John Panofsky's & Noah Tunbjer's presentation at the IARLJ European Chapter Conference in Göteborg, SW 22 November 2013

Recent Swedish Initiatives: Database synopsis of the international and European asylum and migration-related case-law & reflections on gaps in national and European jurisprudence

Introduction

Our presentation is divided into four parts.

First we will describe the newly launched international case law database of the Swedish Migration Board. The background for this government-financed project was a perception amongst some Swedish politicians that the Swedish Migration Board and the Swedish judiciary were not paying enough attention to cases from Strasbourg, Luxembourg and the UN.

Second, we will touch on to what extent the Swedish Migration Court of Appeal has referred to the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights.

In our third part we will attempt to identify some of the areas in which there are gaps in the European case-law acquis, in the sense of a lack of leading decisions in certain areas.

The fourth and last part of our presentation relates to gaps in Swedish national practice, in the sense of leading European and International decisions that the Swedish Migration Court of Appeal has not yet referred to.

1. The case law database of the Swedish Migration Board

The very foundation for most of our national legislation on migration is our obligations pursuant to various international conventions and EU-legislation. However, the case law

of international organs have proven not to be that easily accessible, at least from a Swedish point of view. These difficulties have been recognized by the Swedish government that, in 2012, requested the Migration Board to make this case law more accessible. Following that, the two of us came to an agreement with the Migration Boards legal division. We were employed to develop a case law database consisting of case law from the Court of Justice of the European Union, the European Court of Human Rights, the UN committee against torture and the UN committee on human rights, integrated with case law from the Swedish Migration Court of Appeal.

First of we identified a few possible obstacles that existed for legal practitioners that wanted to look at case law from international organs:

With the exception of the Court of Justice the relevant determinations are written in English or French and they are often very extensive. Additionally there are a lot of cases to look at and since no up to date database including the case- law of all relevant organs has existed, legal practitioners have been forced to consult several databases to access all relevant case- law.

Our aim was to develop a product that would make it easier for legal practitioners to access and make use of case law from these organs in their daily work. In order to do this we addressed the previously identified obstacles in the following ways:

We limited the amount of cases included in the database to the cases that we have deemed to be the most relevant from a Swedish perspective. Accordingly, apart from the leading cases from each organ, there is an emphasis on cases involving Sweden and to some extent cases involving deportations to countries that we commonly have asylum seekers from.

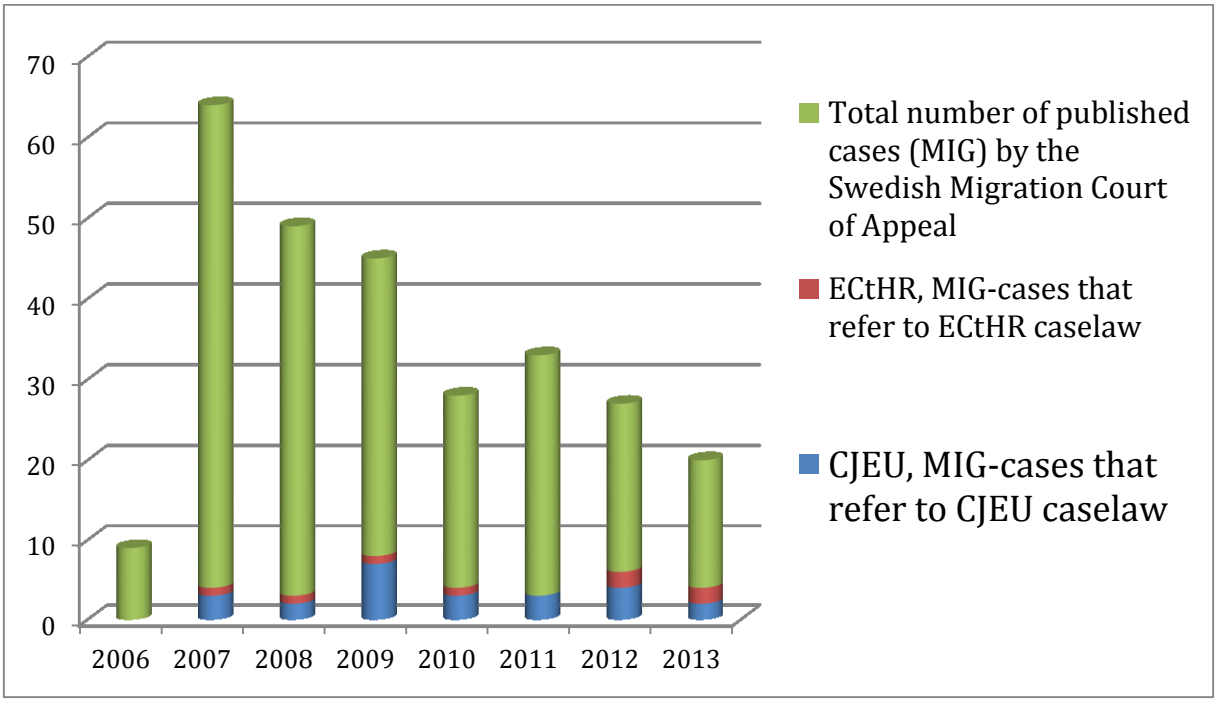
We have written summaries in Swedish in 1-4 pages of all the cases selected. We have also categorised the cases under 20 different themes depending on what we have found to be the primary contribution to practice of each case.

In the database it is possible to limit a search to cases from one or several organs, additionally you can limit a search further by adding a theme of your liking, possibly together with a certain subcategory. Moreover we have indexed all cases with several keywords and the database features an opportunity to make a search independently using keywords or together with the other search functions previously mentioned. A final possibility is to make a search on any word in all the material in the database.

Whatever search functions are used, the hope is that the database will facilitate in providing an easy way for legal practitioners in Sweden to familiarise themselves with international case-law on migration and help diminish any possible reluctance to take due notice of such case-law in applying the Swedish aliens act. The database has now been open for public use for about two months and it remains to be seen whether these hopes will be realized.

2. References to the European case-law acquis by the Migration Court of Appeal

The Swedish Migration Court of Appeal is the highest national instance for migration law, which in Sweden is a term that covers both asylum and migration law. It's a court of precedent and since its inception in 2006 the Court has published about 250 leading judgments – "referat".



This graph shows the total number of published leading cases on a yearly basis and how often the Swedish cases refer to case-law of the Court of Justice and the European Court of Human Rights.

What's striking about the figures is the clear pattern that emerges as to the frequency of references. In the early years, from 2006 to 2008, the Court included references to European case-law in only one of twenty cases. In the next period, from 2008 to 2013 there were references in one out of five cases.

What accounts for this change? It's hard to say. In part, it's likely a reflection on the importance of the Common Asylum System and the fact that the Qualification Directive that was supposed to have been transposed by October 2006 was only implemented into Swedish law in early 2010. Perhaps the increase in national references also reflects a growing realization of the importance of illustrating the close links between the national and the European.

The European cases that would seem to have had the greatest impact in Sweden include the following from the Court of Justice: Elgafaji, El Kott, B & D, Zambrano and Zhu and Chen. From the European Court of Human Rights RC v. Sweden and AA v. UK have been very significant.

The majority of cases with a visible large impact have been from the Court of Justice. This may reflect the fact that the Swedish Migration Court has thus far referred to a far great number of cases from Luxembourg than Strasbourg. Hopefully, cases from Strasbourg, which sometimes are very long, can be made more accessible through the Swedish Migration Board's database.

3. Gaps in the European case-law acquis

Here we will share our reflections as to what to expect in the future from the European courts in Luxembourg and Strasbourg.

Given that the Common Asylum Directives have not been in existence for many years, it is not surprising that the jurisprudence of the Court of Justice is numerically limited in the asylum area.

In relation to areas covered by the Qualification Directive, there are, thus far, no leading and principled cases in many of the core areas. This includes the assessment of sur place claims and the detailed parameters for internal flight. In these two areas there are leading cases by the European Court of Human Rights, namely S.F. v. Sweden, on sur place, and Salah Sheekh v. Netherlands on to internal flight. It can be expected that the Court of Justice will be looking closely at these two cases.

Some of the other large gaps in the Court of Justice asylum case-law acquis relate to the grounds for persecution. While the Court of Justice has provided some guidance as to persecution on the grounds of religion and sexual orientation as a social group, there are no leading decisions on for example political opinion, attributed characteristics or the nexus between acts and reasons for persecution. In these areas there is, naturally, little direct support from the case-law in Strasbourg. It will be interesting to see what sources the Court of Justice looks to for inspiration. One would expect continued and intensified cross-fertilization between the Court of Justice, the European Court of Human Rights and the national courts. The UNHCR and the European Asylum Office will certainly continue to have key roles.

On the topic of cross-fertilization, a very interesting aspect of the Court of Justice's cases- Y and Z and X, Y and Z relates to whether an asylum seeker should be required to hide his/her religion or sexual identity to avoid persecution. In this area, the Court of Justice has already provided far more guidance than the European Court of Human Rights on this vital topic. We think we can expect that Strasbourg will no longer be as silent on the issue of whether one is expected to be discreet.

Comparisons between the EU-Charter and the European Convention on Human Rights raise many interesting questions.

The heart of the European Convention from our perspective is articles 3, 8 and 13. These articles have been incorporated, in very similar ways, in the Charter. In the preamble to the Charter and in article 52, direct reference is made to the ECHR and the case-law of the European Court of Human Rights. Despite these cross-references, an issue may well arise for the national court in case of divergent interpretations by the European Courts. The Charter provides some guidance through article 52.3 which states that the reference to the case-law of Strasbourg does not prevent Union law from providing more extensive protection.

Both the Charter and the Convention contain procedural protections relating to the right to an effective remedy and the right to a fair trial. There are however interesting differences. In article 13 of the Convention, the effective remedy is before a national authority while article 47 of the Charter, which more closely follows the wording of the Asylum Procedure Directive, calls for an effective remedy before a national tribunal. As to the right to fair trial, according to the Strasbourg case-law, asylum and migration matters fall outside the scope of article 6's "civil rights and obligations". See for example the Grand Chamber case in Maaouia v. France. In contrast, article 47 of the Charter states that "Everyone is entitled to a fair and public hearing". How the divergences are to be resolved in light of article 52 is an intriguing question.

Another interesting interpretive gap, not yet filled by the Court of Justice, concerns the meaning of the principle of subsidiarity which is mentioned in the preamble to the Charter and in its article 51. Our question basically would be "which principle of subsidiarity"? This principle has vastly different meanings depending on the context.

The Charter also includes the right to human dignity, the right to asylum, mentioned in the N.S. and M.E. case, and the right to good administration in article 41 which was discussed in the M.M. case. All three of these articles are still waiting to be more definitely shaped through the much anticipated future case law of the Court of Justice.

Looking at the European Convention we can see that there may be barriers to removal based on other human rights grounds than the commonly invoked articles 3 and 8. In case-law we have seen in for example Othman v. UK (2012) that both the qualified right

to a fair trial in article 6 and the likewise qualified right to liberty and security in article 5 may function as a bar to removal of an applicant if he or she is at real risk of a being a victim of a flagrant breach[1] of either of these rights in the receiving country. The court's case law of today however doesn't tell us with any certainty to what extent the court would be willing to include also other qualified rights in the scope of a non-refoulement obligation.

Another remaining issue for the Human Rights Court is to clarify to what extent article 4, that prohibits slavery and forced labour, which is an absolute right, is applicable in deportation cases. At the moment there are pending cases at the court that may come to address this issue.

Looking at the Court of Justice it may also be worth mentioning that it has not explicitly defined what is included in the definition of persecution in article 9 of the Qualification Directive. Accordingly it has not been clarified what is meant by the definition of acts of persecution as something that includes "a severe violation of basic human rights".

Relationship between QD 15 c and art 3 regarding general situations of extreme violence

It is clear that both article 15 c of the Qualification Directive and article 3 in the European Convention on Human Rights in exceptional situations can give reason for protection, in a situation of generalized violence as a consequence of an armed conflict. However, it is less clear to what extent the protection afforded by these two articles overlap each other.

In the Elgafaji case the Court of Justice states that article 15 c of the directive must be interpreted independently from art 3 of the European Convention.

In Sufi and Elmi, the UK government argued that 15 c offers a broader scope for subsidiary protection than article 3 of the convention and that the standard of

[1] However, as with Article 6, a high threshold must apply. A flagrant breach of Article 5 would occur only if, for example, the receiving State arbitrarily detained an applicant for many years without any intention of bringing him or her to trial. A flagrant breach of Article 5 might also occur if an applicant would be at risk of being imprisoned for a substantial period in the receiving State, having previously been convicted after a flagrantly unfair trial.

protection of the EU in this regard shouldn't be transplanted into article 3. The UK argued that the rigours of the Qualification Directive are mitigated by a number of exclusions, set out in article 17 of the directive, which would have no equivalence if article 3 were given the same scope as article 15 c. The Human Rights Court however, doesn't seem to have been entirely convinced by the reasoning of the UK. Instead it stated that based on the interpretation in Elgafaji by the Court of Justice, it is not persuaded that Article 3 of the Convention does not offer comparable protection, to that afforded under the Qualification Directive.

So at the moment we haven't any answer to the question of to what extent the protection offered by the qualification directive and the European Convention are overlapping in situations of generalized violence.

4. Gaps in Swedish national practice

The Elgafaji case tells us that the more the applicant is able to show that he/she has a personalized risk (in a situation of armed conflict) the lower is the level of indiscriminate violence required for him to be eligible for subsidiary protection. Maybe one could also conclude that the opposite is true – the higher the general risk is in a country, the lower would the requirement for an additional personalized risk be? Such a conclusion would as we see it be compatible with what the European Court of Human Rights tells us in for example NA. v. UK. In NA. it was clearly stated that individual factors that may not on their own constitute a real risk could very well give rise to such a risk, when considered in a situation of general violence and heightened security measures. In the case of Salah Sheek v. the Netherlands the court also states that the applicant could not be required to establish any further special distinguishing features in addition to belonging to the Ashraf, which was considered a group at risk in general.

Accordingly one could argue that there is a sliding scale regarding the requirement for a concrete personal risk, depending on the general situation in the receiving country. Looking at national Swedish practice this is not something that you can find extensive reasoning on. Quite the opposite, the general situation in a country is often only dealt

with initially in Swedish cases where an assessment is made whether it would warrant protection in general to applicants from the country in question.

Humanitarian grounds and article 3

In N v. the United Kingdom the European Court of Human Rights states that in exceptional circumstances an applicant's medical condition can be such that a removal would be contrary to article 3. In both MSS v. Belgium and Greece and Sufi and Elmi v. the UK the court also found that the living conditions in Greece and in refugee camps in Somalia, respectively, were sufficiently dire to reach the threshold of article 3.

In Swedish national jurisprudence it has repeatedly been stated that grounds for an application that are related to international protection issues and grounds that are related to health and other humanitarian issues have to be considered separately. It seems that the Swedish Migration Court of Appeal is of the opinion that Sweden is under no non-refoulement obligations whatsoever when it comes to claims based on humanitarian grounds. Accordingly, a residence permit can only be granted on the basis of the provision in the aliens act that specifically deals with exceptionally distressing circumstances.

Strictly speaking the Strasbourg Court is only interested in that an applicant will not be removed from a country in violation of the convention. So, as long as somebody in need of humanitarian protection gets to stay in Sweden, one could argue that no conflict with the convention would occur. However, there are two difficulties with such an approach as we see it.

As stated in Elgafaji, Article 15 b QD corresponds in essence to article 3 of the European Convention. According to the directive, somebody facing a real risk of suffering serious harm as defined in Article 15 b have a right to subsidiary protection. If article 3 then, to some extent, includes health and humanitarian issues wouldn't there also be a right based on the directive to subsidiary protection status if the relevant criteria is met on such grounds?

Secondly, one could argue that maybe not all applicants that fall under article 3 would be guaranteed a right to stay in Sweden when humanitarian grounds are not included in the assessment of a need for international protection. The Swedish legislation and case law of today gives a right to a residence permit based on humanitarian considerations only if exceptionally distressing circumstances are found. This means that the standard of proof is significantly higher than the "substantial grounds for believing that there is a real risk" as is normally required by the Qualification Directive for subsidiary protection, and by article 3 of the European convention.

When dire humanitarian conditions are a result of a lack of resources or naturally occurring phenomenon the Strasbourg case law tells us that only exceptional circumstances can give rise to a breach of article 3. This would seem to be in line with Swedish practice. However, when such humanitarian conditions primarily is a result of actions by the state (or its equivalent), as in the cases of MSS and Sufi and Elmi, the Court has determined that the ordinary standard of proof should be applied. A standard of proof that, as we see it, would place a significantly lower burden on the applicant than if exceptionally distressing circumstances were to be required.

Case-law of the United Nations Committee Against Torture

The Swedish Migration Court of Appeal has not yet in a published case referred to a decision of the United Nations Committee Against Torture (CAT). The Court of Appeal has in one unpublished case referred to two decisions of CAT on the general human rights situation in the Democratic Republic of Congo. While CAT-decisions may be perceived to be essentially in casu and therefore of less precedential value than those of the European courts, we would suggest that these decisions nevertheless constitute an important part of the landscape of the international case-law acquis. Permit us to refer to three areas where there exist Swedish interpretative gaps in relation to the general principles which one can infer from a large body of CAT decisions.

Post traumatic stress syndrome (PTSD) is a medical diagnosis that does figure in the Court of Appeal's published case-law. Discussion of PTSD in Sweden however, has thus far been confined to the issue of whether there exists exceptionally distressing

circumstances. In contrast, in many of CAT's decisions PTSD is discussed in the context of credibility. See for example the case Tala v. Sweden.

In almost half of the CAT-decisions included in the Swedish Migration Board's database the importance of past harm is addressed in relation to a prognosis of risk. As there is some guidance from CAT on this issue, it may be fruitful for the Migration Court to provide help in underlining what interpretive lessons can be reaped here from CAT. See for example the case Ayas v. Sweden.

Another interesting area, so far unexplored by the Court of Appeal, concerns the evidentiary value of potentially verifiable circumstances. See for example the case A.S. v. Sweden in which CAT considered, based on the strength of verbal allegations, that there was a shift in the burden of proof from the asylum seeker to the government.

The final point of our presentation concerns gaps in Swedish national practice in relation to case law from the European Court of Human Rights.

The Migration Court of Appeal has issued several judgments on the use of Country of Origin Information (COI). According to this case law, Swedish migration courts have a duty to ensure that an asylum case is based on recent and relevant COI. While there thus is leading Swedish case law on the use of COI, there's a gap in relation to providing broad principles for the assessment of COI. One of the leading Strasbourg cases in this regard is N.A. v. UK. This case answers pertinent questions such as: Is it appropriate for only domestic COI to be used? What NGOs are considered reputable? What additional criteria should be used in considering the relative strength of a particular source?

In the last three years the Migration Court of Appeal has issued a number of detailed article 8 judgments in various contexts such as the Dublin Regulation, proof of identity between alleged family members, the private life of an adult asylum seeker and most recently family life between young adults and their parents. These cases have referred to a number of article 8 cases by the Strasbourg Court such as Üner v. Switzerland and Nacic v. Sweden. There will however always be additional areas to explore. A general challenge for the Swedish courts, for which the Convention is also national law, is

untangling the web of subsidiarity that clouds the different roles of Strasbourg versus the domestic courts. Another area to explore relates to the state's positive duties to protect family law. A state's positive duties can extend to promoting the creation of family bonds where they have ceased to exist. Two leading cases on a state's positive duty to protect family law are Ciliz and Berrehab. Noteworthy also is the lack of case-law on the private life of children. In filling this gap, the Migration Court of Appeal has currently little specific guidance from the European Court of Human Rights. Perhaps some general guidance can be found in relation to how the Court of Justice weighed the principle of the best interests of the child in the MA judgment referred to in the beginning of this conference.