F-3045/2016, Swiss Federal Administrative Court, 25 July 2018

Procedure (chronology)

The case concerns a Cameroonian girl born in 1997 who applied in September 2013 for family reunification with her mother who had married a Swiss citizen and was residing legally in Switzerland. At the time of her application, the girl was 16 years old and her mother had a residence permit ("autorisation de séjour"; permit B) in Switzerland.

When the responsible cantonal authorities refused to grant family reunification, the applicant appealed the decision before the cantonal court. In September 2015, the cantonal court decided positively on the appeal and granted family reunification. By then, the applicant was already of age.

Following the cantonal court's decision, the cantonal authorities submitted the application for a residence permit to the State Secretariat for Migration (SEM) for approbation. (N.B.: According to Swiss law, a residence permit must be submitted to the SEM for approbation prior to its issuance).

In April 2016, the SEM refused to approve the residence permit, arguing that the applicant did no longer fulfil the requirements for family reunification, more specifically she had come of age. The applicant appealed the SEM's decision before the Swiss Federal Administrative Court (FAC) in May 2016 which decided that the application for family reunification was still possible despite the fact that the applicant reached majority during the procedure.

Legal reasoning of the FAC

According to the Swiss Federal Act on Foreign Nations (FNA), family reunification of non-nationals with a B-permit is subject to a number of requirements and at the discretion of the authorities (art. 44 FNA). A right to family reunification may, however, derive from Art. 44 FNA together with Art. 8 ECHR, if the application concerns a child and the child has a close and effective relationship with the parent with a right to reside durably in Switzerland. Hence, according to the FAC, at the time of the application, the applicant had a right to family reunification with her mother in Switzerland, based on art. 8 ECHR together with art. 44 FNA.

Although the issuance of residence permits by the Cantons is in principle subject to approbation by the SEM, the latter cannot overrule a positive cantonal judicial decision on family reunification. It has to appeal the decision before the Federal Supreme Court (FSC).

A condition for family reunification under Art. 44 FNA is the minority of the child. According to the FAC's and FSC's current praxis, the relevant time for determining whether this condition is fulfilled is the time of the decision on appeal, if the right to family reunion is based on international law, here Art. 8 ECHR. If the right is based on Swiss national law, the relevant time is the time of the application for family reunification.

FAC is now changing its established decision practice and applies the same deadline in both cases for the permission of family reunification, namely, the age of the applicant at the time of the claim for family reunification. Arguments put forward by the FAC for its change of practice are equality of treatment and the predictability of the law. According to the FAC, the outcome of the procedure cannot depend on a condition which is not within the person's control and which may depend the duration of the procedure.

In its reasoning, the FAC refers to the recent change in the jurisprudence of the Court of Justice of the European Union (CJEU), as well as to the case law of the European Court of

Human Rights (ECtHR), which both decided that the age at the time of the application was relevant and that a child who comes of age during the procedure retain his/her right to family reunification. Hence, the new decision practice of the FAC is now in line with both regional courts and reinforces the legal protection of children in family reunification procedures.