



MARRIAGES OF CONVENIENCE:
A COMPARATIVE STUDY
RULES AND PRACTICES IN NORWAY, SWEDEN,
GERMANY, DENMARK AND THE NETHERLANDS

Commissioned by
the Norwegian Directorate of Immigration (UDI)



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LIST OF ABBREVIATIONS

DUF	Datasystemet for utlendings- og flyktningsaker (database on foreigners and asylum cases)
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union
NGO	Non Governmental Organization
no.	number
p.	page
Sec.	section
UDI	Norwegian Directorate of Immigration (Utlendingsdirektoratet)
UNE	Norwegian Appeals Board on Immigration (Utlendingsnemnda)

FOREWORD

This report was commissioned by the Norwegian Directorate of Immigration (UDI) and managed by Econ Pöyry. In addition to Econ Pöyry staff, Maria Bergram Aas has carried out the legal and regulatory review, as well as the case studies in Denmark and the Netherlands. Mária Grethe-Gulickova and Gerrie Lodder have contributed with literature review and interviews in Germany and the Netherlands respectively. Helene Berg at Proba Samfunnsanalyse AS has conducted the longitudinal analysis of marriages and divorces in Norway. The study has also benefited from the insights and guidance of a reference group consisting of representatives from UDI, the Immigration Appeals Board (UNE), and the Ministry of Justice and Police. Any mistakes or inaccuracies however, remain the responsibility of Econ Pöyry.

EXECUTIVE SUMMARY

Abstract

This study, commissioned by the Norwegian Directorate for Immigration (UDI), discusses the rules and practices for handling applications for residence permits on the basis of marriage, and the process of identifying potential marriages of convenience. The report provides a more detailed review of Norwegian rules and practices, and draws comparisons to the situation in Denmark, Sweden, Germany and the Netherlands. The purpose of the analysis is to present similarities and differences in the rules and processes of identifying potential marriages of convenience across countries.

The study is based on literature review and interviews in Norway and the four other countries. The analysis of the situation in Norway is more detailed with regards to the legal situation, the likely extent of the phenomenon and the actual decision process than the four country cases. As far as the extent of the phenomenon is concerned, exact comparisons are difficult to make since Norway is the only country in this study where statistics regarding the extent and characteristics of marriages of convenience are available. However, estimates indicate that the incidence of marriages of convenience is lower in Denmark and somewhat higher in Germany, at least in Berlin. Longitudinal analyses of marriages registered in Norway do not suggest that there is any significant number of unrecorded cases, but such estimates are problematic and should not be treated as exact science. An in-depth discussion of actual practice in the four other countries apart from Norway is beyond the scope of this analysis.

The regulatory framework in the five countries is partly similar and harmonized with EU regulations on the issue. There are however some important variations between countries:

- *The first variation is with regards to the definition of what constitutes a marriage of convenience, where Norway and Denmark have a somewhat broader (and therefore stricter) definition than the other countries and the EU framework.*
- *The second concerns the general requirements for family reunification on the basis of marriage in the respective countries. The countries operate with different requirements regarding financial situation of the applicant and reference person, and not all of them require applicants to fulfill conditions such as satisfactory language skills, close ties to the country or, in case of the reference person, four years of work or education in the receiving country in order to gain the right to establish a family there. In this respect, Denmark and the Netherlands together with Norway have the most restrictive policies.*
- *A third difference lies in the methods that are employed in order to identify potential cases of marriage of convenience, with Sweden being the only country that does not carry out domicile verifications.*
- *A fourth difference concerns the sanctions that are available in case a marriage of convenience is detected, and how these are practiced. Norway and Germany are the only countries with legal provisions and practice for expulsion as a result of having identified a marriage of convenience. Norway and Germany are also the only countries where the Immigration Act or comparable legislation contains provisions for criminal prosecution of marriages of convenience which have been identified.*
- *Fifthly, there are important differences in the institutional framework and the degree of centralization in the administrative treatment of cases between the countries in this study.*

- Finally, the process of appealing against decisions based on marriage of convenience varies. Norway is the only country where appeals are handled by an independent administrative board

Summary of findings

Following a general tightening of immigration rules, most countries have increased their focus on the issue of marriage of convenience and revised rules and practice accordingly. In general, the level of attention around the phenomenon of marriage of convenience has increased during the last years in most countries – in our study, the only exception to this is Sweden. Correspondingly, focus on improved routines and a clearer regulatory framework has been strengthened. In Norway, an instruction from the Ministry of Labour and Social Inclusion issued in 2006 has had major consequences for the administrative treatment of cases of marriage of convenience with regards to attention around the phenomenon, improved routines for detecting such cases, and an increased number of rejected applications on this basis. Other countries in this study have also focused on tightening routines during the last year, partly as a reaction to the Metock-ruling, but also in the years preceding it. This is probably connected to a general tightening of immigration policy, which makes family reunification on the basis of marriage more relevant to potential applicants.

Variations between the reviewed countries are small. Relevant legislation is largely harmonized with EU regulations. Norway and the other countries in this study are also bound by conventions on international human rights that are relevant to immigration policy, such as the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights (ECHR). Both establish a core protection of the right to family life, but open up for interference in this sphere under certain conditions. According to case law by the European Court of Human Rights, marriage always constitutes family life in a legal sense, as long as the marriage is lawful and genuine. In practice, this means that a marriage of convenience without an element of genuine family life does not fall under the protection of the existing conventions, either. The EU's regulatory framework with its gradual establishment of a common migration policy is also relevant to the discussion. Two directives are of special significance to the issue of marriages of convenience, EU-directive 2003/86/EC which establishes the right to family reunification for third-country citizens, and EU-directive 2004/28/EC which harmonizes provisions related to the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Norway is also increasingly harmonized with the EU legal framework within immigration law through the participation in the Dublin and Schengen agreements.

An important milestone in European immigration policy concerning family reunification is the Metock-ruling from 2008. In the wake of the Metock-ruling, the European Commission has revised parts of its practice regarding marriages of convenience, including the publication of new guidelines for residence permits. This ruling established that third-country citizens do not need to have previous residence rights in the EU before they can apply for family reunification on the basis of the EU-directive, but that de facto residence may be sufficient. As a consequence, EU-citizens may reside in another country than their own with their spouse from a third country, for a period of time, and then return to their home country with a right to a residence permit for their spouse there even though the spouse resided illegally in the other EU country.

Guidelines for assessing possible marriages of convenience are similar across countries and aligned with EU guidelines. The Norwegian instruction from 2006 referred above was accompanied by a set of guidelines for the assessment of cases of marriage of convenience, which constitutes an important tool in UDI's treatment of cases. An important challenge highlighted in the guidelines is how to apply the guidelines in

practice while taking national and cultural differences into account. The countries in this study follow similar guidelines, although they vary in degree of detail and precision. All countries operate with guidelines which are in keeping with guidelines issued by the European Commission. A joint domicile is a general requirement, together with other indications for a valid marriage. Assessments of each case are made in the light of traditions relevant to the reference person's and the applicant's own cultures.

Marriage of convenience cases are complex and hence time-consuming. The complexity of cases involving possible marriages of convenience justifies a somewhat longer administrative treatment compared to the process for straightforward family reunification cases. Generally, the issue of marriages of convenience represents a demanding balancing act between the necessary sanctioning of the existing legal framework on the one hand and the right to privacy on the other. Another challenge lies in ensuring cost-efficient use of public resources used to review potential marriages of convenience.

Our interviews indicate that officials are cautious in concluding that a marriage is one of convenience. In Norway as in the other countries, an application can be rejected when it is more likely that a marriage is of convenience than not (balance of probability). It appears from our interviews, however - especially in Norway and the Netherlands - that this requirement is often practiced more strictly than what is actually indicated by the regulations. It is not unusual for an official to actually require a higher likelihood than the required "more likely than the opposite" in order to reject an application on the grounds of marriage of convenience.

It is not possible to compare the extent of the phenomenon in Norway with data in other countries, as the latter are not available. Norway is the only country in this study where statistics indicating the extent and development of marriages of convenience are available. In Norway in 2009, a little over 2 percent of all applications for family reunification on the basis of marriage were turned down on the grounds of a suspected marriage of convenience in Norway. This makes a total of 200 applications.

- The Netherlands is planning to produce such statistics by 2011.
- In Sweden, informed sources suggest that the number of cases is highly unlikely to exceed 5 percent of all applications for family reunification based on marriage, an estimate that seems realistic in the light of the fact that somewhat over 2 percent of cases are rejected in Norway.
- In Germany, an estimate from 2005 suggests 500 marriages of convenience in Berlin each year, amongst a population of just over 3 million, which indicates a much higher incidence of cases than in Norway.
- Manual counts carried out by the Danish immigration authorities (Utlændingetjenesten) suggest that numbers are significantly lower in Denmark, with 35 applications rejected on the basis of marriage of convenience between January and August 2010 and a total of 28 rejections in 2009.

Analysis of Norwegian data indicates that the number of undiscovered cases in Norway is relatively low. In addition to trying to quantify the number of marriages of convenience, it is interesting to discuss to which degree the administrative decisions taken reflect the real situation. A typical assumption on the part of some actors is that the cases which end in rejection reflect only a small percentage of the number of actual marriages of convenience. For this reason, we use statistical analysis to try to determine the likely incidence of marriages of convenience, and to which degree this exceeds the number of cases that are uncovered each year. If we start from the hypothesis that marriages of convenience are likely to show a higher divorce rate than other marriages after permanent residence has been granted, relevant data indicate that the number of undiscovered cases is relatively low. This statement, however, is subject to two important caveats. On the one

hand, we know that transnational marriages in general, and those involving certain regions and combinations in particular, show a higher divorce rate than marriages where both partners come from the same background. On the other hand, it is entirely possible that a marriage that has been concluded with a view to ensuring residence in the country will continue to exist also after permanent residence has been granted, for example in such a way that the involved parties continue to be married on paper, but no longer lead a family life.

Norwegian and Danish definitions of what constitutes a marriage of convenience appear slightly broader, and therefore stricter, than in the other countries. The provisions of the EU family reunification directive define a marriage as a marriage of convenience if its "sole purpose" is to gain a residence permit for the applicant. This is a narrower definition than the one applied by Norway and Denmark, where the authorities are required to consider whether gaining a residence permit constitutes the "main" motivation for concluding a marriage. Whether practice in Denmark is in fact stricter than the rest of the EU is not considered in this analysis.

With regards to the general requirements for family reunification on the basis of marriage, Denmark and the Netherlands together with Norway have the most restrictive policies. The countries operate with different requirements regarding the financial situation of the applicant and reference person, and not all of them require applicants to fulfill conditions such as satisfactory language skills, close ties to the country or, in case of the reference person, four years of work or education in the receiving country in order to gain the right to establish a family there.

As part of the inquiry, all countries except Sweden practice verification at domicile as a part of this process. The use of domicile controls illustrates the potential dilemma between the protection of privacy on the one hand and the need for background information on a case on the other. In Norway, the existing rules require consent to domicile controls, and current practice is that such consent is obtained by the police at the time of their actual visit to the domicile of the person in question.

The degree of centralization varies and may affect both how the case is treated and the extent of common practice across geographical areas. The process typically begins with the applicant presenting his application to the relevant embassy in or close to his home country. Certain embassies routinely carry out interviews with a view to detecting marriages of convenience. Other embassies only interview applicants if the application gives cause to suspect marriage of convenience. In Norway, both the applicant and reference person are interviewed by either UDI or the police. In Norway and Denmark the process is more decentralized than in Sweden, Germany and the Netherlands. The degree of centralization influences the number of people that are involved in an individual case, and the degree to which officials have direct contact with the applicant and the reference person, which in turn may influence what factors are weighed into the decision. Another potential question here is whether a large degree of decentralization might have a negative effect on equal treatment and common practice across geographical areas.

Norway is the country with the most comprehensive sanctions both in relation to the applicant and the reference person when a marriage of convenience is identified. In Norway and Germany, the applicant will be expelled following a rejection based on marriage of convenience. In Norway the applicant is routinely expelled from the Schengen Area and reported to the Schengen Information System (SIS). In Norway and Germany, the Immigration and Residence Acts respectively provide for criminal prosecution following having provided significantly false or clearly misleading information in the application process. It should, however, be noted that there is no established practice for criminal prosecution in Norway. In the other countries, the consequences of a

marriage of convenience-decision also rarely go beyond the rejection of the original application.

The process of appealing against decisions based on marriage of convenience is different in each of the countries in this study. While appeals in Norway are handled by an independent administrative board (Utlendingsnemda – UNE), in Denmark they are treated as an ordinary administrative complaint to the responsible ministry.¹ Sweden on the other hand has a specialized court dedicated to such appeals. Germany and the Netherlands do not have any form of administrative appeal body, which means that rejections have to be contested directly in court if necessary. It is difficult to determine how these differences affect the process of treating cases of marriage of convenience. Starting from the premise that cases of marriage of convenience are viewed as complicated and demanding in all countries mentioned in this study, access to a fair and thorough appeal process is, however, of great importance to protecting the applicants' rights. The Swedish system is unique in this respect, as cases are heard in oral form by a specialized court.

Actors with direct contact with the applicant are more likely to assess a marriage as one of convenience than the more formal centralized process will actually conclude. This is a challenge which becomes especially apparent in the Norwegian process. The differences between embassies and the police on the one hand, and UDI and UNE on the other reflect the contrast between first-hand knowledge – often of the informal type – on the one hand, and the need for information that can be documented on the other. The police and the embassies are typically under the impression that the actual incidence of marriages of convenience is much higher than the number of formal decisions reflects. This contrast could relate to the fact that these actors get a first impression that is difficult to document and therefore cannot be used as a basis for a formal decision. Some of those interviewed in the study in Norway, especially those in direct contact with applicants, call for a more precisely defined understanding of what is required to reject an application in UDI and subsequently UNE. This particular factor is not as apparent in the other countries, which might be due to the fact that for this report, fewer interviews were carried out for the individual country cases than in Norway.

In Norway, other grounds for rejection will often be used, if such grounds exist. To expedite processing, in cases where more than one reason for rejection is valid, the least time consuming reason will usually be selected as the official basis for a decision. For example, if there are elements indicating a marriage of convenience, and at the same time the financial requirements are not met, it is likely that the case in question would be rejected on the basis of lack of financial requirements. These would not be registered as marriage of convenience cases, and not included in the above figures. However, if the necessary financial requirements are met at a later stage and the case is appealed, it might then be subject to a rejection as a marriage of convenience and eventually registered as such.

¹ Detailed country presentations are provided in Annexes.

1 INTRODUCTION

1.1 KEY OBJECTIVES OF THE STUDY

This study has been commissioned by UDI, the Norwegian Directorate for Immigration (“*Utlendingsdirektoratet*”)². The study has two essential objectives. The first is to analyse the rules and practices related to marriages of convenience in Norway. The second is to provide more information on the rules and practices in Denmark, Germany, Sweden and the Netherlands as a way to compare and draw lessons for Norway. The analysis addresses the following research questions in particular:

- How is “marriage of convenience” defined by law? Do national rules differ?
- What methods and criteria are used by the administration to identify such marriages?
- Can we get an estimate of the extent of the phenomenon in the various countries?
- Are there specific patterns in terms of nationality, age, gender or other characteristics?
- In what circumstances and how often are these cases issues for criminal prosecution?
- How is the standard of evidence practiced in these particular cases?
- Which are the most important challenges regarding rules and practice?

1.2 CONTEXT AND RELEVANCE

With immigration rules increasingly strict in many western countries, migration based on family reunification has been on the rise. Family-related migration currently makes up about 44 percent of all legal migration to OECD countries³, with marriage migration constituting an important share of family-related migration (OECD 2008). Several countries have recently increased their attention to the topic and reviewed relevant practice. In parallel, EU rules and guidelines as well as recent rulings in the European Court of Justice may have had an impact on the extent to which marriage is in fact a viable way to circumvent immigration rules. In the country studies, we will provide an overview of the general requirements which apply to family reunification in order to provide a complete picture of this channel of migration.

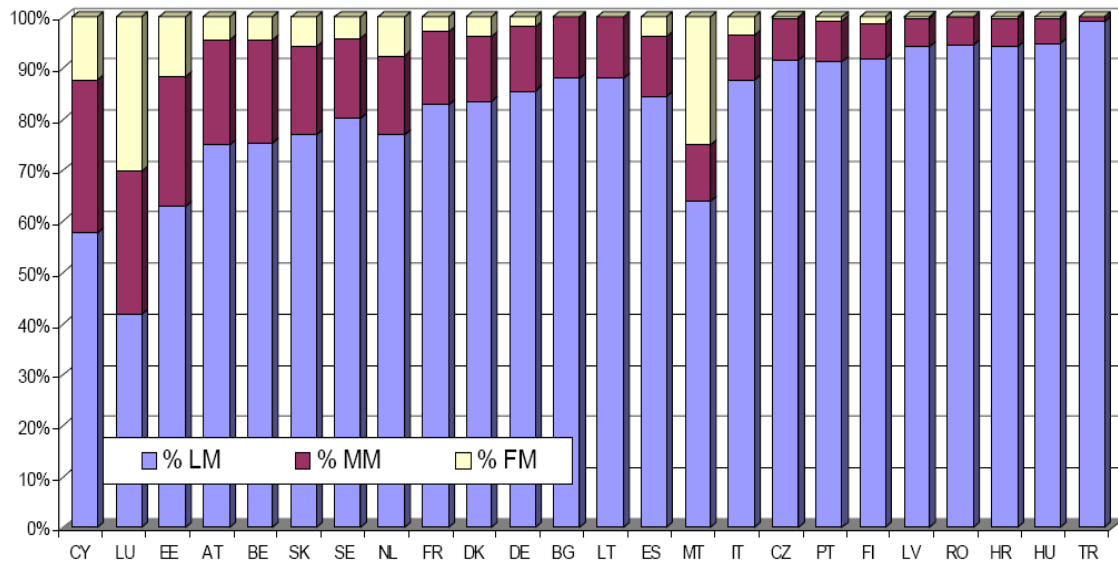
1.2.1 *Family reunification*

Family reunification in migration is not a new phenomenon in Europe, but it may take a particular form in certain countries with rapidly changing and/or multicultural societies. Mixed marriages involving persons with different nationalities account for a significant share of such marriages (see Figure 1.1). Legally residing migrants may also predominantly marry persons of their own community and/or country of origin, with varying patterns depending on the nationalities of the migrants and countries concerned.

² Konkurransesgrunnlag – FOU-prosjekt “Pro forma ekteskap i Norge og i fire andre EØS-land: Regelverk og metoder for å avdekke proforma ekteskap” - Saksnummer: 09/3053.

³ Family reasons — such as when people are travelling to reunite with families or to get married — account for 44% of permanent type migration in OECD countries in 2006 (for which data is available). Labour migration accounts for about 14% and humanitarian migration for about 12%. Free movement accounts for most of the rest.

Figure 1.1 Marriage patterns in EU countries: Marriages between two local citizens (LM), mixed marriages (MM) and marriages between two foreign citizens (FM) (2008)



Source: Vienna Institute for Advanced Studies (2008), based on national statistical data

Among our case countries, the Netherlands is the country with the smallest share of marriages between national citizens and the largest share of marriages between two foreign citizens relative to the other countries. Sweden has the largest share of mixed marriages among the countries in this study.

1.2.2 Marriages of convenience

The rules for family reunification are designed to protect genuine family life. However, entering into a marriage without reality, a so-called marriage of convenience, may be one way to circumvent immigration rules and get access to a residence permit. Discussions regarding the phenomenon of marriage of convenience regularly occur, in the media and in political discourse. In Norway, authorities have increased their focus on this possible loophole over the last few years. Also on EU level generally and in our case countries specifically, the subject has gained attention, with some variations in focus and practical implications across countries.

Although estimates of the extent of the phenomenon are hard to get, attempts at circumventing immigration rules through marriage may in fact be the preferred, if not the only way for some migrants to enter or maintain themselves legally in a European country given the increasingly stringent conditions of entry and residence otherwise. Partly in reaction to these trends, rules for family reunification have been made more stringent in many European countries, including through a toughening of provisions related to marriages of convenience.

Robust and just rules and procedures for assessing possible cases of marriage of convenience are considered important for national authorities both in order to safeguard and sanction immigration rules, and to protect the rights of individuals. An inherent challenge in these objectives lies in the balance between sanctioning rules and avoiding misuse on the one hand and protecting privacy and family life on the other.

1.3 CLARIFICATIONS AND DEFINITIONS

By its very nature, the concept of “marriage of convenience” reflects cultural and legal characteristics specific to each country (De Hart 2006). The institution of marriage is generally defined in national law as a solemn act whereby two persons found a union between themselves, the conditions, effects and dissolution of which are governed by statutory provisions in each country. This act centres on the commitment and consent of the future spouses to form a couple and to live together. At least in western countries, love is often said to be the foundation of marriage, described as a communion of life and love – *communitas vitæ et amoris conjugalis* – but marriage is also a conjugal institution within society (Block 2009).

A marriage entered into for reasons other than the reasons of a relationship, family, or love can be defined as a marriage of convenience. This study focuses on a particular type of marriage of convenience: marriages contracted with the *sole* or *primary* motive of giving a foreign person⁴ a work or residence permit in the country of his or her spouse. Such marriages do not create any rights to family reunion under immigration law.

Although realities may overlap, the concept of marriages of convenience is to be distinguished from the concepts of *arranged marriages* (typified by the intervention of someone outside the future couple) and *forced marriages* (characterised by the absence of consent by one or both of the parties).

1.4 PROCESS AND METHODOLOGY

The study was conducted between November 2009 and June 2010. Following analysis and interviews regarding the situation in Norway, the four country case studies were carried out in April and May 2010, followed by a comparative analysis. Data collection is a combination of literature review and interviews with officials in relevant public institutions.

Review of relevant literature and case profile review

The situation in each country was analysed through a desk review of national official documents, as well as through the use of research papers. Both rules and practices were researched. However, apart from in Norway and Germany, few studies have been conducted on marriages of convenience. The desk studies are hence mainly based on legal texts and the immigration authorities’ Internet sites. Reference lists are provided in each country section and at the end of the report.

For the Norwegian case, 15 complete case files from UDI were also reviewed.⁵ The main purpose of this exercise was to become more familiar with practical examples across different types of cases which have been judged marriages of convenience. The cases were chosen and detailed personal identity markers were removed by UDI staff. They covered the years 2006-2009 and five different countries.

Interviews

To facilitate comparison, a common interview guide was developed and each country section has been drafted according to the same template. About 15-20 interviews were

⁴ By “foreign persons”, we refer to “non-nationals”, i.e. persons who do not hold the nationality of the country under consideration. “EU citizens” refers to citizens of one of the EU Member States. Although they are not EU citizens, Norwegian citizens enjoy the Community right of free movement as a result of Norway’s participation in the Schengen Area. “Third-country nationals” refers to any person who is not a citizen of the EU and who is not a person enjoying the Community right of free movement.

⁵ Permission to access case files given by the Ministry of Justice, January 2010.

conducted with key stakeholders in Norway, including three embassies. Interviews (about 4-6 persons in each case) were also conducted in the countries of comparison to test hypotheses and supplement available information. In Norway, interviews were carried out with UNE and UDI officials as well as police and embassies. In Sweden, immigration authorities and the specialized court were interviewed while in Denmark interviews were only carried out with the immigration authorities. In Germany, immigration authorities in Berlin were consulted, while in the Netherlands, we interviewed immigration authorities and police.

Generally, it was more difficult than anticipated to get access to relevant informants and as a result, fewer interviews than originally planned were carried out. Access to interview objects in the four countries selected for comparison proved difficult and time consuming. Some institutions did not wish to participate and others did not respond to repeated requests. The total number of interviewees is therefore lower than originally planned. This limits the ability of the analysis to make robust observations about practice, and discussions are therefore mostly limited to formal regulations and institutions. A possible supplement to this type of study could have been a more informal discussion around the research questions. All interviewees are anonymous. The persons contacted or interviewed cannot be held accountable for the content of the study. Any omissions or misunderstandings remain the responsibility of Econ Pöyry.

Terminology

In the report, we use the dichotomy “applicant” and “reference person”. The word “applicant” is used for the foreigner regardless of status in the country in question (e.g. he/she may have obtained a permanent residence permit), in order to make a clear distinction between the two actors. The reference person is often also referred to as the “sponsor” in our sources, but this simplification of terminology has been made to avoid confusion of terms.

Notice to the reader

This study seeks to provide an accurate and up-to-date description of national legislation and systems in order to inform decision-makers and the general public. It is not meant to be a “legal textbook” for practitioners. Moreover, given the complexity of national cases, we cannot exclude mistakes or inaccuracies. For specific questions related to national legislation, we would recommend consulting national legal documents mentioned in the annexes and reference list.

It is important to bear in mind that this study reflects the situation in the first half of 2010, and that this situation is likely to change, for instance as a result of developments in EU rules on family reunification.

1.5 STRUCTURE OF THE REPORT

Chapters two, three, and four in the report describe the Norwegian case. Chapter two discusses different approaches to estimating the actual number of marriages of convenience in Norway. Chapter three presents the legal and regulatory framework concerning family reunification and marriages of convenience in Norway, while chapter four discusses practice in the different Norwegian institutions involved in this subject matter. Chapter five presents a comparative analysis of findings from the Danish, Swedish, German and Dutch country cases, related to the Norwegian situation. The annexes describe the four country cases in more detail.

2 ESTIMATING THE MAGNITUDE OF MARRIAGES OF CONVENIENCE IN NORWAY

In order to get a better understanding of the concept of marriage of convenience, this chapter presents key statistics for marriage migration, suspected and actual marriages of convenience in Norway. First, we provide an overview of mixed marriages in Norway as a basis for family reunification in general. This is based on figures from Statistics Norway (SSB) reflecting registrations in the Norwegian Central Population Registry (CPR). Second, we review the applications for family reunification which have been rejected by UDI over the last three years on the grounds of marriage of convenience. Third, we carry out a longitudinal analysis with individual data from the national register to explore whether there are patterns in divorce statistics for mixed marriages which can indicate the size of the phenomenon of marriage of convenience. As none of these methods are able to provide a precise estimate, all the information extracted must be interpreted with caution. The number of applications for family reunification based on marriage has steadily been rising since 2005. In 2009, the number of such applications was about 11 000. Of these, about 200 were rejected because UDI suspected marriage of convenience. Turkey, Morocco, Vietnam and Somalia rank as top three when it comes to the number of rejections on the grounds of marriage of convenience. Statistics for the other four countries in question were not available, and it is hence not possible to compare the magnitude of marriages of convenience in Norway with these countries.

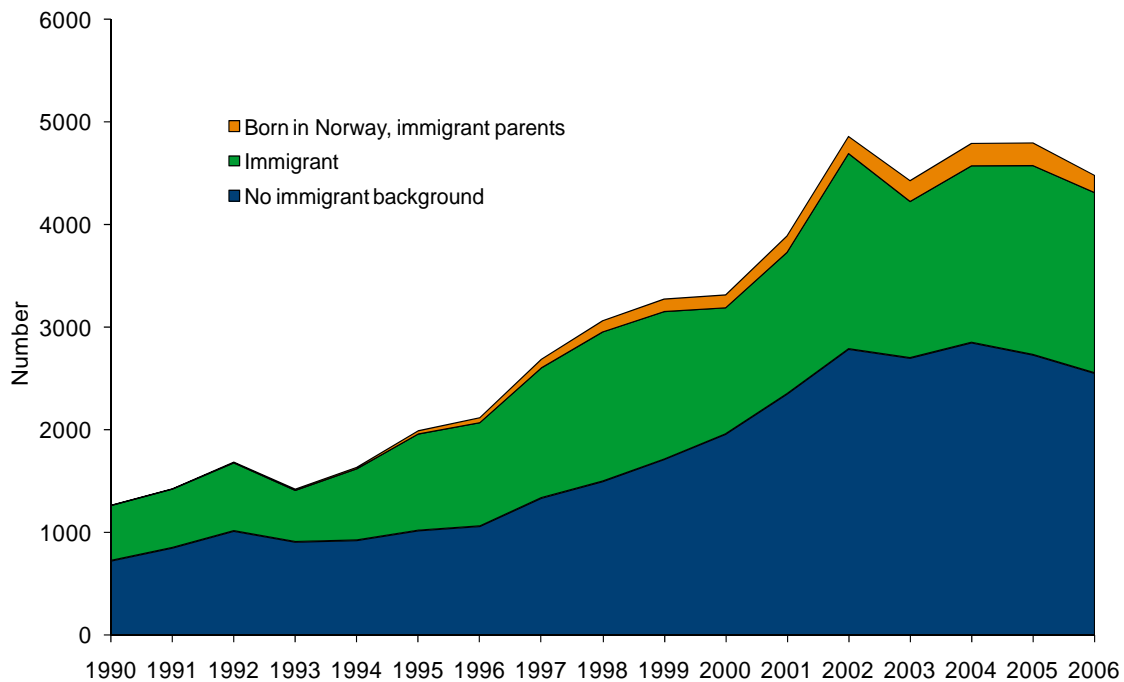
2.1 MIXED MARRIAGES AS A BASIS FOR FAMILY REUNIFICATION

Marriage migration is an increasing reality in Norway, with an increasing number of mixed marriages (Daugstad 2008).

- **Mixed marriages are on the increase, with variations across gender and national background.** In 2007, 10 percent of marriages entered into by men residing in Norway were with a woman not residing in Norway, compared to 4 percent in 1996. For the female share of the population the increase has been less, from 2 percent in 1996 to 4 percent in 2007. The prevalence of mixed marriages varies across immigrant groups. Immigrants from Pakistan, Turkey, and Morocco marry transnationally to a large extent, while immigrants from a number of refugee populations (including Vietnam and Bosnia-Herzegovina) to a lesser extent marry transnationally. Immigrants from Western Europe to a much larger extent than other groups marry persons that already reside in Norway (ibid).
- **Immigration based on family establishment is increasing.** In 1990, 1 300 people were granted residence in Norway on the grounds of family establishment, while the same figure in 2006 was 4 500. In this period the nationalities with the highest share of family establishments as grounds for immigration have been Thailand, Pakistan, Turkey, Russia, and the Philippines (ibid).

Cultural and religious preferences play an important role in these patterns, and may explain wide variations between countries. These patterns may also change over time in line with integration trends.

Figure 2.1 Immigration on the grounds of family reunification/marriage, by immigration status of the reference person, 1990-2006



Source: SSB (Daugstad 2008)

2.2 ADMINISTRATIVE STATISTICS FROM UDI

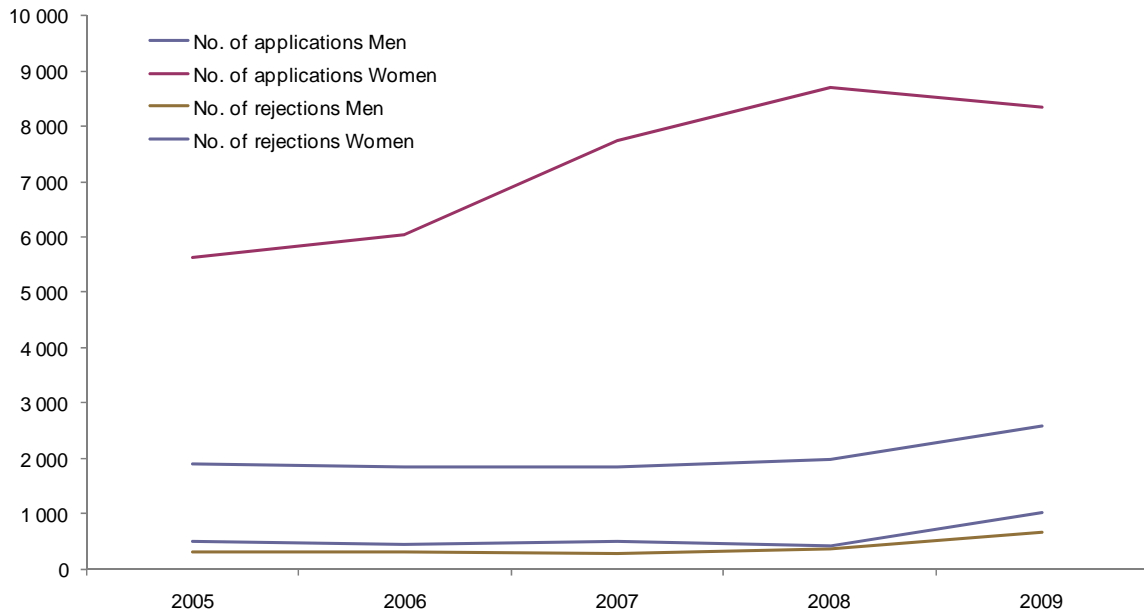
The following statistics are based on the number of applications rejected on the grounds of marriage of convenience as recorded in the database of the case registration system (DUF).⁶ As the numbers only reflect the cases that are actually rejected, they do not necessarily represent the whole reality. Where relevant, we try to shed light on the findings from UDI data by including observations made during interviews.

Applications and decisions concerning residence permits based on marriage

In 2009, about 11 000 decisions on applications for residence permits based on marriage were made. In the last years this number has been steadily increasing, up from 7 500 decisions in 2005.

⁶ Datasystemet for utlendings- og flyktningsaker

Figure 2.2 *Number of decisions in cases where application for residence permit is based on marriage, and number of rejections. Male and female applicants in Norway*



Source: UDI

UDI granted residence permits in about 85 percent of these cases in 2009. This is a reduction from the preceding years, when the share of applications granted was around 90-92 percent.

About 15 percent of the applications for residence permits were rejected. There are a number of possible reasons for this, and only a minority of cases are rejected on the basis of the marriage being considered one of convenience.

Decisions about marriages of convenience

Table 2.1 illustrates the number of rejections based on decisions of marriage of convenience in the period 2007-2009, as well as the proportion of rejections for all applications. Before 2007, marriage of convenience decisions were not specifically registered as such in the DUF database of UDI; we therefore do not have data for earlier years. We can observe that the number and the share of rejections based on marriage of convenience decisions increased somewhat from 150 in 2007 to 198 in 2009. Rejections on the grounds of marriage of convenience represented 1.5 percent of the total in 2007 and 1.8 percent in 2008 and 2009.

Table 2.1 *Number and proportion of rejections based on marriage of convenience in Norway (2007-2009)*

	Rejected as marriage of convenience	Number of cases	Percentage of rejections (of all applications) based on marriage of convenience
2007	150	9837	1.5
2008	200	10930	1.8
2009	198	11168	1.8

Source: UDI, Econ Pöyry

To expedite processing, in cases where more than one reason for rejection is valid, the least time consuming reason will usually be selected as the official basis for a decision. For example, if there are elements indicating a marriage of convenience, and at the same time the financial requirements are not met, it is likely that the case in question would be rejected on the basis of not fulfilling financial requirements. These cases would not be registered as marriage of convenience cases, and are therefore not included in the above figures. However, if financial requirements are met at a later stage and the case is appealed, it might then be subject to rejection as a marriage of convenience and eventually be registered as such. The number of cases rejected on other grounds is thus considered to be small.

Nationality of the applicant

In the period 2007-2009, 43 different nationality groups had at least 20 persons applying for residence permits based on marriage, and at least one rejection based on marriage of convenience. Figure 2.3 shows the proportion of applications that resulted in a marriage of convenience decision, based on frequency, for the 20 nationalities with the highest share.⁷

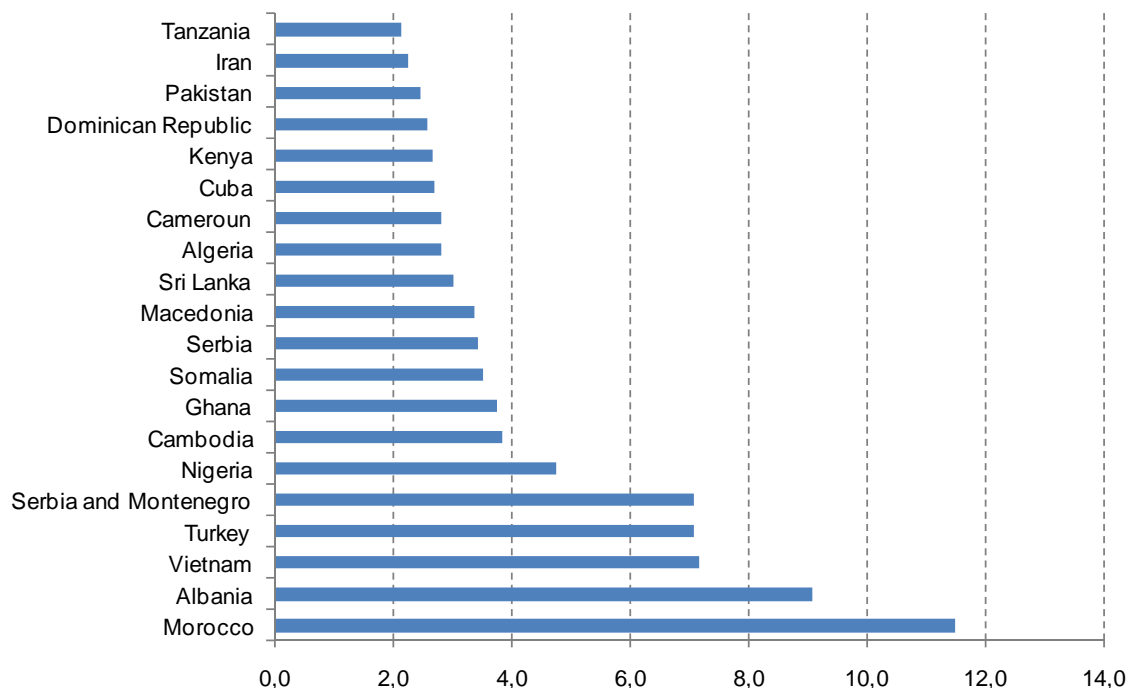
Interviewees point out a handful of typical profiles for cases that are observed on a regular basis. These observations do not indicate that all marriages involving these nationalities necessarily are marriages of convenience, but illustrate types of cases that are seen more frequently than others in applications rejected on the basis of marriage of convenience.

- For Turkey and North African countries, a common case profile is a history of a Norwegian woman who has married a younger man. Quite often, these marriages appear to be what is called a one-way marriage of convenience, meaning that the reference person believes that the relationship is genuine, while the applicant uses it as an opportunity to obtain a residence permit. UDI has unveiled a significant number of these cases at a later stage, after the applicant had obtained a permanent residence permit. After divorce from the Norwegian woman, the man's initial family from his country of origin typically applies for family reunification with him. In such cases, where an initial applicant reoccurs as a reference person in the UDI system, for example with children from before the marriage with the Norwegian woman, the initial file would be reopened and considered a case of marriage of convenience.
- Common patterns for Vietnamese applicants are also mentioned by a number of informants. A typical case is referred to as a cross marriage. In these cases, a couple who have stayed in Norway for a sufficient amount of time and obtained legal residence will divorce. The partners in this first couple will then marry one Vietnamese national each, who in turn will apply for family reunification. Once in Norway, all four (or together with additional couples) live at the same address. The first couple may still exist, and the new spouses may also be a couple – even if cross married to the first couple.
- The last variation of these typical cases concerns applications from Somalis who have married a Somali (or a partner from another African country of origin) with legal residence in Norway after a very short period of acquaintance. In these cases, the spouses have received each other's contact details from a relative or a friend and have not met before the wedding. While investigating applications, officials may find that the reference person is in another relationship – while claiming that he or she has married the applicant and intends to embark on marital life with this person.

⁷ There were an additional 61 nationalities with at least 20 applications, but where no marriage of convenience decisions were made

Five nationalities distinguish themselves by a particularly high share of rejections based on marriage of convenience: Morocco (12 percent), Albania (9 percent), followed by Vietnam, Turkey, Serbia and Montenegro (7 percent). Further, we observe that Turkey, Morocco, Vietnam and Somalia rank as top three when it comes to the number of negative decisions based on marriage of convenience.

Figure 2.3 Percentage of applications which were rejected based on marriage of convenience in the years 2007-2009. Only nationalities with more than 20 applicants. Countries with highest share of marriage of convenience decisions



Source: UDI

The nationalities with at least 20 applicants which had the most rejections of family reunification applications based on marriage of convenience in absolute numbers are ranked as follows: Turkey, Morocco, Somalia, Vietnam, Pakistan, Serbia, China, Russia, Iran, Sri Lanka, Serbia and Montenegro, and Nigeria.

Gender of the applicant

There are great variations in the distribution of gender across countries of origin. The majority of the applicants are women; they represented 76 percent of applicants in 2009. The percentage of rejected applications is different for male and female applicants. Even though the majority of applicants are women, the absolute number of rejections for men and women is about the same.

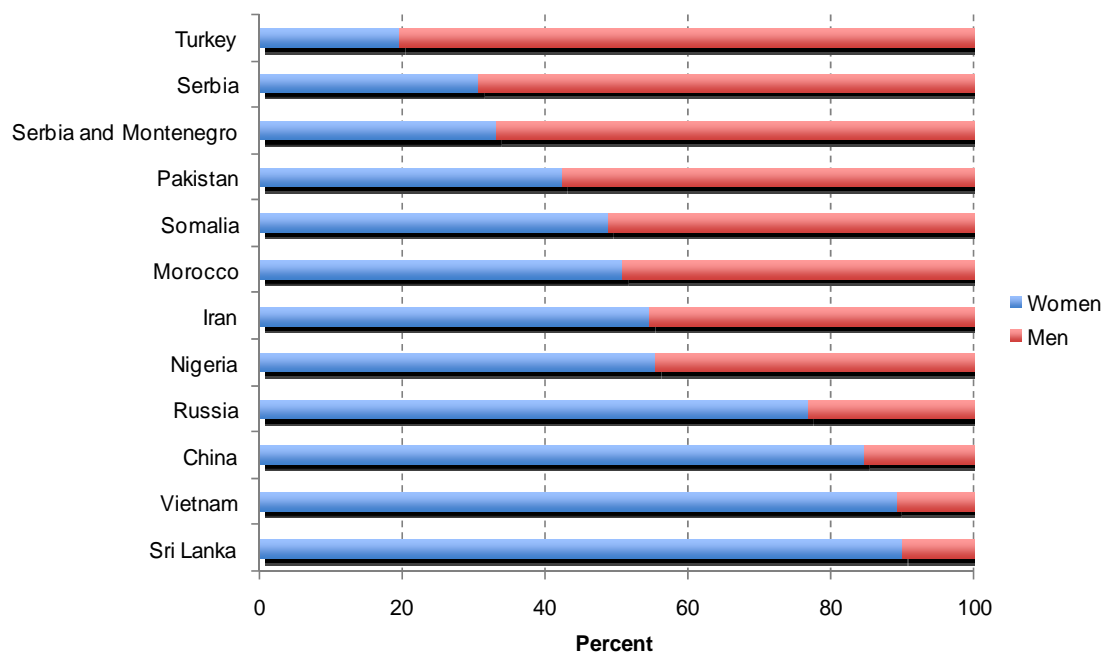
Figure 2.4 shows the gender distribution of rejections based on marriage of convenience decisions, according to both gender and nationality.

Sri Lanka, Vietnam, China and Russia are distinguished by a high proportion of female applicants among those rejected on the grounds of marriage of convenience (from 90 to 77 percent). On the other end of the scale, among the applicants from Turkey rejected for this reason, only 20 percent are women. Serbia and Serbia/Montenegro are characterized

by a high share of male applicants rejected on the grounds of marriage of convenience compared to female. For most countries, however, the distribution of gender is relatively even, as is the case for instance for Morocco and Somalia.

This largely matches the typical case patterns described above, except in the case of Vietnam, where the rejected applicant is most frequently a woman. If the observed pattern of cross marriages for Vietnam had been representative, one might have expected to see an equal share of men and women among the rejected applicants.

Figure 2.4 The proportion of men and women among the applicants with rejections based on marriage of convenience



Source: UDI

Differences in age

The age difference between the spouses is one of the criteria which can trigger suspicion of a marriage of convenience. Table 2.2 summarizes the average age difference between the applicant and the reference person, depending on gender and decision made. If the number is negative, the applicant is younger than the reference person.

The average female applicant is 7 years younger than her spouse. In the cases in which a marriage of convenience decision was made, she is on average 13 years younger. When the applicant is male, on average the couple is of the same age. In cases where a marriage of convenience decision was made and the applicant is male, he is on average 8 years younger than her. We see that in marriage of convenience cases, the age difference is bigger than in other family reunification cases.

Table 2.2 Average age difference – by gender of applicant

	MoC decisions	Not MoC decisions	All applications
Women	-12.66	-6.7	-6.75
Men	-7.87	0.45	0.17

History of reference persons from other cases

In 5 percent of the applications for residence permits on the basis of marriage, the reference person has already been a reference person for someone else in the past. In the cases rejected on the grounds of marriage of convenience, this applies to 11 percent of the reference persons.

Among the marriage of convenience cases, there is no reference person that appears more than twice in earlier rejections, while among the other family reunification cases several reference persons have appeared three, four or five times earlier.

2.3 LONGITUDINAL ANALYSIS OF INDIVIDUAL TRAJECTORIES

In order to get a broader picture of the scope of undiscovered cases of marriage of convenience, it is interesting to explore the marriage trajectories in cases where residence permits were granted on the basis of marriage. While this is far from an exact science, patterns in divorce rates (e.g. a “jump” after 3 years – the time required in Norway to obtain a permanent residence permit) could be an indication of opportunistic use of marriages. It should be noted that this approach could give an exaggerated picture, as far from all divorces reflect a marriage of convenience in the first place. On the other hand, it would not cover cases where a marriage continues on paper but not as a real marriage after a residence permit, or even citizenship, has been granted.

We have conducted an analysis of all marriages where one part of a couple received a residence permit based on marriage in the course of 2002-2004. Each couple was followed for 24 quarters, or six years. This is two and a half years longer than the normal time period required to qualify for a permanent residence permit and should provide sufficient lag to make the analysis robust on the time aspect if obtaining a permanent residence permit is a realistic indicator for when a marriage of convenience would typically be dissolved. For each quarter after the residence permit was granted, information about what share of marriages were dissolved and what share continues to exist was analyzed. The analysis can be broken down into whether the reference person (spouse) is an immigrant, of the same or a different nationality than the applicant, or of Norwegian origin. This data is compared to divorce rates by quarter following entering marriage for all marriages in Norway in the time-period 2002-2004. Based on this, we are able to compare the accumulated divorce rate over a longer time period among immigrants and others.

The analysis shows that for immigrants with the same national background, divorce rates are lower than average. For couples where the reference person is Norwegian, or an immigrant marrying an immigrant of another nationality, divorce rates are higher, and increase by three percentage points after the 16th quarter (3 years and 4 months). This constitutes about 110 persons per year.

Figure 2.5 illustrates the share of marriages dissolved each quarter following the decision to grant a residence permit, compared to all marriages lasting a minimum of two quarters. On average, a couple has been married for six months when a residence permit is granted.

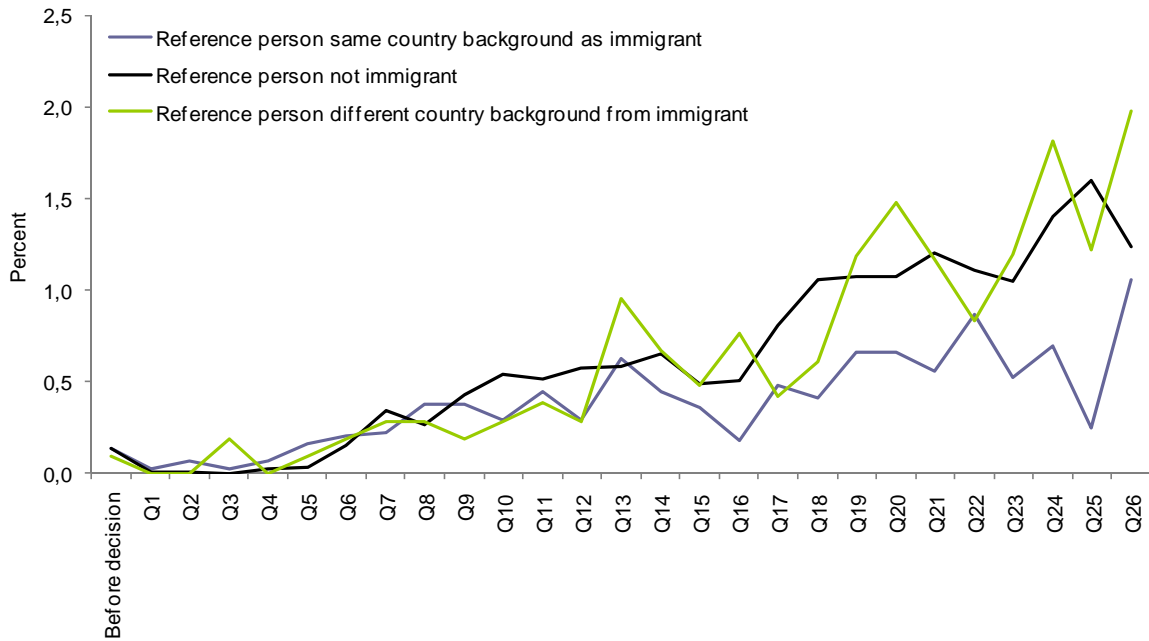
Figure 2.5 Divorce rates in the general population and among immigrants



Source: SSB

Figure 2.6 illustrates divorce rates by quarter for three different types of marriages: where the reference person has the same country background as the applicant (blue line, bottom), where the reference person is not an immigrant (black line, middle), and both are immigrants but with different national backgrounds (green line, top).

Figure 2.6 Divorce rates in three groups having been granted family reunification



Source: SSB

It should be noted that transnational marriages in general have a higher divorce rate than marriages between parties with the same nationality. Between Norwegian women and men from Asia and Africa, divorce rates are higher than average, while divorce rates between Norwegian men and immigrant women are somewhat lower (Daugstad 2006). The rates also vary with the length of the marriage (rates increase after three years). Since the number of individual cases in each nationality group is relatively small in our sample, we are not able to make meaningful observations by nationality. Such an analysis would not be statistically robust and would also be at odds with the anonymity of the inquiry.

The hypothesis for our longitudinal analysis was that actual marriages of convenience might be more likely than other marriages to show a spike in divorce rates after the minimum period of residence required in order to obtain a permanent residence permit. Following this logic, the analysis may be more useful in indicating an upper limit for the number of undiscovered marriages of convenience than a lower one. This is because there may be a number of other explanations for divorce apart from the marriage being one of convenience, especially in light of the fact that divorce rates generally tend to increase after three years. On the other hand, there might also be actual marriages of convenience where the couple stays married, either in wait of obtaining citizenship after seven years, or by staying married on paper while dissolving marital life in practice. In other words, this analysis could indicate that around 110 actual marriages of convenience are entered per year in addition to what appears in official statistics. The figure could however be both lower and higher in reality.

3 LEGAL AND REGULATORY FRAMEWORK

3.1 INTERNATIONAL PRACTICE AND DILEMMAS

3.1.1 *Assessing the degree of convenience*

The legal concept of marriage of convenience is hard to pinpoint. Most marriages worldwide are situated somewhere along a scale between on the one hand romance and intimate knowledge of each other and on the other material benefits including land, assets or status. Cultural variations are an important part of this, and the concept of love as a basis for marriage is typically more prevalent in western countries, while marriage as a practical arrangement may be the norm in other cultures. When considering whether a marriage is “real”, it is assessed against what would be considered a normal marriage and motivation for marriage in the culture of the spouses in question.

To assess the nature of a marriage, it can be useful to distinguish between two aspects: (i) the motives to enter a marriage and (ii) the consequences resulting from the marriage. Examples for marital motives include love, economic benefits, residence/citizenship status improvement or compliance with parental or social pressure. Examples of marital consequences include co-habitation, mutual responsibility and childbearing. Both dimensions can be evaluated separately, by the actors themselves and/or by the state/judicial authorities, using criteria such as “legality”, “authenticity”, and “voluntariness”.

Most immigration legislation speaks of convenience in cases where the *sole* or *primary* purpose of the marriage is access to a residence permit through family reunification and/or acquisition of citizenship.

3.1.2 *Reconciling diverse public policy objectives*

From a public policy point of view, the identification of marriages of convenience raises important legal and ethical questions in terms of privacy rights (with the need to respect private and family rights recognised by law), non-discrimination (between types of couples, genders and/or nationalities, with the risk of stigmatisation of certain groups), and proportionality and cost-effectiveness of public action (the sum of public resources invested in the activity compared to the results from the action and possible trade-offs with other activities).

Rules set for marriages of convenience may have spill-over effects and/or unintended consequences affecting wider parts of society. For instance, a toughening of conditions for family reunification may dissuade a number of persons from entering such marriages, but it may also have the opposite effect of pushing a number of mixed couples into marriage – although they might have preferred not to get married – as a way of pursuing their relationship in the absence of other legal ways to remain together and/or co-habit. To the extent that such relationships can be considered more fragile, they may result in a higher rate of divorce, hence raising the suspicion – if one looks at statistics and not at individual cases – that such marriages were marriages of convenience in the first place. In some cases, persons/couples may also be led to relocate between countries to pursue their relationship.

Overall, the combination of rules and practices creates different incentives for individuals/couples. How “easy” is it to enter a marriage of convenience? What are the “risks” and “benefits” associated with such marriages? The answers will vary depending on the individuals and the countries concerned.

3.1.3 *International and EU law: a binding framework*

Relevance of international and European human rights law to marriages of convenience

Norway and the four comparison countries in this analysis are all bound by human rights obligations, which apply to the area of immigration law. Such obligations are the International Covenant on Civil and Political Rights (ICCPR) article 17, and the European Convention on Human Rights (ECHR) article 8. Both establish a core protection of the right to family life, but open for interference in the sphere of family life under certain conditions.

The legal concept of family life has evolved in the course of the lifetime of the ECHR, having taken account of social and legal changes in the member states. The paramount consideration by immigration authorities when considering potential marriages of convenience in the context of immigration law is whether “family life” in the sense of the human rights obligation exists between the applicant and the reference person (article 8 (1)). According to the case law of the European Court of Human Rights (ECHR) the concept of family life always applies to marriages, but it is required that the marriage is lawful and genuine. Central in this respect is whether there are close and personal ties between the two parties. As a general rule cohabitation is not a sine qua non of family life. However, a marriage that has been entered into only in order to avoid immigration rules may fall outside the sphere that is protected by these human rights obligations.

In cases where it is revealed that a residence permit was granted on the basis of a marriage of convenience, leading to considerations of revocation or withdrawal of a residence permit, ECHR article 8 (2) may prove relevant. In such cases, the state must always consider whether family life has been established between the reference person and the applicant after the marriage was contracted. Family life in the sense of the ECHR may have come to exist even though a parallel (or the original) motivation for the marriage was that of obtaining a residence permit. If family life has come to exist, despite former characterization of the marriage as one of convenience, the residence permit may only be revoked following a balancing test as to whether such revocation is “necessary in a democratic society” for the objective of safeguarding the interests which are explicitly included in article 8 (2). Within the area of immigration law, the contracting states to the ECHR have been afforded a wide margin of appreciation as to the application of the balancing test that follows article 8 (2).

Evolving EU law - balancing individual rights and collective goods

Rules and regulations on immigration based on family reunification and marriage have evolved in response to changes in general immigration rules as well as reactions from the public. Progress in the free movement of people within the EU and the gradual establishment of a common EU migration policy requires national authorities to adapt their rules and practices. Two pieces of EU legislation have contributed to a greater approximation of national rules related to “marriage migration” in recent years:

- Directive 2003/86/EC on the right to family reunification harmonizes provisions regarding the rights of third-country nationals legally established in an EU Member State to family reunification with a third country spouse. Article 16.2.b foresees in particular that Member States may reject an application for entry or residence if “it is shown that (...) marriage, partnership or adoption was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State”.
- Directive 2004/38/EC harmonizes provisions related to the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Article 35 of this Directive stipulates that Member States may “adopt

the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience”.

Until recently, many countries required non-EU spouses to have residence rights in another EU state before they could get a permit in the new one. That made it easier for countries to deport spouses suspected of marrying EU citizens for the sole purpose of immigrating to the EU. In a landmark ruling (“Metock” case C-127/08), the European Court of Justice found that this requirement violated the rights of the spouses. There have also been complaints that some countries require EU citizens to submit unnecessary documents when they apply for residence.

In December 2008, the European Commission reviewed compliance with the 2004 Directive on free movement and concluded that many national laws transposing the Directive were not correct (European Commission 2009a). In line with the ruling from the Court, the Commission considered that a number of rules meant to prevent marriages of convenience were in fact violating the right to live and move freely in the EU of non-EU citizens having married EU citizens.

In July 2009, the Commission published a new set of guidelines clarifying residence rights under EU law (European Commission 2009b). In particular, the new guidelines foresee that the following principles and rights apply to non-EU spouses of EU citizens residing in a Member State other than their own:

- In principle, all marriages validly contracted must be recognized for the purposes of the application of the Directive.
- Non-EU spouses have a right to obtain an entry visa to the EU-country in which his or her EU citizen spouse resides.
- Union countries can investigate suspected marriages of convenience, but such investigation must be based on a well-defined set of criteria. Systematic checks may not be conducted. In addition, all relevant circumstances in each individual case must be investigated where such suspicion arises.
- The rights conferred by the Directive do not apply in cases where the intention of the non-EU citizen was to abuse those rights. A marriage of convenience is one where the marriage was contracted with the sole purpose of enjoying rights of free residence and movement which that person would otherwise not hold (this definition is in essence identical with that contained in Directive 2003/86/EC article 16 (2)(b)).
- People can be deported if they present a threat to the country's “fundamental interests”. Free movement can also be restricted on the grounds of public security.

Recent legal and case-law developments essentially apply to European citizens who have moved to another European country, and may therefore result in differences of treatment between groups of the population. For instance, a German citizen living in France may have more chances of getting his/her non-EU spouse a residence permit valid for five years than a French national whose spouse may need to renew his or her residence permit every year (GISTI 2009).

All EU countries are expected to comply with new EU rules. For instance, Denmark introduced several changes to its regulations for legal residence, genuine and effective residence, marriage and cohabitation following the “Metock case”. The Guidelines of the Commission described above are also meant to help clarify applicable rules. Should infringements persist, the Commission might bring Member States to the European Court of Justice.

Norway, not being a member of the EU, is not formally bound by the EU legal framework within immigration law. However, legal developments in Norway over the recent years

show a clear tendency towards participation in the common EU approach to immigration. This has been formalized through Norway's participation in the Dublin and Schengen agreements. Directive 2003/86/EC (on family reunification) has not been implemented in Norwegian domestic law. However, it has been considered as important in the development of the current legal framework in Norway, based on an objective to harmonize Norwegian law with that of the EU.

The Guidelines of the EU Commission list the following non-exhaustive criteria as relevant in the consideration of whether the marriage is one of convenience in the sense of article 35 of the Directive (the criteria are direct quotations from the guidelines):

- The couple has never met before their marriage;
- The couple are inconsistent about their respective personal details, about the circumstances of their first meeting, or about other important personal information concerning them;
- The couple do not speak a language understood by both;
- Evidence of a sum of money or gifts handed over in order for the marriage to be contracted (with the exception of money or gifts given in the form of a dowry in cultures where this is common practice);
- The past history of one or both of the spouses contains evidence of previous marriages of convenience or other forms of abuse and fraud to acquire a right of residence;
- Development of family life only after the expulsion order was adopted;
- The couple divorces shortly after the third country national in question has acquired a right of residence.

Mirroring these criteria, the Guidelines also identify a set of criteria which are indicative that the marriage is unlikely to have been contracted with the sole purpose of abusing Community rights (also direct quotations from the guidelines):

- The third country spouse would have no problem obtaining a right of residence in his / her own capacity or has already lawfully resided in the EU citizen's Member State beforehand;
- The couple was in a relationship for a long time
- The couple had a common domicile / household for a long time
- The couple have already entered a serious long-term legal / financial commitment with shared responsibilities (mortgage to buy a home, etc.);
- The marriage has lasted for a long time.

3.1.4 Human rights in the context of marriages of convenience

The definition which follows Directive 2003/86/EC on family reunification provides a strict understanding of what constitutes a marriage of convenience: it is required that the authorities establish that the "sole purpose" of the marriage was to enable the applicant to enter into or reside in the member state. This is a narrower definition than that which follows from Norwegian and Danish law, on whose basis the authorities must only establish that the residence permit was a "main" or "prominent" motivation. Dutch, Swedish and German law, on the other hand, is in line with the EU directive.

No cases relating to the right to family life and marriages of convenience have actually been tried by the ECHR. In light of the interpretative method applied by the court it is

however likely that the understanding of marriage as family life when considered against parallel or ulterior motives will be in line with that of the EU directive and the strict interpretation of the European Court of Justice. Thus, rejections of applications for family reunification or renewal of such permits with reference to the Danish and Norwegian definitions may constitute interference in the convention sphere of family life.

In the case of such interference, the states must consider the legitimacy and proportionality of the intervention according to ECHR article 8 (2). Denmark's and Norway's reactions when a de lege marriage of convenience has been established are different in this respect. Whereas Denmark merely rejects the application, Norway also expels the applicant permanently from the realm, and registers the person in the Schengen Information System, effectively an expulsion from the Schengen area as a whole. It is not known whether the Norwegian reaction has had any preventative effect on fraudulent cases within the immigration context.

3.2 REGULATORY FRAMEWORK IN NORWAY

3.2.1 *Family reunification*

The legal and regulatory framework relating to family reunification in Norway is found in the Immigration Act (enacted by parliament) and in the Immigration Regulations (enacted by the Ministry of Labor and Social Inclusion, now administratively sorted under the Ministry of Justice and the Police).⁸ A complete revision of the Act and the Regulations came into force 1 January 2010, replacing the older Immigration Act of 1988 and the Immigration Regulations of 1990. With the revision, a definition of marriages of convenience was included in the Act (section 40, paragraph four). Further rules and regulations are given by instruction from the Ministry of Justice. Jurisprudence is also relevant when considering the law within the area. UDI also issues circulars regarding the applicable law and practice, which are applied by case workers on a case to case basis.

In order to enter into marriage in Norway, it is required that both parties hold legal residence in the country.⁹

The requirements for obtaining various forms of residential status in Norway, including naturalization, are important when considering the phenomenon of marriages of convenience. A residence permit based on family reunification is valid for one year, after which it must be renewed. Having held such a permit for three years, the foreigner may apply for a permanent residence permit. Until the permanent residence permit has been issued, it is required that the marriage with the reference person persists and that the parties live together. Once he/she has obtained a permanent residence permit, the foreigner is no longer required to uphold the requirements of family reunification in order to remain in Norway. If such a permit is granted, the foreigner will no longer be dependent on the relationship to the reference person.

A foreigner who has come to Norway on the basis of family reunification and who renews his or her temporary permit for subsequent years may at the earliest obtain naturalization after 3 ½ years.¹⁰

⁸ Lov om utlendingers adgang til riket og deres opphold her (utlendingsloven) LOV-2008-05-15-35, Forskrift om utlendingers adgang til riket og deres opphold her (utlendingsforskriften) FOR-2009-10-15-1286.

⁹ Marriage Act section 5 a

¹⁰ Lov om norsk statsborgerskap (statsborgerloven) / Citizenship Act section 12 paragraph one.

Norway has transposed Directive 2004/38/EC through the regulations in Chapter 13 of the Immigration Act, which contains special provisions for foreigners who come under the EEA Agreement and the EFTA Convention. Section 110 second paragraph stipulates that the chapter applies both to family members of EEA citizens as well as to family members of Norwegian citizens who follow or are reunited with that reference person after he or she has made use of the right to free movement in another EEA country.

In the parliamentary debates prior to the transposition of the Directive, a minority consisting of representatives from the Norwegian Progress Party made the formal suggestion that the proposition should be returned to the Government in order to investigate further the extent to which the Metock judgment would affect Norwegian domestic policy on asylum and family reunification.¹¹ However, no specific arguments relating to marriages of convenience were put forward by this minority group. As the directive was fully and finally transposed by the enactment of Chapter 13 of the 2008 Immigration Act, the ruling of the Metock Judgment with the subsequent EU Guidelines applies to applications presented under this chapter.¹²

3.2.2 *What defines a marriage of convenience?*

Legal definitions

Marriage of convenience (“pro forma”) is defined in section 40, paragraph four of the Immigration Act as a marriage in which it is *most likely* that the *main objective* of the marriage has been to establish a basis for residence in Norway for the applicant. Marriages of convenience legally constitute grave breaches of the Norwegian Immigration Act, and may lead to criminal prosecution of both the applicant and the reference person. The applicant may also have his or her residence permit revoked, and be expelled from Norway and the Schengen Area.

Like other requirements for family reunification, the reality of the marriage is a precondition for granting a residence permit based on the family tie. This follows directly from section 40 paragraph four of the Immigration Act, which states that a residence permit may be denied if it is *most likely* that the *main objective* of the marriage has been to establish a basis for residence in Norway for the applicant. Herein lies the legal definition of marriage of convenience in Norwegian immigration law. This rule must be read in conjunction with section 40 paragraph three of the Immigration Act, which requires that the spouses shall live together in Norway. Furthermore it must be read in conjunction with section 40 paragraph six third sentence, following which a residence permit may be denied if it is most likely that the reference person intends to continue the relationship with a former spouse regardless of having married the applicant.

According to the definition, obtaining a residence permit in Norway must be established as the “main” (“hovedsakelige”) objective of entering into the marriage. Thus it is not required that the authorities prove that a residence permit was the *sole* objective of entering into the marriage, which is the requirement following from EU law. Prior to the Supreme Court ruling in Rt 2006 s 1657, rendered 15 December 2006, it was required that the marriage was more or less void of any factual marital intentions in order to be classified as a marriage of convenience.¹³ The white paper NOU 2004:20 suggested narrowing down the

¹¹ Ot. prp. No. 72 (2007-2008), Inst. O. No. 33 (2008-2009) page 3.

¹² See also Inst. O. No. 33 (2008-2009) page 2 where the majority in the Parliamentary Committee stated that it was aware that the EU Commission would develop guidelines on the interpretation of the Directive in light of the Metock Judgment during the course of 2009.

¹³ NOU 2004:20 subsection 8.5.4.2.

question at hand to what could be identified as the main objective of the applicant, a suggestion which was picked up by both the majority and the minority in the 2006 ruling. Although it is stated in Ot.prp. 75 (2006-2007) that the new provision is narrower and stricter than previous law, the new provision had already been applicable law for half a year based on the 2006 Supreme Court ruling.

Still, it is not sufficient to prove that obtaining a residence permit has been *one* of many objectives. In the preparatory work, specific mention is made of cases where only the applicant, not the reference person, has an (isolated or combined) objective of obtaining a residence permit. It is stated that as long as the marriage is also intended to have some degree of reality, a motivation on the part of the applicant to also improve his or her living standard should not lead to a conclusion that the marriage is a marriage of convenience.¹⁴

Notwithstanding section 40, paragraph four of the Immigration Act, the EU definition of marriages of convenience ("sole objective") applies to applications presented by third country nationals married to EEA citizens in Norway or married to Norwegian citizens who return to Norway after having made use of the right to free movement within the EEA.

Based on the wording in section 40 paragraph four, the basis for the assessment of the nature of the marriage are the factual circumstances which were present at the time when the marriage was contracted. Subsequent developments in the facts of the case which may shed light on the nature of the marriage should however also be taken into consideration.¹⁵ As a consequence of the latter point, immigration authorities must consider the facts of the case as they appear when the decision on the application is made. Discussions are ongoing as to whether this implies that it is in fact the time of decision and not the time of marrying that constitutes the basis for review.

Criteria for considering potential marriages of convenience

In 2006, the Norwegian Ministry of Labor and Social Affairs provided an overview of the most significant criteria to consider under the definition of marriages of convenience contained in section 40, paragraph four of the Immigration Act.¹⁶ The instruction was updated in 2010 by the Ministry of Justice, now responsible for immigration affairs. The list is based on jurisprudence, the preparatory work to the 2008 Immigration Act and on administrative practice, and provides the following, non-exhaustive list, of main elements to consider:

¹⁴ Ot. Prp. 75 (2006-2007) s 190.

¹⁵ Rt 2006 s 1657 paragraph 46.

¹⁶ Instruks 2006 AI-8/2006 "Instruks for å hindre familiesameining på grunnlag av proforma ekteskap/partnerskap".

Box 3.1 *Criteria to assess marriages of convenience*¹⁷

- Contact between the spouses, e.g. for how long they have known each other, including the character and intensity of the contact
- The respective parties' knowledge of the other spouse
- Whether the information given by the parties with relation to how they met, how they got married and their subsequent contact is congruent
- Whether the spouses may communicate in a common language
- Age difference between the parties
- Whether payment has been provided for the marriage, and whether such payment follows local traditions
- Whether the marriage is clearly atypical compared to marital traditions in the parties' country of origin
- Whether circumstances indicate that the marriage is based on coercion or exploitation, e.g. where the parties are unequal in their mental development
- Whether the reference person or close family members of the applicant have a marital history which gives rise to suspicions regarding marriages of convenience
- Whether the applicant has applied for a residence permit on other grounds before marrying the reference person, and whether the marriage has been concluded in close proximity to a rejected application for residence permit for the applicant.
- Whether the parties' have a former spouse or partner who is going to live with them

Source: Norwegian Ministry of Justice

The criteria are not listed in any order of priority, and the list is non-exhaustive. Application of the criteria is made on a case-by-case basis, and must take into account the cultural background of the parties, including marital traditions.

It is explicitly stated in the *travaux préparatoires* to the Immigration Act that for certain nationalities there may be cultural reasons for lacking prior contact between the parties or for a low level of knowledge of the spouse. It is also stated that in cases where money has been transferred between the parties, this does not necessarily indicate that the marriage is of convenience if payment of dowry is part of the marital traditions of the parties. However, if the sum is substantially above what would be considered normal in the culture in question, this indicates that the marriage is of convenience.¹⁸

3.2.3 *Requirements for family reunification on the basis of marriage*

Although none of the basic requirements established in Norway have been introduced with the objective of preventing marriages of convenience, these requirements are relevant because they may influence the extent to which a marriage of convenience constitutes a viable channel for immigration. In Norway, a person is generally entitled to a family immigration permit if he or she otherwise meets the requirements as provided in chapter 6 of the Immigration Act and is married to or the registered partner of

¹⁷ G1-01/2010 "Instruks om proforma ekteskap, jf utlendingslova § 40 fjerde ledd", January 21st 2010.

¹⁸ Ot. Prp. 75 (2006-2007) s 190.

- a Norwegian or Nordic citizen living in Norway or going to live in Norway
- a foreigner with a permanent residence permit in Norway,¹⁹
- a foreigner holding a permit which may lead to a permanent residence permit, or who will be granted such a permit, or
- a foreigner who holds a residence permit based on a temporarily limited, non-individual protection permit (due to collective flight from the home country, as opposed to individual asylum).²⁰

In addition, the reference person must as a main rule demonstrate that he or she is able to provide financial support (subsistence requirement), specifically a total income corresponding to salary grade eight in the pay scale for Norwegian state employees - currently NOK 225 400 / year.²¹ Exceptions to this rule can be made, such as in the case of particularly weighty humanitarian grounds.

In certain cases of family establishment (i.e. where the family relation was established after the reference person moved to Norway) it is also required that the reference person has worked or followed education in Norway for a period of four years.²² This rule applies if the reference person is residing in Norway on the basis of asylum (refugee status),²³ as a quota refugee,²⁴ on the basis of collective flight,²⁵ on the basis of particular humanitarian grounds²⁶, or on the grounds of family reunification. It also applies if the reference person has obtained a permanent residence permit on the basis of any of these grounds.²⁷ This rule was established in order to reduce the number of unfounded asylum applications to Norway, and in order to act as an incentive towards integration.²⁸ Certain exceptions apply.

Another requirement is that the parties must, as a main rule, live together.²⁹ In the context of marriages of convenience, this requirement is seen as practical in the sense that an application may be rejected, or a permit withdrawn, on the basis of the lack of cohabitation.³⁰ In such cases, it is not necessary to consider whether the marriage is one of convenience, reference can merely be made to the requirement of cohabitation.

In instances of polygamous relationships, only one of the marriages may constitute grounds for family reunification in Norway.³¹

According to section 103 of the Immigration Act, the home of the immigrant may be investigated in cases where there is reason to believe that the immigrant has provided false information to the immigration authorities. It must be more likely than the opposite

¹⁹ Section 62.

²⁰ Section 34.

²¹ http://www.regjeringen.no/upload/FAD/Vedlegg/Lønns-%20og%20personalpolitikk/Lonnstabeller/A-tabell_2010.pdf

²² The Immigration Act section 40a chf Immigration Regulation section 9-1.

²³ Section 28.

²⁴ Section 35 third section.

²⁵ Section 34.

²⁶ Section 38.

²⁷ Section 40a.

²⁸ AID-2009-07-14 (July 14, 2009).

²⁹ Section 40 paragrafj three.

³⁰ Ot. Prp.75 (2006-2007) pkt 9.6.2.1.

³¹ Section 40 paragraph six.

that this is the case. The immigrant must furthermore consent in writing to such control. In cases where the immigrant has not consented, a court order must be provided before such controls may be made. Only in exceptional cases where the police cannot wait for a court order, which can be provided on very short notice, the chief of police or someone within the police who has been delegated the requisite competency may issue an order authorizing such home controls.

3.2.4 *The burden and level of proof*

In Norway, the burden of proof as to whether a marriage is one of convenience rests on the immigration authorities, which must establish this to be the case beyond a balance of probabilities.³² In cases where it is just as likely that the marriage is of convenience as that it is legitimate, it follows from a 2006 Supreme Court judgment that the benefit of the doubt must be granted to the applicant.³³

For reasons relating to the burden of proof of the immigration authorities, it will often be easier to react to marriages of convenience after a residence permit has been granted and the applicant has been established in Norway. If it is discovered that the parties no longer live together, which is often the case with marriages of convenience, the residence permit may be revoked on this basis without having to apply the criteria established in order to assess whether section 40 paragraph four of the Immigration Act applies.

The immigration authorities must show that it is more likely that a marriage is of convenience than that it is not in order to reject an application on these grounds. This could be seen as a slim margin when considering the severity of the consequences for individuals should an application be rejected. As will be discussed in chapter four, it appears that in practice, a somewhat stricter requirement is applied. The challenge for the immigration authorities is to balance two factors: to prevent circumvention of rules without incurring disproportionately large human and material costs.

3.2.5 *Sanctions*

Once it is determined that the main objective of entering into the marriage was to obtain a residence permit in Norway, the application will be rejected on this basis. In identified "convenience" cases where a permit has already been granted, that permit will be revoked.³⁴ In addition, UDI will as a main rule initiate expulsion of the applicant from Norway and the Schengen area. The basis for such expulsion is § 66 first section litra a) second alternative.³⁵ As a main rule, a rejection based on marriage of convenience leads to a permanent re-entry ban to Norway and the Schengen area, including registration in the Schengen Information System.³⁶

In addition to the expulsion of the applicant, both reference person and applicant as well as aiders and abettors to a marriage of convenience may face criminal prosecution, although this is not the general practice. Criminal responsibility may be established when it is proven that the person with intent or grave recklessness provided false information in

³² Ibid.

³³ Rt 2006 s 1657 paragraph 36 (this is one of two Supreme Court Judgment Norway regarding pro forma, the other dating from 1926)..

³⁴ Section 63.

³⁵ See also "RS 2010-024 Utvisning etter utlendingsloven §§ 66, 67 og 68 - brudd på utlendingsloven og/eller straffbare forhold", section 5.4.

³⁶ RS 2010-024 subsection 5.4.2.2.

an immigration case.³⁷ The maximum sentence is a fine and / or 6 months imprisonment.³⁸ However, as opposed to the balance of probabilities which applies when considering the application for a residence permit, criminal conviction requires proof beyond a reasonable doubt that the marriage is a marriage of convenience. In practice, identified marriages of convenience are generally not subject to criminal prosecution.

3.2.6 Examples from the case law

The first judgment on marriage of convenience in the context of the Immigration Act was rendered in 2003. Since then, Norway has seen several city and appeal court judgments on the matter. One Supreme Court judgment has also been rendered, providing specific guidance on the matter of balance of probabilities and burden of proof relating to marriages of convenience (Rt 2006 p. 1657, above). In this case, the majority of the Supreme Court (3 out of 5 judges) disagreed with the conclusion reached by the Immigration Appeals Board on whether a marriage was one of convenience or not. The facts of the case related to a marriage between a Norwegian woman born in 1956 and a Pakistani man born in 1979. The woman had formerly been married to two Pakistani men, with whom she had five children. She had converted to Islam, and spoke some Urdu. The two got married shortly after having met in Norway.

On a general basis the Supreme Court stated that the intentions for entering into marriage as well as the forms of living as a married couple may vary. On this basis, one may not conclude *ipso facto* that an atypical marriage is one of convenience in the sense of the Immigration Act.³⁹ In the case at hand, the marital intentions of the woman had never been questioned, only those of the man (the applicant). The Immigration Appeals Board referred to the substantial age difference between the parties, a proven motivation for obtaining a residence permit in Norway, the fact that the meeting between the parties had been arranged by the cousin of the applicant, that the marriage was atypical compared to the cultural practices of the husband and that the parties had only known each other for three months before they entered into marriage. The majority of the Supreme Court did not agree that these elements were sufficient in order to establish beyond a balance of probabilities that the marriage was one of convenience. The majority referred to the fact that the parties spent a substantial amount of time together after they had entered into the marriage (several months in Norway and five visits abroad, of which two visits lasted for one month, including cohabitation in Norway between the time of the Immigration Appeals Board Decision and the Supreme Court hearing).⁴⁰ It was also emphasized that the parties spoke a common language (Urdu), shared a common religion and common references to the Pakistani establishment in Oslo. In total, the majority considered that the Immigration Appeals Board had not provided sufficient evidence to establish that the marriage was one of convenience.

The Immigration Appeals Board has gained support for their view in a majority of the cases tried by the Appeals Courts and the City Courts. However, in about 10 percent of the cases, the courts have landed on a different conclusion than the administrative body. This underscores the complexity of the considerations at stake.

³⁷ Section 108 second paragraph litra c.

³⁸ Section 108 second paragraph.

³⁹ Paragraph 44.

⁴⁰ Paragraph 46.

4 PROCESS AND PRACTICE IN NORWAY

This chapter presents the process from application, via a possible appeal, to final decision across the involved actors. The review includes work methods and routines, as well as perceptions and daily practices as presented in interviews with selected officials. The main findings of this chapter are as follows:

- The instruction from the Ministry of Labour and Social Inclusion in 2006 pertaining to marriages of convenience increased the attention for and facilitated the process of dealing with possible marriages of convenience.
- The criteria for considering whether a marriage is one of convenience, also issued in 2006 (see Box 1), constitute an important tool as a list of check points for UDI officials. However, the criteria are not adapted to all situations and cases and are therefore applied with discretion across different country and cultural backgrounds.
- The necessary use of discretion as a complement to standard rules requires that the officials take a holistic approach to a case and requires a certain level of experience and capacity among officials. Formal and informal arrangements for discussing grey zone cases are in place to safeguard decisions.
- While the formal requirement for a decision is for a balance of probabilities, this requirement appears to be applied more strictly in practice. Interviewed officials state that due to the complexity of the issue and the severity of the consequences for individuals, practice is cautious with regards to meeting the requirement for a case to “more likely than not” constitute a marriage of convenience before rejecting an application on this basis.
- If other requirements for residence are not fulfilled (for example requirements for financial support or housing), a case will usually be rejected on these grounds rather than as a marriage of convenience, for reasons of process efficiency.
- First-line agencies (police and embassies) tend to believe that the phenomenon of marriage of convenience is more widespread than the number of cases actually identified by UDI. The police are closer to the applicants and get non-verbal information which may get lost when transferring case files to UDI, while UDI on the other hand must follow a strictly formal process. Some stakeholders claim there is insufficient communication between the various actors involved across institutions, and consequently a lack of shared understanding of what is required to reject an application on the grounds of marriage of convenience.
- While country-specific knowledge of culture and practice is an important basis for considering whether a marriage is one of convenience, it is difficult to strike a balance between standard procedures on the one hand and taking country-specificities into consideration on the other.

4.1 INCREASED ATTENTION SINCE 2007

The immigration authorities are responsible for detecting and preventing abuse of the Immigration Regulations. According to the Immigration Act, the responsible ministry may instruct the Directorate of Immigration in general questions about interpretation of the law, the use of discretion and prioritisation of cases. In 2006 the former Ministry of Labour and Social Inclusion (MLSI) issued an instruction to the Directorate to prevent family reunification on the basis of marriage of convenience (Instruks AI-8/06). UDI was asked to secure that the practice in family reunification cases has sufficient focus on marriages of

convenience. The ministry reminded UDI of the rules regulating the field of marriage migration and underlined that doubtful cases had to be investigated in a broad and thorough manner. Also, the criteria used to assess a marriage of convenience (see chapter 3.4.1) were listed. The instruction was renewed by the Ministry of Justice and the Police in 2010 (Instruks GI-01/2010), mainly due to the revision of the Immigration Act and Immigration Regulations, but also in order to highlight new reporting routines established by the MLSI in 2008 (letter of 19.12.2008).

The increased level of political attention to the topic most likely emanated from an assumption that the phenomenon of marriage of convenience could be on the rise, in light of restrictions in immigration policy in general, European studies referred earlier, and to some extent also from media and other public attention to the matter. Our impression from interviews is that this instruction (i) increased the attention to possible marriages of convenience in UDI, (ii) facilitated the decision process by making available relevant tools and criteria, and (iii) probably led to an increase in the number of negative decisions.

4.2 FROM APPLICATION TO DECISION

According to its own statistics, UDI rejects about two percent of the total family reunification application caseload (where marriage is the connection) on the basis of marriage of convenience. A larger amount of cases are being investigated as possible marriages of convenience but end up with approval decisions.

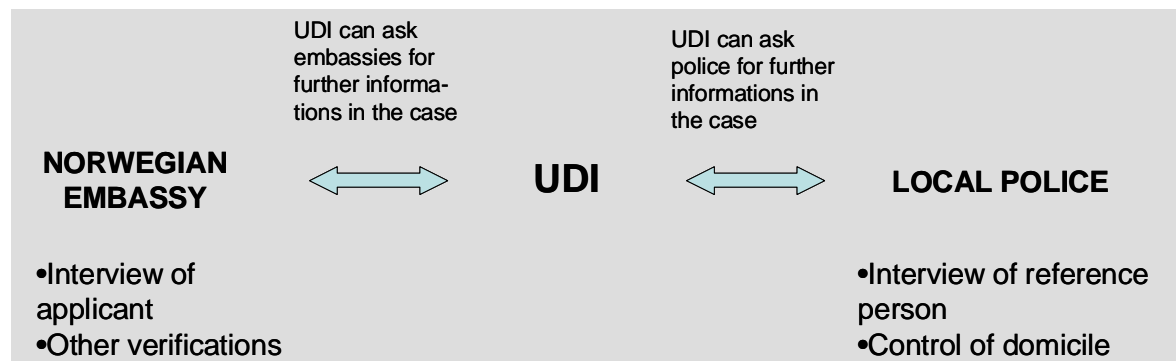
The processing of cases is presented in Figure 4.1 in a chronological manner, from receipt of the application at either an embassy or by the local police, via treatment at UDI and a possible appeal to UNE to the implementation of a decision.

First time applications and renewals are handled somewhat differently, both in terms of requirements (for example subsistence requirement not applied at renewals) and in terms of what actors are involved and at what stage in the process.

First time applications

In most of the first time applications, the applicant presents his or her application at the Norwegian embassy in the country of origin. The embassy prepares the case and conducts interviews with the applicant as considered necessary before sending the case file to the UDI. At UDI, the case is reviewed and the local police is asked to carry out an interview with the reference person. UDI can ask both the police and the embassies for further information in the case before making a decision.

Figure 4.1 Process for first time applications



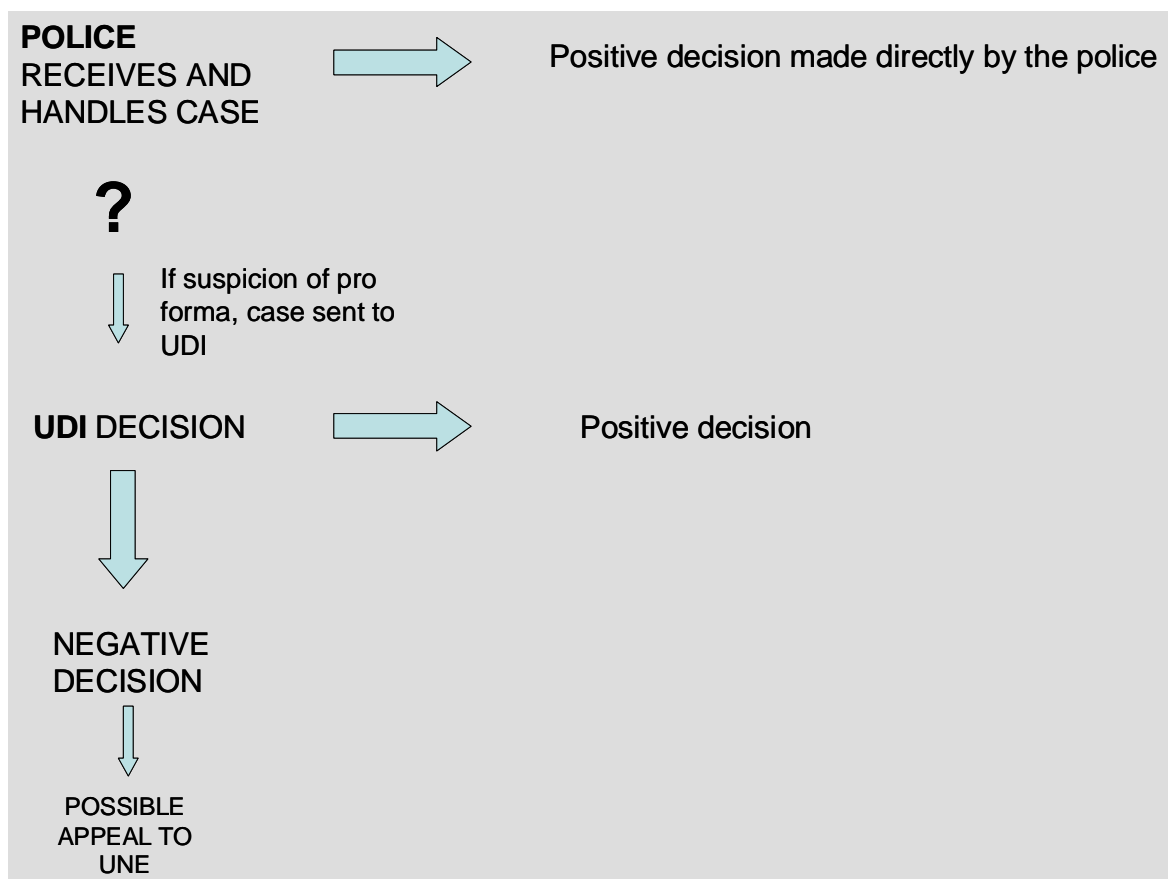
Renewal cases

In cases of an application for renewal of a permit (see Figure 4.2), the applicant will in the majority of cases reside in Norway. The application is received by the local police. The police have positive power of decision, which means that if the case meets requirements and is considered straightforward, the police can approve without sending the file to UDI.

Embassies are rarely involved in renewal cases (except for verification of documents on occasion), but the police may initiate new interviews in renewal application cases. Also, controls at home are more common in renewal cases than in first time applications (because at this point normally both spouses are in Norway). UDI can also request the local police to follow up a case with interviews or control at domicile if there has been doubt about the first permit given.

A negative decision may be appealed to UNE. There is a three week deadline for this.

Figure 4.2 Process for application for renewal of residence permit



4.3 THE ACTORS INVOLVED

Table 4.1 provides a brief overview of the various departments and bodies working with family reunification, and their respective roles.

Table 4.1 Institutional set-up

The Directorate of Immigration (UDI)	<p>UDI (“Utlendingsdirektoratet”) is Norway’s central executive and administrative body for immigration, including asylum, family reunification, work or student permits, permanent residence permits, visitor’s visas and expulsion. UDI is also in charge of reception centers for asylum seekers. UDI is one of the largest administrative bodies in Norway, with more than 1000 employees.⁴¹ UDI is divided into two main sections: the Asylum Section (“Asylavdelingen”) and the Residence Section (“Oppholdsavdelingen”). The Residence Section consists of several sub-units, including five units working with family reunification cases exclusively. A sixth unit, the Specialist Team, acts as a “mobile” unit whose work capacity is used in order to lower the number of unconsidered cases within the various case types.</p> <p>A negative decision by the UDI may be appealed to UNE.</p>
The Immigration Appeals Board (UNE)	<p>UNE (“Utlendingsnemnda”) handles appeals of UDI decisions pursuant to the Immigration Act, including asylum cases, family reunification and other cases relating to residence permits, visa, citizenship, and expulsion. Although UNE administratively sorts under the Ministry of Police and Justice, the Ministry may not instruct UNE with relation to legal interpretation or the outcome of individual cases.⁴²</p> <p>Formally, the main rule following the immigration act is that cases appealed before UNE are considered by one leader of the board and two members of the board sitting together. However, in cases which do not give rise to particular doubt (“vesentlig tvil”), the leader of the board may make the decision based on case review and precedence material prepared by UNE staff. In practice, most cases are considered in this form. In cases reviewed by the full board the applicant may be invited to give an oral statement.</p>
The Ministry of Justice and the Police	<p>The Norwegian Ministry of Justice and the Police (MoJP), through its department of Migration, is in charge of the immigration area of the Norwegian executive administration. The Ministry took over this responsibility as of 1 January 2010, previously allocated within the Ministry of Labor and Social Inclusion. The MoJP has the competency to enact and review regulations within the framework provided by the Immigration Act, such as the main Immigration Regulation of 2009 which provide detailed requirements regarding family reunification.⁴³</p> <p>The Department of Migration is in charge of co-ordinating administrative practice within the immigration field, and of representing Norway and ensuring Norwegian interests with relation to the EU and the Schengen co-operation.</p>
Norwegian embassies and consular stations	<p>Norwegian embassies and consular stations are the first bodies to receive applications for family reunification presented by the applicant, <i>i.e.</i> his or her country of origin or in a country in which the applicant has resided legally for a minimum of six months. The consular stations forward the applications to UDI. The consular stations also conduct interviews with the applicant, most on commission by UDI, but some by routine. The stations also carry out other investigative tasks such as home visits.</p>

⁴¹ UDI, annual report 2008.

⁴² In a white paper presented to the MoJP 26 april 2010, it is suggested that the MoJP shall be given competency to instruct UNE in matters not relating to asylum.

⁴³ The Immigration Act section 126 grants the Ministries such competency.

The National Police Immigration Service (PU)	The National Police Immigration Service is the Norwegian police's expertise centre and ancillary body in immigration cases. PU ("Politiets utlendings-enhet") was established in 2004 as a coordinating police body responsible for, i.e. registering and identifying asylum seekers arriving in Norway. The role of PU is to register requests of asylum seekers, to establish the identity of the applicants, to process applications to UDI and to co-ordinate the repatriation of persons whose application has been rejected. In particular, PU is responsible for the transportation of persons who are to be removed or deported from Norway, either because they lack a residence permit in Norway or because they have been positively expelled e.g. for violating the Immigration Act (i.e. marriage of convenience) or due to a criminal conviction.
The local police	The Norwegian police is divided into 27 geographical districts. Their role in family reunification cases is to receive applications, and to conduct investigative tasks by request of the UDI. In cases concerning possible marriage of convenience the local police is often requested to conduct interviews with one or both of the spouses (depending on the geographic location of the spouses), to carry through unannounced in-house examinations in cases where the UDI hold a sufficiently serious suspicion that a marriage is of convenience, and to conduct other forms of investigation on behalf of the UDI. In cases where the UDI decides to file a police report with reference to a marriage of convenience, the criminal case is investigated by the local police.
The Norwegian Country of Origin Information Centre - Landinfo	Landinfo is a country and area information service established to serve the immigration authorities. The unit is independent from both the UDI and the UNE. In cases concerning possible marriages of convenience, the unit provides information to UDI and UNE on the domestic law and practice in the country of origin, cultural practices etc. ⁴⁴ Landinfo also runs a database containing country of origin information. ⁴⁵

4.3.1 Embassies

Process

Upon receiving applications the embassies will sort cases according to internal guidelines and decide which applicants to interview. Some embassies interview all applicants, while others interview half or one third of the applicants, and give priority to cases where they suspect a marriage of convenience. A number of embassies have developed their own interview guides and templates for reporting (based on those proposed by the UDI). There is an ongoing process between UDI and one embassy in order to improve routines and templates.

Embassy staff will occasionally make notes on the cover of the case file before sending it to UDI. Such notes can pertain to factors specific to the national/cultural context, especially dynamic issues where conditions change fast or where template questions are not able to cover specific traditions or culture. There appears to be a general impression at the embassies interviewed that the number of cases rejected by the UDI is not as high as one could have expected from observations and information in the interviews. Some interviewees indicate that there is lack of clarity regarding a specific definition of what would constitute a marriage of convenience and how this is ruled on in practice.

⁴⁴ E.g. "Temanotat Tyrkia: Ekteskapstradisjoner i Tyrkia" / Marital traditions in Turkey, published 30. November 2009, available at www.landinfo.no

⁴⁵ www.landinfo.no

Resources

In countries where the caseload is relatively high, experience and attention at the embassies is obviously higher than at embassies with only a limited number of cases. According to UDI, many embassies do not have sufficient human resources to investigate cases and carry out interviews.

Certain embassies also cover several countries, or share responsibilities with other Scandinavian countries. In these embassies interviews of applicants are rarely carried out, if ever.

Trends and challenges

In some countries, typically in North Africa, it can be difficult to distinguish between forced marriages and marriages of convenience. The marriages may have been set up in order to give the applicant access to Norway and may seem like an equal contract between the spouses. However, the reference person may be subject to social and cultural pressure, and does not necessarily know that he or she can refuse to contract the marriage. In these cases, there is often a significant amount of money involved. Interviewees also report that some of the applicants appear prepared for the interview, and generally answer “I don’t know” to any questions beyond the standard ones.

4.3.2 Local police

Process

The police receive and prepare the application for family reunification on the basis of marriage in cases of renewal and may interview the reference person for new applications upon request from UDI. In the first case, more careful review will typically be carried out if the applicant comes from a country from which the incidence of marriages of convenience is high, if there is a large difference in age of the spouses, if they cannot communicate in a common language, or if the applicant is a former asylum seeker. On occasion, the front desk officers receiving the applications can provide additional insights. For example, there have been cases where the applicant did not remember the spouse’s full name when filling out the application form. The police may also receive tip-offs from the public.

House visits are often carried out prior to interviews, and according to interviewees those tend to provide more information than interviews, in terms of assessing whether a couple lives as husband and wife. Examples include cases where the police find that the spouses do not live at the same address or that the applicant has a separate apartment in the basement. Both according to the current and the previous immigration act domicile controls may only take place with the consent of the person in question, following a court order, or - in exceptional circumstances - a decision by the local Chief of Police, or someone within the police with delegated competency (new in the 2008 Act). Interviews with different stakeholders show, however, that there is some lack of clarity as to at what point consent is to be obtained. According to the police, no prior arrangements are necessary as long as consent to enter is provided at the door. Clearly, the value of house controls would diminish should consent have to be provided in advance, as the couple would then have the opportunity to prepare for the visit. On the other hand, one could question the voluntary nature of a consent provided at the door when the applicant or reference person may suspect that denial of consent would affect the final decision.

The police also carry out interviews. As a general rule, interpretation services are not offered by the police. If necessary, a translator must be provided by the applicant, along with a declaration that the interpreter has no conflicts of interest regarding the outcome of the case.

The police use their own report template based on the example from UDI. When the report is submitted to UDI, the latter can (after a first assessment) return the case and ask the police for further investigation or check details in a case. This is however not done very often, according to interviewees from the police.

Resources

Investigating marriages is a time consuming process. While regular renewal applications usually take four months to process at the police, cases where doubts regarding the legitimacy of the marriage arise may take up to six months. In a few cases, the police have held couples under observation for an extended period of time. This is not done often as it is time consuming. At the police districts with the largest number of cases, several police officers are involved in reviewing and investigating. Typically, there is no dedicated personnel for marriage of convenience cases.

Some police districts with larger amounts of family reunification application cases have trained other local police departments and assisted with questionnaires and templates. Competence in the field has improved over the last years, and several districts have developed their own routines. Still, the level of competence seems to correlate with the number of cases received every year in the specific police districts.

Trends and challenges

The local police report to have observed the phenomenon of marriage of convenience since the beginning of the 1990s. In the most affected police districts, the police started working with the challenge in a more systematic manner from the mid-1990s. A number of interviewees state that the process has gradually become more demanding, in particular as the reference person more often has the same immigrant background as the applicant, with the same traditions and custom, making it difficult to judge what constitutes "normality". Also, when the reference person has an immigrant background, there seems to be more pressure and support from surrounding persons, often the extended family. A general observation is that couples have had time to rehearse and coordinate histories when they apply for renewal of residence permits. In response, police officers try to adjust and vary the types of questions asked.

One-way marriages of convenience are reportedly the most difficult to identify. These are marriages where the reference person considers the marriage as legitimate while the spouse has entered it with the intention of obtaining a residence permit. The police also will not spend significant resources on investigation in cases where the couple has had a child together. In addition to the fact that having had a child in itself is an indication that the couple is living a married life, rejections in cases where there are common children also will most likely result in a request for family reunification with the child. Family reunification with a child is possible when the parents do not live together.

According to the interviewed police officers, marriage of convenience constitutes a complex area, most importantly because marriage and marital life are private affairs and reviewing a case involves penetrating this private sphere. Also, the lack of resources means that the police are not able to carry out necessary controls in all cases, and are required to respond to formal documentation requirements in a timeframe insufficient in relation to the necessary workload. Despite the lack of resources, the police state that they spend a lot of time preparing family reunification cases. In fact, many feel that the workload is disproportionate to the number of cases rejected by UDI. Some express concern that even in cases where the police observes and explicitly notes that a couple does not live as husband and wife, UDI will still accept the marriage as genuine. To some, it is difficult to understand what factors determine whether marriages of convenience are ruled as such.

Some officials note that the legal framework on the field of marriage of convenience is not clear enough. The police estimate the real number of marriages of convenience to be much higher than the number of cases identified.

4.3.3 UDI

Process

At UDI, applications for family reunification are reviewed and signed off by two officials within the respective unit, one preparing the case and drafting a decision, the other reviewing and reconsidering the draft.

Upon receiving an application for family reunification based on marriage, the first step at UDI is to review the file, including verification of documents, checking whether interviews have been carried out, verifying the national registry address against the postal address on the application, and generally assessing the nature of the case. The guidelines provided in the instruction from the Ministry pertaining to marriages of convenience are applied. Certain criteria in this instruction typically give rise to more suspicion than others – e.g. marriages which are atypical according to the applicant's culture and tradition. Cases where suspicions arise are not approved in the first instance, but subjected to a more thorough review.

In addition to checking elements from the instruction, officials often look into other aspects depending on the country of origin. For example, they can look at the migration history of both spouses or check the number of registered people at the same address.

Some interviewed officials claim that they can see the patterns of a marriage of convenience very early when looking at a case, while others have a more deductive approach. Occasionally the receiving embassy will have made notes on the front page of the file. To the extent that these notes are objective observations they may provide useful supplementary information. Subjective statements indicating conclusions or impressions are seen as less useful as they are more difficult for UDI to include in the evaluation. On rare occasions, UDI receives tips which make them investigate a case further. However, second hand information like this would not count in a prospective decision.

When reviewing a case, UDI considers the different criteria in relation to the country, tradition and custom in question. How do couples get to know each other in this culture? Was the wedding celebrated according to traditions? Is it common to marry a much younger or older person? Does the country or area in question have an emigration potential? The information services provided by "Landinfo" (see Table 4.1) represent an important tool that provides useful information about habits and culture. Some interviewees claim that they rarely need to look up country-specific facts because they assess cases from the same countries fairly frequently and are familiar with the necessary background information.

In addition to country traditions and specificities, significant weight is given to the information provided in interviews, if such interviews have been carried out. If no interviews have been conducted prior to the treatment of a case at UDI, the officials will ask the police to interview the reference person and the embassy to interview the applicant if it is a first time application, and interviews are then compared. Officials check for consistency in the information spouses provide about each other, about the relationship and the marriage celebration. They also consider whether the spouses have changed explanations in the course of the interview.

In first time applications, house controls are rarely requested as the applicant will typically be abroad. These visits are more commonly used in connection with applications for renewal. If the applicant has been granted a residence permit after initial hesitation by

UDI, the latter will often ask for extra follow-up by the police. Also in cases where the spouses do not live together according to the national registry, or where there are many people living in the same household, these controls are considered useful. House controls are generally used when there are strong reasons to believe that the marriage is one of convenience, hence providing the “tipping argument” for a rejection if suspicion is confirmed.

When judging whether a marriage on a balance of probability is likely to be of convenience, arguments must be weighed against each other, complex cases are discussed informally among staff, and often practice meetings with the unit leader and field coordinator will be arranged. If no conclusion is reached, the case is lifted to the next level in the hierarchy. In cases of withdrawal of residence permits, there is always an independent consideration by the unit leader.

By law, in order to reject an application based on marriage of convenience, it must be established beyond a balance of probabilities that the marriage is one of convenience. In practice, a number of interviewees report that in order to reject an application as a case of marriage of convenience, they would base this decision on 51 percent probability. This means that the regulatory requirements are applied more strictly than intended by the Immigration Act (see chapter 3.2.4). A possible explanation for this practice is that officials consider the complexity of the cases to be so high and the potential consequences so serious that they are reluctant to rule a marriage of convenience without more than a balanced probability. The fact that all UDI decisions must be possible to defend in court, may underpin this practice.

Resources

A number of interviewees state that given the complexity of reviewing the legitimacy of a marriage, a certain level of discretion is required in reviewing the cases. In this situation, experience becomes all the more valuable. Interviewees estimate that they spend more time on cases where marriage of convenience is considered likely, than on other, often more objective and straightforward cases. It takes time both to consider all elements of a case, and to wait for interviews with the persons implied.

For reasons of processing economy, in cases where more than one reason can be used to underpin a rejection the least time consuming will typically be used. This means that a case can be rejected because the reference person does not fulfil the subsistence requirement, although it is also a potential case of marriage of convenience. However, as such requirements can change over time, a number of these cases may resurface at a later stage and then be treated as possible marriages of convenience.

A number of interviewees express concern about the necessity to meet productivity requirements from the Ministry and at the same time get to spend enough time to examine each case.

Trends and challenges

For countries like Somalia and Vietnam it is often difficult to state that a marriage is against tradition and culture. The spouses will usually have the same background and be of about the same age. Some of the criteria, like age difference and cultural aspects, are less striking in these cases. For other countries, it is difficult to verify information and papers. Some countries do not have a reliable national registry (or none at all). In Somalia, there are no authorities who can issue valid documents. The spouses may be brother and sister without any possibility of verifying the absence of such relations. In these cases, UDI can offer DNA-testing.

Some officials have the impression that they request fewer house controls now than before. The reason may be that more cases are being identified at the stage of the first time application, before the applicant is established in Norway. At the same time, many claim it is easier to see the pattern of a marriage of convenience at a later stage, with more information and observation of its history over time.

4.3.4 UNE

Process

UNE reviews cases that are rejected and then appealed. The number of marriage of convenience cases that are appealed each year is about 70. Appealed cases are rarely overturned at the first instance (by UDI). This only happens if there is new information which has not been presented before and which changes the understanding of the case. As a consequence, the large majority of appeals are transferred to UNE for a new consideration of the case.

UNE's prioritisations are given yearly by the Ministry of Justice and the Police, through the annual budget. These provide the main directions for UNE's work. The Ministry cannot, however, instruct the Board on interpreting the law or decisions in individual cases. As opposed to UDI, UNE is not committed by the instruction on marriages of convenience given by the MoJP.

As a main rule, UNE prioritises family reunification cases according to the age of the case – the oldest cases are considered first. However, other considerations may also affect the prioritization of cases, such as whether a case gives rise to humanitarian considerations, or whether a case involves children. The file in question is reviewed to assess whether all necessary aspects have been considered and required information is included. If interviews/domicile controls have not been carried out, or if new ones are needed, UNE can request the local police to do so (or the relevant embassy if the applicant is abroad). However, house controls and additional interviews are rarely requested. When all elements of a case are in place, UNE makes a new examination of the case.

Criteria considered in this review include the following (the list is not exhaustive and not in prioritised order):

- Knowledge of partner as indicated by contradictory or corresponding information provided in interviews
- Marriage circumstances, for example when the marriage was contracted in relation to when the couple got to know each other
- Immigration history
- Family history related to immigration
- Culture/traditions/common language/fields of interest. The case workers use Landinfo every now and then, but in far from all cases.
- Verification from embassy – valid marriage/divorce in country of origin
- Specific countries with high prevalence of marriages of convenience – Turkey, Vietnam, Pakistan (this may vary from one year to another)
- Emigration potential
- Age difference

Very rarely, the secretariat may come to a decision without involving a board leader. Other, more complex cases will be treated by an appeals board hearing, constituted by

the chairman of the board and two board members. In these hearings, the reference person and the applicant (if in Norway) can be present and provide factual information. As opposed to UDI, UNE thus has a possibility to meet one of or the two parties face to face.

About 10 percent of the marriage of convenience decisions appealed to UNE are overturned, often on the basis of new information having been presented in the case. The average time for treating a marriage of convenience case is seven months.

Resources

Cases concerning marriage of convenience are complex and time-consuming, and interviewees are conscious of this complexity, demanding a different treatment and more effort for each review than many other cases.

Similarly to UDI, UNE has no official document on practice. The use of discretion makes it less relevant to apply too rigid guidelines. Each case is processed individually. However, UNE makes systematic use of precedence from previous cases and court decisions.

Trends and challenges

In 2005 a Grand Board was established. The Grand Board reviews immigration cases regarding issues of principle, cases which may imply major economic or social consequences, and cases where practice varies. Decisions of the Grand Board are precedence setting for other cases. To present, no marriage of convenience cases have been treated by the Grand Board. Following reports in the media and criticism from certain embassies that UDI and UNE were too lenient, a new reporting routine was established in 2006. This opens the possibility for embassies to report disagreements with UDI to the Ministry, who in turn may decide that the case should be brought before the UNE Grand Board ("Stornemnd"). Since 2006, five or six UDI decisions have been reported by embassies, but none of these cases has been brought to the Grand Board.

Cases involving withdrawal of permits are seen by many as particularly difficult. The applicant at this point often has a closer connection to Norway, sometimes he or she even has children who live in the country.

4.3.5 Enforcing decisions (UDI / police practices)

A rejection based on marriage of convenience is followed by a decision on expulsion and possible registration in the international Schengen Information System (SIS) register. UDI sends the decision on expulsion to the local police which are responsible for following up on the decision. In larger cities specific units deal with expulsions, but they prioritise cases involving persons with a criminal record. Persons who must leave the country because of a revealed marriage of convenience are given lower priority.

After having received the decision, the applicant is given a deadline by the local police within which he or she must show that he or she has procured tickets and intends to leave the country. The police regularly check outward journeys with the airports as a second step. Experience shows that very few people have left a few months after the decision on expulsion. Later, police carry out domicile controls, but they do not have resources for unlimited follow-up.

4.4 COOPERATION BETWEEN ENTITIES

Representatives from the police and the embassies tend to perceive the actual number of marriages of convenience as higher than the number of applications that are rejected in practice. In some cases informal and non-documented factors may indicate a marriage of

convenience, while the formal review of the case does not substantiate this suspicion. A number of interviewees in the first line entities (embassies and police) call for more clarity on shared understanding of what is to be considered a marriage of convenience, or what it takes to reject an application on this basis. There are limited formal channels for discussing practice and sharing experiences; such experience sharing seems to be based on channels established on an ad hoc basis.

A number of embassies have direct contact and good cooperation with UDI and UNE. This varies across embassies, and embassies with a relatively high number of cases have more experience and more contact with UDI than embassies where applications for family reunification on the basis of marriage occur more rarely. There appears to be less dialogue between the police and UDI. There has been more contact between UNE and the police. The police claim they have tried to have dialogue and practice meetings with UDI, but there have been very few. Police officers wish to discuss which elements UDI considers necessary to make a decision, so that they in turn can prepare the case as thoroughly as possible. Further, they think UDI should contribute to competence development.

Table 4.2 Examples of cases and Norwegian practice

Test cases	Overall approach	Consequences if marriage of convenience	
		Applicant	Ref.person
Case A: A person who applies from abroad to marry a national.	<p><u>Actors involved:</u> Foreign service mission, local police, UDI</p> <p><u>Methods:</u> Interview of applicant and reference person, in some cases verification of information provided</p> <p><u>Main issues:</u> Considers the case and the information provided in view of the elements given in the directive from JD regarding pro-forma marriages, GI 2010-001, which exemplifies typical elements of a marriage of convenience.</p>	Application is rejected cf. Immigration Act section 48, doubt about purpose cf. § 40 4 paragraph	The reference person <u>might</u> be reported to the police for a criminal offence if it is clear that it is, for the reference person also, a marriage of convenience, cf. Circular - 2010-021
Case B: A person who applies from abroad to reunify with national spouse.	<p><u>Actors involved:</u> Foreign service mission, local police, UDI</p> <p><u>Methods:</u> Interview of applicant and reference person, in some cases verification of information provided</p> <p>Considers the case and the information provided in view of the elements given in the directive from JD regarding pro-forma marriages, GI 2010-001 which exemplifies typical elements of a marriage of convenience.</p>	Application is rejected cf Immigration Act section 40 4 paragraph, and applicant will be notified of grounds for expulsion being present	The reference person <u>might</u> be notified of grounds for expulsion being present and the reference person <u>might</u> be reported to the police for criminal offence if it is clear that it is, for the reference person also, a marriage of convenience, cf Circular - 2010-021
Case C: a person who applies from abroad for reunification with spouse who has migrant background (legally residing in the country).	<p><u>Actors involved:</u> Foreign service mission, local police, UDI</p> <p><u>Methods:</u> Interview of applicant and reference person, in some cases verification of information provided</p> <p><u>Main issues:</u> Considers the case and the</p>	Application is rejected cf Immigration Act section 40 4 paragraph and applicant will be notified of grounds for expulsion being present	The reference person <u>might</u> be notified of grounds for expulsion being present and the reference person <u>might</u> be reported to the police for criminal offence if it is clear that it is, for the reference person also, a marriage of convenience, cf Circular -

Test cases	Overall approach	Consequences if marriage of convenience	
		Applicant	Ref.person
	information provided in view of the elements given in the directive from JD regarding pro-forma marriages, GI 2010-001 which exemplifies typical elements of a marriage of convenience.		2010-021
Case D: a person having formerly resided legally in the country (e.g. rejected asylum application, expired student visa) who is still in the country gets married to a national or legally residing person. Applies for family reunification.	<p><u>Actors involved:</u> local police, UDI</p> <p><u>Methods:</u> Interview of applicant and reference person, in some cases verification of information provided, and/or house control (bostedskontroll)</p> <p><u>Main issues:</u> Considers the case and the information provided in view of the elements given in the directive from JD regarding pro-forma marriages, GI 2010-001 which exemplifies typical elements of a marriage of convenience.</p>	Application is rejected cf Immigration Act section 40 4 paragraph and applicant will be notified of grounds for expulsion being present	The reference person <u>might</u> be notified of grounds for expulsion being present (if legally residing person) and the reference person <u>might</u> be reported to the police for criminal offence if it is clear that it is, for the reference person also, a marriage of convenience, cf Circular -2010-021
Case E: a person has obtained legal residence based on family reunification. New information prompts re-opening of the case. Suspicion of marriage of convenience	<p><u>Actors involved:</u> local police, UDI</p> <p><u>Methods:</u> Interview taken by applicant and reference person, in some cases verification of information provided and/or household control</p> <p><u>Main issues:</u> Considers the case and the information provided in view of the elements given in the directive from JD regarding pro-forma marriages, GI 2010-001 which exemplifies typical elements of a marriage of convenience.</p>	Previous permit will be revoked and new permit rejected, cf § 40 4. Applicant will be notified of grounds for expulsion being present	The reference person <u>might</u> be notified of grounds for expulsion being present (if legally residing person) and the reference person <u>might</u> be reported to the police for criminal offence if it is clear that it is, for the reference person also, a marriage of convenience, cf Circular -2010-021

5 COMPARATIVE ANALYSIS

This chapter summarises the main similarities and differences between the rules and systems in Norway compared to the situation in Sweden, Denmark, Germany and the Netherlands. The chapter sheds light on the research questions identified at the outset and used in developing interview guides for the case countries, summarized in Box 2.

While the Norwegian case has been discussed in detail in chapter 2, 3 and 4, the case studies for Sweden, Denmark, Germany and the Netherlands are presented separately in annexes 1-4.

Seven research questions were articulated at the outset of the study and are incorporated in the discussion. The questions are:

- Can we get an estimate of the extent of the phenomenon in the various countries?
- Are there specific patterns in terms of nationality, age, gender or other characteristics?
- How is “marriage of convenience” defined by law? Do national rules differ?
- What methods and criteria are used by the administration to review potential cases?
- How is the standard of evidence practiced in these particular cases?
- In what circumstances and how often are these cases issues for criminal prosecution?

The discussion is structured around main issues as they have emerged in the study. We review the estimated magnitude of the phenomenon in the five countries under review, the legal framework, including the various definitions of a marriage of convenience and what it takes to get a residence permit through family reunification related to marriage, the process including methods and criteria used to investigate possible cases, level and burden of proof and possible sanctions. We also discuss the challenges related to the rules and practices in the four countries as compared to Norway. In addition, this chapter also provides an overview over the main actors in the process in the different countries. Finally, the countries are reviewed in the light of emerging EU law.

5.1 ESTIMATING THE MAGNITUDE OF MARRIAGES OF CONVENIENCE

Norway is the only one of the case countries that has statistics on the incidence of identified marriages of convenience. These statistics however only cover the rejected cases, with no overview of the total amount of cases where marriage of convenience has been considered by the immigration authorities.

As noted in chapter 2, the number of applications for family reunification based on marriage has been rising steadily since 2005. In 2009, there were about 11 000 applications of this kind, and about 200 of these were rejected on the grounds of marriage of convenience.

Six nationalities distinguish themselves with a particularly high share of rejections based on marriage of convenience: Morocco, Albania, Vietnam, Turkey, Serbia, and Montenegro. Some nationalities are known for certain patterns specific to marriages of convenience, for example Norwegian women marrying a younger man from Turkey or North Africa.

None of the four case countries had relevant statistics allowing for direct comparison. As a result, we have not been able to create an estimate of the scope of the phenomenon in the various countries, nor a reliable overview over specific patterns in terms of nationality, age, gender, or other characteristics.

It is possible that unofficial estimates circulate in the case countries, but they have not been made available for this study. However, interviews have provided some indications on the magnitude and nature of the issue:

- While there are no statistics available on marriages of convenience in Sweden, interviewees estimate the number of rejected cases on this basis to be less than five percent of all marriage migration cases. It also appears to be a common assumption that the real number of cases is actually higher. In 2009 about 30 000 applicants for family reunification were granted residence permits to reunite with a spouse or partner in Sweden. Almost 23 000 of these were new relationships (the couple had not lived together more than two years abroad). Applicants from Iraq and Somalia ranked on top for family reunification based on both new and established relationships. Applicants from Thailand, Turkey, Iran, Serbia, China, Kosovo and Russia show a significantly larger proportion of new relationships than of established relationships when they apply for family reunification. The Swedish Migration Board handles a significant amount of cases from the same countries that are frequently handled in Norway, like Turkey, Vietnam and Somalia. However, according to interviewees no nationalities or other traits stand out as typical in marriages of convenience case-files in Sweden.
- Ad-hoc counts made by the Danish Immigration Service officials for this study counted a total of five rejections on the basis of marriage of convenience in 2008, 28 rejections in 2009 and 35 rejections in the period January-August 2010. From interviews in Denmark, it appears that female applicants from Thailand are predominant among the cases which are rejected on this basis convenience, even in relative terms compared to the large number of applications from Thailand. Male applicants from Turkey and female applicants from the Philippines were also mentioned as a visible group, although to a lesser extent than Thai women.
- The Utrecht immigration police in the Netherlands started to register cases of marriages of convenience last year and expect to have statistics on the question of marriages and relationships of convenience within 2011. There is an overall impression among the interviewed officials that Moroccan and Turkish citizens are overrepresented in cases which have given rise to further investigation as to the nature of the marriage or the relation. These two nationalities are number one and three respectively on the statistics relating to numbers of granted family reunification permits in 2009. In the 1990s, estimates ranging between 5 000 and 20 000 cases of marriage of convenience per year were circulating in the media debate, although these figures were unofficial, and are not substantiated.
- Similarly, German authorities do not have statistics on marriages of convenience on a national level. However, the German authorities estimate that less than 1 percent of all marriages contracted in the country are of convenience. There is also available information on the situation in a few German cities, for example Berlin. In 2004 the Berlin Administrative Court handled about 900 cases of suspected marriages of convenience. One study from 2005 indicates that about 500 marriages of convenience are concluded in Berlin every year.⁴⁶ According to the interviewees in Berlin, suspicion most often arose in cases concerning applicants from Turkey,

⁴⁶ Titel: Zuwanderungsgesetz, Zuwanderung, Einwanderung, Migration, Ausländer, Ausländerrecht - Sachstand 11.10.2005. Available online: <http://www.aufenthaltstitel.de/zuwg/1059.html>

Vietnam, North Africa, Kenya, Tanzania or Thailand. During the 1990s there were many cases in Germany where the so-called *Yugoslavian model* of marriage of convenience was identified and brought to court. Couples from former Yugoslavia would divorce in their home country, marry two residents in Germany, and then keep living together with the first spouse. Today this practice is not known to be common anymore.

5.2 PUBLIC ATTENTION TO THE ISSUE

In most of the reviewed countries, the identification of marriages of convenience has been subject to renewed attention and revised processes in later years, influenced by increased immigration as well as relevant EU legislation.

Sweden appears to be an exception to this pattern. Interviewees report that limited attention is given to potential marriages of convenience. In our literature review and interviews, we have not come across any recent instruction or criteria similar to the Norwegian Ministry decree from 2006, nor does there appear to be a significant number of dedicated staff in the relevant public entities dealing with possible marriages of convenience.

In Germany, marriages of convenience were subject to a significant level of public debate and political attention a few years ago, but this has since subsided somewhat. Marriages of convenience have been a topic for a much longer time in Germany than in Norway, they were an issue of discussion already in the 19th century. The German language has a wide range of terms for different variations of the phenomenon; in addition to *Scheinehe* (marriage of convenience), terms such as *protection marriage*, *paper marriage*, *citizenship marriage*, *simulation marriage*, *purpose marriage* etc. are used to distinguish various types of cases. Currently the word *residence marriage* is commonly used in the public debate. The latest case regarding marriages of convenience receiving massive media attention was a case of criminal proceedings against a local politician of Turkish immigrant background who is charged with incitement to marriage of convenience. Allegedly, he had encouraged his ex-girlfriend to marry a Turkish national in order to gain a residence permit.

Marriages of convenience are not pointed out as a focus area by the German immigration authorities. The representatives of involved institutions have underlined that investigation of the issue is very difficult and time consuming, as well as delicate, since it involves intervening in the private sphere of people. However, an increasingly restrictive German immigration policy in general has triggered a certain amount of personal protest from the population. Idealistically motivated marriages of convenience, especially among young, politically involved people, are a well known phenomenon. There is also a large degree of active organized advocacy promoting the rights and opportunities of immigrants in Germany, with several NGOs, websites, blogs and online chats focusing on protecting immigrants from being expelled from the country through marriage of convenience.

In the Netherlands, there were large-scale political discussions about marriages of convenience in the late 1990s and early 2000s which eventually led to the implementation of the Act to prevent marriages of convenience (WVS). Some of the Dutch restrictions were later revoked by the European Court of Justice as conflicting with EU legislation.

Denmark has since the change of government in 2002 implemented a strict immigration practice, which has led immigration rates to drop substantially. In public debate, the topic of marriages of convenience is often raised in conjunction with concerns about so-called social fraud, where immigrants are accused of taking advantage of and abusing social and welfare services. Danish media and politics saw increased focus on marriages of convenience and circumvention of immigration rules following the *Metock* ruling in 2008.

5.3 DIFFERENCES IN LEGAL AND ADMINISTRATIVE PROCEDURES

5.3.1 *Similarities within a common EU framework*

The five countries under review in this study belong to the Schengen area, and their examination offers a mix of experiences between old and new, big and small Schengen members. While differences persist, a common trend towards a toughening of rules is noticeable over the last decades (European Migration Network 2008). To ensure the relevance of the conclusions, it is also important to bear in mind the international and European context applicable to these five countries, notably EU developments in the field of migration and rulings from the European Court of Justice.

One of the most significant decisions related to family reunification on the basis of marriage in the EU has been the *Metock* case, where the European Court of Justice in July 2008 decided that a non-community spouse of an EU citizen (third country nationals moving from another EU member state) can move and reside with that citizen also when they have no legal permit to stay in the other EU country. The case was groundbreaking and set an example for how the European Free Movement Directive should be interpreted in cases concerning third-country national spouses of EU citizens. The court also ruled against national restrictions related to when and where the marriage was contracted and how the third-country national entered the host member state.

The case has led to protests from several EU-member countries, which are no longer able to make national decisions on certain immigration issues. There is a concern that the *Metock* ruling will make it more difficult to handle illegal immigration, including immigration through marriages of convenience. The development in the EU legislation regarding marriages of convenience influences attitudes and level of interest in the phenomenon in several EU countries. Denmark has been one of the most critical countries, as the ruling has affected the restrictive Danish immigration practice. The German government has repeatedly brought up, together with other EU Member States, that one of the consequences of the ruling might be abuse - which must be followed, observed closely and combated. Germany also supports the idea that the Member States should exchange information about the abuse and deception related to marriages of convenience, and report on systemic trends to the European Commission.

5.3.2 *Definitions*

The EU family reunification directive 2003/86/EC uses a strict understanding in its definition of a marriage of convenience: It is required that the authorities establish that the *sole purpose* of the marriage was to enable the applicant to enter into or reside in the member state. While the Norwegian and Danish definitions include all marriages where, respectively, the *main* or *decisive objective* was to obtain residency, Sweden and the Netherlands limit the definition to only concern marriages where the *sole purpose* was such residency. Germany is similar to the latter two but with a negative definition of what the marriage *is not*.

While the exact wording varies and makes comparison challenging, similarities and differences in the legal definition can be noted:

- In Norway a marriage of convenience is defined in paragraph 40, fourth section of the Immigration Act as a marriage where it is *most likely that the main objective* of the marriage has been to establish a basis for residence in Norway for the applicant.
- In Denmark the definition is similar to Norway; marriages of convenience and cohabitations of convenience are defined in paragraph 9 section 9 of the Aliens Act as

a situation where “there are *definite reasons* for assuming that the *decisive purpose* of the marriage or the cohabitation is to obtain a residence permit.” However, it must be assumed that the Danish provision is interpreted in line with the EU definition.

- In Sweden, the definition follows the EU family reunification directive: The Migration Board may reject an application for entry or residence if “it is shown that (...) marriage, partnership or adoption was contracted *for the sole purpose* of enabling the person concerned to enter or reside in a Member State”. In other words, it must be proven that the exclusive objective of the foreigner was to obtain a residence permit.
- The Dutch definition which follows the Implementation Guidelines of the Immigration Act is also in line with the EU directive, indicating that a marriage of convenience is a marriage contracted *with the sole purpose to grant a foreign national, with no, or no longer, legal residence status, a residence permit*.
- In Germany the definition of a marriage of convenience is a marriage *which has not been concluded in order to establish a matrimonial cohabitation, in whatever form, but to fulfill another purpose, especially to enable a foreign partner to gain a residence permit*.

Even though Norway has a broader definition of a marriage of convenience than most other countries, proving that obtaining a residence permit has been one of several objectives is not sufficient grounds for rejection in Norway. As noted in chapter 3, as long as the marriage also is intended to have some degree of reality, a motivation on the part of the applicant to also improve his or her living standard should not lead to the conclusion that the marriage is a marriage of convenience.

German law similarly states that additional or secondary motives for a marriage, such as name, tax advantage, local residence allowance, right to social housing etc. are not sufficient to make a marriage a marriage of convenience, provided that the spouses have the will to establish a matrimonial cohabitation.

5.3.3 Requirements of the spouses

When granting residence permits based on family reunification with a spouse, the marriage is also subject to additional requirements with some variations across countries. These regulations influence the possibility to use marriage as a channel for immigration including through marriages of convenience. However, such regulations also represent a general limitation to marriage for non-nationals. The EU framework, in particular the Metock ruling, limits countries’ flexibility to enact such restrictions. In short, matrimonial cohabitation is an absolute requirement for family reunification and for a marriage to be recognized as valid in all the reviewed countries. Age requirements are stricter in Denmark and the Netherlands than in the other countries, arguably to prevent forced marriages. All countries also have some kind of economic requirement, where the intention is to ensure that the applicant’s living expenses will be covered.

- In Norway, both parties in the marriage must be over 18 years of age. They must also fulfil a subsistence requirement which in 2010 is set to NOK 225 400 / year.⁴⁷
- In the Netherlands, new restrictions on marriage migration were introduced in November 2004 distinguishing between family reunification and family establishment, with a minimum age requirement for the applicant of 21 years for both. These regulations also introduced requirements that the reference person must earn at least 120 percent of minimum wage. In March 2010 the EC Court of Justice ruled that

⁴⁷ http://www.regjeringen.no/upload/FAD/Vedlegg/Lønns-%20og%20personalpolitikk/Lonnstabeller/A-tabell_2010.pdf

distinguishing between family establishment and family reunification was not in accordance with the family reunification directive, and the salary requirement is now 100 percent of the level of social assistance in both categories of cases. The applicant must also pass a cultural exam.

- In Denmark, both parties must be over 24 years of age to enter into marriage. The reference person must provide DKK 62 000 as a guarantee for potential future public expenses related to the process. The reference person must have been in possession of a permanent residence permit for the previous three years. Also, the parties must have closer ties to Denmark than to another country ("tilknytningskravet").⁴⁸
- In Germany, the Residence Act sets out the general preconditions for granting a residence permit and the general principles for family reunification with foreigners, namely. The age requirement for both spouses is 18 years. In addition to holding a residence permit, the reference person must have sufficient living space, may not rely on public benefits, and in addition, the immigrating spouse must have a basic knowledge of German.
- In Sweden, the age requirement is 18, and an income requirement was introduced in April 2010. The reference person is required to be able to support him- or herself and provide a domicile of "adequate size for himself/ herself and the foreigner"⁴⁹.

5.3.4 What does it take to obtain permanent residence through family reunification?

In all countries there are certain requirements that must be met in order to obtain permanent residence through family reunification, with some variations in the time of residence that is required.

- In Norway, a residence permit is valid for one year, after which it must be renewed. After three subsequent years of holding a permit the foreigner may apply for a permanent residence permit in Norway. If the permit is granted, the foreigner will no longer be dependent on the relationship to the reference person. In total this means a couple has to stay married for a minimum of three years before the applicant can get a permanent permit on his or her own.
- In Denmark, permanent residence permits are granted on the basis of a points system. Following a basic condition of four years of residence and having been employed for 30 of the past 36 months, the applicant gains points on the basis of criteria such as not having committed a serious crime, not owing public debts or having received public social assistance, as well as other criteria.
- According to the Swedish Alien's Act, an applicant may be granted a permanent residence permit on first time application. If the married couple has cohabited in the country of origin for a time period longer than two years, the applicant spouse will normally be granted a permanent residence permit right away. If the cohabitation period is shorter than this, a residence permit will be granted for 12 or 6 months, after which the limited residence permit will be extended for another year. If it is a rather new relationship, the Migration Board will grant a limited permit valid for two years. After that, the applicant can be granted a permanent residence permit if the marriage still exists and the couple still lives together.

⁴⁸ Practice note of 1.12.2005 regarding the attachment requirement.

⁴⁹ <http://www.sweden.gov.se/sb/d/3083>

- In the Netherlands, the applicant can apply for independent residence after three years, and after passing an integration exam. After five years it is possible to apply for a permanent residence permit.
- In Germany, the foreign spouse can receive an unlimited residence permit after three years of marriage. A married foreigner will be able to get an independent residence permit after two years of marital cohabitation if he or she has a regular job and also fulfils a few other conditions.

5.4 PROCESS

5.4.1 *Criteria assessed in the consideration of marriage of convenience*

All countries apply criteria and elements similar in nature to those established by the EU Commission. However, the degree of precision in the elements which are considered in each country varies. The identification of a marriage of convenience generally involves two steps. In a first step, couples can be selected for further investigation by the responsible public authorities (civil registry, migration services, consulates, police services, etc.) based on certain factors that might create suspicion.

In order to facilitate a common understanding, the Council of the European Union has identified a list of grounds which might lead to suspicion that a marriage is of convenience. They are listed in the EU resolution on measures for combating marriages of convenience.⁵⁰ Factors which may provide grounds for believing that a marriage is one of convenience include:

- the fact that matrimonial cohabitation is not maintained,
- the lack of an appropriate contribution to the responsibilities arising from the marriage,
- the spouses have never met before their marriage,
- the spouses are inconsistent about their respective personal details (name, address, nationality and job), about the circumstances of their first meeting, or about other important personal information concerning them,
- the spouses do not speak a language understood by both,
- a sum of money has been handed over in order for the marriage to be contracted (with the exception of money given in the form of a dowry in the case of nationals of countries where the provision of a dowry is a common practice),
- the past history of one or both of the spouses contains evidence of previous marriages of convenience or residence anomalies.

All the countries in the study use these or similar criteria in order to identify marriages of convenience. In the Norwegian guidelines used by UDI (see chapter 3.2.2.), there is also emphasis on age difference between the parties, whether the marriage is clearly atypical compared to marital traditions in the parties' country of origin and whether circumstances indicate that the marriage is based on coercion or exploitation, e.g. where the parties are unequal in their mental development. The Norwegian guidelines were updated in January 2010 by the Ministry of Justice based on jurisprudence, the preparatory work to the Immigration Act of 2008 and on administrative practice.

⁵⁰ http://europa.eu/legislation_summaries/other/l33063_en.htm

Some other factors are also commonly considered, for example in Germany where the following would reportedly influence how the case is treated:

- Age difference - especially when the woman is older than the man
- The existence of a notarized certified pre-marital contract which to a large degree excludes proprietary and financial consequences of marriage for the spouses
- Repeated unsuccessful applications for marriage by the foreign partner.

In Denmark, the criteria applied when considering marriages of convenience are similar to those in Norway. However, the six Danish criteria are less specific than the eleven Norwegian ones, and a few of the Norwegian ones stand out compared to the Danish criteria:

- Whether the applicant has previously tried to obtain residency in the country
- Whether the marriage has been entered into on the basis of force
- The complex consideration of whether the marriage is atypical compared to the cultural context of the country of origin

In Danish practice, it is also interesting to note that as a main rule, one of the above criteria alone will never constitute grounds for rejection but fulfilling three criteria will always be sufficient for a negative decision on the basis of marriage of convenience, unless there are clear indications to the contrary. As a main rule, simultaneous interviews are also to be carried out in cases where two criteria are met. With this practice, officials involved in each case have some specific rules to steer by which may contribute to more efficient review. This may also bring some extent of additional guidelines on interpretation of the issue of balance of probabilities.

5.4.2 Review and methods

Once the possibility of a marriage of convenience has been established, the second step involves the investigation of the case. In most of the first time applications for family reunification, the applicant presents his or her application at the embassy of the country where he or she wishes to get a residence permit, in the country of origin. Public authorities generally proceed with interviews of the spouses, both separated and jointly, to check up on their knowledge of one another. If an interview with the applicant is considered necessary, it will normally be carried out at the embassy, while the reference person will be interviewed in the recipient country. Some Norwegian embassies interview all applicants, while others interview half or one third of the applicants. Embassies in the comparative countries generally do not conduct interviews of all applicants.

After a period of time the applicant will have to ask for a renewal of the residence permit. At this stage the police may initiate new interviews, or conduct a home visit, in order to check if the couple really is living together. All countries in the study except Sweden practice home visits as needed.

In Germany the police conduct the interviews, but according to interviewees both interviews and home visits are rarer today than they used to be. Domicile controls are only allowed when there are clear indications that justify a concrete suspicion that the applicant does not intend to establish a matrimonial cohabitation. In Denmark, the bodies involved in conducting the interviews are the same as in Norway. However, an essential element in the process of conducting interviews in Denmark is that these are carried out simultaneously (the interviews are as such called “simultanintervju” in Denmark). Danish authorities consider this essential to safeguarding the quality and credibility of the information provided by the spouses. In addition to interviews and home visits, common measures to expose marriages of convenience include questioning neighbours and in cases of

renewal, requesting documents bearing proof of a long-standing relationship (e.g. letters/bills addressed to both spouses). The existence of an intermediary and/or of a financial arrangement between the spouses is also a matter of investigation.

According to the Danish administrative act, the spouses have a right to comment on diverging information following the interview if the Immigration Service considers that the information may lead to a rejection. This may clarify points of misunderstanding at an early stage. Compared to Norway, the same clarification may as a main rule only take place on the basis of an appeal of the first instance rejection.

5.4.3 *What does it take to reject?*

Even in cases where the only motivation behind a marriage is to secure a residence permit, demonstrating that it is indeed a marriage of convenience is difficult. The formal requirement in all five countries is for a balance of probabilities, in other words it has to be more likely that a marriage is of convenience than not. Similarly to Norway, this requirement also tends to be applied more strictly in practice in the other countries, most explicitly stated through interviews in the Netherlands.

5.4.4 *Who are the actors involved?*

The process concerning appeals over rejections based on the grounds of marriage of convenience varies across countries. While appeals in Norway are treated by an independent, administrative unit (UNE), Danish appeals are handled by the responsible administrative unit. In Sweden a specialized court has been established for these cases while appeals in Germany and the Netherlands are handled by the regular court system.

It is difficult to judge how these differences may affect the outcome. In view of the complexity of these cases, access to a real and thorough appeal is of essential importance for preserving the rights of the applicant.

Another difference lies in the level of centralization, affecting the number of people likely to be involved in reviewing a case on the one hand, and common practices across the country on the other. In Germany, Sweden, and partly also in the Netherlands, a higher degree of decentralization may affect the extent to which cases are treated identically.

- The Swedish Migration Board is divided into 26 local units, each responsible for its own district. While this decentralization can make common practice a challenge, it could also have the advantage of fewer layers involved in the process and more direct contact between applicant and official handling the case. The application for a residence permit is normally handed in at the Swedish embassy or consulate in the applicant's country of origin, where he or she is permanently resident. In most cases the applicant will attend a personal interview before the case is forwarded to the Migration Board in Sweden for consideration. The official appointed there will normally follow the case through the whole process, and is responsible for carrying out the interview with the reference person. If the application is rejected the applicant can appeal the decision within three weeks. The Migration Court will then review the case completely. The Migration Board states that a large proportion of the negative decisions in marriage of convenience cases are appealed. It is also possible to appeal the decisions from the Migration court to the Migration Court of Appeal. However, only cases where the decision will set an example and provide guidance for decisions by the Swedish Migration Board and the Migration courts are accepted by the Court of Appeal.
- The process in Germany is similar: an application must be filed in the country of origin, but instead of sending the case to a national institution, the case is passed on

to the local Foreigners Authority in Germany. There is close cooperation between the diplomatic mission and the locally responsible Foreigners' Authority when it comes to carrying out and interviews. In case of suspicion of marriage of convenience at renewal, the Foreigners Authority cooperates with the police to check the existence of the matrimonial cohabitation.

- Also in the Netherlands, the process is more decentralized than in Norway, at least in the first instance. The Dutch municipalities consider whether a marriage conducted abroad may be registered in the Netherlands, a registration which is a precondition for family reunification. In this process, they are assisted by the various police districts who conduct investigation in the cases. On the other hand, decisions on renewal or revocation of permits based on marriage of convenience are centralized at the Immigration and Naturalization Service (IND). Thus, in the Netherlands, marriages of convenience in the immigration context are considered both by different bodies serving different functions, including by decentralized offices.

5.4.5 Sanctions

When it comes to sanctions, Norway and Germany are stricter than the other three countries, at least in theory.

- In Norway, marriages of convenience may lead to criminal prosecution of both the applicant and the reference person. The applicant may also have his or her residence permit revoked, and may be expelled from Norway and the Schengen Area as a whole. The applicant and reference person can also be subject to criminal investigation, as discussed in chapter three. It should be noted that there is limited practice for criminal prosecution. The main difference to the other countries is that while Norway has a specific provision in the Foreigners' Act concerning misinformation, this is covered by general regulations about misinformation in the other countries.
- In Sweden, the Migration Board might notify the police if the reference person has given false information in the case, but this is rarely done. Such a decision would, however, not lead to expulsion or reporting according to Swedish law. In theory, the applicant can apply for a residence permit again the day after having received a rejection.
- In Denmark, illegal residence resulting from rejection of an application for family reunification may lead to expulsion. Only in rare cases would rejection based on marriage of convenience lead to a criminal investigation. In most cases there will be no other sanctions except not having the application granted. In interviews, we have not been able to find examples of criminal convictions for having provided false information in the context of a marriage of convenience for immigration purposes.
- When a marriage of convenience is discovered in the Netherlands, the residence permit can be revoked, or an application for renewal can be rejected. But similarly to Denmark and Sweden, there is no extensive practice of sanctions. In theory, both parties can be taken to court for forgery and fraud. This requires that the case is reported to the police, who is responsible for investigating the case. The report sent to the police from the NDI only concerns the applicant. The police may open an investigation of the reference person, but this is rare in practice. The police may also initiate criminal proceedings against applicants (not reference persons) for fraud or falsification of information/documents.
- An applicant in Germany loses his or her residence rights when a marriage of convenience is identified and will be obliged to leave the country. There might be a financial or penal sanction, usually on probation, expulsion, and re-entry can be banned.

5.5 SUMMARY OF FINDINGS

5.5.1 *Similarities across countries*

Variations between the reviewed countries are small. Regulations are largely harmonized across countries and with EU regulations. Norway and the other countries in this study are also bound by conventions on international human rights that are relevant to immigration policy, such as the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights (ECHR). Both establish a core protection of the right to family life, but open up for interference in this sphere under certain conditions. According to case law by the European Court of Human Rights, marriage always constitutes family life in a legal sense, as long as the marriage is lawful and genuine. In practice, this means that a marriage of convenience without an element of genuine family life does not fall under the protection of the existing conventions. The EU's regulatory framework with its gradual establishment of a common migration policy is also relevant to the discussion. Two directives are of special significance to the issue of marriages of convenience, EU-directive 2003/86/EC which establishes the right to family reunification for third-country citizens, and EU-directive 2004/38/EC which harmonizes provisions related to the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Norway is also increasingly harmonized with the EU legal framework within immigration law through the country's participation in the Dublin and Schengen agreements.

Guidelines for assessing possible marriages of convenience are similar across countries and harmonized with EU guidelines. The Norwegian instruction from 2006 referred above was accompanied by a set of guidelines for the assessment of cases of marriage of convenience, which constitutes an important tool in UDI's treatment of cases. An important challenge is to apply the guidelines in practice while taking national and cultural differences into account. The countries in this study follow similar guidelines, although they vary in degree of detail and precision. All countries operate with guidelines which are in keeping with guidelines issued by the European Commission. A joint domicile is a general requirement, together with other indications for a valid marriage. Assessments of each case are made in the light of traditions relevant to the reference person's and the applicant's own cultures.

An important milestone in European immigration policy concerning family reunification is the Metock-ruling from 2008. In the wake of the Metock-ruling, the European Commission has revised parts of its practice regarding marriages of convenience, including the publication of new guidelines for residence permits. This ruling established that third-country citizens do not need to have previous residence rights in the EU before they can apply for family reunification on the basis of the EU-directive, but that de facto residence may be sufficient. As a consequence, EU-citizens may reside in another country than their own with their spouse from a third country for a period of time, and then return to their home country with a right to a residence permit for their spouse there even though the spouse resided illegally in the other EU country.

Following general tightening of immigration rules, most countries have increased focus on the issue of marriage of convenience and revised rules and practice accordingly. In general, the level of attention around the phenomenon of marriage of convenience has increased during the last years in most countries – in our study, the only exception to this is Sweden. Correspondingly, focus on improved routines and a clearer regulatory framework has been strengthened. In Norway, an instruction from the Ministry of Labour and Social Inclusion issued in 2006 has had major consequences for the administrative treatment of cases of marriage of convenience with regards to attention around the phenomenon, improved routines for detecting such cases, and an increased

number of rejected applications on this basis. Other countries in this study have also focused on tightening routines during the last year, partly as a reaction to the Metock-ruling, but also in the years preceding it. This is probably connected to a general tightening of immigration policy, which makes family reunification on the basis of marriage more relevant to potential applicants.

Our interviews indicate that officials are cautious in concluding that a marriage is one of convenience. In Norway as in the other countries, an application can be rejected when it is more likely that a marriage is of convenience than not (balance of probability). It appears from our interviews, however - especially in Norway and the Netherlands - that this requirement is often practiced more strictly than what is actually indicated by the regulations. It is not unusual that an official bases his or her decisions on a higher likelihood than the required "more likely than the opposite" in order to reject an application on the grounds of marriage of convenience.

5.5.2 Differences across countries

Some important differences are summarized below.

Firstly, it is not possible to compare the extent of the phenomenon in Norway with data in other countries, as the latter is not available. Norway is the only country in this study where statistics indicating the extent and development of marriages of convenience are available. In Norway in 2009, a little over 2 percent of all applications for family reunification on the basis of marriage were turned down on the grounds of a suspected marriage of convenience in Norway. This makes a total of 200 applications, more than twice as many as for the previous year.

- The Netherlands are planning to produce such statistics by 2011.
- In Sweden, informed sources suggest that the number of cases is highly unlikely to exceed 5 percent of all applications for family reunification based on marriage, an estimate that seems realistic in the light of the fact that somewhat over 2 percent of cases are rejected in Norway.
- In Germany, an estimate from 2005 suggests 500 marriages of convenience in Berlin each year, amongst a population of just over 3 million, which indicates a much higher incidence of cases than in Norway.
- Manual counts carried out by the Danish immigration authorities (Utlændingetjenesten) suggest significantly lower numbers in Denmark, with 35 rejections on the basis of marriage of convenience between January and August 2010 and a total of 28 rejections in 2009.

Secondly, Norwegian and Danish definitions of what constitutes a marriage of convenience appear slightly broader, and therefore stricter, than in the other countries. The provisions of the EU family reunification directive define a marriage as a marriage of convenience if its "sole purpose" is to gain a residence permit for the applicant. This is a narrower definition than the one applied by Norway and Denmark, where the authorities are required to consider whether gaining a residence permit constitutes the "main" motivation for concluding a marriage. Whether practice in Denmark is in fact stricter than the rest of EU is not considered in this analysis.

Thirdly, achieving permanent residence is comparatively easier in Germany and Sweden, while requirements in the Netherlands and Denmark are more stringent than in Norway. Regarding the requirements that need to be fulfilled in order to gain permanent and independent residence, Norway holds the middle ground between the other countries.

Fourthly, Norway is the country with the most comprehensive sanctions both in relation to the applicant and the reference person when a marriage of convenience is identified. In Norway and Germany, the applicant will be expelled following a rejection based on marriage of convenience. In Norway the applicant is routinely expelled from the Schengen Area and reported to the Schengen Information System (SIS). In Norway and Germany, the Immigration and Residence Acts respectively provide for criminal prosecution for the provision of significantly false or clearly misleading information in the application process. It should, however, be noted that there is no established practice for criminal prosecution in Norway. In the other countries, the consequences of a marriage of convenience-decision also rarely go beyond the rejection of the original application.

Fifthly, the degree of centralization varies and may affect both how the case is treated and the extent of common practice across geographical areas. The process typically begins with the applicant presenting his application to the relevant embassy in or close to his home country. Certain embassies routinely carry out interviews with a view to detecting marriages of convenience. Other embassies only interview applicants if the application gives cause to suspect marriage of convenience. In Norway, both applicant and reference person are interviewed by either UDI or the police. In Norway and Denmark the process is more decentralized than in Sweden, Germany and the Netherlands. The degree of centralization influences the number of people that are involved in an individual case, and the degree to which officials have direct contact with the applicant and the reference person, which in turn may influence what factors are weighed into the decision. Another potential question here is whether a large degree of decentralization might have a negative effect on equal treatment and common practice across geographical areas.

Sixthly, the process of appealing against decisions based on marriage of convenience is different in each of the countries in this study. While appeals in Norway are handled by an independent administrative board (Utlendingsnemda – UNE), in Denmark they are treated as an ordinary administrative complaint to the responsible ministry.⁵¹ Sweden on the other hand has a specialized court dedicated to such appeals. Germany and the Netherlands do not have any form of administrative appeal body, which means that rejections have to be contested directly in court if necessary. It is difficult to determine how these differences affect the process of treating cases of marriage of convenience. Starting from the premise that cases of marriage of convenience are viewed as complicated and demanding in all countries mentioned in this study, access to a fair and thorough appeal process is, however, of great importance to protecting the applicants' rights. The Swedish system is unique in this respect, as cases are heard in oral form by a specialized court.

⁵¹ Detailed country presentations provided in Annexes

Table 5.1 Summary of research questions

Country	Scope and attention, specific patterns	Definition of marriage of convenience	Criteria and methods	Practice of standard of evidence	Sanctions
Norway	Increased focus since 2006, 200 known cases in 2009	“Most likely that the <i>main objective</i> is (...) residence”	Guidelines similar to EU Centralized Board of appeals	Balance of probabilities applied conservatively	Expulsion from Schengen area Reporting to Schengen register
Sweden	Limited public attention and resources allocated	“shown that (...) marriage (...) was contracted for the <i>sole purpose</i> ” (of what??)	Guidelines harmonized with EU No house visits Decentralized Specialized court of appeal	Balance of probabilities	May prosecute on grounds of false information, rare in practice
Denmark	Stricter immigration rules since 2002 and increased attention to abuse of EU rights including marriages of convenience after Metock ruling in 2008	“Definite reasons for assuming that the <i>decisive purpose</i> (...) is to obtain a residence permit” (Practice is assumed to be in accordance with the EU directive on family reunification)	Guidelines harmonized with EU Centralized Administrative appeal	Balance of probabilities	May prosecute on grounds of false information, rare in practice
Netherlands	Increased focus since 2004. Main focus on abuse of EU rights, including marriages of convenience.	“contracted with the sole purpose” of obtaining residence	Guidelines harmonized with EU Appeal to regular court	Balance of probabilities applied conservatively	May prosecute on grounds of false information, rare in practice
Germany	Historically high focus, has subsided some but subject to professional advisory services	“ <i>not been concluded</i> (...) to establish matrimonial cohabitation (...) <i>but to</i> (...) gain residence permit”	Guidelines harmonized with EU Decentralized Appeal to regular court	Balance of probabilities	Possible banned re-entry and possible financial/ penal sanction

ANNEX 1: GERMANY CASE STUDY

TRENDS AND ATTENTION TO THE CONCEPT

In German language, the term *Scheinehe* is used as an equivalent to marriage of convenience, and it can be literally translated as a *sham marriage*. The connotation of the expression is that such a marriage simulates the existence of a real, intended marriage. Stephanie C. Lumpp has characterized *Scheinehe* (and analyzed its legal aspects) independently of its differing forms and motives on the basis of its main feature – the lack of intention by the spouses to establish and realize marital cohabitation.⁵²

In Germany, the phenomenon of a marriage of convenience is not only an issue of current interest, but WAS discussed in legal practice and legal scripts already one hundred years ago. Naturally, the framework conditions have changed since then. In the past, the so called *name marriage (Namensehe)* was discussed: a marriage in order to gain a certain family name. The notion of marriage of convenience is linked to the different motives leading to a marriage, and the descriptive terms used in the media for marriages of convenience are the following: *simulation marriage (Simulationsehe)*, *purpose marriage (Zweckehe)*, *residence marriage (Aufenthaltsehe)*, *citizenship marriage (Staatsangehörigkeitsehe)*, *protection marriage (Schutzsehe)*, *pro forma marriage (Pro-forma-Ehe)* or *paper marriage (Papierehe)*.⁵³ Currently, it is the so-called *residence marriage (Aufenthaltsehe)* which is in the spotlight of media and public attention, the main purpose of which is the acquisition of a residence permit.⁵⁴ However, in the language of the media and general public, the notion of *Scheinehe – sham marriage* - is the most widespread.

An increasingly restrictive German immigration policy has given rise certain expressions of protest, such as young people marrying migrants for political or idealistic motives, or simply out of the desire to help or provide protection – these marriages are called *Schutzehen (protection marriages)*. Other reasons are less noble – marriages being entered into in exchange for money or for other commercial reasons, including human trafficking, or prostitution. At the same time, associations and NGOs protecting rights of migrants speak of discriminatory practices against mixed marriages or marriages of people with migrant background.⁵⁵ A number of websites, blogs and online chats provide advice on how to handle interviews with the Foreigners' Office.⁵⁶ These websites list details of the so called *catalogue* of more than a hundred questions which the Foreigners' Office asks the couple separately.

The main concern for public authorities in Germany regarding marriages of convenience relates to cases where it is used as a tool to facilitate the involvement in criminal activities – such as human trafficking into prostitution, dealing in drugs.

The development in the EU legislation on marriages of convenience does influence attitudes and level of interest in the phenomenon. In relation to the *Metock* ruling by the European Court of Justice of July 2008 (C-127/08), the opinion of the German Govern-

⁵² Lumpp, Stephanie (2007): Die Scheineheproblematik in Gegenwart und Vergangenheit. Berlin: Duncker & Humblot.

⁵³ See for instance VRiVG Dr. Ralph Göbel-Zimmermann, Aarbergen: »Scheinehen«, »Scheinlebenspartnerschaften« und »Scheinväter« im Spannungsfeld von Verfassungs-, Zivil- und Migrationsrecht. Available online at: http://www.zar-online.info/zar/hefte/Aufsatz_zar_06_03.pdf

⁵⁴ Lumpp, Stephanie (2007): Die Scheineheproblematik in Gegenwart und Vergangenheit. Berlin: Duncker & Humblot 2007.

⁵⁵ For instance the IAF – Verband binationaler Familien und Partnerschaften or Ban Ying.

⁵⁶ For instance <http://www.nittaya.de/viewtopic.php?t=29907>

ment has been expressed in the 2008 Migration Report, in which it is stated that the German Government agrees with the majority of the EU Member States that the Metock ruling could possibly lead to an abuse of the freedom of movement directive 2004/38/EG. The German Government has repeatedly brought up the issue of the potential abuse of the ruling and had declared, together with other EU Member States, that the effective application of the free movement directive must be secured and its abuse must be followed, observed closely, and combated. The German Government has also supported the idea that the Member States should exchange information about the abuse and deception linked to marriages of convenience, and report on systemic trends to the European Commission.⁵⁷ The Minister of Interior, Dr. Wolfgang Schäuble, at the meeting of the Council of the Ministers of Interior and Justice on 25th September 2008, maintained that *he also finds it important to reinstitute the previous legal situation*.

Compared to other social issues, marriage of convenience has been more of a peripheral phenomenon in public debate, yet able to stir the waters of the media once in a while. Among the more recent media reports regarding marriages of convenience in Germany was a case of criminal proceedings against a local politician of Turkish immigrant background, Bülent Ciftlik. Mr. Ciftlik was a member of the parliament of the city of Hamburg (which unifies the status of a city and a federal state) for the German social-democratic party SPD. The Public Prosecution Service of Hamburg brought charges of incitement to marriage of convenience against him. Allegedly, Mr. Ciftlik incited his ex-girlfriend to marry a Turkish national in order for the latter to gain residence permit. The ex-girlfriend later admitted the sham marriage to the police. The politician temporarily withdrew from his positions, and the case was still pending at the time of writing of this study.⁵⁸

KEY FACTS AND FIGURES

There is no official data on marriages of convenience in Germany. In addition to data on family reunification in general, only rough estimates can be quoted. The Federal Government of Germany does not have any numbers on cases of legally confirmed cases of marriages of convenience involving EU citizens living in Germany. Statistical data collection on marriages of convenience and other law abuse is also not collected during visa application process in line with the act on free movement.⁵⁹ The Federal Ministry of the Interior also does not dispose of a full picture of the real occurrence of marriages of convenience in each Bundesland. There is no data on the number of recorded cases of suspicion on marriages of convenience and legally confirmed cases in the individual Bundesland.⁶⁰ In general, responsible authorities estimated that less than 1 percent of all contracted marriages in Germany are those of convenience, but at the same time

⁵⁷ The family reunification with non-German EU citizens is in Germany regulated solely by the EU Directive on free movement. Accordingly, third country nationals joining their non-German spouses do not need to provide a proof of their German language skills (whereas this is obligatory to provide a proof of language skills for third country nationals joining German spouses or joining foreigners without EU citizenship, which is regulated by the German Residence Act). Migrationsbericht 2008: 145.

⁵⁸ Hamburger Morgenpost: Ciftlik lässt sein Amt ruhen (08.01.2010), available online at: http://archiv.mopo.de/archiv/2010/20100108/hamburg/politik/ciftlik_laesst_sein_amt_ruhen.html and Junge Freiheit: SPD-Abgeordneter wegen Anstiftung zur Scheinehe angeklagt, (07.01.2010), available online at: <http://www.jungefreiheit.de/Single-News-Display.154+M5533641745b.0.html> (downloaded 27.4.2010).

⁵⁹ Antwort der Bundesregierung auf die Kleine Anfrage zur "Gewährleistung von Freizügigkeit von Unionsbürgerinnen und Unionsbürger sowie ihre Familienangehörigen in Deutschland". Erscheinungsdatum 05.03.2009. Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 16. Februar 2009 übermittelt. P.9. Further in here as *Antwort der Bundesregierung 2009*. Available online at: http://www.bmi.bund.de/cae/servlet/contentblob/366456/publicationFile/26611/KI_Anfrage_Gewaehrleistung_von_Freizuegigkeit.pdf

⁶⁰ Ibid, p.9.

prosecution authorities assume that the extent of marriages of convenience for criminal reasons is much bigger than it is possible to identify.⁶¹

There is a bit of information on the situation in some cities, for instance in Berlin. The Berlin Administrative Court has been increasingly confronted with the issue. In 2004, approximately 900 cases of suspected marriages of convenience landed in the court. That represented an increase of 20 percent in comparison with 2003. In 2005, an estimate of about 500 sham marriages in Berlin annually was presented.⁶²

In cases where suspicion arises a few countries are overrepresented, namely Turkey, Vietnam, North Africa (typical holiday destinations such as Tunisia or Morocco), Kenya, Tanzania or Thailand.

In 2008, 1787 family members of EU or EEC citizens entered the territory of Germany, and received a so-called residence card (Aufenthaltskarte) in accordance with § 5 section two of the Free Movement Act/EU. Out of this number, 184 were citizens of Brazil, 150 of Switzerland, 129 of the United States of America, 86 of Turkey, and 82 of Russian Federation. The subsequent immigration of spouses and other family members cannot be distilled from the general immigration statistics, as it does not specify according to migration reason. However, the visa statistics of the German Foreign Office provide a good source on immigration for marital reasons. Yet, it offers only a partial picture of the immigration for marriage as it only registers cases of granted applications for visa for family reunification by the Germany diplomatic mission. This information is only provided by diplomatic missions abroad in cases when the visa is granted, and can only be differentiated by country of origin. Only since 2005 is the visa statistics of the Foreign Office complemented by the Central Registry of Foreigners (Ausländerzentralregister AZR) as a source of data on subsequent immigration of spouses and other family members. The AZR also includes cases of foreigners who receive a residence permit for family reasons once inland. This source also differentiates nationality and age.⁶³ As evident from the figure no.1, the number of visa for family reunification had been rising from 1998 to 2002, then started falling rapidly, so it reached half of the number in 2007.

LEGAL AND REGULATORY FRAMEWORK

Definitions and sources

Marriage is legally protected in Germany by the German Basic Law, specifically Article 6 Marriage – Family – Children section 1 (Art. 6 Grundgesetz - GG), which settles that marriage and the family shall enjoy the special protection of the state.⁶⁴ In relation to marriages of convenience the following legal regulations are of relevance:

- **Article 1353 - Matrimonial Cohabitation - of the German Civil Code (§ 1353 BGB)** which establishes that marriage is a concluded for a *lifetime*, that the spouses are obliged to establish matrimonial cohabitation, and are responsible for one-another.

⁶¹ Hartman 2008.

⁶² Titel: Zuwanderungsgesetz, Zuwanderung, Einwanderung, Migration, Ausländer, Ausländerrecht - Sachstand 11.10.2005. Available online: <http://www.aufenthaltstitel.de/zuwg/1059.html>

⁶³ Migrationsbericht 2008, p. 145. Available online at: http://www.bmi.bund.de/cae/servlet/contentblob/876734/publicationFile/55728/Migrationsbericht_2008_de.pdf (downloaded: 27.3.2010). But the statistics of the Auswärtiges Amt are not complete and do not offer a full picture of spouse and family migration. Nachdem nun im AZR auch die Speicherung der Aufenthaltzwecke möglich ist, kann der Familiennachzug differenzierter dargestellt werden als dies bislang durch die Visastatistik möglich war. Zum anderen wird auch der Nachzug sonstiger Familienangehöriger registriert. Dies wurde möglich durch die Speicherung der Aufenthaltzwecke nach dem zum 1. Januar 2005 in Kraft getretenen Aufenthaltsgesetz.

⁶⁴ The official translation of the German Basic Law. Available online at: <https://www.btg-bestellservice.de/pdf/80201000.pdf>

- **Article 27 – Principles of Family Reunification - section 1a No. 1 of the German Residence Act (§ 27 Abs. 1a Nr. 1 AufenthG)** which states that family reunification or unification with a spouse is not allowed when it is confirmed that the marriage (or other family relationship) was concluded for the sole purpose of achieving entry and residence for the spouse (or other family member) in Germany.⁶⁵ The same applies to those cases where factual evidence grounds the assumption that one of the spouses has been forced into marriage (§ 27 Abs. 1a Nr. 2 AufenthG).⁶⁶
- **Article 1314 – Reasons for Cancellation - section 2 no.5 of the German Civil Code (§ 1314 Abs.2 Nr.5 BGB 1998)** which lays down the reasons for cancellation of a marriage in cases when both spouses agreed that they do not intend to establish a matrimonial cohabitation as anchored in article 1353 of the German Civil Code.

Thus, article 27 section 1a No. 1 of the Residence Act forms a pronounced ground for suspending a reunification of spouses in case of a marriage of convenience or in case of proxy family relationships, in order to reduce the incentive for it. The law states that a formal marriage by itself does not entitle spouses to reunification, but that the existence of a matrimonial cohabitation is required. A matrimonial cohabitation can be assumed when the spouses recognizably have a durable, mutually supportive relationship marked by a strong bond, in which they live or intend to live. It is presumed that the bond between the spouses surpasses a relationship between friends in a mere co-existing relationship (*Begegnungsgemeinschaft*). Additional, or secondary, motives for a marriage (such as name, tax advantage, local residence allowance, right to a social housing etc.) do not constitute a marriage of convenience, provided that at the same time the spouses have the will to establish a matrimonial cohabitation. Therefore the use of the notion of *marriage for a purpose* (*Zweckehe*) in the sense of marriage of convenience (sham marriage or in German *Scheinehe*) should be avoided.⁶⁷

Living together is a precondition for family reunification and for the recognition of a valid marriage. It can thus be seen as an absolute requirement, with only rare and plausibly explainable exemptions.⁶⁸ According to German legislation and the ruling of the Federal Constitutional Court, the marriage of convenience means a marriage which has not been concluded in order to establish a matrimonial cohabitation, in whatever form, but instead to fulfill another purpose – especially to enable the foreign partner to gain a residence permit. In case the Foreigners Authorities uncover a marriage of convenience, the

⁶⁵ From: <http://www.aufenthaltstitel.de/aufenthaltsg.html>: Abschnitt 6: Aufenthalt aus familiären Gründen

§ 27 Grundsatz des Familiennachzugs

(1) Die Aufenthaltserlaubnis zur Herstellung und Wahrung der familiären Lebensgemeinschaft im Bundesgebiet für ausländische Familienangehörige (Familiennachzug) wird zum Schutz von Ehe und Familie gemäß Artikel 6 des Grundgesetzes erteilt und verlängert.

(1a) Ein Familiennachzug wird nicht zugelassen, wenn feststeht, dass die Ehe oder das Verwandtschaftsverhältnis ausschließlich zu dem Zweck geschlossen oder begründet wurde, dem Nachziehenden die Einreise in das und den Aufenthalt im Bundesgebiet zu ermöglichen, oder tatsächliche Anhaltspunkte die Annahme begründen, dass einer der Ehegatten zur Eingehung der Ehe genötigt wurde.

⁶⁶ Einige Verbände sehen in der Regelung einen Generalverdacht gegen alle binationalen und ausländischen Ehen. Tatsächlich gibt die Neuregelung den bisher schon in der Rechtsprechung und der Verwaltungspraxis zugrunde gelegten Begriff der aufenthaltsrechtlich schutzwürdigen ehelichen Lebensgemeinschaft wieder. Nach dem Wortlaut der Neuregelung, der dem des Art. 16 Abs. 2 der Familiennachzugsrichtlinie entspricht, muss das Bestehen einer Scheinehe feststehen. 7. Bericht der Bundesbeauftragter, p.153-154.

⁶⁷ 27.1a *Ausdrücklicher Ausschlussgrund bei Scheinehe, Scheinverwandtschaftsverhältnissen und Zwangsverheiratung*. Bundesministerium des Innern, M. Migration, Integration; Flüchtlinge; Europäische Harmonisierung, Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz Vom 26. Oktober 2009. Also in Information from the material of the German Foreign Office *Ehegattennachzug*. 40. *Ergänzungslieferung*, Stand: 10.06.2009. Received from the Foreign Office in April 21, 2010.

⁶⁸ In the course of the research for this study it was not possible to find out wheater there would be a rule governing exemptions, nor how that would be put into practice.

residence permit will be withdrawn and the foreign partner will be viewed as if he or she had never had any residence permit and is therefore obliged to leave the country.⁶⁹

Developments in legislation and background/rationale for changes. EU-regulations within the regulatory framework regarding marriages of convenience

The German Immigration Act (Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners of 30 July 2004) came into force on 1 January 2005. This act was passed following a long and difficult legislative process and intense discussions in public and in the Bundestag and Bundesrat. The Immigration Act, which is essentially made up of the Residence Act (AufenthG) and the Act on the General Freedom of Movement for EU Citizens (Freedom of Movement Act/EU) has thoroughly reformed Germany's immigration law. Through the Immigration Act a number of other laws (such as the Asylum Procedure Act, the Act on the Central Aliens Register, the Nationality Act) have also been amended. The Act regulates the rules for entry and residence of foreign family members of persons legally residing in Germany (§§ 27-36 of the Residence Act). Family reunification is guaranteed on the basis of article 6 section 1 of the German Basic Law for protection of marriage and family (§ 27 section 1 Residence Act). These new regulations on family reunification in the Residence Act apply to foreigners who are not EU citizens and are also not family members of EU citizens. They also apply to the subsequent immigration of third country nationals to German nationals. The full implementation of the EU Family Reunification Directive was achieved with the Act to Implement Residence- and Asylum-Related Directives of the European Union (EU-Directives Implementation Act), which came into force on 28 August 2007, has once again amended these acts.⁷⁰ These amendments transposed provisions to implement eleven EU directives on residence and asylum rules, especially the EU Directive on Family Reunification, with the aim to prevent marriages of convenience or forced marriages.⁷¹ The subsequent immigration of EU-citizens and their family members is regulated on the basis of European law on free movement.⁷² The rationale behind these changes is explained on the website of the German Ministry of the Interior:

Reducing the number of discretionary provisions governing the subsequent immigration of dependents that were contained in the previous Foreigners Act has proved to facilitate the implementation. It has, however, become evident, that the right to subsequent immigration of dependents was quite often abused. This is why Germany has made use of the possibility provided under EU law to request basic proficiency in the German language from immigrants wishing to join their spouses in Germany. A minimum age for persons wishing to join their spouses in Germany was introduced. This provision is aimed not only at combating forced marriages but also at improving the prospects of a successful integration of those who join their families in Germany. In order to restrict immigration into Germany's welfare systems, the authorities routinely examine beforehand whether the persons concerned have sufficient means of livelihood.⁷³

⁶⁹ Systematische Darstellung. <http://www.rechtsanwaltpralm.de/scheidungsehe.htm>

⁷⁰ Migrationsbericht 2008: 142. See also BMI: The Immigration Act. Available online at: http://www.zuwanderung.de/cln_153/nn_1068550/EN/ImmigrationToday/TheImmigrationAct/theImmigrationAct__node.html?__nnn=true

⁷¹ The Act contains provisions on the entry of foreigners into Germany, their residence in the country, various residence purposes, the termination of residence and asylum procedures. <http://www.auswaertiges-amt.de/diplo/en/WillkommeninD/EinreiseUndAufenthalt/Zuwanderungsrecht.html>

⁷² Migrationsbericht 2008: 142.

⁷³ BMI: The Immigration Act. Subsequent Immigration of Dependents http://www.zuwanderung.de/cln_153/nn_1068550/EN/ImmigrationToday/TheImmigrationAct/theImmigrationAct__node.html?__nnn=true

The additional requirements established in the new provisions of the legislation for the granting of a residence permit for a spouse of a third country national coming from a third country is that both spouses must have reached the age of 18 and the immigrating spouse has to have at least a basic knowledge of Germany (A1 level of the Goethe Institute). The same conditions are valid also for immigrating spouses of German nationals. The reason for these changes was the will to facilitate integration of newcomers and prevent forced marriages.⁷⁴

Standard of evidence and burden of proof

In accordance with general principles, the applicant (for reunification with a spouse) is responsible for the provision of material proof of his/her intention to establish a matrimonial cohabitation. The applicant is required to present without delays the necessary proofs of his/her personal affairs. The standard of evidence is similar to the other case countries; it must be established with a balance of probabilities that the marriage is one of convenience in order to reject an application.

Sanctions

When the Foreigners' Authority uncovers a marriage of convenience, the residence permit will be withdrawn – which means that the foreigner will be viewed as if he or she had never had any residence permit, and is hereby obliged to leave Germany.⁷⁵ After evaluation of the available literature and cases, it seems that in most cases both partners who were found to have entered into a marriage of convenience were sanctioned by:

- financial sanctions
- penal sanctions (usually on probation, in some harsh criminal cases with imprisonment)

The sanctions for the foreign spouse went further and could also include:

- revocation of residence permit
- revocation of citizenship
- expulsion
- re-entry ban (period of time differs, but is usually very short)

The conclusion of a marriage of convenience in itself is not punishable by German law, not until a residence permit is applied for. Only when the marriage is used as an immigration gate can criminal liability arise.⁷⁶ Marriages of convenience are liable to prosecution in accordance with the following legal regulations and under the following circumstances:

A) **The German Residence Act 2004** allows for penal sanctions for a marriage of convenience in a two-fold way:

- a) §95 section 2 no.2 (which is linked to the §§25ff of the German Penal Code). The article states, that anyone who:
 1. a) enters the Federal territory or
 - b) resides in said territory

⁷⁴ Migrationsbericht 2008: 143.

⁷⁵ Strafbarkeit einer Scheinehe. <http://www.rechtsanwalttrpalm.de/scheidungsehe.htm>

⁷⁶ <http://de.wikipedia.org/wiki/Scheinhe>

in contravention of Section 11 (1), sentence 1 or

2. furnishes or uses false or incomplete information in order to procure a residence title or a suspension of deportation for themselves or for another or who knowingly uses a document procured in this manner for the purposes of deceit in legal matters

shall be punishable with up to three years' imprisonment or a fine.

In accordance with this provision, also handling of third parties can be classified as criminal offence in relation to marriages of convenience.⁷⁷

- b) § 96 section 1 no.1 of the Residence Act, which penalizes smuggling of foreigners into the Federal territory, states that anyone who

1. incites another person to commit an act pursuant to Section 95 (1), no. 3 or (2), no. 1, letter a and
 - a) receives a pecuniary advantage or the promise of a pecuniary advantage in return or
 - b) acts in such a manner repeatedly or for the benefit of several foreigners or
2. incites another person to commit an act pursuant to Section 95 (1), no. 1 or no. 2, (1a) or (2), no. 1, letter b or no. 2 and receives a pecuniary advantage or the promise of a pecuniary advantage in return

shall be punishable with a prison sentence of up to five years or a fine.⁷⁸

B) In addition, the conclusion of a marriage of convenience is punishable in line with the **German Penal Code - § 271 of the due to indirect falsification of documents** or due to a *false statutory declaration as established in § 156 of the Penal Code*.

C) A marriage of convenience can also be cancelled by the Family Court on the basis of **§ 1314 section 2 no.5 German Civil Code**, so in cases when both spouses agreed that they had not intend to establish a matrimonial cohabitation as anchored in article 1353 of the German Civil Code. In such cases the claim for cancellation can also come for an administrative authority (e.g. Regulatory Office - *Ordnungsamt*), as stated in § 1316 sec. 3 German Civil Code.

Legal practice and developments in the case-law

The following legal cases have been identified as relevant in the last five years for deciding on marriages of convenience:

Ruling by the Administrative Court Berlin from September 9, 2007:

Also after the entry into force of the new Residence Act (28.08.2007), in case of application for family reunification and subsequent granting of residence permit, the burden of proving that the matrimonial cohabitation is intended by the spouses is to be borne by the foreign spouse. Thus, it does not suffice, that the German spouse desires a relationship, if the foreign spouse desires only a residence permit. The fact that fiancés do not speak a language understandable by both of them speaks against the earnestness of the marriage.⁷⁹

⁷⁷ Hartmann 2008: 177. Quotation from the German translation of the Residence Act available online at: http://www.migrationsrecht.net/cat_view/364-english-documents/450-german-immigration-law.html

⁷⁸ Hartmann 2008: 179. Quotation from the German translation of the Residence Act available online at: http://www.migrationsrecht.net/cat_view/364-english-documents/450-german-immigration-law.html

⁷⁹ <http://www.rechtsanwalttrpalm.de/scheidungsehe.htm>

Ruling by the Higher Administrative Court of the federal state Schleswig-Holstein (November 15, 2000 - 11 M 3199/00):

1. For the presumption on the existence of the so-called sham marriage it does not suffice, when only one of both spouses has had adequate visions, or when the purpose of marriage was also, even not solely, the acquisition of a residence permit.⁸⁰

2. The fact of having two flats does not exclude the assumption of future establishment of a matrimonial cohabitation.⁸¹

The second ruling from Schleswig-Holstein is very important as it clarifies, that the intention to marry in order to get a residence permit does not automatically imply a marriage of convenience. When also other motives induce two people into marriage, the accusation of a sham marriage does not apply to their case.⁸²

Lawyers however advise against concluding marriages with foreigners solely for the purpose of providing him or her with a residence possibility in Germany. In doing so, as ruled for instance by the Higher Regional Court Düsseldorf (22.12.1999 - 2b Ss 542/99), the involved person will be accused of smuggling of foreigners in accordance with the Residence Act. Paying a reference person for entering a marriage can make the reference person liable to criminal prosecution.⁸³

The law enforcement proceedings methods of criminal investigation vary in Germany, depending on the individual cases and the regional Organisation. The law enforcement agencies cooperate with local Registry Offices and Foreigners Authorities.⁸⁴

In legal practice marriages of convenience, and generally providing incorrect information in order to acquire residence permit usually will not have consequences in terms of criminal proceedings. The affirmation of criminal liability in practice requires circumstantial evidence of a considerable severity.⁸⁵

The disclosure of a marriage of convenience by one of the spouses to the Foreigners' Authority would lead to the loss of residence permit. It can also lead to the withdrawal of long standing residence permits (as for instance in the ruling by the Administrative Court Göttingen - 3 B 177/03, Ruling from August 15, 2003).⁸⁶ In cases where the marriage was associated with a financial reward, the imposed penalty will be adjusted to this fact. Such indictable payments differ considerably – from a pack of cigarettes to monthly payments of about 500 € until the independent residence permit is granted.⁸⁷

- In one case in Hamburg in 2003, a self-indictment of one woman resulted in a minimal financial fine of 250 euro.
- In another case from Bochum in 2009, much higher financial penalties were imposed on spouses in a marriage of convenience – 2700 euro for the wife from Belarus, who was engaged in prostitution, and 900 euro for the husband from Germany, who was a

⁸⁰ Für die Annahme einer sog. "Scheinehe" reicht es nicht aus, wenn nur einer der beiden Ehegatten entsprechende Vorstellungen hatte oder wenn der Zweck der Ehe zwar auch, aber nicht ausschließlich die Verschaffung des Aufenthaltstitels war.

⁸¹ <http://www.rechtsanwaltdrpalm.de/scheidungsehe.htm>

⁸² <http://www.rechtsanwaltdrpalm.de/scheidungsehe.htm>

⁸³ Strafbarkeit einer Scheinehe. <http://www.rechtsanwaltdrpalm.de/scheidungsehe.htm>

⁸⁴ Hartmann 2008: 183.

⁸⁵ <http://de.wikipedia.org/wiki/Scheinehe>

⁸⁶ Folgen einer Scheinehe. <http://www.rechtsanwaltdrpalm.de/scheidungsehe.htm>

⁸⁷ Folgen einer Scheinehe. <http://www.rechtsanwaltdrpalm.de/scheidungsehe.htm>

craftsman. The reason was that the marriage was concluded only to enable the Belarusian woman to practice prostitution in Germany. The wife faced also expulsion from Germany. The couple did not appeal against the decision, by which the financial penalty became valid.⁸⁸

- Finally, in a widely reported in the media, occurred in Berlin in 2006, a group of Chinese smugglers with migrants was detected and crashed, with financial penalties of up to 4000 euro for involved individuals, suspended sentence for Germans involved and expulsion from Germany for the mediators and involved Chinese nationals.⁸⁹

In practice, identified marriages of convenience usually end only in the non-prolongation of the residence permit and effectively in departure from Germany. In some cases, departure is accompanied by a criminal charge, usually ending in a financial penalty. Prison sentence occurs only in very rare cases, usually when marriage of convenience is one of several other crimes committed by the person, or in cases of serious previous criminal record of the person involved in marriage of convenience. In a total majority of cases, the breach of § 95 leads both to a financial penalty (as for penal legislation) and to expulsion from the territory of Germany (as for immigration legislation). Residential penalty (expulsion or non-prolongation of residence) precedes the criminal penalty. Foreigners Authority follows the cases often not further – the expulsion or non-prolongation of residence remain the only fine, and persons involved in marriages of convenience are not further prosecuted. The marriage is not automatically revoked.⁹⁰ The re-entry bans are only done in cases of expulsion and usually for a period of maximum 1 year, usually only a few months.

Appeals⁹¹

Once a case of marriage of convenience goes to the court, it is reported in interviews that approximately 95 percent are won by the Foreigners' Authorities. Their arguments or even proofs of the proxy character of marriage are usually strong enough to end in the penalization of the partners.⁹² Following an expulsion or a deportation, it is advisable to file an application for a limitation, which could limit the time period until a new entry to Germany is allowed, in order to prevent that the person in question is unlimitedly hindered to come to the country.⁹³

INSTITUTIONAL AND ADMINISTRATIVE SET-UP

The following actors play an important role in the law and practice of policy regarding marriages of convenience. The tasks of the actors can be divided according to their responsibilities into i) executive and monitoring level, and ii) operational and law-enforcement level.

⁸⁸ Der Westen (WAZ): 3600 Euro Strafe für Scheinehe. Gericht, 19.10.2009, Bernd Kiesewetter. Available online at: <http://www.derwesten.de/staedte/bochum/gericht/3600-Euro-Strafe-fuer-Scheinhe-id31192.html> (downloaded: April 22, 2010).

⁸⁹ Der Tagesspiegel: 22.02.2006 5000 Euro für Scheinehe mit asiatischen Partnern. Chinese als Mitglied von Schleuser-Bande verurteilt, Available online at: <http://www.tagesspiegel.de/berlin/5000-euro-fuer-scheinhe-mit-asiatischen-partnern/687116.html>

⁹⁰ Interview Berlin 26.5.2010.

⁹¹ In the course of this research it was not possible for us to find out, what proportion of marriage of convenience cases result in an appeal to a higher administrative authority, nor whether there would be a a pattern as to which cases go into appeal? (Nationality or similar). It was also not possible to find out, how big a proportion of these appeals are successful at first instance, and how many succeed at second instance. It could not be found out how often is a final rejection appealed against in court, nor what which cases are brought to court (nationality or similar).

⁹² Interview Berlin 26.5.2010.

⁹³ Strafbarkeit einer Scheinehe. <http://www.rechtsanwalttrpalm.de/scheidungsehe.htm>

- i) **On the executive and monitoring level, the following ministries and offices are involved:**

Federal Ministry of the Interior (Bundesministerium des Inneren, BMI)

The Interior Ministry is responsible for the implementation of the legislation in the areas of migration and integration, migration and integration policies, as well as with the associated issue of European harmonisation. In October 2009 the Ministry published General Administrative Regulations on Residence Act (Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz) with detailed elaboration of how the possible marriages of convenience are to be tackled by the Foreigners' Authorities so that it would be in line with the provisions of the German Residence Act. The Ministry also exercises legal and technical oversight over the Federal Office for Migration and Refugees.⁹⁴

Commissioner for Migration, Refugees, and Integration (Die Beauftragte für Migration, Flüchtlinge und Integration)

The Commissioner for Migration, Refugees and Integration (formerly Federal Government Commissioner for Foreigners)⁹⁵ is appointed by the Federal Government for consultancy purposes as well as to participate in forming bills. Furthermore, the Commissioner of the Government is responsible for promoting the integration of foreigners in Germany while simultaneously counteracting xenophobia. The Office of the Federal Commissioner has been publishing reports on the situation of migrants in the Federal Republic in Germany. Especially in the *6th Report (6. Bericht über die Lage der Ausländerinnen und Ausländer in der Bundesrepublik Deutschland)* a lot of attention was paid to the phenomenon of Scheinehe.⁹⁶

Federal Office for Migration and Refugee (Das Bundesamt für Migration und Flüchtlinge, BAMF)

With the entry into force of the new Immigration Act, the Federal Office for Migration and Refugees, in addition to implementing asylum procedures, also undertakes tasks in the areas of integration promotion, migration research, refugee protection and voluntary returns assistance.⁹⁷ The operations of the BAMF are in the portfolio of the Ministry of Interior. In relation to sham marriages, the Office collects relevant information and publishes it, and does not have the role of an active actor.

Appeals are handled by the administrative courts.

- ii) **On the operational and law-enforcement level, the following authorities are the main actors:**

Federal Foreign Office and Diplomatic Missions

Diplomatic missions are authorised by the Federal Foreign Office to handle all passport and visa issues abroad. Third country nationals intending to marry their

⁹⁴ See Bundesministerium des Innern, M. Migration, Integration; Flüchtlinge; Europäische Harmonisierung, Allgemeine Verwaltungsvorschrift, zum Aufenthaltsgesetz. Available online at: http://www.bmi.bund.de/cae/servlet/contentblob/874562/publicationFile/54976/AufenthG_VwV.pdf. See also <http://emn.sarenet.es/Downloads/download.do;jsessionid=5000746F5CCD47C5DB0EF4487BA239E1?fileID=686>

⁹⁵ <http://www.bundesregierung.de/Webs/Breg/DE/Bundesregierung/BeauftragtefuerIntegration/beauftragte-fuer-integration.html>

⁹⁶ Since 2005, the Commissioner of the Government has operated out of the Federal Chancellery as a Minister of State. From The Organisation of Asylum and Migration Policies in Germany. Available online: <http://emn.sarenet.es/Downloads/download.do;jsessionid=5000746F5CCD47C5DB0EF4487BA239E1?fileID=686>

⁹⁷ http://www.bamf.de/cln_092/nn_433806/EN/DasBAMF/dasbamf-node.html?__nnn=true

partner who is living in Germany and subsequently live in the country have to apply for a visa at the German diplomatic missions abroad. The Foreign Offices stresses that it is important to start the visa application process only after the partners have informed themselves about and have fulfilled necessary civil and civil status law conditions for a marriage. The German Consulates decide if applications meet the basic criteria for a Visa for Marriage / Registered Partnership in Germany

Foreigners Authorities (Ausländerbehörden)

The Foreigners Authorities of each Federal State implement the immigration legislation in Germany in practice (all legal residence and passport issues including decisions on deportations and their execution), and are under the supervision of the individual federal states. German embassies and consulates forward applications for Visa for Marriage / Registered Partnership to the locally competent Foreigners Authorities in Germany for approval. The Foreigners Authorities are obliged to involve law enforcement agencies when they have a founded suspicion of a marriage of convenience. And vice-versa, the law enforcement agencies are obliged to inform the Foreigners Authority about the beginning of criminal proceedings. Employees of the Foreigners Authorities are the most important external contact persons as they are in direct contact to the spouses. Very often the Foreigners Authorities make a report and refrain from own investigations.⁹⁸

Registry Office (Standesamt)

Since the entry into force of the German Marriage Act of 1998, many officers of the registry offices make use of the articles 1310 section 1 and article 1214 section 4 no.5 of the German Penal Code, which obliges them to refuse their cooperation in a conclusion of a marriage, when it is evident⁹⁹ that it would be a marriage of convenience. According to the procedural law of the article 5 section 4 of the Civil Status Law (Personenstandsgesetz) allows the registrars to carry out investigations. Should there be sufficient clues for a marriage of convenience in accordance with the article 1314 section 2 no.5 of the German Civil Code 1998, is it possible to carry out an interview with the couple (together or separately) (pursuant to the section 5 sub-section 2 sentence 1 Civil Status Law) or to request from them a submission of relevant certificates (e.g. rental contract, documents from third parties or other official documents which may be obtained inland). Or the registrars require that the couple make an affirmation in lieu of an oath /statutory declaration as a proof of the veracity of the marriage. The choice of tools is up to the officers. The registry officers may also visit the housing of the fiancés, yet, surprise visits or search of the housing without the prior agreement by the couple are impermissible. The investigations must be limited to facts, which would be fundamental to the abolition of a marriage. Interview happens often on the basis of a questionnaire and can take place either at the same time when filing application for marriage, or during an agreed extra appointment or on the day of marriage – it depends on the registry officer. The appointment takes place in the premises of the registry office.¹⁰⁰

However, it is very rarely apparent, that the marriage is of convenience. Usually, the investigations will be undertaken when there is a suspicion of the abuse of

⁹⁸ Hartmann 2008 and Foreign Office.

⁹⁹ It is this required patency (Offenkundigkeit) of the marriage that is being discussed, as it is extremely difficult to judge the probability of a sham marriage. It has not been established, how intensive the investigation by the registry offices may be.

¹⁰⁰ Hartmann 2008: 299.

Residence Act. Neither marriages of two German nationals, nor marriages with partners from the EU or the USA, are subjected to investigation.¹⁰¹

Law Enforcement Agencies

Police

The police is responsible for starting investigations when the first suspicion of having committed the crime of a marriage of convenience on the basis of Residence Act occurs. The priority in this respect is for the police the combating of marriages of convenience concluded as a way of circumventing the entry and residence regulations and enable the involved persons, or one of the involved persons, in order to engage in criminal activities on the territory of the German Republic (organized crime, prostitution, smuggling of migrants, trafficking in drugs or human beings and others). Especially the Criminal Police Departments in bigger cities and State Offices of Criminal Investigation (Landeskriminalamt LKA) are involved.¹⁰² In 1995, the State Office of Criminal Investigation Berlin established the first specialized police department¹⁰³ focusing solely on the marriages of convenience and investigating their relation to organized crime, especially in relation to prostitution.¹⁰⁴ Similar specialized police departments were founded in Munich and Hannover.¹⁰⁵

Public Prosecution Service

When the police investigations reveal that the marriage is of convenience and can be classified as a criminal offence, the public prosecution service will be involved. Even before the case is handed to the prosecution, a close cooperation between the police corps and the prosecution, as for some police interventions a court order has to be obtained.

Cooperation between actors

In the framework of the visa granting process the decision making is done in a close cooperation between the diplomatic mission and the locally responsible Foreigners Authority. This applies especially to the prognosis about the intention and will of partners to establish a matrimonial cohabitation in Germany. This prognosis contains the information gained by the mission abroad as well as the information of the Foreigners Authority collected inland. This information can be gathered in form of parallel oral interview or eventually written questioning of the German national and of the spouse by the Foreigners Authority, or by the diplomatic mission, if necessary with the assistance of an interpreter. For the interview, there is a prepared sample questionnaire with additional indicators, which is a part of a handbook on visa.¹⁰⁶

The cooperation between registry offices, foreigners' authorities, police and public prosecution services differs in different cities and so does the exchange of data and

¹⁰¹ Hartmann 2008.

¹⁰² Hartmann 2008: 183.

¹⁰³ Die "Arbeitsgruppe Ausländer" (AGA) in Berlin and Gemeinsame Arbeitsgruppe Intensivtäter (GAI) in Hannover and also in Frankfurt. Hartmann 2009: 184 and in Bürgerrechte & Polizei/CILIP 65 (1/2000), "Ausländerpolizeien" Von der Amtshilfe zur gezielten Überwachung, von Norbert Pütter <http://www.cilip.de/ausgabe/65/ausl-pol.htm> (downloaded: April 22, 2010).

¹⁰⁴ Nivedita Prasad. Ban Ying: p.4.

¹⁰⁵ Hartman 2008: 183-184.

¹⁰⁶ Bundesministerium des Innern, M. Migration, Integration; Flüchtlinge; Europäische Harmonisierung, Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz. Vom 26. Oktober 2009, part 27.1a.1.1.4

information. Some Foreigners Authorities however prefer not to cooperate with law enforcement agencies in cases of marriages of convenience due to the sensitivity of this issue and previous negative experiences (for instance this is reported in the city of Kiel) and involve police only when arresting migrants. An important issue in this respect is the guarantee of data protection, when information is exchanged between actors, which are neglected quite often. Many times sensitive personal data gained by the registrars have transpired into the files of foreigners at the Foreigners Authorities (Ausländerakte), so these were available to the law enforcement agencies. Authorities have also highlighted as useful the cooperation with the Social Assistance Office (Sozialamt), where the couples in some cases apply for a flat. The scale and form of administrative cooperation is in all cases regulated by law. Internal guidelines exist in some cities, but they are usually based on well-established cooperation patterns.¹⁰⁷

PROCESS AND PRACTICE

Formal requirements for a third-country national to be granted permanent residence in Germany in the framework of family reunification

The application for family reunification has to be filed with the German diplomatic mission in the country of origin. The mission passes it on to the local Foreigners Authority. This procedure applies to all foreigners other than EU citizens or citizens of the other member states of the European Economic Area, Switzerland, the US, Australia, Israel, Japan, Canada and New Zealand. After having entered Germany, the dependent has to apply for a residence permit at the local Foreigners Authority before his/her visa runs out.¹⁰⁸

The Residence Act sets out the general preconditions for granting a residence permit set out in and the general principles for family reunification with foreigners:

- namely that the sponsor has to hold a residence permit and
- sufficient living space must be available
- the sponsor may not rely on public benefits
- the immigrating spouse must have basic knowledge of German.

Before entering a marriage, certified copies of many documents (usually translated into German by certified translators) have to be provided to the Registry Office.¹⁰⁹ In most cases, a certificate of no impediment to the marriage has to be provided as well.¹¹⁰ These

¹⁰⁷ Hartmann 2009: 184-185.

¹⁰⁸ Kreienbrink, Axel and Rühl, Stefan (2007): Family Reunification in Germany. Small Scale Study IV in the Framework of the European Migration Network. Federal Office for Migration and Refugees, Berlin. In this study abbreviated as Family Reunification Study. P. 19-20. Available online at: http://www.bamf.de/clin_101/nn_435228/SharedDocs/Anlagen/EN/Migration/Downloads/EMN/EMNselbst/small-scale-4-family-reunification,templateId=raw,property=publicationFile.pdf/small-scale-4-family-reunification.pdf

¹⁰⁹ The family relationship between the sponsor and the dependent has to be proved by public documents, usually certificates of birth, marriage or divorce, passport or other identification, evidence of the parentage and other documents depending on the laws of his/her country of origin. The authorities have discretion on how the necessary evidence can be produced. If documents are written in a foreign language, the authorities may require a certified translation by a qualified translator. In principle, the responsible German embassy may require the legalisation of foreign public documents. Depending on the country of origin, the furnished documents and certificates may be examined for accurateness and credibility (e.g. mutual authorisations, divorce decrees for former marriages, custody orders, contracts, joint expenditure etc). Often the partners are interviewed separately to make sure that the marriage is not a sham marriage. In doing so, the foreigners authority has to respect the spouses' privacy. The sponsor may be asked to declare his/her commitment to guarantee the family member's livelihood, health insurance coverage and accommodation. From Family Reunification Study 2007: 19.

¹¹⁰ If no international certificate of no impediment can be provided (section 1309 of the German Civil Code (BGB)), this obligation can be waived by a decision of the relevant Higher Regional Court (Oberlandesgericht, OLG). In order to examine the legality of the certificate of no impediment the OLG will usually involve the foreigners authority, which will

documents will be examined by the registrar. If there are reasons to suspect that a marriage of convenience is intended, the registrar may interview the fiancés, and eventually refuse the marriage. Even after the couple gets married, the Foreigners Authorities may investigate whether a “fake” marriage was concluded. If this is concluded, for example because no matrimonial cohabitation (common family household) was established, the marriage is not protected by Article 6 sub-section 1 of the German Basic Law. In German law, and the residence permit becomes void, pursuant to section 95 sub-section 2 Residence Act. The investigations into a possible marriage of convenience in Germany are in line with the provisions of the Family Reunification Directive.¹¹¹

A residence permit entitles its holder to pursue an economic occupation if the foreigner who is being joined by the spouse is entitled to pursue an economic activity, or if marital cohabitation has lawfully existed in the republic for at least two years. There is no separate work permit, the right to work derives from the residence permit.¹¹²

A married foreigner has a chance to get an independent residence permit after two years of marital cohabitation, which is independent of the partner. It means that the foreign spouse can remain in Germany when he or she has a regular job and fulfils some other conditions. After three years of marriage, the foreign spouse can receive an unlimited residence permit. Therefore, many marriages of convenience end after these periods of time.¹¹³

A marriage of convenience can be ended under the following circumstances:

- before it is even concluded; since 1 July 1998, the German Marriage Act pursuant to § 1310 section 1 of the German Civil Code forbids registrars the cooperation on the conclusion of a marriage of convenience when it is evident that the marriage could be voidable pursuant to § 1314 section. 2 no. 5 of the German Civil Code.
- by a regular divorce without administrative bodies noticing a marriage of convenience has ever existed
- on the application of a spouse or of a responsible administrative body pursuant to the article § 1314 section 2 no.5 of the German Civil Code
- when both partners are in agreement before the marriage ceremony that the marriage does not intend to fulfil the conditions of § 1353 section 1 of the German Civil Code and that they will not live together and not for a lifetime¹¹⁴ - in this case the marriage can be proclaimed void
- the marriage is proclaimed void when the couple has been convicted of having concluded a marriage of convenience in order to circumvent regulations on entry and residence as established in Article 27 section 1a no. 1 of the German Residence Act

compare the data in order to review the suspicion that a fake marriage is intended. If the OLG concludes that the marriage is fake, it may refuse to waive the requirement of a certificate of no impediment.

¹¹¹ Binationaler Alltag in Deutschland. Ratgeber für Ausländerrecht, Familienrecht und interkulturelles Zusammenleben.. Also in: Kreienbrink, Axel and Rühl, Stefan (2007): Family Reunification in Germany. Small Scale Study IV in the Framework of the European Migration Network. Federal Office for Migration and Refugees, Berlin. In this study abbreviated as Family Reunification Study. P. 19-20. Available online at: http://www.bamf.de/clin_101/nn_435228/SharedDocs/Anlagen/EN/Migration/Downloads/EMN/EMNselbst/small-scale-4-family-reunification,templateId=raw,property=publicationFile.pdf/small-scale-4-family-reunification.pdf

¹¹² Family Reunification Study: 17.

¹¹³ Systematische Darstellung. <http://www.rechtsanwalt-rpalm.de/scheidungsehe.htm>.

¹¹⁴ Systematische Darstellung. <http://www.rechtsanwalt-rpalm.de/scheidungsehe.htm>.

Criteria for assessing whether a marriage is one of convenience

The Foreigners Authority may carry out its own investigations of the potential existence of a marriage of convenience. For German authorities, the suspicious factors hinting at a marriage of convenience are identical to those listed in the EU resolution on measures for combating marriages of convenience:¹¹⁵

- the fact that matrimonial cohabitation is not maintained,
- the lack of an appropriate contribution to the responsibilities arising from the marriage,
- the spouses have never met before their marriage,
- the spouses are inconsistent about their respective personal details (name, address, nationality and job), about the circumstances of their first meeting, or about other important personal information concerning them,
- the spouses do not speak a language understood by both,
- a sum of money has been handed over in order for the marriage to be contracted (with the exception of money given in the form of a dowry in the case of nationals of countries where the provision of a dowry is a common practice),
- the past history of one or both of the spouses contains evidence of previous marriages of convenience or residence anomalies.

In practice in Germany, also some additional clues are relevant, for instance:¹¹⁶

- a significant age difference between the fiancés, especially when the woman is older than the man
- two flats, with at the same time quite humble living conditions
- existence of notarized pre-marital contract, which excludes to a large extent proprietary and financial consequences of marriage for the spouses
- the immigrating foreign partner has unsuccessfully tried to acquire a residence permit in the country for a longer period of time, and has avoided deportation by going into hiding
- application for asylum of the partner or a marriage shortly before the deportation, expulsion or end of residence permit
- previous marriages of the German partner with migrants
- repeated unsuccessful applications for marriage by the foreign partner.

The Foreigners' Authorities prove, in case of a serious suspicion, also, whether other indications for the existence of marriage of convenience exist. Observations by external cooperation partners of the Foreigners Authority which show, that despite the same registered address the couple does not live there together, or that one of the spouses appears at the place only sporadically, endanger the granting or prolongation of the residence permit. It is also possible, that neighbours, friends or even children will be asked, if it is a real marriage or if only the impression of such a one should be made. Spouses can also count with the possibility of being questioned separately on the basis of a questionnaire. The questionnaire (Fragenkatalog) contains questions regarding the beginnings of the relationship, getting to know each other, daily routines, free time,

¹¹⁵ Council Resolution 97/C 382/01 of 4 December 1997 on measures to be adopted on the combating of marriages of convenience. Available online at: http://europa.eu/legislation_summaries/other/l33063_en.htm

¹¹⁶ Verdachtsmomente einer Scheinehe. <http://www.rechtsanwalt.palm.de/scheidungsehe.htm> and Vgl. BVerfG Beschluss v. 05.05. 2003 -2 BvR 2042/02.

different circumstances of the relationship etc. Sometimes even superficial diversions or differences can raise the risk that the Foreigners Authority will have the suspicion for marriage of convenience.¹¹⁷

IMPLEMENTATION CHALLENGES

Responsible authorities commented that uncovering marriages of convenience is an sensitive issue, time-consuming, and officials usually decide to refrain from judgments on the sincerity of marriage as they would interfere with the most private of sphere of people. Besides, as the interviewees maintained, marriages of convenience are extremely rarely used for criminal purposes.¹¹⁸

¹¹⁷ Verdachtsmomente einer Scheinehe. <http://www.rechtsanwaltdpalm.de/scheidungsehe.htm>

¹¹⁸ Interview Berlin 25.5.2010.

ANNEX 2: SWEDEN CASE STUDY

TRENDS AND ATTENTION TO THE CONCEPT

In Sweden, limited attention is given to the concept of marriage of convenience. During the last years, there have been a few articles in the Swedish newspapers where the police has stated that they observe marriages of convenience, that the immigration authorities should investigate, and where Sweden is described as a transit destination for third country nationals who wish to enter the EU (svd.se 29.06.2009, Sveriges radio 22.03.2010, Sydsvenskan 27.04.2009).

The Swedish word for marriage of convenience is *skenäktenskap*, meaning a marriages of convenience or a marriage which looks like a real marriage, but which is not.

EU rulings such as the Metock case have influenced Swedish policy. Officials are aware of developments at EU level and new rulings. As for the Metock case, this did not lead to any major changes in Sweden. However, the ruling helped clarify how to interpret EU legislation. Before the Metock ruling, there was a degree of uncertainty connected to similar cases.

KEY FACTS AND FIGURES

In 2009, about 30 000 family reunification applicants were granted residence permits to reunite with spouse or partner. This constitutes about 30 percent of the total case load by the immigration authorities. Among those 30 000, a little more than 6000 were established relationships (the couple had lived together for more than two years abroad) and almost 23 000 were new relationships. Iraq and Somalia rank on top in both categories, whereas Thailand, Turkey, Iran, Serbia, China, Kosovo and Russia all have a significantly larger proportion of new relationships.

In cases where the officials question the reality of the marriage, they can grant a time limited residence permit. Such a resident permit was granted in 146 cases. The largest group receiving time limited permits were applicants without nationality, and applicants from Somalia, Iraq and Kosovo.

There are no statistics on marriage of convenience in Sweden. The officials interviewed in this study expect the number of rejected cases on this basis to be less than five percent of the marriage migration cases. They think that the real number is probably higher, and that there are cases which will never be identified. The impression is nevertheless that marriage of convenience is one of several kinds of cases treated at the Migration Board, and that the phenomenon does not constitute an important problem.

No nationalities or other traits stand out as typical cases. The Migration Board experiences quite a lot of cases from the same countries as Norway (Turkey, Vietnam, Somalia), Thailand and Russia are also mentioned. However, there are no clear, typical traits in the cases, and no nationality which dominates the marriage of convenience case files.

LEGAL AND REGULATORY FRAMEWORK

The requirements for granting a residence permit on the basis of family reunification in Sweden follow from the 2005 Aliens Act.¹¹⁹ Sweden has implemented the EU Directive on family reunification (EG 2003 / 86 / EG), thus rendering family reunification a right when the requisite conditions therein are met. As a main rule, residence permits shall be granted to a foreigner that is married or cohabiting with someone who is a permanent resident in Sweden, or who has been granted permanent residency in Sweden. There is no income requirement in Swedish law. The parties must provide documentation as to the validity of the marriage.

Family reunification may be denied in the case of a marriage of convenience. The relevant provision is found in chapter 5, § 17 a first section, which states that

“A residence permit may be refused in such cases as are referred to in Section 3, if

1. Incorrect information has knowingly been supplied or circumstances have knowingly been suppressed that are of importance for obtaining the residence permit,
2. An alien has been adopted or a marriage entered into or a cohabite relationship begun exclusively in order to give the alien a right to a residence permit or
3. If the alien constitutes a threat to public order and security.”

In other words, it must be proven that the *exclusive* objective of the alien was to obtain a right to a residence permit.

Following the second section of § 17a, a residence permit may also be refused if the application is based on false information, false documents concerning family ties and fraud. Furthermore, the third section of § 17a stipulates that “account must be taken of the alien’s other personal circumstances and family situation” when assessing whether a residence permit should be refused.

The assessment of whether the marriage in question is one of convenience must be made on the basis of objective criteria. There is a presumption that a valid civil marriage is not one of convenience, i.e. authorities must find one or more reasons which break this presumption.¹²⁰

According to the preparatory works to the Alien’s Act, when immigration authorities suspect that a marriage is one of convenience, a thorough assessment must be made in order to clarify whether that is the case or not.¹²¹ The burden of proof lies with the authorities. The assessment must consider the origin of the relationship and the knowledge that the parties have of each other.

It follows clearly from the preparatory work that traditional marriages, which are based on consent from both parties, should not be excluded from the possibility of family reunification due to limited prior contact between the parties and possible limited mutual knowledge of one and other.¹²²

¹¹⁹ Aliens Act (2005) 29. September 2005, entered into force 31 March 2006. The Act replaced the former Alien’s Act of 1989 (1989:529).

¹²⁰ MIG: 2007:60.

¹²¹ Prop. 2005/06:72 s 39 f.

¹²² Prop. 1999/2000:43 s 38 and 40.

In cases of polygamous marriages, the application for family reunification must be rejected (Aliens Act Chapter 5, § 17 b). By comparison, the provision regarding marriages of convenience is facultative.

Residence permits are as a main rule, first granted on a temporary basis, for one year. A continued residence permit, including a permanent permit, may only be granted if the relationship founding the base for family reunification still exists when the decision is taken (Chapter 5, § 16 of the Alien's Act).

A permanent residence permit may be granted after two years, on the condition that the terms of the original residence permit are still present (Chapter 5, § 16).

Following a 1904 Act on certain international legal issues concerning marriages and guardianship, a marriage which has been contracted on the basis of international law will not be recognized in Sweden if it is based on force for any of the parties.

On the basis of Chapter 7 in the Alien's Act, § 7 (1), a residence permit may be revoked if the foreigner consciously has presented incorrect information or concealed circumstances relevant for the decision to grant the residence permit.

Marriages of convenience may not lead to expulsion in Sweden.

According to the Swedish Alien's Act Chapter 5 § 3 no. 1, a residence permit may be granted on the basis of cohabitation as well as marriage. If the parties cohabited in the country of origin for a time period longer than two years, the spouse will normally be granted a permanent residence permit right away. If the cohabitation period is shorter than this, a residence permit will be granted for 12 or 6 months, after which the limited residence permit will be extended for another year.

INSTITUTIONAL AND ADMINISTRATIVE SET-UP

The Ministry of Justice/the Ministry of integration and gender equality

The Ministry of Justice is responsible for immigration policy, both when it comes to admission and return policy. The Ministry of Integration and Gender Equality is responsible for issues relating to citizenship and citizenship legislation and human rights as well as integration and national minorities.

The migration service – Migrationsverket

The Swedish Migration Board is the authority which is responsible for treating the applications from people wishing to visit or settle in Sweden.

The Swedish Migration Board is a government body which works at the order of the Swedish Parliament and Government. The Board answers to the Ministry of Justice and the Ministry of Integration and Gender Equality.

The Migration Board is charged with impartially and correctly implementing the decisions of the government. The Government controls the Migration Board by means of statutes and ordinances, but also through ongoing management. One example is that the Swedish Parliament once a year decides what budget the Migration Board will receive for its operations from the government's proposal in the budget bill.

The Board participates actively in the EU's Council working parties and Commission committees. The Migration Board is member of networks like GDISC (General Directors' Immigration Services Conference), IGC (Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia) and ICMPD (International Centre for Migration Policy Development).

The Swedish embassies and consulates

The Swedish embassies receive the applications for work permit or residence permit. After having registered the case, the embassy will call the applicant in for an interview. As a rule, this is a short, standard interview about the applicant’s intentions and the relationship. However, if the embassy recognises features which are not according to tradition, contradictory information or other things with the information given that are suspicious, the officials are obliged to do a more thorough interview. After the interview, the officials send the information to the migration service.

The Migration Court – Migrationsdomstolen/Migrationsöverdomstolen

There are three migration courts in Sweden, in Malmö, Stockholm and Gøteborg. These are part of the administrative courts in the same cities. In case of a negative decision, the applicant can appeal to the Migration court which will review the case. The Migration board and the applicant meet as two parties in the Migration court.

The Migration Court’s decision may be appealed to the Supreme Migration Court in accordance with the Aliens Act ch.16 § 9. Public legal aid is available in case of such appeals.

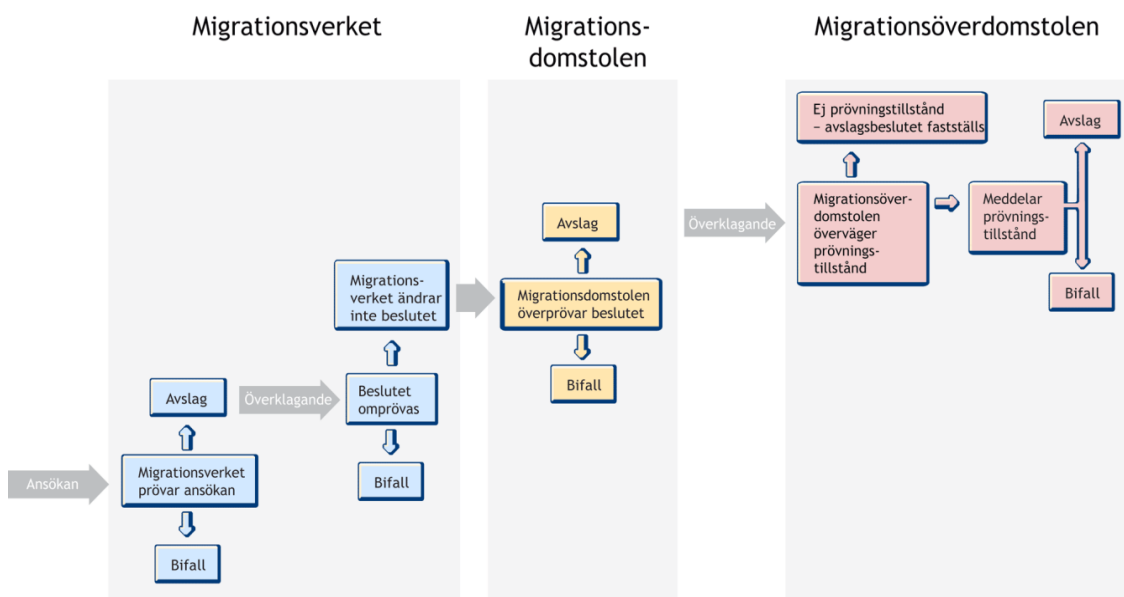
LIFOS – country of origin information database

Lifos is a database which contains country information. The officers at Migrationsverket use it when investigating cases, for example to check out marital traditions in a specific country when handling a marriage of convenience case. The decisions are based both on the applicant’s details given in the application and in interviews, and on the officials’ knowledge of the conditions in the applicant’s country of origin. Lifos also contains judgments from the Migration Court of Appeal. Older decisions from the previous Alien’s Appeals Board and the Government are also included.

A large part of the material in Lifos is also available on the Internet to increase transparency and availability.

The division of tasks between actors involved in treating applications for family reunification is illustrated below:

Figure A2.1 Institutional setup treating family reunification in Sweden



Source: The Migration Court

PROCESS AND PRACTICE

According to Swedish law, you are entitled to receive a residence permit if you are married, have entered into a registered partnership with or are the common-law spouse of someone living in Sweden. However, the application may be rejected if, for example,

- The application is based on incorrect information
- The relationship is fraudulent
- The couple does not plan to live together.

One may also receive a residence permit if one is planning to marry or cohabit with someone living in Sweden.

The application for a residence permit must be handed in at the Swedish embassy or consulate in the applicant's country of origin or where the applicant is permanently resident. In most cases, an application will not be approved if submitted during a visit to Sweden. The permit must be entered in the passport before the applicant's travel to Sweden.

In addition to the application the applicant must submit:

- Passport
- Two passport photographs
- Marriage certificate or proof of union (applies to married couples and registered partners)
- A civic registration certificate, a so-called family certificate for the person living in Sweden
- Civic registration certificate, lease or certificate of purchase for residence or other document which shows that the couple has a shared home (applies to common-law spouses who have lived together abroad)

Once the application is submitted to the embassy, the embassy will give the applicant an appointment at the embassy or consulate. In most cases, the applicant will attend a personal interview before the matter is forwarded on to the Migration Board in Sweden for consideration.

The Migration Board will write to the reference person notifying that they have received the application. Also, the letter will state that they must complete a questionnaire which can be found on the Migration Board's website. The reference person must answer the questions in writing and send the form to the Migration Board.

Marriage of convenience is not considered as a major problem, but the subject is treated seriously and in a thorough manner by the officials at the Migration board. The interviewees refer to the EU guidelines as a tool for uncovering cases, and the preparatory works of the Immigration Act explicitly refer to the practice in the European Court of Justice when discussing the relevant elements of the consideration.¹²³ These criteria may work as triggers for investigation. If the official suspects a marriage of convenience, he or she may investigate the case further. An investigation implies a thorough overall assessment of the case and interview (by phone or physical) with the reference person. The questions are adjusted to the specific application, but based on a standard questionnaire. The official appointed in one case follows it the case through the whole process and is responsible for carrying out the interview with the reference person. The

¹²³ Radboud University Nijmegen, Centre for Migration Law, Comparative study on the implementation of the Family Reunification Directive 2003/86/EC in (25) Member States, available at <http://cmr.jur.ru.nl/CMR/Qs/family/sweden/>

official may also ask the embassy for a new interview and make use of the country of origin database (LIFOS). The collaboration between the Migration Board and the Swedish embassies is very good in the majority of cases.

The Migration Board offers DNA analysis when the other evidence on the family relationship is not sufficient for the Board to be able to reach a decision on the residence permit.

There is no practice of domicile controls in marriage of convenience cases. The interviewees consider that this would not be possible to carry out in Sweden as it would be seen as breaking in to the private sphere.

The lead time for decision on family reunification is six months on average. It may be slightly longer for possible marriage of convenience cases.

If the couple has been married for a period of time and lived together abroad / in the applicant's country of origin, the Migration Board will as a rule grant a permanent residence permit. In cases where the marriage has recently been contracted, the applicant will usually be granted a limited residence permit, valid for two years. In cases of doubt, for example if the official suspects a marriage of convenience but does not have enough evidence to reject the application, it is possible to grant a one year residence permit. After one year, the applicant has to apply for extension.

After two years, the applicant can be granted a permanent residence permit if the marriage still exists and the couple still lives together. The couple must sign a declaration stating that they still live together when applying for extension or permanent residence permit. This is usually the only method for checking the case at a later stage. If the relationship ends during the time-limited residence permit, the permit will in most cases not be extended. The Migration Board may also cancel a permit if the relationship ends.

Occasionally officials at Migrationsverket discover marriage of convenience cases after having granted a permanent residence permit to an applicant. The identification of such cases may be based on tips from others or that the officials see the last part of the puzzle as the initial applicant figures as reference person in a new case to have an initial spouse come to Sweden. It is then possible to withdraw the (now) reference person's residence permit. However, if the reference person has been in Sweden for more than four years, the Migration Board must have a reasonable ground for withdrawing the permit. The officials interviewed in this study state that permits are seldom withdrawn on the basis of marriage of convenience.

Appeal

The applicant can appeal a decision by the Migration Board to the Migration Court within three weeks after having received the decision. The Migration Court will then review the case completely. The applicant (or a person with power of attorney) and the Migration Board meet as parties in the case.

The Migration Board states that a large proportion of the negative decisions in marriage of convenience cases are appealed.

It is also possible to appeal the decisions from the Migration Court to the Migration Court of Appeal, which reconsiders determinations in full made by the Migration Courts. The Migration Court of Appeal is located at the Administrative Court of Appeal in Stockholm. However, not all decisions can be appealed to this instance. Only cases where the decision will set an example and provide guidance for decisions of the Swedish Migration Board and Migration Courts in similar matters are accepted in this court. It is also possible to appeal cases where serious mistakes have been made earlier in the process.

Sanctions

The Migration Board rarely gives any sanctions when judging a case a marriage of convenience. It is possible to notify the police if the reference person has given false information in the case, but it is rarely done. As the applicant most often is abroad when the decision is taken, it is not necessary to give a decision on expulsion in the marriage of convenience cases. Also, the Swedish law does not provide this measure. In theory, the applicant can apply for residence permit again the day after having received a rejection.

IMPLEMENTATION CHALLENGES

The interviewees do not see any important challenges in treating marriage of convenience cases, except that they are time consuming because they often imply interviews with the spouses and a more thorough process than other family reunification cases.

There is nevertheless an organizational challenge: The Migration Board is divided into 26 local units where each unit is responsible for its own district. The local units treat all kinds of applications, also marriage of convenience cases. It is difficult to ensure that all units have the same practice in these cases, especially because some regions have less experience with marriages of convenience and therefore less expertise. The Migration Board arranges meetings where they gather officials treating the same kinds of cases. In addition, the board has established a competence group which trains officials in all units. Handling marriage of convenience cases is one of the subjects in the trainings. Through the competence group, the Board hopes to coordinate and streamline practice in a better way.

ANNEX 3: DENMARK CASE STUDY

TRENDS AND ATTENTION TO THE CONCEPT

As illustrated by the level of media coverage, there has been some focus on marriages of convenience and fraudulent use of the immigration regulations in general in Denmark.¹²⁴ A marked shift in the Danish approach to immigration followed the change of government in 2002. The conditions for obtaining family reunification in Denmark became significantly stricter, and statistics indicate that immigration rates have dropped significantly as a consequence. According to the Danish informants, marriage of convenience is an area of general focus within the Immigration Service. Approaches to improving methods of consideration in these cases are constantly assessed and evaluated in order to ensure that the rights of the applicants are ensured, and that permits for family reunification are not granted on the basis of a marriage of convenience.

Opposition to the Metock judgment has been particularly strong in Denmark. Until 2009, both Denmark and Ireland demanded changes to the Directive on the right of Union citizens and their family members to move and reside freely in the territory of a Member State. However, few other countries in the EU wished to reopen discussions on the directive, and as the European Commission was in opposition to such a move, Denmark and Ireland declared themselves satisfied with a statement from the Commission that member states are allowed to take “appropriate steps” to combat abuse and fraud. However, both states continue to monitor the extent of sham marriages and abuse of the EU law, and have signalled that they will demand a proposal for change by the Commission if systematic fraud can be documented.¹²⁵

The term used for marriages of convenience in the Danish language is “pro forma ægteskab”, i.e. marriages of convenience. Although the term is not applied in the provision relating to such marriages, it was used to describe the phenomenon in the preparatory works to the immigration act.¹²⁶ Danish immigration authorities do not use the term “pro forma” in their decisions, instead describing the marriage as “lacking reality”.

KEY FACTS AND FIGURES

Generally, Denmark saw an increase in the number of granted residence permits from 3749 in 2008 to 4479 in 2009. However, the number of rejected applications also rose from 25% in 2008 to 33% in 2009. Thailand, Turkey and the Philippines were the countries of origin for which the largest number of residence permits were granted (these three nationalities constituted approximately 32% of the total number of granted permits).¹²⁷

There are no statistics available regarding marriages of convenience in Denmark. However, counts made by Immigration Service officials for this study counted a total of five rejections on this basis in 2008, 28 rejections in 2009 and 35 rejections in the period January-August 2010. No particular countries of origin were predominant in 2008. In 2009, Somalia, Thailand and Turkey stood out with a few more rejections on the grounds of

¹²⁴ E.g. Berlingske Tidende: <http://www.berlingske.dk/danmark/grotesk-jage-os-ud-af-danmark>

¹²⁵ European Voice 2010.

¹²⁶ 1997-98, 2. samling - L 59: Forslag til lov om ændring af udlændingeloven, straffeloven og ægteskabsloven. (Tidsubegrænset opholdstilladelse, asyl, familiesammenføring og udvisning m.v.).

¹²⁷ Udlændingetjeneste / Ministeriet for flyktninge, indvandrere og integration, Tall og fakta på udlændingområdet 2009, s 3

marriage of convenience than other countries. So far in 2010, a marginally higher number of rejections were made in applications from Thailand and Somalia.

LEGAL AND REGULATORY FRAMEWORK

Foreign citizens may obtain a residence permit in Denmark based on family reunification with a married spouse, registered partner or on the basis of long term cohabitation. The main criteria are listed in the Danish Alien's Act § 9.¹²⁸

Certain criteria apply to the marriage which constitutes the basis of the application. First, the marriage must be valid according to the Danish Marriage Act.¹²⁹ Second, the marriage must have been entered into on a voluntary basis (i.e. not a forced marriage). Third, the marriage or partnership must not be one of convenience. Specific criteria also apply to the spouses or partners. First, both must be a minimum of 24 years of age. Second, the parties must live together at the same address in Denmark after having obtained a residence permit for the applicant. Third, the parties must, on a concrete basis and considered as a whole for both parties, have closer ties to Denmark than to another country ("tilknytningskravet").¹³⁰

The reference person must be a Danish or Nordic citizen, be a refugee or a person having obtained residence on the basis of protection in Denmark or be in possession of a permanent residence permit in Denmark. The reference person must also have been in possession of a permanent residence permit in Denmark for the previous three years. The reference person must also provide financial security of DK 62 231 (in 2010) as a guarantee for potential future public expenses in assisting the foreign partner or spouse. It is also a requirement that the reference person has not been convicted for violence committed against a former partner or spouse during the past 10 years before the decision on family reunification.

In the case of family reunification between cohabitants, it is required that the cohabitation has lasted for a long time and that it has been steady. Normally the parties must be able to provide documentation of having lived together for 1.5-2 years, although this requirement will not necessarily apply in all cases.

Permanent residence permits in Denmark are granted on the basis of a points system. As a basic precondition, the foreigner must have resided legally in Denmark for at least four years. He or she must also have worked 30 out of 36 months prior to submitting the application for permanent residency, and must be employed when the immigration authorities consider the application. Furthermore, if the foreigner has been convicted of certain criminal activity, has received public social assistance prior to three years before the applicant was submitted or owes overdue public debts, permanent residence permit may not be granted. Points are awarded on the basis of these criteria as well as on other positive criteria such as degree of language knowledge and involvement in Danish civil society. Some exceptions apply, e.g. to minors or retired persons.¹³¹

¹²⁸ Udlændingeloven, jf. lovbekendtgørelse nr. 945 af 1. september 2006.

¹²⁹ Lov om ægteskabs indgåelse og opløsning, jf. lovbekendtgørelse nr. 147 af 9. marts 1999.

¹³⁰ Practice note of 1.12.2005 regarding the attachment requirement.

¹³¹ http://www.nyidanmark.dk/en-us/coming_to_dk/permanent-residence-permit/permanent-residence-permit.htm

Definition of marriages of convenience

The provision in the Danish Aliens Act relating to marriages of convenience can be found in § 9 stk 9:

"A residence permit under subsection 1 (i) cannot be issued if there are definite reasons for assuming that the decisive purpose of the marriage or the cohabitation is to obtain a residence permit".¹³²

This means evidence must establish that the decisive purpose ("afgørende" in the Danish language) was that of obtaining a residence permit. According to the preparatory works to the provision, the case must show clear reasons to believe that the marriage is of convenience.¹³³ This was also highlighted by the Danish parliamentary ombudsperson in a statement.¹³⁴

It is sufficient to establish that one of the parties, either the applicant or the reference person, has entered into the marriage for convenience purposes. In such cases, the immigration authorities clearly indicate which party this is.

Family reunification in Denmark based on the EU law

Foreigners may, under certain conditions, be eligible for residency in Denmark on the basis of EU law rather than on the stricter conditions that follow the Danish Alien's Act. The applicable terms are, in short:

- The Danish citizen (reference person) must have taken advantage of his or her right to free movement, i.e. have taken residency in another EU/EEA-state or in Switzerland as a worker, student or pensioner. The residency must be stable, and based on the purpose of working, studying etc.
- The marriage or registered partnership between that person and the applicant must be real, i.e. not one of convenience
- A subsistence requirement must be fulfilled for students and others without financial activity as the purpose of their stay in the other EU country, while for those with financial activity as their purpose the subsistence requirement only applies when the applicant is under the age of 21.

Generally, it takes more to reject an application for residence based on EU law than based on Danish law. For example, couples that may not obtain a residence permit on the basis of Danish law due to the "cousin rules" (§ 9 second paragraph second sentence, prohibiting family reunification on the basis of marriage between cousins) often try to obtain a permit on the basis of EU law.

Before the Metock judgment, the immigration authorities assessed whether the marriage was one of convenience. After Metock, immigration authorities rather consider whether the application constitutes an abuse of the right to free movement. For example, Danish nationals must have had a genuine and effective residence in another EU/EEA Member

¹³² Udlændingeloven 9 stk 9, english version available at http://www.nyidanmark.dk/NR/rdonlyres/C2A9678D-73B3-41B0-A076-67C6660E482B/0/alens_consolidation_act_english.pdf. Danish text: Det står i § 9 stk 9 at "Opholdstilladelse efter stk. 1, nr. 1, kan ikke gives, såfremt der er bestemte grunde til at antage, at det afgørende formål med ægteskabets indgåelse eller etableringen af samlivsforholdet er at opnå opholdstilladelse".

¹³³ 1997-98, 2. samling - L 59: Forslag til lov om ændring af udlændingeloven, straffeloven og ægteskabsloven. (Tidsubegrænset opholdstilladelse, asyl, familiesammenføring og udvisning m.v.).

¹³⁴ Folketingets Ombudsmand, FOU nr 2002.257, 19.1.2004: "Jeg henviser endvidere til at det fremgår af forarbejderne at der skal foreligge et 'sikkert grundlag' for at antage at ægteskabet indgås med det 'afgørende formål' at opnå opholdstilladelse, og at en formodning herom ikke vil være tilstrækkeligt."

State before family reunification may be granted.¹³⁵ The Danish EU Residence Order provides guidelines as to this assessment.¹³⁶

Standard of evidence and burden of proof

The burden of proof lies with the immigration authorities, who according to general administrative principles of law must establish that it is more likely than not that the marriage is one of convenience. It follows from administrative practice that among the criteria which constitute the consideration as to the nature of the marriage, two of the criteria must provide grounds for rejection in order to reject with reference to the marriage being one of convenience, and indication by way of three criteria would always be sufficient for rejection. According to the internal practice of the administrative authorities, there must be “certainty” that the main objective of obtaining a residence permit in Denmark before this may serve as grounds for rejection.¹³⁷

Sanctions

Applicants for family reunification who have their application rejected on the basis of the marriage of convenience provision may not be expelled according to Danish law. Only in the case of a criminal conviction may marriages of convenience lead to expulsion. Illegal residence may also lead to expulsion. Available sanctions, apart from the actual rejection of the application, are limited to revocation of the existing permit which has been proven as based on false premises, and possible criminal prosecution on the basis of falsified documentation or on the basis of having provided false information to the immigration authorities.

Criminal conviction on the basis of the immigration act may lead to a maximum of two years in prison. This also applies to aiders and abettors. However, the immigration authorities do not have set routines on reporting such cases to the police. Only in very grave cases, e.g. where immigration authorities or other authorities are made aware of contracts having been entered into for payment for a marriage of convenience, will the case be filed for criminal investigation. None of the informants in Denmark were familiar with any criminal convictions for having provided false information in the context of a marriage of convenience for immigration purposes.

A foreign citizen who has applied for family reunification, and whose application has been rejected on the basis of that marriage being assessed as a marriage of convenience or a forced marriage, may not subsequently be granted a Schengen visa for the purpose of visiting the intended reference person. Exceptions can be made if the spouses have common children.¹³⁸

¹³⁵ http://www.nyidanmark.dk/en-us/faq/family_reunification_under_eu-law.htm

¹³⁶ Executive Order on Residence in Denmark for Aliens Falling Within the Rules of the European Union (the EU Residence Order), Act no. 322 of 21. April 2009.

¹³⁷ “Nægtelse af opholdstilladelse efter den foreslåede bestemmelse vil dog alene finde sted, hvor der foreligger et sikkert grundlag for at antage, at ægteskabet indgås med det i bestemmelsen beskrevne formål. En formodning herom vil således ikke være tilstrækkelig”, chf Lovforslag nr. L 59 fremsat den 16. april 1998, side 21.

¹³⁸ Ministeriet for Flyktninge, Indvandrere og Integrasjon - Notat om visumpraksis gældende fra den 5. april 2010, section 12.2.

INSTITUTIONAL AND ADMINISTRATIVE SET-UP

The Immigration Service

The Immigration Service is the first administrative authority which considers applications for residence in Denmark. The family reunification section at the Immigration Service employs approximately 37 officials in total, and is divided into two units. One considers cases relating to children, and the other unit considers applications from spouses, cohabitants, other family members and cases where children apply together with another family member.

Cases are handled at the Immigration Service within three or seven months respectively. Cases are first screened, in order to determine whether it is one of simple or complex nature. In this initial process it is also ensured that all necessary documentation has been provided by the applicant. Complex cases will be considered within seven months, while simple cases are considered within three months. The applicant receives written notification from the Immigration Service as to the outcome of this initial screening, and is informed of the expected time by which the application will be considered. Complex cases encompass those in which concrete, and sometimes time consuming investigation and considerations must be made, *i.e.* cases concerning possible marriages of convenience, cases where there is a suspicion of forced marriage, applications for residence permit based on health conditions or cases involving complex considerations of the requirement that the parties must have closer ties to Denmark than to the country of origin (the "attachment requirement"). As a main rule, marriage of convenience considerations are considered complex cases.

The Ministry of Refugees, Integration and Immigration Affairs

The Immigration Division of The Ministry of Refugees, Integration and Immigration Affairs considers appeals on cases rejected by the Immigration Services. The Immigration Service must follow the administrative practice which develops at the Ministry, and receives copies of all decisions made by the Immigration Division. The Immigration Division and the Immigration Service publish common practice notes describing the administrative practice within the immigration field. As a main rule, these notes are publicly accessible. The Immigration Division publishes its own decisions in principal cases in a database which is publicly accessible at www.nyidanmark.dk.

Cases at the Ministry are prepared and considered by one official, but always signed by the head of bureau or a deputy head of bureau. The same person may never prepare and sign a decision. All case workers at the family reunification office consider cases relating to marriages of convenience, *i.e.* these cases are not designated to a specialized case worker. The average delay in handling appeals at the Ministry is officially three months. However, according to the Ministry, recent overviews show that the factual delay is only two months.

The Danish Embassies

The Danish embassies abroad receive applications for residence permits and visas. They have the competency to grant or reject visas but not applications for family reunification, which are sent to the Immigration Service in Denmark for consideration. In cases where the embassies find an application to be suspicious, the Immigration Service will be informed of this and the reasons behind it through a note made on the case when it is sent for processing. According to one of the Danish informants, marriages of convenience are not an area of particular focus at Danish embassies.

The municipalities and marriage authorities

Danish municipalities and marriage authorities have an obligation to report to the Immigration Service any suspicious information they receive, e.g. from schools, kindergartens or social workers, which may be of interest to the Immigration Service in the consideration of the terms of residence for an alien (immigration act § 9 paragraph 21, marriage act § 22 a). The purpose of this provision is to gather all relevant information in the case relating to family reunification, including facts which may indicate that the marriage is one of convenience (e.g. that the parties do not speak the same language, or that an official has the impression that the parties did not know each other before they got married). A designated information sheet is used by the municipalities when reporting suspicion of marriages of convenience.¹³⁹

The police

The National Police in Denmark is in charge of all policing within the field of asylum, e.g. forcible returns. In addition to the National Police, the general Danish police districts have administrative and investigative duties within the immigration field, such as receiving applications, writing out passports and carrying out home controls in cases where the Immigration Service or the Ministry suspect that a marriage is one of convenience.

There is no general directive from the immigration authorities regarding police reports in immigration cases. The quality of police reports varies greatly, from the objective to subjective descriptions of the facts which are to be presented. The immigration authorities consider the value of the information received based on the quality of each concrete report.

According to Danish interviewees there is currently a debate going on in Denmark regarding whether house controls should be carried out by the police or whether this responsibility should be transferred to the Immigration Service. Because the police do not apply force in conducting tasks for the Immigration Service, and because all interaction between the police and the foreigner is based on consent on the part of the foreigner, some argue that these tasks might as well be carried out by others than the police.

PROCESS AND PRACTICE

From application to decision

Applications are first presented to either the Danish embassies abroad or, when the applicant is already legally present in Denmark, to the local police or to the Immigration Service in Copenhagen. Applications are first considered by the Immigration Service, following which an appeal may be made to The Ministry of Refugees and Integration. Negative decisions at the Ministry may be brought before Danish courts. They may also be brought before the Parliamentary ombudsperson, which may advise the Ministry to change its decision.

The reference person and the applicant each hand in a form to the Immigration Service in which they provide information about their relationship and sign to confirm that the information they provide is correct.

¹³⁹ Se www.nyidanmark.dk, information sheet "Mistanke om pro forma-ægteskab".

Criteria for assessing the marriage

According to the Danish informants, the following criteria are considered relevant when assessing whether a marriage is one of convenience:

- Whether the parties have lived together at the same place of residence
- Whether the parties are in a position to communicate on the same language
- Whether there is a significant age difference between the parties
- How well the parties knew each other before entering into the marriage
- Previous marriages of the parties
- Whether the parties have children together

The criteria are derived from the preparatory works to the immigration act,¹⁴⁰ as well as from the practice of the administrative authorities. They are publicly available at the web site of the Immigration Service.¹⁴¹ In addition to these criteria, other elements in the case may come into consideration as the assessment of an application is always concrete and case specific. One example provided was cases where the reference person still lives together with an ex-spouse in Denmark while a new application for family reunification with a new spouse is being considered. Cases are considered individually and on the basis of the totality of information provided.

In cases where the reference person has previously been married to a foreigner and then divorced from that spouse after he or she obtained a permanent residence permit, this will be considered when deciding upon a new application for family reunification with that reference person.

Presence of three criteria may lead to rejection on the grounds of marriage of convenience without further investigation, unless other elements in the case create doubt as to the nature of the marriage. Presence of one of the above mentioned criteria may not. Cases with a presence of two criteria are considered cases of doubt where, as a main rule and when there is a concrete suspicion of marriage of convenience, simultaneous interviews of the spouses are held. In this process, the parties will be asked the same set of questions prepared by the Immigration Service. Reference persons residing outside the greater area of Copenhagen are interviewed by the local police, while reference persons residing within greater Copenhagen are interviewed by the Immigration Service. Applicants still residing in their countries of origin are interviewed at the respective Danish embassies. The interviews are always conducted simultaneously, in order to avoid co-ordination of statements among the spouses.

In 2010, the Immigration Service has actively worked to improve the interviews which are conducted in these cases. Whereas the interviews were previously based on a general template with similar questions in all cases, the Immigration Service now provides specific questions for each interview, in order to receive relevant information in the cases.

In cases where simultaneous interviews of the parties have been conducted, the interviews must be clear in their indication that the marriage is one of convenience before they may be taken into account as speaking for a rejection. Danish authorities report to be careful in how they interpret the interviews, as not all discrepancies in the answers provided by the parties necessarily indicate that the marriage is one of convenience.

¹⁴⁰ Lovforslag nr. L 59 of 16. april 1998, page 21.

¹⁴¹ http://www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/spouses/pro_forma_marriages.htm

In cases where the interviews show that the parties have given diverging information which may lead to a negative decision in the case, the parties have a right to provide comments to the divergence.¹⁴² The Immigration Service will inform the parties of the diverging points in writing and provide a deadline for written or documentary comments. In practice, most applicants make use of this right. Only after having received these comments or after the expiry of the deadline may a negative decision be made.

In cases where the authorities are in doubt as to whether the marriage is real or one of convenience, the common procedure is to grant a residence permit but to flag the case and follow up through controls at the place of residence at a later stage. The Immigration Service decides whether such controls should be made, whereas the local police carry out the control on their behalf.

The Immigration Services are informed when spouses apply for separation. There is an ongoing debate in Denmark as to whether it should be possible to co-ordinate central personal registers to a larger degree than today, e.g. through comparing residential registers with the registers of the immigration authorities.

According to one of the informants, there has been a paradigm shift in Danish immigration law and practice during the course of the last decade. The approach has shifted from a former focus on prior control to a current focus on posterior control of whether the terms of the residence permit are present. Whereas earlier, immigration control would be general and would apply to almost all applicants, the current approach is rather to concentrate control mechanisms on cases give rise to suspicion. The current approach is focused on applying control resources to the cases which do give rise to suspicion, and not to use resources and interfere in the privacy of individuals in cases which do not.

IMPLEMENTATION CHALLENGES

Over the years, immigration authorities have observed a certain skills development on the part of applicants in responding to simultaneous interviews, i.e. by preparing answers to be provided in interviews.

¹⁴² Danish administrative act § 19 – "partsavhør".

ANNEX 4: NETHERLANDS CASE STUDY

TRENDS AND ATTENTION TO THE CONCEPT

Challenges relating to integration of foreigners have been at the heart of Dutch political discourse during the last decade. There is some focus on marriages of convenience *per se*, but this discourse is rather placed within the greater debate regarding circumvention of the immigration rules such as through the so-called "U-turn"-procedure (also known as the "Belgian route"). In essence, this implies a use of EU Directive 2004/38/EC in order to avoid requirements which would otherwise apply to applications for family reunification, such as a common place of residence and financial subsistence requirements. Based on this use of the directive, the Netherlands have seen a significant increase in the number of non-Dutch EU-citizens living in the Netherlands with their partner from a third country. Article 35 of the directive may be used as a direct basis for rejection in these cases.

Family reunification and marriages of convenience have been on the political agenda for the past few months. Policy makers are looking into possibilities of refusing applications and entry into the Netherlands at an earlier stage than today in such cases.

KEY FACTS AND FIGURES

At present, the Netherlands do not have any statistics on marriages of convenience. However, according to the interviews conducted in the country, cases relating to Turkish and Moroccan nationals stand out in terms of the number of rejections based on marriages or relations of convenience. In 2009, the Utrecht immigration police started registering cases in a way which facilitates the production of statistics. They expect to have statistics on the question of marriages and relationships of convenience within 2011.

In 2009, the highest number of positive decisions on family reunification were granted to the following nationalities (in successive order): Turkey (1324), India (1171), Morocco (788), USA (767), Japan (559), China (475), Suriname (365) and Brazil (240).¹⁴³

LEGAL AND REGULATORY FRAMEWORK¹⁴⁴

The Dutch legislation pertaining to immigration is laid down in the *Aliens Act 2000* (Vw) and elaborated in the *Aliens Decree 2000* (Vb) and the *Aliens Regulations 2000* (VV). In addition, policy rules were drawn up that are set out in the *Aliens Act Implementation Guidelines* (Vc).

A foreigner who wants to stay in the Netherlands for the purpose of family reunification has to apply for a temporary residence permit. The conditions attached to the granting of a temporary regular residence permit have been set out in general terms in the Aliens Act. Specific conditions for the purpose of family reunification can be found in the Aliens Decree and have been further elaborated in the Aliens Act Implementation Guidelines.

¹⁴³ IND Information and Analysis Centre, information provided by IND.

¹⁴⁴ The information about the general description of regulations regarding family reunification in The Netherlands is partly based on the EMN report Family reunification (2007).

Family migration to the Netherlands: family reunification and family formation

Until the ruling of the Court of Justice of the EC in the case of *Chakroun vs. the Netherlands*¹⁴⁵, in Dutch policy a distinction was made between family reunification and family formation.

Family reunification is defined as the reunification of family members with a sponsor in the Netherlands where the family relationship already existed before the sponsor moved to the Netherlands. If the family relationship arose after the entry of the sponsor into the Netherlands, we speak of family formation.

However, as the Court of Justice in the case of *Chakroun* ruled that this distinction is not allowed according to the family reunification directive (regulation 2003/86/EC), the conditions for both forms of family reunification have now been changed. The main difference is that a minimum age of 21 is now required in both cases.

General conditions

The first general condition for the granting of a regular temporary residence permit is a valid provisional residence visa (mvv). Certain categories of foreign nationals are exempted from the provisional residence visa requirement. The most important category concerns foreign nationals who are exempted on the ground of their nationality. This provisional residence visa must be applied for in the country of origin or permanent residence. The conditions for the visa are the same as for the residence permit. Other general conditions for the granting of a regular residence permit are a valid passport, adequate financial resources and that the applicant must not present a danger to society. Finally, a family migrant between 18 and 65 should pass a basic integration exam prior to his arrival in the Netherlands. This requirement only applies to foreign nationals subject to the provisional residence visa requirement.

Specific conditions

The minimum age requirement for family reunification in the Netherlands is 21 years.¹⁴⁶ Until recently, the requirement was 18 years in the case of family reunification and 21 years in the case of family formation.¹⁴⁷ The sponsor can be someone with Dutch nationality, or with a foreign nationality with a residence permit.¹⁴⁸ Family reunification can be applied for on the grounds of a registered or non-registered partnership between two people of a different or the same gender. The relationship should be permanent and monogamous and both partners should be unmarried, unless the marriage has not been annulled as a result of legal impediments.¹⁴⁹ In case of a polygamous marriage or relationship only one of the spouses or partners is entitled to a residence permit.¹⁵⁰

The spouses or partners are obliged to live together and lead a joint household. In case of a marriage or registered partnership this must be inscribed in the municipal administration.¹⁵¹

¹⁴⁵ Court of Justice EC, March 4th 2010, C-578/08.

¹⁴⁶ See *Besluit van 24 juli 2010 tot wijziging van het Vreemdelingenbesluit 2000 in verband met Richtlijn 2003/86/EG van de Raad van 22 september 2003 inzake het recht op gezinshereniging* (PbEU L 251), article I, A and B.

¹⁴⁷ Art. 3.14 (1) a Vb 2000.

¹⁴⁸ Art. 3.15 Vb 2000.

¹⁴⁹ Art. 3.14 (1) b Vb 2000.

¹⁵⁰ Art. 3.16 Vb.

¹⁵¹ Art. 3.17 Vb.

The sponsor must have sufficient income. This income must be available for at least one year. The level of the income must be 100% of the level of social assistance for a couple. Until the decision in the case of Chakroun the income level for family formation was 120% of the minimum wages. However the Court ruled that this income requirement was a violation of the Directive on family reunification. Thus, for both groups the income requirement is now based on the minimum income level.¹⁵² The formulation of the new income requirement also leaves some space to make an individual assessment of the situation.

Duration of residence permit and independent residence right

A residence permit for family reunification is in principle always granted for a temporary period of one year first. This temporary residence permit can be renewed if the conditions are still fulfilled. After three years the dependent spouse or partner of a Dutch national or a foreign national with a permanent residence status can apply for an independent temporary resident permit. A condition for acquiring this independent residence status is passing an integration exam in the Netherlands. Sufficient income is not a condition for this independent resident permit. After 5 years of legal stay someone can apply for a permanent residence status. Passing an integration exam (in case someone did not pass this exam for the independent residence status) and sufficient resources are conditions for this residence permit for indefinite duration.

Definition of marriages of convenience

The legal definition of a marriage of convenience in The Netherlands may be found in the Dutch Civil Code, Book 1, article 50, which specifies in which situations a request for registration of a marriage in the Netherlands may be rejected. A non-authoritative translation of the provision follows:

'A marriage can be refused when the partners to be do not fulfill the requirements for marriage, and where the intentions of the partners or of one of them is not to fulfill the duties attached by law to a marriage but the intention to marry is directed at getting (legal) access to the Netherlands'.

Because the registrar must ask a declaration of the chief of the police in cases where one of the partners to be does not hold legal permanent residence status, the definition used by the immigration police of a marriage of convenience is also relevant. This definition is included in the Implementation Guidelines to the Immigration Act:

"Marriage with the sole purpose to grant a foreign national, with no, or no longer, legal residence status, a residence permit" (unofficial English translation).¹⁵³

In practice, the latter definition is decisive as it is more precise and provides the basis of consideration for the police when they conduct interviews and home visits.

Grounds for revoking a residence permit

A residence permit for family reunification can be revoked and renewal can be refused if the conditions are no longer fulfilled, if the holder of the residence permit moved to

¹⁵² See Besluit van 24 juli 2010 tot wijziging van het Vreemdelingenbesluit 2000 in verband met Richtlijn 2003/86/EG van de Raad van 22 september 2003 inzake het recht op gezinshereniging (PbEU L 251), article I, M.

¹⁵³ Aliens Act Implementation Guidelines (Vreemdelingencirculaire B2/3.1c): *"Definitie van een schijnhuwelijk/partnerschap: Een schijnhuwelijk of -partnerschap is een huwelijk of geregistreerd partnerschap dat wordt aangegaan met als enig oogmerk een vreemdeling die nog niet (of niet meer) over een verblijfsrecht in Nederland beschikt alsnog een verblijfsrecht te verschaffen."*

another country or if he has submitted incorrect information or if he has withheld relevant information which might have led to the rejection of the application.¹⁵⁴

A foreign national has to specify changes in his situation that are relevant for his/her right to a residence permit. For example, a disrupted relationship between the partners should be reported by the foreign national. Failure to report relevant information is punishable.¹⁵⁵

Sanctions

The Dutch immigration act does not contain any provision to refuse a residence status if a marriage is conducted and inscribed into the municipal registers. Providing false information or withholding relevant information is as such also not a ground for refusing a temporary resident permit.¹⁵⁶ However in case of a relationship both partners have to sign a declaration of relationship in which they declare to maintain an exclusive and enduring relationship. In case of a relation of convenience signing this declaration can be labelled as forgery of documents.

A residence permit which has already been granted can be revoked or the application for renewal can be rejected if a marriage or relationship of convenience has been assessed.¹⁵⁷ In theory it is possible to revoke Dutch nationality if this is granted on the grounds of submitting incorrect information or withholding relevant information, which would have led to the rejection of the application.

Both partners in a marriage or relationship which has been assessed as fake can in principle conduct a marriage or partnership again. The previous fake marriage or partnership can only be used as one of the indicators to take into account in assessing the nature of the new marriage/relationship. The application for a residence permit will be tested for compatibility with all the conditions for granting a residence permit.

In 2009, IND established an ad hoc so-called “Fraud and Enforcement” project, with specific focus on improving routines for uncovering fraudulent use of the immigration regulations (including marriages of convenience). The project will end in December, following which improved routines will be sought incorporated in the daily routines of the IND.

Furthermore it is possible to prosecute both partners for forgery or fraud. However, this happens very seldom. Starting in 2009 as part of the Fraud and Enforcement project, the IND routinely reports cases of marriages or relationships of convenience to the police, which may initiate criminal investigations. The report of the IND only concerns the applicant, not the reference person. Based on the investigation of the case, the police may initiate investigation of the reference person.

¹⁵⁴ Art. 18 Vw 2000.

¹⁵⁵ See Art. 54, paragraph 1 sub b Vw and Art. 4.43 Vb for information duty. Penalisation is set out in Article 108 Vw.

¹⁵⁶ However a proposal to amend the aliens law in this way is in preparation.

¹⁵⁷ Article 18 Vw for rejecting the application for renewal, article 19Vw for revoking and article 21 Vw for refusing a permanent residence permit.

INSTITUTIONAL AND ADMINISTRATIVE SET-UP

The following actors play an important role in the law and practice of admission of foreign nationals and return policy.

The immigration and naturalisation service (IND)

The IND is a department of the Ministry of Justice. The IND acts on behalf of the State Secretary of Justice. The IND is responsible for processing the applications for asylum, for residence permits to work and live in the Netherlands for other reasons than asylum and for naturalisation. It takes decisions on first applications, on applications for renewing a permit, to change a residence permit or to revoke a residence permit. The IND also takes a decision in cases someone objects to the decision in first instance. Furthermore the IND can act as the representative of the State Secretary of Justice before the court.

Since 2009, the IND regularly reports cases of falsified information or fraud, including relationships of convenience, to the police, which may initiate criminal investigation.

The police

The IND has four contact persons in the aliens police, which cover all 25 police districts between themselves. Routines in handling cases relating to marriages of conveniences differ among police districts.

The Utrecht Immigration Police, which was interviewed in this study, has two police officers in charge of co-ordinating the various tasks relating to investigating marriages of convenience. These two officers also conduct other policing tasks, and are as such not designated full time to counteracting marriages and relationships of convenience.

After a residence permit has been granted on the basis of family reunification, the police may receive requests by the IND to investigate whether a couple is still living together.

According to the VWE, applications for family reunification based on marriage are presented by the reference person to the IND together with a form regarding the marriage which constitutes the basis for the application (the so-called "M46-form"). The IND passes this form on to the aliens police in the region (e.g. the Utrecht aliens police). The form contains formal information regarding the parties and the marriage, including former marriages of the spouses. The police approve most of the forms without further consideration, but in a few cases investigation is initiated.¹⁵⁸ The police may then visit the home of the reference person or the home of both parties if they are both present in the Netherlands, and collects information from the parties and others. Information may only be gathered on a voluntary basis. On the basis of their investigation, the aliens police issue a recommendation to the local municipality as to whether the marriage should be approved according to the 1994 marriages of convenience act or not.

The Civil Code article 44 defines in which circumstances investigation and advice by the police must take place before the municipality may register a marriage conducted abroad.

The police may not advise the municipality or the IND on the outcome of an application. The police officers who were interviewed clearly considered that it is up to the immigrant to co-operate and to prove that the marriage or relationship is real.

In 2009, the Utrecht immigration police started registering cases in a way which facilitates production of statistics. They expect to have statistics on the question of marriages and relationships of convenience within 2011.

¹⁵⁸ In 2009 the Utrecht Aliens Police considered a total of 800 M46 forms.

According to the Utrecht immigration police, there is an over-representation of persons of Moroccan and Turkish nationality among cases which have given rise to further investigation by the police.

The aliens police does not routinely conduct interviews of the parties, although this is one of the investigative steps they may take.

According to the immigration police, the main challenge in investigating suspected marriages of convenience is to provide sufficient proof as to the nature of the marriage. The level of proof required is considered to be high.

Repatriation and Departure Service

This is an executive agency, falling under the jurisdiction of the Ministry of Justice. This agency is responsible for the whole process of return of illegal foreign nationals. This includes encouraging, preparing and organizing the departure of aliens who are not or no longer entitled to stay in the Netherlands.

The Ministry of Justice¹⁵⁹

The Ministry of Justice is responsible for immigration policy. This includes admission policy and return policy. The Minister of Justice is authorised to take decisions in individual applications for residence. This authority is exercised by the State Secretary of Justice.

The Directorate Integration of the Ministry of Public Health, Environmental Planning and Environment is responsible for the integration policy.

The Ministry of Foreign Affairs

The Ministry of Foreign Affairs is responsible for visa policy. The application for a visa (for a short stay as well the provisional residence visa) must be submitted at a Dutch embassy or consulate. The embassy or consulate sends the application to the visa department. This visa department takes a decision on behalf of the Minister of Foreign Affairs. In practise the visa department is part of the IND.

The immigration department of the district court of 's-Gravenhage

A rejection can be appealed with the district court. Immigration cases are dealt with by a special Immigration department of the Court of 's-Gravenhage. The court sessions are held in all the district court.

The Council of State

Both parties can lodge an appeal against an adverse judgement of the District Court with the Council of State.

The municipalities

A marriage conducted abroad must be registered in the Netherlands by the municipal official of the Registry of Births, Deaths and Marriages before it may constitute grounds for family reunification. According to article 44 paragraph 1 sub k of the Civil Code (Book 1), the municipal office must receive a declaration as to the nature and validity of the marriage by the Chief of Police before such registration may take place. The declaration contains information as to the residence of the immigrant. It also contains the formal advice by the police as to whether the marriage may or may not be one of convenience. A

¹⁵⁹ The division of authority of different aspects of immigration and integration policy over several Ministries and directorates is changing regularly with the forming of a new government.

negative advice must be justified and based on a questionnaire where the observations of the police are included.¹⁶⁰

The municipality is autonomous in its consideration of the case, based on the information and advice submitted by the police. On the basis of the information received by the police, the marriage is either registered or not. In the Netherlands, it is therefore the municipal offices of Registry of Births, Deaths and Marriages and the immigration police which apply the definition of marriages of convenience contained in the VWE, not the IND. The IND does not consider the nature of a marriage following registration by the municipality.

It is possible to appeal against the decision by the municipality not to register a relationship in the Netherlands.

The Dutch embassies

The embassies may take their own initiative in reporting suspicion of marriages of convenience, including advising the IND on concrete cases. The IND has frequent e-mail contact with Dutch embassies in countries generating large numbers of applicants, i.e. Turkey, Morocco and Surinam.

In cases of applications for family reunification not based on marriage, the embassies conduct interviews of the applicants, which are then in turn compared with interviews of the reference person conducted by the IND in the Netherlands.

According to the IND, none of the embassies have employees working specifically with marriages of convenience. However, local employees conduct investigative tasks.

PROCESS AND PRACTICE

The family member (applicant) first has to apply for a provisional residence visa in the country of origin or permanent residence.¹⁶¹ The application is sent by the embassy to the Visa Service of the IND. If the application for a provisional residence permit is refused, the applicant has the right to lodge an objection with the Visa Service (formally the Minister of Foreign Affairs). If this objection is declared unfounded, the applicant can appeal to the Aliens Chamber of the District Court of The Hague. Both parties can lodge an appeal against a reverse judgement of the District Court to the Administrative Law Chamber of the Council of State (ABRvS). If the application for a provisional residence permit is granted, the family member can enter the Netherlands within a period of six months upon the delivery of the provisional residence permit. After arrival in the Netherlands the family member has to report to the Aliens Police of the municipality where he/she will reside in the Netherlands within three days after his/her entrance and he will have to register with the Municipal Administration (GBA). He has to submit an application for a temporary regular residence permit with the IND. The identity of the foreign national is established based on the required source documents. Subsequently, the submission of all required documents by the applicant is checked and the payable legal fees are collected.

The IND (formally the State Secretary of Justice) will take a decision on the application. If the family member entered the Netherlands with a provisional residence visa (mvv), the decision will normally be positive. However if circumstances have changed since the delivery of the mvv or new information has come up it is possible that the application will be refused. In case the foreign national is exempted from the mvv-duty the IND will

¹⁶⁰ Radboud University Nijmegen, Centre for Migration Law, Comparative study on the implementation of the Family Reunification Directive 2003/86/EC in (25) Member States, available at <http://cmr.jur.ru.nl/CMR/Qs/family/Netherlands/#B36>

¹⁶¹ This condition does not apply to nationals of a few selected countries.

conduct a full investigation into the application. The foreigner can lodge an objection with the IND against a refusal. If the IND declares the objection unfounded, the foreign national can lodge an appeal against this decision with the Aliens Chamber of the court in The Hague.

Both the foreign national and the Secretary of State have the right to appeal the decision of the judge at the Administrative Law Chamber of the Council of State (ABRS).

Documentary evidence to be submitted

Family members have to provide evidence of their family tie by means of official legalised documents. Foreign documents that relate to the marital status of persons such as a birth certificate, marriage certificate, divorce certificate and documents concerning custody or guardianship should be legalised for most countries. If there are indications that the contents of the documents are false, the IND can decide to request the Minister of Foreign Affairs to conduct an investigation.

Prior to licensing a marriage or registering a marriage contracted outside the Netherlands, where one of the partners possesses another nationality than the Dutch nationality, the registrar should first request a declaration from the Chief of Police. The Chief of Police fills out the details of previous marriages or relationships. The aim of this declaration is to investigate whether there is reason to suspect a marriage or partnership of convenience prior to the celebration of the marriage or registration of the marriage or registered partnership.

Admission on the grounds of a relationship requires the submission of a (legalised) unmarried status declaration of both parties. The sponsor also has to sign a guarantor declaration. Directions for the establishment of stable relationships are included in the Aliens Act Implementation Guidelines.

The first serious political turmoil about the phenomenon of marriages of convenience can be placed in the 1990s and the beginning of this century. There were estimates of huge numbers of marriages of convenience (between 5.000 and 20.000 a year). Although these figures lacked a solid basis they still led to the implementation of an Act to combat this phenomenon: the Act to prevent marriages of convenience (WVS).¹⁶²

A marriage of convenience was (and is) defined as a marriage with the sole purpose to grant a foreign national with no legal residence status, a residence permit.

In first instance for every marriage in which one of the spouses had a foreign nationality a statement of the superintendent was obligatory to conduct a marriage or to register a marriage conducted abroad.

After an evaluation of the law in 1998, the WVS was amended in 2001. The WVS was no longer applicable to EU-citizens and not in case the partner had a permanent residence permit. At the same time the scope was extended to foreigners who wanted to conduct a registered partnership.

Furthermore the WVS gives the public prosecutor the jurisdiction to demand the prohibition of a marriage or to annul a marriage already entered.

In the evaluations of 1998 and 2004 of the Act to prevent marriages of convenience it was concluded that the effect of the Act is very limited. Although there is no national registration, the estimates are that in no more than 2% of the marriages which could fall within the scope of the Act an intended marriage was refused or a conducted marriage not

¹⁶² Wet voorkoming schijnhuwelijke, adopted in 1994.

inscribed in the municipal registers.¹⁶³ Furthermore, a significant part of these refusals were not sustained in court, according to the interviewed actors.

According to the IND, the WVS is to be considered as containing procedural rather than a material provisions regarding family reunification. The IND bases itself *ipso facto* on the approval of a marriage according to the WVS, and does not itself consider whether that marriage is one of convenience.

The Aliens Act does not contain any definition of marriages of convenience. Thus, the IND is confined to rejecting applications on the basis of the formal requirements for family reunification, such as whether the parties live together or whether the subsistence requirement is met in the case.

Only when the IND is in practice positive that the application is based on a marriage of convenience may the rejection be made on this basis alone. This may be the case e.g. where one of the spouses denies the existence of the marriage.

Whether the relationship in question is one of convenience or not is to a much larger extent considered in cases of non-marital relationships than in applications based on marriages. In order for a non-marital relationship to lead to family reunification, that relationship must be of "a sustainable and exclusive" nature. Furthermore, the parties must live together when they settle in the Netherlands, they must be more than 21 years of age, they must earn more than 100 % of the Dutch minimum wage, and they must give a declaration that they are not married. A "partner question list" is applied. This list is a pilot list, not a formal question list, which is sent to the parties together with the application form and must be filled in and returned to the IND. Based on the answers provided, the applicants may be called to an interview at the Dutch embassy in the country of origin of the applicant.

Quite often, the IND has a suspicion that a relationship is one of convenience, without being able to prove this. In such cases, the IND "labels" the case, and conducts a follow up of the relationship at a later stage.

A significant number of the applications for family reunification based on non-marital relationships which end in rejection are rejected because the IND find that the relationship is one of convenience.

According to the Dutch Administrative act, decisions must be prepared thoroughly, they must be motivated, and they must balance the interests of both parties. If tried in court, decisions must be considered as based on a reasonable presumption grounded in the objective facts of the case. In practice, case workers are required not to reject an application unless they are sure that the marriage is not genuine.

The officials interviewed stated that they found the considerations in these cases very challenging, both because it may be difficult to differentiate between arranged marriages and marriages of convenience, and because they as case workers, must be convinced before an application may be rejected on this basis. Equally, in the consideration of relationships of convenience, the officials find it challenging to assess what is a real relationship and what is not.

IMPLEMENTATION CHALLENGES

The IND has established an *ad hoc* Fraud and Enforcement project with the purpose of improving the procedures and the structure involved in counteracting circumvention of the rules contained in the aliens act. The project has been designated to run for one year and

¹⁶³ Evaluatie WVS.

four months, lasting until December 2010, following which lessons learnt will be implemented in the policy department of the IND. The project focuses on relationships of convenience as part of this.

According to the IND, there is a significant difference in how the 25 Dutch police districts handle family reunification and marriages of convenience. There is no standard procedure as to how such cases should be investigated. The aliens' police in Utrecht which was interviewed as part of this study shared this perception, including that there were no regulations to which the police had to relate apart from the aliens act, and the aliens regulations. However, both the police and the IND had the impression that the implementation of a common standard in approaching marriages and relationships of convenience was improving.

A main challenge which was identified by the IND was the lack of a clear definition of marriages of convenience, and the fact that the IND lacks statistics on the phenomenon.

ANNEX 5: SAMMENDRAG OG KONKLUSJONER

Resymé

Denne rapporten, utarbeidet på oppdrag fra Utlendingsdirektoratet (UDI), drøfter regelverk og praksis for håndtering av oppholdstillatelse på grunnlag av ekteskap og avdekking av proforma ekteskap. Rapporten tar utgangspunkt i norske regler og praksis på området og sammenlikner disse med Danmark, Sverige, Tyskland og Nederland. Formålet med analysen er å få frem likheter og forskjeller i regelverk og metoder for å avdekke pro forma ekteskap på tvers av landene.

Studien bygger på litteraturgjennomgang og intervjuer i Norge og de fire andre landene. Analysen av Norge går noe mer i dybden i diskusjon av lovverk, omfang og praksis enn de fire landstudiene. Når det gjelder omfang er det vanskelig å gjøre presise sammenlikninger, da Norge er det eneste av landene som systematisk produserer statistikk på emnet. Anslag tyder imidlertid på at tallene er lavere i Danmark og høyere i Tyskland, i hvert fall i Berlin. Longitudinale analyser av ekteskap inngått i Norge tyder ikke på at det er store mørketall, men slike anslag er problematiske og ingen eksakt vitenskap. Praksis er ikke inngående drøftet for de fire landene der analysen i hovedsak er fokusert på regelverk og aktørbilde.

Regelverk i de fem landene er tildels likt og harmonisert med EUs regelverk på området. Noen viktige variasjoner trekkes fram.

- Den første gjelder definisjonen av hva som utgjør et proforma ekteskap, der Norge og Danmark har en noe videre (og dermed strengere) definisjon enn de øvrige land og EU-regelverket.
- Den andre gjelder de alminnelige vilkår for familiegjenforening på grunnlag av ekteskap i de respektive landene. Her fremstår Danmark og Nederland sammen med Norge som blant de strengeste.
- En tredje forskjell gjelder hvilke metoder som anvendes i undersøkelsen av mulige proformasaker, der Sverige er det eneste landet som ikke gjennomfører hjemmebesøk.
- En fjerde forskjell er hvilke sanksjoner som er tilgjengelige ved avdekking av proforma ekteskap, samt hvordan disse praktiseres. Norge og Tyskland er de eneste landene som hjemler og praktiserer utvisning fra riket som følge av at et ekteskap er konstatert til å være proforma i utlendingslovens forstand. Norge og Tyskland er også de eneste landene som hjemler straff gjennom utlendingsloven eller tilsvarende.
- Det er også enkelte forskjeller i institusjonelt rammeverk og grad av sentralisering i saksbehandlingen på tvers av landene.
- Til slutt er ankeprosessen ulik på tvers av land og Norge er det eneste landet hvor klager håndteres av en uavhengig administrativ klageinstans.

Sammendrag

Parallelt med generelle innstramninger i immigrasjonsregelverk har de fleste land økt fokus på proformasaker og revidert regelverk og praksis deretter. Generelt har oppmerksomheten omkring proforma ekteskap økt i omfang de senere år i de fleste land – i vår studie kun med unntak av Sverige. Tilsvarende har fokus på bedrede rutiner og et tydeligere regelverk blitt styrket. I Norge har en instruks fra Arbeids- og Inkluderingsdepartementet i 2006 hatt stor betydning for behandlingen av proformasaker, med hensyn til oppmerksomhet rundt fenomenet, bedring av rutiner for å avdekke proformasaker, og

økt antall avslåtte søknader på grunnlag av proforma. Også andre land i studien har hatt fokus på innstramning av rutiner de senere år, i noen grad som følge av Metock-dommen, men også i årene før denne ble avsagt. Dette har sannsynligvis sammenheng med innstramminger i immigrasjonspolitikken generelt, som gjør muligheten for familie-gjenforening via ekteskap relativt mer interessant for søkermassen.

Forskjellene mellom land er små. Relevant lovverk er i stor grad harmonisert med EUs regelverk. Norge og de andre landene i studien er alle bundet av konvensjoner om internasjonale menneskerettigheter med relevans for innvandringspolitikken, som Den Internasjonale Konvensjonen om Sivile og Politiske Rettigheter og den Europeiske Menneskerettighetskonvensjonen. Begge fastsetter retten til familieliv, men åpner for inngrep i dette under særlige omstendigheter. Rettspraksis fra den Europeiske Menneskerettighetsdomstolen tilsier at et ekteskap alltid utgjør familieliv i rettslig forstand, såfremt ekteskapet er gyldig og reelt. I praksis betyr dette at et proforma ekteskap der genuint familieliv ikke inngår, heller ikke er beskyttet av de gjeldende konvensjonene. EUs regelverk med gradvis etablering av en felles immigrasjonspolitikk har også betydning for drøftelsen. To rettsakter er av særlig betydning for proforma ekteskap, 2003/86/EC som etablerer retten til familie-gjenforening for statsborgere av tredjepartsland (familie-gjenforeningsdirektivet) og 2004/38/EC som gjelder retten til borgere av unionen og deres familiemedlemmer til å bevege seg fritt mellom medlemslandene. Norge er i økende grad innlemmet gjennom deltakelse i Dublin- og Schengenkonvensjonene.

En viktig milepæl i europeisk immigrasjonspolitikk knyttet til familie-gjenforening er Metock-dommen fra 2008. I kjølvannet av dette har EU-kommisjonen revidert enkelte deler av sin praksis knyttet til proforma ekteskap og blant annet publisert nye retningslinjer for oppholdstillatelse. Dommen etablerte at borgere av land utenfor EU ikke trenger lovlig oppholdstillatelse i EU før de kan oppnå familie-gjenforening på grunnlag av EU-direktivet. Som ledd i sin utøvelse av retten til fri bevegelse kan EU-borgere således ta opphold over noe tid i et annet EU-land enn sitt eget sammen med sin ektefelle fra et tredjeland, for deretter å returnere til hjemlandet med rett til oppholdstillatelse for ektefellen der. Forutsatt at oppholdet er utøvet som del av EU-borgerens rettigheter til fri bevegelse, må oppholdet legges til grunn ved søknad om oppholdstillatelse for ektefellen i EU-borgerens hjemland. Det kreves også at ekteskapet er reelt, og at EU-borgeren har en genuin tilknytning til det EU-landet ektefellen søker oppholdstillatelse i.

Retningslinjer for vurdering av mulige proformasaker likner på tvers av land og er i stor grad harmonisert med EUs retningslinjer. Med den norske instruks fra 2006 fulgte et sett med retningslinjer for vurdering av proformasaker som utgjør et viktig redskap i UDIs saksbehandling. En sentral utfordring som omtales i retningslinjene ligger i å kunne praktisere saksbehandling i henhold til felles kriterier og samtidig ta høyde for nasjonale og kulturelle forskjeller. Landene i studien følger liknende retningslinjer, selv om graden av detalj og presisjon blant disse varierer. Samtlige land opererer med retningslinjer som er i tråd med de retningslinjene EU-kommisjonen har avgitt. Felles husstand er et gjennomgående moment, sammen med andre indikasjoner på et gyldig ekteskap. Hva som er normalt skal her ses i lys av tradisjoner relevante for søkers og referansepersons egne kulturer. Til å bistå med dette har UDI tilgang på informasjon om spesifikke trekk ved ulike land og kulturer gjennom tjenesten Landinfo, i tillegg til at ambassadene kan være til hjelp.

Vurdering av mistenkte proformaekteskap er vanskelig og tidkrevende. Dette begrunner en noe lengre saksbehandlingstid i saker hvor det foreligger mistanke om proforma ekteskap sammenliknet med enklere familie-gjenforeningssaker. Proformasaker representerer en vanskelig balansegang mellom hensynet til vern om familie- og privatliv på den ene siden med behovet for et tydelig og konsekvent regelverk, og sanksjonering av brudd på dette på den andre. En annen utfordring ligger i å sikre kostnadseffektivitet i bruk av offentlige ressurser.

Intervjuene tyder på at saksbehandlere er forsiktige med å avslå søknader på grunnlag av proforma. I Norge som i andre land kan avslag på søknad om familie-gjenforening fattes dersom det er mer sannsynlig at ekteskapet er proforma enn at det ikke er det. Det fremgår imidlertid fra intervjuene særlig i Norge og Nederland at dette kravet ofte praktiseres noe strengere enn regelverket krever. Det er ikke uvanlig at saksbehandler legger til grunn en høyere sannsynlighetsgrad enn den påkrevde "mer sannsynlig enn det motsatte" for å kunne avslå på grunnlag av proforma.

- **Det er ikke mulig å sammenlikne omfanget i Norge med andre land, ettersom statistikk for disse ikke er tilgjengelig.** Norge er det eneste landet i analysen som produserer statistikk på proforma ekteskap avdekket i saksbehandlingen. I Norge i 2009 ble litt over to prosent av alle søknader om familie-gjenforening basert på ekteskap avslått med begrunnelse i proforma. Dette utgjorde 200 søknader.
- Nederland planlegger å utarbeide slik statistikk innen 2011.
- I Sverige antyder man at omfanget neppe utgjør mer enn 5 prosent av familie-gjenforeningssøknadene basert på ekteskap, noe som kan virke sannsynlig sammenliknet med de drøye to prosent som utgjør avslagene i Norge.
- Et anslag fra 2005 antyder at det hvert år inngås 500 proforma ekteskap i Berlin, blant en befolkning på drøye 3 millioner, altså et betydelig høyere omfang enn det som avdekkes i Norge.
- Manuelle tellinger foretatt av Udlændingesservice i Danmark for denne analysen tyder på langt lavere tall, med 35 avslag på grunnlag av vedtak om proforma mellom januar og august 2010 og totalt 28 avslag i 2009.

Analyse av relevante data for Norge tyder på at antallet uavdekkede saker er relativt lavt. I tillegg til tallmessige angivelser vedrørende antall proformasaker er det interessant å drøfte i hvilken grad vedtakene reflekterer den reelle situasjonen. En typisk antakelse fra enkelte aktører er at avslagene kun utgjør en liten andel av reelle proforma ekteskap. Gjennom statistisk analyse av skilsmisser forsøker vi derfor å si noe om omfanget av proforma ekteskap og i hvilken grad dette går utover det antall som årlig avdekkes. Dersom man tar utgangspunkt i en hypotese om at proforma ekteskap skulle ha en høyere skilsmisserate enn andre ekteskap etter at permanent oppholdstillatelse er innvilget, tyder disse tallene på at antallet uavdekkede saker er relativt lavt. Dette må imidlertid nyanseres i begge retninger. På den ene siden vet vi at transnasjonale ekteskap generelt, og særlige regioner og kombinasjoner spesielt, har en høyere skilsmisserate enn ekteskap der begge parter har samme bakgrunn. På den annen side kan det tenkes at ekteskap som er inngått med hensikt å sikre opphold består også etter at permanent oppholdstillatelse er innvilget, for eksempel ved at partene fortsetter å være gift på papiret men ikke lenger lever et familieliv.

De norske og danske definisjonene av hva som utgjør et proforma ekteskap fremstår som noe videre, og dermed strengere, enn i de andre landene. Det følger av EUs familie-gjenforeningsdirektiv at et ekteskap kan betegnes som proforma dersom dets "eneste målsetning" er å oppnå oppholdstillatelse. Dette er en smalere definisjon enn hva som følger av lovtekst og praksis i Norge, der myndighetene skal vurdere hvorvidt oppholdstillatelse er den hovedsaklige motivasjonen for å inngå ekteskap. Det er imidlertid ikke grunnlag for å vurdere om praksis i Danmark avviker fra EUs regelverk.

Når det gjelder alminnelige vilkår for opphold på grunnlag av familieetablering, er Danmark og Nederland sammen med Norge de strengeste. Landene opererer med ulike underholds krav, og ikke alle opererer med krav til språkferdigheter, tilknytningskrav og krav om at referansepersoner må ha fire års arbeid eller utdanning i landet det søkes oppholdstillatelse i for at søkeren skal ha rett til familieetablering.

Som et ledd i sakens utredning praktiseres hjemmebesøk i alle land unntatt Sverige. Bruk av hjemmebesøk illustrerer det dilemmaet som kan oppstå mellom vern om privatliv på den ene siden og ønsket om saksopplysning på den andre. Gjeldende forskrift i Norge krever samtykke, og praksis er at dette innhentes av politiet ved oppmøte på bopel.

Graden av sentralisering i saksbehandlingsprosessen varierer og kan ha innvirkning både på hvordan saken behandles og hvor likt saker behandles på tvers av geografiske områder. Prosessen begynner typisk med at søker presenterer sin søknad ved den relevante ambassaden i eller i nærheten av sitt hjemland. Ved enkelte ambassader gjennomføres det rutinemessig intervju med tanke på avdekking av proforma ekteskap. Ved andre ambassader gjennomføres intervju kun dersom søknaden foranlediger mistanke om proforma. I Norge gjennomføres intervju av både søker og referanseperson av ambassadene eller av politiet. I Norge og Danmark behandles søknaden av utlendingsforvaltningens sentrale organ i mottakerlandet, mens Tyskland, Nederland og Sverige har noe mer desentraliserte prosesser. Graden av sentralisering i saksbehandlingsprosessen påvirker antallet mennesker involvert i en enkeltsak og i hvilken grad saksbehandler har direkte førstelinjekontakt med søker og referanseperson. Dette kan i teorien også påvirke hvilke faktorer som vektlegges i beslutningen. Det kan på den annen side spekuleres i om stor grad av desentralisering kan svekke likebehandling og felles praksis på tvers av geografiske områder.

Norge har de mest inngripende sanksjonene både overfor søkeren og referanseperson dersom proforma ekteskap avdekkes. Både Norge og Tyskland utviser søker. I Norge utvises søkeren rutinemessig fra hele Schengenområdet og innrapporteres til Schengen Information System (SIS). Norge og Tyskland hjemler straffeforfølgning for forsettlig eller uaktsomt å ha oppgitt vesentlig uriktige eller åpenbart villedende opplysninger i søknadsprosessen i utlendingsloven. Det er imidlertid ikke praksis for straffeforfølgning i Norge. Konsekvensen av et vedtak om proforma vil også sjelden gå utover avslått søknad i de andre landene.

Prosessen rundt behandling av klager over vedtak om proforma er ulik i landene som inngår i studien. Mens klager i Norge behandles av en uavhengig administrativ nemnd (Utlendingsnemnda), behandles de i Danmark som en alminnelig administrativ klage til det ansvarlige departementet. Sverige, derimot, har en egen spesialisert domstol til behandling av slike klager. Tyskland og Nederland har ingen klageinstans, med den konsekvens at avslag eventuelt må prøves direkte for domstolene. Det er vanskelig å vurdere hvordan disse forskjellene påvirker prosessen rundt behandling av proformasaker. Tar man utgangspunkt i at proformasakene anses som kompliserte saker i samtlige land i studien er imidlertid adgangen til en reell og grundig klagebehandling av stor betydning for ivaretagelse av søkerens rettigheter. Den svenske ordningen skiller seg i så måte fra samtlige øvrige klageordninger, ved at sakene høres muntlig ved en spesialisert domstol.

Aktører med direkte kontakt med søker er mer tilbøyelige til å vurdere et ekteskap som proforma enn den mer formelle og sentraliserte saksbehandlingsprosessen. Dette er en utfordring som særlig fremgår i den norske prosessen. Ulike oppfatninger mellom på den ene siden politi og ambassader og på den andre UDI og UNE reflekterer kontrasten mellom førstehåndskunnskap – ofte av uformell karakter – på den ene siden, og nødvendigheten av dokumenterbar informasjon på den andre. Politi og ambassader har ofte en oppfatning om at faktisk forekomst av proforma er noe høyere enn antallet faktiske avslag. Politi og ambassader får et førstehåndsintrykk som er vanskelig dokumenterbart og dermed ikke kan anvendes som et formelt beslutningsgrunnlag. Enkelte intervjuobjekter, særlig i førstelinjen, etterlyser en mer presis forståelse av hva som skal til for å avslå en søknad på grunnlag av proforma i UDI og UNE. Dette forholdet

fremgår ikke tydelig i andre land, noe som også kan ha sammenheng med at færre intervjuer er gjennomført i landstudiene enn i Norge for denne rapporten.

I Norge vil ofte andre begrunnelser enn proforma legges til grunn for avslag dersom slike foreligger. Av prosesseffektivitetshensyn vil det ofte være slik at dersom mer enn en årsak for avslag foreligger vil den minst tidkrevende inngå i avslaget som begrunnelse. Eksempelvis er underholdskravet for familiegjennforening ofte brukt som grunnlag for avslag i familiegjennforeningssaker mellom ektefeller, også dersom mistanke om proforma foreligger. Disse sakene vil i så fall ikke registreres som proforma og inngår dermed heller ikke i de 200 avslagene med grunnlag i proforma. Imidlertid kan underholdsevne endres over tid, og mange av disse sakene vil dermed dukke opp igjen og eventuelt vurderes på nytt som mulige proforma ekteskap.

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