Assessment of the implementation in Belgium of article 59 of the Istanbul Convention, CAW Brussel

Introduction 'CAW Brussel'

CAW Brussel is a non-profit organization based in Brussels. As a centre for social well-being, it offers differentiated services and assistance in the Brussels-Capital Region. CAW helps to promote social integration and participation, and to reinforce the social well-being.
By offering an approachable access they try to reach every person whose chances are threatened or diminished, as a result of personal, relational, family related or social factors. CAW uses a community-orientated approach based on a pluralistic vision to give people the chance to get back on their feet in their own environment.

This input is written by the jurists/lawyers of the migration team of CAW Brussels. The migration team offers first-line legal assistance to migrants based in Brussels by counselling migrants on a wide range of issues regarding their right of residence. They do so by offering correct legal information to migrants in person, follow-up on individual cases and related case files and by drafting guiding documents and intervention notes for the different government authorities. In relation to this work, CAW is also working together with other organisations to identify bottlenecks for policy direction purposes.

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Family reunification and victims of domestic violence

Introduction

Migrant women who come to Belgium in the context of family reunification and then become victim of domestic violence, are in most cases insufficiently protected with regard to their residence status. According to a report of Human Rights Watch in 2012 a lot of victims prefer to undergo the violence (for years), out of fear of deportation. Those who dare to leave the family home often lose their residence permit.[1]

[1] HUMAN RIGHTS WATCH, *De wet was tegen mij*, VS, 2012, 2 en 4.

Since the amendments of the Belgian Immigration Act[2] in 2013[3] and 2016[4], the period of conditional residency[5] under the family reunification procedure was extended (from three) to five years (!)[6],

leaving victims of domestic violence highly vulnerable. The Belgian legislator tried to mend this by providing 'protection clauses', that need to insure the victim doesn't lose her right to residency in case she leaves the family home (and the perpetrator of the violence). However, these 'protection clauses' are very limited in their scope and are not fully and correctly applied in practice by the competent administration ('Office of Immigration' or 'DVZ'), in violation of the Istanbul Convention. One of the biggest shortcomings is the fact that the Office of Immigration is not transparent on how it applies the 'protection clauses': it does not communicate to the public in any way *who* is protected, under what *conditions*, which *procedure* needs to be followed and what *evidence* needs to be produced. Victims and social workers are literally left in the dark. As a result, even victims that would be eligible in practice to obtain protection, either lose their residency or continue to undergo the violence.

For the purpose of this contribution we will only focus on the implementation of article 59 §§ 1-3 of the Istanbul Convention, as only these provisions are relevant with regard to family reunification in Belgium. In what follows we give a short overview of the major shortcomings in Belgian legislation and practice, which we believe to be in direct violation of the Convention.

A. Not all victims of domestic violence are protected (> violation of article 59 §1 Convention)

According to article 59 §1 of the Istanbul Convention *"[P]arties shall take the necessary legislative or other measures to ensure that victims whose residence status depends on that of the spouse or partner as recognised by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship".*

According to the Explanatory Report to the Istanbul Convention, paragraph 1 of article 59 Convention requires Parties to the Convention to take the necessary legislative or other measures to ensure that *migrant victims [of domestic violence] whose residence status is conditional on marriage or on being in a relationship* are granted an autonomous residence permit of a limited validity in the event of the dissolution of the marriage or the relationship.

[2] Wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *BS* 31 december 1980.
[3] Programmawet van 28 juni 2013, *BS* 1 juli 2013.
[4] Wet houdende diverse bepalingen inzake asiel en migratie van 4 mei 2016, *BS* 27 juni 2016.
[5] This is the period in which the right to residency is dependant on meeting the conditions for family reunification, *inter alia* forming a family unit or cohabitation with the sponsor. In principle, these conditions have to be met during five years.
[6] According to the Explanatory Report to the Istanbul Convention (p 51) most Council of Europe member states require spouses or partners to remain married or in a relationship for a period ranging from one to three years for the spouse or partner to be granted an autonomous residence status. This makes Belgium one of the countries that apply the longest duration of conditional stay among Council of Europe member states.

Neither the provision of article 59 §1 of the Istanbul Convention itself, nor the Explanatory Report to the Istanbul Convention, provide exceptions to this protection clause, making it applicable to *all* migrant victims whose residence status is conditional on marriage or on being in a relationship.

However, the Belgian Immigration Act does provide exceptions to the protection prescribed by the Convention. More specifically, it doesn't provide any protection for victims of domestic violence whose residence status depends on that of the spouse or partner:

1) when the sponsor himself is a third country national with a temporary residency in Belgium[7];

2) when the victim has the nationality of an EU-member state and is the spouse or partner of an EU-sponsor (including a Belgian national).

To fulfill its obligations under the Istanbul Convention, Belgium will have to extend its protection clauses to all victims of domestic violence in a family reunification procedure, regardless of the residency status of the sponsor and regardless of their own nationality.

B. No protection during all the stages of the family reunification procedure (> violation of article 59 §1 Convention)

Article 59 §1 of the Istanbul Convention provides protection for "victims whose residence status depends on that of the spouse or partner". The Convention does not specify the type of (legal) residency status of the victim, only that it should be dependent upon that of the spouse or partner.

However, in Belgium the competent administration (the Office of Immigration) only applies the protection clauses to victims that have a right to residency *for more than three months*, leaving out all the victims with a right to residency *not* for more than three months[8]. Are thus *not* protected in Belgium:

- spouses or partners that apply for family reunification in Belgium (and not from abroad) in possession of an orange card ('attestation d'immatriculation'), valid for 6 months or 9 months (and possibly prolonged to 15 months).

- spouses or partners that apply for family reunification in Belgium (and not from abroad) in possession of an annex 19 or 19ter. These documents prove that you have applied for family reunification with an EU-citizen (including a Belgian national) and that you are yourself either

[7] See article 10bis Immigration Act. Examples are labour migrants or foreign students. When their spouses or partners join them under the family reunification procedure and become victim of domestic violence, they enjoy no protection at all in terms of residency if they leave the family home.

[8] The term 'a right to residency for more than three months' is a bit misleading, because there are several types of legal residence statuses that do not entail a residency right for more than three months, but nevertheless concern legal stays that can last over a year. Examples are: an application for family reunification that still needs to be examined by the competent authority or the application has been rejected but a suspending appeal has been lodged or residency for more than three months was granted and later withdrawn, followed by a suspending appeal. In all these cases the victim is granted a temporary residence permit with a validity varying from one (and monthly prolonged for an undetermined period of time, for the duration of the appeal) to six , nine, twelve or fifteen months. Some victims are in possession of an annex 19 or 19ter. This concerns EU-citizens and their family members who have a declarative right to residency. These documents are proof of a lodged application and entail legal residency, but with no specific duration of validity.

an EU-citizen (= annex 19), or a third country national (= annex 19ter). Because the fundamental and personal right of residence in another Member State is conferred directly on Union citizens and their family members by Union law and is not dependent upon their having fulfilled administrative procedures, it is generally accepted in Belgian jurisprudence that an annex 19 and 19ter counts as a legal residency.

Effective protection from the start of the application for family reunification (meaning: from the moment they receive an annex 19, 19ter or orange card) is crucial as migrant spouses or partners often become victims of violence at a very early stage of their arrival.

- spouses or partners that applied for family reunification in Belgium, whose application was refused (for instance, because the migrant victim fled the violence and no longer cohabitated with the sponsor) or whose application was approved, but who's residence permit was later withdrawn because the victim no longer met the conditions for family reunification during the period of conditional stay. In both cases, the victim can lodge a suspending appeal with the Conseil du Contentieux des Etrangers ('CCE') in which case it will receive a temporary residence permit in the form of an annex 35, which is monthly renewed for the duration of the appeal. A victim in possession of an annex 35 is not protected by the Office of Immigration because it is not considered a right to residency *for more than three months.* At the same time, the CCE has limited powers: if the violence is only raised for the first time during the appeal procedure (and not *before* the Office of Immigration refused or withdrew the victim's residence permit), the Court may not take the violence into account. The Court can only check the legality of the decision of the Office of Immigration, based on the elements at hand *at the time of the appealed decision*. This could be remediated by expanding the competence of the CCE in family reunification procedures, allowing the CCE to accept evidence of violence presented by the victim for the first time during the appeal procedure.

C. No protection for victims with no legal residency (> violation of article 59 §3 Convention)

Where article 59 §1 of the Istanbul Convention provides protection for victims with (legal) residence status (dependent on that of the spouse or partner), article 59 §3 of the Convention provides protection for (undocumented) victims with no legal residency, in two specific situations:

1) where the competent authority considers that their stay is necessary owing to their personal situation;

2) where the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

If one or both of these situations occur, Parties to the Convention have the obligation to provide renewable permits. At present, Belgium doesn't provide any residence permits for undocumented victims, in either situation. It is not provided in the Immigration Act, nor is any protection in such cases granted in practice (by the discretionary power of the Office of Immigration). In theory there is a possibility for the victim to apply for a residence permit based on article 9bis Immigration Act, but there is no legal certainty whatsoever that a permit will be granted in these specific circumstances. There are no transparent criteria available and it's totally dependent, as any application based on article 9bis Immigration Act, on the discretionary power of the Office of Immigration.

Protection for undocumented victims is also relevant for family reunification, as several family members in a family reunification procedure are temporarily without any residence permit.

D. Expulsion of the violent spouse or partner: not always suspension of expulsion proceedings against the victim and no possibility to apply for a residence status on humanitarian grounds (> violation of article 59 §2 Convention)

Whether a migrant victim may obtain the suspension of expulsion proceedings due to expulsion proceedings against the violent spouse or partner (on which the residence status of the victim is dependent), depends on the type of family reunification procedure.

1) A victim, who's the family member of a third country national with permanent residency in Belgium or a third country national with international protection in Belgium, is always protected against violence in terms of residency status. This is also the case when expulsion proceedings would be initiated against the violent spouse or partner, but *only* if the violence is timely notified to the Office of Immigration (this means *before* the residence permit of the migrant victim is withdrawn). This is why it's absolutely crucial that the application of the 'protection clauses' by the Office of Immigration is transparent to the public (see infra point E), so that victims, as well as social workers can notify the violence timely to the competent authority. If the violence hasn't been timely reported to the Office of Immigration, there is in theory a suspensive appeal at the disposal of the victim. However, this will not serve the victim because of the limited competence of the CCE (as already mentioned above): the Court can only check the legality of the decision of the Office of Immigration, based on the elements at hand (of the Office of Immigration) *at the time of the appealed decision*. There is also no possibility for the victim to apply for a residence status on humanitarian grounds, as required by article 59 §2 Istanbul Convention[9].[10]

2) A victim, who's the family member of a third country national with temporary residency in Belgium without international protection status,[11] does not enjoy any protection in terms of residency in case of violence, nor does it have a suspensive appeal at its disposal in case of expulsion proceedings due to expulsion proceedings against the violent spouse or partner. This is in direct violation of article 59 §2 Istanbul Convention.

3) A victim, who's the family member of an EU-citizen (including a Belgian national), and has itself the nationality of an EU-member state, does not enjoy any protection in terms of residency in case of violence (as mentioned above). Moreover, expulsion of the EU-sponsor

[9] As interpreted by §306 Explanatory Report to the Istanbul Convention.
[10] In theory there is a possibility for the victim to apply for residence status based on article 9bis Immigration Act, but there is no legal certainty whatsoever that it will be granted in these specific circumstances. There are no transparent criteria available and it's totally dependent, as any application based on article 9bis Immigration Act, on the discretionary power of the Office of Immigration. In any case, there is no policy to grant residence status to victims of domestic violence to our knowledge.
[11] For example labour migrants or foreign students.

is an explicit ground for withdrawal of the residence permit of the EU-victim. The victim does have the possibility to lodge a suspensive appeal at the CCE, but the CCE will not be

able to take the violence into account if the violence was only raised for the first time before the CCE (and not before the Office of Immigration *before* the latter took the appealed decision). In theory there is a possibility for the EU-victim to apply for residence status based on article 9bis Immigration Act, but there is no legal certainty whatsoever that it will be granted in these specific circumstances and to our knowledge, there is no policy to grant residence status to victims of domestic violence.

4) A third-country national, who's the family member of an EU-citizen (including a Belgian national), and victim of violence, enjoys protection in terms of residency in case of violence, as long as the violence is timely notified to the Office of Immigration (= before the Office of Immigration ends the residency of the victim). However, expulsion of the EU-sponsor is an explicit ground for withdrawal of the residence permit of the victim. According to the European Court of Justice a third-country national, who is divorced from a EU- citizen at whose hands she has been the victim of domestic violence during the marriage, cannot rely on the retention of her right of residence in the host Member State, where the commencement of divorce proceedings post-dates the departure of the Union citizen spouse from that Member State.[12] In other words: if the EU-spouse or partner is expelled *before* the commencement of divorce proceedings, Belgium can end the residence status of the third-country national, regardless of domestic violence suffered by the victim. The victim can then lodge a suspensive appeal at the CCE. In theory there is a possibility for the victim to then apply for residence status based on article 9bis Immigration Act, but as said, there is no legal certainty or policy that residence status will be granted based on the domestic violence.

E. <u>No transparent conditions or procedure for protection</u> (> violation of article 59 §1 Convention)

According to the Explanatory Report to the Istanbul Convention *"[t]he drafters felt it best to let Parties establish, in accordance with internal law, the conditions relating to the granting and duration of the autonomous residence permit, following an application by the victim. <u>This includes establishing which public authorities are competent to decide if the relationship has dissolved as a consequence of the violence endured by the victim and what evidence is to be produced by the victim</u>."*[13]

At present there is no procedure made public in Belgium in any way to allow victims of domestic violence in a family reunification procedure (or undocumented victims) to obtain protection in terms of residency status. There is no public announcement on:

- **which authority is competent** to decide if the relationship has dissolved as a consequence of the violence endured by the victim. In practice, this is the Office of Immigration but this was never made public and no information on the subject can be found,

[12] Case C-115/15.

[13] §303 Explanatory Report to the Istanbul Convention.

for instance, on its website;

- **which victims** in a family reunification procedure **can obtain protection** according to the interpretation of the Office of Immigration. As described above, not all victims in a family reunification procedure are at present protected in Belgium, nor are victims protected in every stage of the procedure: it is obviously crucial for victims and social workers to know whether a victim that potentially wants to leave a violent home-situation, is at risk to be deported.

- what **type of violence** can entail protection. 'Violence' is broadly defined by the Convention and not at all limited to physical abuse, which is often (wrongfully) presumed by victims, social workers and lawyers.

- **what evidence is to be produced** by the victim, not only regarding the violence, but also regarding the other conditions to *obtain* and *maintain* protection (which is partly defined in the Immigration Act, partly a practice of the Office of Immigration and partly defined by jurisprudence). At present, this is only communicated in each individual case to the victim that was lucky enough to know the procedure (or was lucky enough to be in contact with a specialized social worker or lawyer);

- **the procedure to follow** to obtain protection. Given the limited powers of the CCE, it's crucial for victims, social workers and lawyers to understand the importance of timely notification of the violence to the Office of Immigration (meaning *before* the residence permit of the migrant victim is refused or withdrawn). In practice, the Office of Immigration also applies certain delays in which the victim has to produce certain evidence: this is again not made public. The protection procedure can ultimately result in a permanent (autonomous) residency, but it is at present untransparent and unclear when and under which conditions such a permanent residency is granted.

It's clear that there can be no question of any protection whatsoever, if there is no information available on basic rights. This is where it all begins.