



Summary

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Suitable counsel with fair compensation – handling public counsel in migration cases

Summary

The Swedish National Audit Office (Swedish NAO) has audited whether the handling of public counsel in migration cases is fit for purpose. Asylum seekers and other people who risk refusal of entry or expulsion may have the right to public counsel paid for by the State. These persons are in a vulnerable situation, not least due to their often limited knowledge of the Swedish language and the Swedish legal system. For this reason, it is of great importance that the State acts as a guarantor for appointing appropriate legal representatives. Competent counsel contribute to legally secure decisions and an efficient migration process. A counsel who helps their client present relevant arguments and claims in their case may decrease the workload of administrative authorities and courts and contribute to better case law through appeals. This audit therefore focuses on appointment, suitability checks, and handling of compensation to counsel at the Swedish Migration Agency, the migration courts and the Swedish Police Authority.

The Swedish NAO's overall assessment is that the handling of public counsel in migration cases is efficient in most respects, but is not fit for purpose in its entirety. In the absence of a clear regulatory framework, the courts and administrative authorities have had to meet several needs in their handling of counsel through informal solutions. This applies, for example, to saving and sharing information about counsel and what requirements can be placed on a counsel when requested by an individual.

Audit findings

There are shortcomings in the process for appointing public counsel and assessing their suitability

The audit indicates that administrative authorities and courts more often than not appoint public counsel that may be considered fully fit for their assignment. In fewer than one in one thousand appointments, an administrative authority or court has decided that the counsel appointed to the case is unsuitable for that specific assignment or for further appointment. However, there are exceptions. The audit presents examples of counsel who have been deemed by an administrative authority or a court to lack basic legal competence, but who have nevertheless been granted compensation by another administrative authority or court, sometimes on a large number of occasions. The Swedish NAO finds that each actor should collect relevant documentation from others when they assess the suitability of a counsel ahead of an appointment. However, such collection should be clearly regulated and take place through formal channels. Interviews with representatives of administrative authorities and courts show that it is currently unclear what information about a counsel's possible misconduct or special competence they are permitted to compile and share with each other. In the absence of a clear regulatory framework, the information risks getting stuck with individual employees. It also happens that the actors share information with each other about the counsel through informal channels and often channels that rely on individuals. The Swedish NAO therefore considers that the Government needs to ensure that administrative authorities and courts are given the right to compile and share the necessary information about public counsel for the purpose of improving the effectiveness of the suitability check.

Moreover, the audit shows that administrative authorities do not consider that they are able to place as high demands on a counsel requested by an individual, as on a counsel that they themselves appoint. This is justified by the principle of the individual's right to choose their own counsel. However, the Swedish NAO notes that the legislative history and the statements made by the Parliamentary Ombudsmen indicates that the legislator intended that the suitability requirements for counsel should be the same regardless of how they are appointed. The Swedish NAO therefore considers that the Government should clarify the regulatory framework in terms of balancing the requirements on suitability and the free choice of counsel.

The Swedish Migration Agency allocates appointments as evenly as possible among the counsel who have notified that they are available. The procedure is justified by the pursuit of objectivity and impartiality. However, the audit shows that the majority of counsel appointed by the Swedish Migration Agency only have

one or two assignments per year. The Swedish NAO considers that this makes it more difficult to maintain and develop the general skills level among counsel. The Swedish NAO notes that the primary purpose of public counsel in migration cases is not to distribute the assignments fairly, but rather to ensure that the applicant receives effective legal support. Therefore, in the opinion of the Swedish NAO, the Swedish Migration Agency has not designed their appointment process entirely appropriately.

All in all, the Swedish NAO considers that the mentioned shortcomings risk leading to individuals being assigned a counsel who lacks sufficient legal competence or who for some other reason is unsuitable for the assignment, and that the formation of case law, and thereby the final impact of the legislation, will be delayed. This, in turn, leads to a risk that individuals will suffer the loss of rights and that the migration process as a whole becomes less effective. The Swedish NAO considers that one way of raising the general competence level of the counsel is to introduce specific suitability or eligibility requirements for public counsel in migration cases.

The counsel compensation process can be improved

The total costs of public counsel in migration cases increased sharply in the period 2013–2020. This is in part explained by the fact that a larger proportion of asylum seekers were assigned a counsel. However, the audit shows that the cost per assignment has not increased significantly.

The Swedish NAO assesses that the counsel compensation process can be improved in some areas. Assessment of cost statements must be individual. However, in support of their assessments, both administrative authorities and courts use standard times that indicate a reasonable time input for various tasks carried out by the counsel. The Swedish NAO considers that the Swedish Migration Agency and the Swedish Police Authority could streamline the processing of compensation through better communication to the counsel on how they assess cost statements. This would avoid an undue number of cost statements being reduced or appealed, thereby avoiding additional work for themselves and for the counsel. The audit shows that administrative authorities and courts are aware of the risk of incorrect payments. However, the Swedish NAO assesses that supporting documentation for cost statements could be improved to reduce this risk. The Swedish NAO notes that the Ordinance concerning legal aid requires that the cost statement contains information on when the counsel's assignment began. However, the audit shows that this is not always the case.

Finally, the Swedish NAO notes that assessment of cost statements is mainly followed up by appeals to the court for review of administrative authorities' decisions to reduce compensation. Neither the administrative authorities, the

courts, nor the National Courts Administration carry out any regular follow-up of compensation to legal counsel. The Swedish NAO also notes that the Chancellor of Justice only rarely oversees migration cases. This is because individual cost statements very rarely reach the threshold amount of SEK 150,000.

Recommendations

The Swedish NAO makes the following recommendations.

To the Government

- Clarify the regulatory framework in terms of the balance between suitability requirements and the free choice of counsel in order to make it clear what requirements administrative authorities and courts are to place on requested public counsel.
- Consider introducing specific suitability or eligibility requirements for public counsel in migration cases in order to raise the general competence level.
- Ensure that administrative authorities and courts are given the right to compile and share the necessary information about public counsel for the purpose of improving the effectiveness of the suitability check.
- Examine the possibility for the Swedish Migration Agency to be able to dismiss unsuitable public counsel in general in the same way as the migration courts.

To the Swedish Migration Agency, the Swedish Police Authority, and the migration courts

- Within the scope of the duty of investigation, collect relevant information about public counsel from other administrative authorities and courts for a suitability check.

To the Swedish Police Authority

- Coordinate efforts among the regions, for the purpose of streamlining the handling of public counsel and increasing the consistency of assessments.