



Migrating Young Unaccompanied Children and the Mobile Commons: Law, Vulnerability, and the Practice of Family Reunification in Sweden

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Abstract

In this article I call for an awareness of the mobile commons— the informal support that exists among migrating people, NGOs, and activists – in relation to the realization of family reunification. Taking its point of departure in a concrete case of family reunification for young unaccompanied children, the article seeks to expose how the traditional legal notion of the liberal subject fails to provide protection in the context of legal practice. I argue for using the vulnerable subject as a starting point, in order to make more visible the context in which law operates and ensure protection even for the youngest children.

Keywords Mobile commons · Vulnerability · Unaccompanied young children · Family reunification · Migration law

1 Introduction

This article explores the importance and relevance of the mobile commons: the informal support that exists among migrating people, NGOs, and activists, related to the practical parts of applying for family reunification, including the process following the legal decision. The focus lies on the *realisation* of family reunification for very young children who have been separated from their parents and have applied for asylum or residency based on family affiliation in the country where their parents are now residing, and the argumentation draws on the authors own experience of one specific case in Sweden. This situation has not been much studied [cf. 10]. By comparison, situations involving older children migrating, or children migrating before

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their parents, who then seek to join them, have been scrutinized from various angles [e.g. 12, 16].

My aim here is twofold: first, to call for an awareness of the mobile commons in relation to the practice of migration law; second, to argue for the use of the vulnerable subject as a theoretical and methodological point of departure in law [1, 6].

Clarifying the applicable law is not complicated: young unaccompanied children, particularly the youngest children, have legal protection both nationally and internationally. The rights of migrating children are protected and defended in statutes and case law as well as in conventions and policy papers [10]. According to the Swedish Aliens Act, a person who has a connection to someone living in Sweden is entitled to a Swedish residence permit. Children are considered to have such a connection, and the Act mentions them specifically.¹

The case discussed below shows that even if the subject fulfills the legal requirements set out in the relevant law, in practice, it could still be hard to enjoy the right to family reunification, due to several practical barriers. In this anonymous case an eighteenth-month-old child was migrating to Europe together with the mother, two close relatives, and several siblings. The family was leaving a threatening, dangerous and highly insecure situation in their home country.² At one border crossing, the car carrying the youngest child and the close relatives was stopped, while the rest of the group had to continue across the border. For the next six months, the child had no contact with the rest of the family. Once the mother and her other children had reached Sweden, they received assistance in contacting the youngest child, who had returned to their home country with her relatives. During the period when the mother was working to get her child to Sweden, they were able to speak by phone.

As soon as the mother and her children in Sweden received a temporary residence permit, she was entitled to apply for a residence permit on behalf of her youngest child. Eighteen months passed between her first contact with the Swedish Migration Agency until the child finally reached Sweden: a considerable amount of time, given the legal matter at stake, the security situation at the child's location, and above all the child's age.³

In this case, although the law is clear, given the facts at hand, its practical outcome proved to be very complicated. At least three practical barriers emerged before the child could finally receive a residence permit and safe transport from her country of birth to be reunited with her family in Sweden. These barriers were primarily removed with the help of informal support from other migrating people, NGOs, and activists, both in Sweden and in the home country. In other words, the mobile commons played a crucial role in how law was practiced, and in particular how the right

¹ Swedish Aliens Act, Chap. 5, Sect. 3, Paragraph 2 (Utlänningslagen 5:3, p 2). See also The Convention on the rights of the child, now Law in Sweden. The GENERAL COMMENT No. 6 [19], stresses the right for children in relation to access to the asylum procedure etc., particularly part VI. E.g. the paragraph 70 states that the 'Refugee status applications filed by unaccompanied and separated children shall be given priority and every effort should be made to render a decision promptly and fairly.'

² The case is discussed here with the permission of the child's mother. I was personally involved in this case via a Swedish NGO and eventually also as a legal representative. For considerations regarding this involvement, see below.

³ The problem of long waiting periods is confirmed by the Council of Europe [15: pp. 40–41].

to family reunification was realized, once the child had received residence permit and could reunite with the family in Sweden.

I will first briefly discuss the concept of the mobile commons, as used by Dimitris Papadopoulos and Vassilis Tsianos, and Martha Fineman's theory of the vulnerable subject. I will then enumerate the practical barriers found in the case above and analyze each in relation to the vulnerable subject and the relevant mobile commons, which eventually led to the child's residence permit and safe transport to Sweden. I conclude with some final remarks.

2 Theoretical and Methodological Approach

Without various kinds of mobile commons, or the informal support that exists among migrating people, NGOs, and activists, the child in this case would most likely never have reached Sweden. The concept of the mobile commons is explained by Dimitris Papadopoulos and Vassilis Tsianos as follows:

People on the move create a world of knowledge, of information, of tricks for survival, of mutual care, of social relations, of services exchange, of solidarity and sociability that can be shared and used and where people contribute to sustain and expand it. [14: p. 190]

The concept of the mobile commons has been developed out of the perspective of the autonomy of migration and could be seen as a response to a failure of the formal legal structures and policies [cf. 11] In this article, I place it in relation to the practice of migration law and the barriers that occurred in the case described above, to illustrate and analyze how various forms of informal support were crucial at different stages of the legal process, and the procedure of organizing a safe transportation to Sweden, once the residence permit had been received.

Further, I combine the mobile commons with Martha Fineman's theory of the vulnerable subject as a substitute for the traditional liberal legal subject, and this forms the basis for my methodological approach. Instead of taking for granted the autonomous subject presupposed in law, I question it, using the vulnerable subject proposed by Fineman. Fineman's vulnerability thesis was largely developed as a criticism of the notion of autonomy that is central to the view of the liberal legal subject [4–6]. Taking as a point of departure the idea that vulnerability should be understood as universal and constant, and as such inherent in the human condition, Fineman proposes placing the notion of the vulnerable subject at the heart of social and state responsibility, which includes the responsibilities of the international community [cf. 7].

The main areas of law that Fineman touches on are family law, social law, and labor law. Here, I use the idea of the vulnerable subject to examine migration law and the application of that law in context, particularly in the context of the mobile commons. Fineman suggests that our personal and social lives are "marked and shaped by vulnerability" and that a "vulnerability analysis must have both individual and institutional components" [6: p. 10]. I agree with this idea and believe it moves us away from focusing on individuals and toward a greater focus on institutions [6: p.

21]. Taking the vulnerable subject as a starting point in the application of migration law would also tend to expose power relations, allowing us to take structural factors into account. This might shed new light on some cases and improve the individual's chances of claiming legal protection. When a specific situation is explicitly connected to structural aspects of power, such as gender inequality or the global south and north context, such a connection may have a positive effect on legal practice. The chances of noticing that the individual is vulnerable would also be improved. The following analysis of vulnerability in relation to the asylum process exemplifies how individuals are "positioned differently within a web of economic and institutional relationships" and how our vulnerabilities have great differences at the individual level [6: p. 21].

The traditional notion of the legal subject assumes that this subject is competent, able to negotiate, and can make rational choices. This traditional legal subject is supposed to be autonomous, free, and rational: characteristics that form the basis of legal justice, legitimizing its use of repressive power, such as the repressive power in the asylum process, in relation to the individual. A number of scholars have foregrounded and questioned the traditional notion of the subject in criminal law, as well as in human rights and law in general.⁴ Further, Godzimirska, Küçüksu & Ravn [7] argue that procedures and practices around access to human rights courts need to be sensitive to the applicants' context and acknowledge their inherent vulnerability.

In the following I will explore and analyze how the vulnerability of the child in the migration case described above was positioned within the practical application of migration law, and discuss this positioning in relation to the concept of the mobile commons. I will also discuss the practical barriers that emerged, one by one, in relation to vulnerability and the mobile commons. It should be stressed that I do not analyze the law itself here and thus do not focus traditional legal materials, but use primarily oral information communicated by the mother, fellow asylum seekers, friends of the family, friend networks, social support networks and NGOs, as well as my own experience of the case. What I want to make visible is rather the practical, commonplace and everyday part of the legal application [3]. The child's own experience is not at all focused. Instead, the institutional handling and its practical consequences of the case is scrutinized. My personal involvement in this case means, of course, that my own experience could affect the information put forward, and so I must also continuously and critically analyze my own position [cf. 13]. This means that my findings and claims have to be read according to this methodological limitation. Ethically, my ambition has been to maintain principles pointed out in research on migrant children themselves, such as consent, in this case from the mother, total anonymity and a minimizing of risks for the child and the family [e.g. 8].

⁴ See [1] with further references.

3 Family Reunification in Practice: Three Practical Barriers

3.1 Background

Statistics available on migration within Europe show that during the period between January and June 2018, 10,404 children arrived in Greece, Italy, Bulgaria, and Spain. Of these, 4,684 (45%) were unaccompanied or separated children (UASC). Of the 4,458 accompanied children who arrived in Greece and Bulgaria, a large percentage (37%) were 0–4 years old (UNHCR, UNICEF and IOM).⁵

Regarding asylum applications lodged by children, including unaccompanied and separated children, 3,071 children lodged such applications in Sweden between January and June 2018. Of these, 460 were unaccompanied and separated children.⁶

As noted, under the Swedish Aliens Act, a person who has a connection to someone already living in Sweden is entitled to receive a Swedish residence permit, and the statute specifies that children have such a connection.⁷

As also noted, the case discussed in this article was not legally complicated in theory. In practice, however, three difficult barriers appeared: getting the case prioritized for a ruling by the Swedish Migrations Agency; DNA testing the child at an embassy in a foreign country; and, once a residence permit was granted, arranging safe transport to Sweden from the child's home country. The last barrier, although perhaps appearing the easiest, in the end turned out to be the most complicated. I analyze each of these barriers in turn in relation to both vulnerability and the mobile commons.

3.2 Prioritization of the case at the Migration Agency

It was via the mobile commons, in this case fellow asylum seekers and her own experience, that the mother learned that it was necessary to telephone the Migration Agency to get them to act. After her initial application for a residence permit on behalf of her child, months passed and nothing happened. The mother and the rest of the family became convinced they would need to call the agency, and they asked me for help. I had become friends of the family via a so-called cultural circle: a weekly workshop organized by the local NGO with the explicit aim of integrating newly arrived residents with people already living in the local community.

The whole family was convinced that contacting the agency in writing would not be sufficient. After one submission of documents and persistent telephoning, the family managed to reach a case officer who really listened and in turn contacted her supervisor. On the grounds of the child's best interest, her very young age, and the fact that she was staying with older relatives in an unsafe country, the case was eventually prioritized.

Only after this prioritization did the Migration Agency begin to process the case. Prior to prioritization, the case was in a "pool" of residence permit applications,

⁵ [18].

⁶ For the international community's definitions of "unaccompanied minors" or "unaccompanied children," and for brief histories of unaccompanied minors in immigration flows to the US and EU, see [12].

⁷ Swedish Aliens Act, Chap. 5, Sect. 3, Paragraph 2a (Utlänningslagen 5:3, p 2a) plus last part of Sect. 3.

which would only be reviewed when the applicants began to approach their 18th birthday. The information gleaned from the mobile commons turned out to be vital here. Undoubtedly, the persistent phone calls helped in the end. The child occupied a very vulnerable position in relation to the practice of the Migration Agency, which, had it acted in accordance with its procedures, would not have initiated action in the case, for the simple reason that they would not have known of it. Drawing on Fine-man, we can say that the child was not only vulnerably embodied, primarily because of her age, but also extremely vulnerably embedded in the practice of the Migration Agency. Godzimirska, Küçükşu and Ravn have argued that procedures and practices surrounding access to human rights courts need to be sensitive to the applicants' contexts and acknowledge applicants' inherent vulnerability [7]. Seen in this light, the case at hand serves as an appalling example of the need for institutions to be aware of such contexts beforehand, and to organize their routines so that they can pay attention to situations such as young unaccompanied children in high-risk countries.

3.3 DNA Testing of a Child at an Embassy in a Foreign Country

Eventually, the Migration Agency offered the opportunity for the child, now about two and a half years old, to take a DNA test to prove her identity, since she could not do so by other means. Her documents from her home country were not considered valid, according to the Migration Agency's practice. The DNA test had to be performed at an embassy in another country, about a 15-hour drive away and otherwise only reachable by a complicated journey involving first a bus, then a plane. The child's relatives were too old to make this journey.

At this point, friends and members of local NGOs and other networks started raising money for the journey, while simultaneously looking for reliable people who could fly with the child to the embassy for the test. The full range of the mobile commons was used here. Information exchange among friends and former asylum seekers, financial help from friends, family, and networks, and connectivity and solidarity from people in the child's home country all played a role in getting the child to the embassy for the test. Eventually the parents of a person from informal networks went with the child to the embassy in another country to take the DNA test.

Once again, the child became embedded in institutional practices that raised practical barriers, placing the child in extremely vulnerable positions. I should note that the UNHCR has called for DNA testing to remain a last resort for verifying family relationships, to be used only when serious doubts remain after all other types of proof have been examined, or when strong indications of fraudulent intent exist and DNA testing is considered the only reliable recourse to prove or disprove fraud.⁸

3.4 Transport to Sweden

Subsequently, the child received a Swedish residence permit. The permit was temporary, for the same period of residency as the rest of the family. Once the mother

⁸ UNHCR [17]. On family reunification in Europe in general and legal and practical barriers to family reunification in particular, see further [15: pp. 40–46]. See also [9].

received the necessary papers from the Migration Agency, the family was able to start planning to bring the child to Sweden. As already indicated, this turned out to be a challenge.

To begin with, no airlines permitted a child under the age of five to travel alone, with only an escort from the airline. Nor could the child's relatives in Sweden go to their home country to pick up the child, as their travel documents from Sweden did not allow that.

Formal procedures between the embassies in Sweden and the child's home country were initiated. The home country's ambassador to Sweden was involved to arrange the paperwork, many phone calls were made to arrange help from the Swedish embassy in the home country, and so on. In short, the family tried to arrange for someone to take the child to Sweden. This was complicated, since the courts in the home country would not allow the transport of minors abroad without their parents, with an eye to the best interest of the child. The problem was that the child's father had been missing for many years and the child's mother was in Sweden. The parents simply could not transport the child. All the papers from Sweden and the diplomatic assistance from both embassies made no difference.

In addition, the Migration Agency in Sweden and international organizations were contacted, but none of these had relevant or useful information.

Again, the family had to turn to the mobile commons. In this case, fellow asylum seekers in Sweden from social networks provided some valuable and trustworthy information about how to transport the child. According to this information, it was safe to travel with other people's children to a third country near the home country. Many people in the home country took regularly other people's children to the hospital in the third country, and there were rarely any border checks. So, in the end, some friends of the family in the home country travelled with the child to the third country and the mother and one of her older children travelled from Sweden to meet the child there.

And once again, these practical barriers embedded the child in a highly vulnerable position that most probably would not have been solved without the information, financial and social support, and solidarity offered by the mobile commons.

4 Concluding Remarks: Mobile Commons is Crucial in the Realization of Family Reunification

The legal subject in the case described here – a very young child in a high-risk country, unaccompanied by parents or siblings – differed in every way from the traditional liberal subject presupposed in law. This child was not free to make choices or rational enough to make decisions in this precarious situation. Instead, the child was dependent in every way on her family and on society and all its institutions. The procedural and practical barriers involved in the process and after the legal outcome – the granting of the residence permit – hindered the realization of the substantive right of family reunification. In this case, friends of the family and friends within wider local and global networks, by providing information, help and support, ultimately embedded

the child in a safe and secure situation that the law and its institutions had failed to provide.

This case clearly shows that the circumstantial vulnerability of an unaccompanied and separated child on the move makes it highly dependent - if not on the mercy of - on institutional, social and legal systems [cf. 2]. This, according to Fineman, requires institutions that respond to such dependency' by contributing to what she calls the 'resilience' necessary for confronting social challenges. The case further illustrates the child's diminished resilience, as a result of the total collapse of the family and state structures on which children usually depends, but also the dependency on the unfamiliar institutional systems in the destination state [4–5].

As a result of the institutional un-responsiveness or rigidity of Sweden's and the international community's formal structures, not paying attention to the child's particular vulnerability, this case is an example of how informal structures, networks, social solidarity & mobile commons, come to the aid and helped building the child's resilience.

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