive (Horsti & Pellander, 2015; Staver, 2014). However, a comparison of the income requirements in Norway and Finland showed that the structure of the requirement has an impact on its outcome, so it is not always easy to say in which of the countries the requirement is stricter.

Shifts in the integration paradigm towards the 'thickening of political belonging' (Kostakopoulou, 2010) were also discussed in this article in the context of the Danish attachment requirement. In the current protectionist political climate, transnational ties are easily interpreted to signal non-belonging and otherness, which lead to evolving challenges for transnational families. With populist rhetoric being quite loud in political chambers and marketplaces alike, spaces for resistance may appear to be sparse and shrinking. The recent ECtHR case of *Biao v. Denmark* was examined in order to map a critical sphere where restrictive policies may be challenged. The purpose of discussing this case was to demonstrate that law does not merely serve as a means to redistribute and rearrange the entitlements that follow political decisions. Rather, it is a site for political and ethical struggles beyond the practice of applying legal norms.

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