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Litins'ka, Yana

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Climbing the Tower of Babel: Obligations for Swedish Healthcare to Use Interpretation Services for Migrants

Av Yana Litinska

Climbing the Tower of Babel: Obligations for Swedish Healthcare to Use Interpretation Services for Migrants[1]

YANA LITINS'KA, Doctor of Laws, post doc.

ABSTRACT

Svensk hälso- och sjukvård står inför stora utmaningar rörande kommunikation med patienter. En del av dessa utmaningar är kopplade till situationer där patienter, såsom asylsökande eller papperslösa, inte själva behärskar svenska språket. Användning av tolktjänster kan vara nödvändigt i sådana situationer. I denna artikel undersöks vårdgivarens och vårdpersonalens skyldigheter i tre situationer, nämligen, när patienten kräver tolkanvändning, när patienten vägrar tolkanvändning och när patienten inte uttrycker någon åsikt angående tolkbehov. Artikeln fokuserar på åtaganden enligt internationella konventioner om mänskliga rättigheter samt svensk allmän och speciell förvaltningsrätt. I artikeln diskuteras även regionernas tolkning av skyldigheten att erbjuda tolk. Undersökningen görs med hjälp av traditionell rättsdogmatisk metod. I artikeln dras slutsatserna att patientens vilja att ha tillgång till tolktjänster ska respekteras enligt svensk rätt, men den har inte avgörande betydelse enligt internationella åtaganden om mänskliga rättigheter. Både nationell och internationell rätt tillåter vårdgivarna att bortse från patientens önskemål om att avstå från tolkanvändning, om användning av tolk är nödvändigt för att rädda patientens liv eller hälsa. Samtidigt innebär åtaganden enligt internationella konventioner ett ansvar för regionerna att utreda orsakerna till varför patienten vägrar tolktjänster och tillhandhålla nödvändiga anpassningar. I situationer där patienter inte utrycker någon åsikt kring användningen av språktolk, ska

1 The author would like to thank Kavot Zillén, Lena Wahlberg, Vilhelm Persson and two anonymous reviewers for constructive feedback on earlier drafts of the article.

tolkning tillhandhållas där det bedöms nödvändigt för att säkerställa patientens självbestämmande och integritet i vården. I artikeln framhävs även att regioner sällan har riktlinjer om hälso- och sjukvårdspersonalens skyldigheter att anlita tolk och de få riktlinjer som finns ser olika ut i olika delar av landet. Detta kan resultera i stora regionala skillnader i vårdtillgängligheten för asylsökande och papperslösa, samt förvirring för vårdpersonalen huruvida de är skyldiga att använda en språktolk eller ej. För att säkerställa patienters möjligheter att få vård av god kvalité, rekommenderas i artikeln att Socialstyrelsen tar fram en nationell vägledning för att klargöra vårdgivarnas och vårdpersonalens skyldigheter i de utmanande situationer som uppstår inom vården.

KEY WORDS:
Interpreters; healthcare; asylum seekers; irregular migrants; Sweden

1. Introducing Challenges

In a Swedish hospital a woman is about to give birth to her first child. Her name is Reem and she is an asylum seeker. Reem wants an interpreter as she considers her understanding of Swedish or English to be too basic. However, healthcare personnel believe her language skills are sufficient to communicate effectively, and interpreters should be prioritised for communication with other patients.

Another woman Faven, who is an irregular migrant, has an infected wound. Personnel at the clinic where she has gone for treatment, offer interpretation services to help her comprehend relevant medical information. However, Faven is terrified that an interpreter will report her to the police or reveal information about her using healthcare services in the small community she belongs to. She makes it clear that she does not want an interpreter and will run away from the clinic if one is called.

An asylum seeker, Ivan, has been vomiting, sweating, and feels tired. When an ambulance team arrives, there is a problem with communication: Ivan is only able to understand a few phrases in Swedish. Ivan's partner and the healthcare team communicate with a mixture of spoken words and hand gestures. Ivan arrived a few weeks previously from overseas where there had been an outbreak of an infectious disease, so he is transferred to an infectious disease unit. It later transpires that he had a myocardial infarction (heart attack), and he and his partner had not known how to communicate the information about pain in his chest.

These three fictive examples are the focus for discussion in this article. They illustrate different types of communication challenges between healthcare professionals and patients, which are common occurrences in modern multicultural healthcare systems. How these challenges are tackled can affect the quality of healthcare services, which might result in saving or losing lives. Each case is differentiated by the requests of the patients: In the first case, patient Reem, asks for interpretation services. While in the second, Faven, clearly refuses them – ready to jeopardise her health and potentially her life if the services are provided. And in the third case, Ivan neither demands nor refuses the use of the interpreters.

This article analyses the obligations for healthcare practitioners and providers to use interpretation services in situations, where patients demand, reject, or express no preference to the use of interpreters. The obligations will be analysed at three levels: in practice of international human rights bodies with regard to the conventions Sweden is a party to (section 2); in Swedish legislation (section 3); and in county council guidelines (section 4). The need for language interpreters is often found in situations where a person has not long been living in a new country or not had the chance to learn a new language. In this article, the focus is on two groups of people that may experience such difficulties, namely, asylum seekers and irregular migrants. The method that will be used in this study comprises analysis of various legal sources, including laws and international treaties, preparatory works, case law, doctrine, and documents from county councils. The method of analysis can therefore be categorised as a traditional doctrinal approach.

The questions relating to the use of interpretation services in Sweden have been discussed within various disciplines. Examples of previous research include investigations on the usage of family members as interpreters, and the role of interpreters as a tool for promoting equality.[2]

2 See e.g. Gustafsson, K., Norström, E. & Höglund, P., Language Interpreting and Brokering in Swedish Public Service Institutions: The Use of Children for Multilingual Communication, Revista de Llengua i Dret, Journal of Language and Law, Vol. 71, pp. 13–26, 2019; Kriz, K., Skivenes, M., Lost in Translation: How Child Welfare Workers in Norway and England Experience Language Difficulties when Working with Minority Ethnic Families, British Journal of Social Work, Vol. 40, No. 5, pp. 1353–1367, 2010; Gustafsson, K., Norström, E., Fioretos, I. & Höglund, P., Barn och andra anhöriga som översätter och medlar inom socialtjänst och hälso- och sjukvård,

Yet, the obligations of healthcare personnel and providers in Swedish and international human rights law have not been substantially studied before.[3] This specifically concerns interpretation of obligations in light of patients' wishes to use interpreters or not. The findings of the article will hopefully provide some guidelines to various actors in Swedish healthcare as to their obligations.

2. Interpretation Services in Healthcare: A Human Rights Concern?

The United Nations' (hereafter the UN) and the Council of Europe's conventions that Sweden is a party to, do not directly recognise access to interpretation services in general or specifically in healthcare, as a distinct human right. The reference to "the right to interpreter" is only occasionally given in the context of access to justice and the right to fair trial.[4] The emphasis is made on the duty of a state to provide interpreters, which derives from various positive obligations, discussed below, rather than an independent right to an interpreter.

The requirement of interpretation services relates to the right to health, which is, as a rule, a progressively realisable right.[5] The right to health has been interpreted as, *inter alia*, the obligation to make healthcare services informationally accessible to everyone, and of a good quality. Communication in a language a patient can understand is crucial for these components of the right. Concerning informational accessibility,

Socialstyrelsen, 2018; Gustafsson, K., Norström, E., Fioretos, I., Interpreters in Sweden – A Tool for Equal Rights? Gramma: Journal of Theory and Criticism, Vol. 19, pp. 59–75, 2011; see also Vikkelsø Slot, L., Wessel U.A., Egenbetaling for tolkebistand – lægers erfaring med ordningen, Institut for Menneskerettigheder, 2019.

3 See an overview of some of the international human rights treaty bodies' practice in Phelan, M., Medical Interpreting and the Law in the European Union, European Journal of Health Law, Vol. 19, No. 4, pp. 333–353, 2012.

4 See European Court of Human Rights (ECtHR), Protopapa v. Turkey, application number 16084/90, Judgment of 24 February 2009, para. 79; UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, 2005, para. 30.

5 UN Committee on Economic, Social and Cultural Right (CESCR), General Comment No. 14 Article 12 The Right to the Highest Attainable Standard of Health, E/C.12/2000/4, 11 August 2000, paras 30–31.

the UN Committee on Economic, Social and Cultural Rights stresses the need for increasing the number of available interpreters in healthcare for non-citizens. To ensure quality, the Committee also asks states that only qualified interpreters provide services in healthcare. The reflections of the Committee on the need to use qualified interpreters only provides relevant guidance for Reem's and Ivan's cases, where qualified interpreters were absent.[6] Yet, the obligations mean only that states shall undertake steps to provide qualified interpreters, which largely depends on the available resources.

The right to health also means that healthcare services must be acceptable, which requires cultural appropriateness and sensitivity to various factors, including gender and age of patients.[7] The component of acceptability of the right to health gives rise to the dilemma of whether to satisfy the patient's wishes in cases similar to Faven's, where patients refuse interpreters. On the one hand, accepting patients' refusal of interpreters can lead to not fulfilling the obligation to provide care of good quality. On the other hand, imposing interpretation to ensure the quality and accessibility of information, can mean non-acceptable care. Unfortunately, the methods of interpreting the treaties or the practice of the committees do not provide any straightforward solutions to this dilemma.

The obligations linked to the right to health shall not be dependent on resources, when there is a connection with immediately realisable obligations, such as, the freedom from discrimination.[8] Many human rights conventions directly acknowledge that discrimination based on language is not permissible. The freedom from discrimination in modern international human rights law also encompasses the positive actions of states to ensure that people have the ability to exercise their rights

6 CESCR, Concluding observations on the fifth periodic report of Norway, E/C.12/NOR/CO/5, 13 December 2013, para. 17; UN High Commissioner for Refugees, Greece as a Country of Asylum, 6 April 2015, para. 2. The issue of access to qualified interpreters has been especially relevant in a Swedish context. SOU 2018:83 p. 105.

7 CESCR, General Comment No. 14, supra note 5, para. 12.

8 CESCR, General Comment No. 20 Non-discrimination in economic, social and cultural rights, E/C.12/GC/20, 2 July 2009, paras 7, 9.

on an equal basis with others.[9] This reasoning has been confirmed by various treaty bodies. For example, the European Commission Against Racism and Intolerance, considers access to interpreters in healthcare to be relevant for deciding whether states abide by their obligations not to discriminate. The Commission urges states to ensure that qualified interpreters are accessible, especially for cases where patients' conditions pose a risk to life or health, which is a relevant requirement for all three cases discussed at the beginning of the article.[10] Nevertheless, this obligation is limited to what is reasonable, which signifies that a state bears a burden of proof to show that it did all that was reasonable with available resources, to prevent discrimination.[11] Similarly, the UN Committee on the Elimination of Discrimination Against Women calls on states to ensure that interpreters are available for women, and that not only male heads of households are heard. It also emphasises the need for a gender-sensitive approach when providing interpreters, especially when speaking to those at risk (or victims) of gender-based violence. The provision of male interpreters to women might not always be appropriate or acceptable; women should have the opportunity to express themselves outside the presence of men.[12] Similarly, to avoid substantial discrimi-

9 Ibid, para. 9; UN Human Rights Committee (HRC), General Comment No. 18 Non-Discrimination, HRI/GEN/1/Rev.9 (Vol. I), 10 November 1989, para. 5; ECtHR, Glor v. Switzerland, application number 13444/04, Judgment of 30 April 2009, paras 94–95; ECtHR, Çam v. Turkey, application number 51500/08, Judgment of 23 February 2016, para. 65.

10 European Commission Against Racism and Intolerance (ECRI), Conclusions on the Implementation of the Recommendations in Respect of Norway, CRI(2012)9, 21 February 2012, para. 2; CERD, Concluding observations on the twentieth and twenty-first periodic reports of Denmark, CERD/C/DNK/CO/20-21, 15 May 2015, para. 18; see also European Committee of Social Rights, European Roma Rights Centre (ERRC) v. Bulgaria, Complaint No. 151/2017, paras 80–85.

11 ECtHR, Oršuš and Others v. Croatia, [GC] application number 15766/03, Judgment of 16 March 2010, para. 150; HRC, Toussaint v. Canada, CCPR/C/123/D/2348/2014, 30 August 2018, paras 11.7–8.

12 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, 5 November 2014, para. 50; HRC, Concluding observations of the HRC: Austria, CCPR/C/AUT/CO/4, 30 October 2007, para. 18; CEDAW, Concluding comments: Denmark, CEDAW/C/DEN/CO/6, 25 August 2006, paras 26–27; see also CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination on

nation, legal systems should have culturally-sensitive and child-friendly approaches in their obligations to use interpreters.[13] Reasons for possible refusal of translation or healthcare services should be understood and interpreted appropriately.[14]

Human rights related to the valid consent to medical treatment are intricately connected with the realisation of a number of immediately realisable obligations.[15] The inability of the legal system to ensure that the appropriate measures exist to protect patients' lives, dignity, integrity, or ability to express opinion on care, can invoke a violation of the right to life, freedom from inhumane and degrading treatment, right to privacy or freedom of expression, including the right of a child to be heard.[16] Exactly which right is invoked, depends on the specific outcome of each individual case. One example confirming this reasoning is the recent Grand Chamber case of *Rooman v. Belgium*, where the European Court of Human Rights (hereafter the ECtHR) decided that provisions of compulsory psychiatric care in a language that the applicant did not understand was a violation of the Convention for the Protection of

Guatemala, CERD/C/GTM/CO/11, 15 May 2006, para. 14; CERD, Concluding observations, France, CERD/C/FRA/CO/16, 18 April 2005, para. 22; CERD, Concluding observations, Sweden, CERD/C/SWE/CO/18, 23 September 2008, para. 17.

13 See e.g. UN Committee on the Rights of the Child (CRC), R.K. v Spain, CRC/C/82/D/27/2017, 5 November 2019, para. 9.4.

14 HRC, Concluding observations on the fifth periodic report of the Netherlands, CCPR/C/NLD/CO/4, 25 August 2009, para. 7; HRC, Concluding observations: Switzerland, CCPR/C/CHE/CO/3, 3 November 2009, para. 13.

15 CESCR, General Comment No. 14, supra note 5, para. 30; European Committee of Social Rights (ECSR), Conclusions 2005 – Statement of interpretation – Article 11, 2005_Ob_1-1/Ob/EN.

16 ECtHR, Lopes de Sousa Fernandes v. Portugal [GC], application number 56080/13, Judgment of 9 December 2017, para. 191; see also UN Committee Against Torture (CAT), Concluding observations on Bosnia and Herzegovina, CAT/C/BIH/CO/2-5, 20 January 2011, paras 14 and 16; CERD, Concluding observations on the twentieth to twenty-second periodic reports of Greece, CERD/C/GRC/CO/20-22, 3 October 2016, para. 23(b); CAT, Concluding observations on the sixth periodic report of Bosnia and Herzegovina, CAT/C/BIH/CO/6, 17 November 2017, para. 29. On the freedom of expression see, UN Committee on the Rights of Persons with Disabilities (CRPD), Concluding observations on the initial report of China, CRPD/C/CHN/CO/1/Add.1, 2 April 2013, paras 71–72; CRC, General Comment No. 6 Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, 1 September 2005, para. 25.

Human Rights and Fundamental Freedoms (hereafter the ECHR). In this case, the accessibility of language had a profound impact on the effectiveness of medical care: the applicant was unable to receive psycho-pharmacological and psycho-therapeutic treatment, to which he was obliged to participate by a domestic court.[17]

How would the various treaty bodies reason about the immediately realisable positive obligations in the cases of Reem, Faven and Ivan? The ECtHR and the UN Human Rights Committee perceive that states have material positive obligations in healthcare to take preventive measures. States authorities, including healthcare providers and personnel, are duty-bound to take preventive measures if they know, or ought to have known about the real and immediate risk of harm.[18]

The duty to take preventive measures means that if a patient, like Reem, is at immediate risk of harm and informs the healthcare provider or personnel about the need for an interpreter to secure her rights, the obligation to use interpreters is likely to arise. Reem's wishes are not paramount but play a role of informing healthcare.[19] Whether the obligation to use interpreters arises depends on the gravity of the circumstances, the consequences of not providing an interpreter and on effectiveness of healthcare.

The duty to take preventive measures also has its boundaries: it should not impose an impossible or disproportional burden and respect other rights.[20] It is the state that bears the burden of proof to show that having an interpreter is disproportional or impossible. In the above-mentioned case of *Rooman v. Belgium*, the ECtHR considered that absence of interpreters was not regarded as a legitimate excuse for absence of appropriate

17 ECtHR, Rooman v. Belgium, [GC], application number 18052/11, Judgment of 31 January 2019.

18 See e.g. ECtHR, Fernandes de Oliveira v. Portugal [GC], application number 78103/14, Judgment of 31 January 2019, paras 109–110, 115; HRC, General comment No. 36 Article 6: right to life, CCPR/C/GC/36, 3 September 2019, paras 6, 18, 21.

19 On informing authorities, see ECtHR, Jasinskis v. Latvia, application number 45744/08, Judgment of 21 December 2010, para. 66; Stoyanova, V., Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights, Leiden Journal of International Law, Vol. 33, No. 3, p. 610, 2020.

20 ECtHR, Fernandes de Oliveira v. Portugal [GC], supra note 18, para. 67.

treatment during thirteen years of compulsory psychiatric treatment.[21] Whether the use of an interpreter constitutes an impossible or disproportional burden in Reem's case depends on individual circumstances.

In Faven's situation, the medical staff are informed about the need for interpreters, but she wished to refuse this service and her privacy was respected. The boundaries of the duties to take preventive measures signify a need to balance the state's positive obligations to act through imposing an interpreter and negative obligations not to act, to respect her privacy. The ECtHR considers that, in cases where persons do not want to collaborate with healthcare, they cannot claim a violation of rights if interpreters were not provided.[22] This suggests that it is unlikely that respecting Faven's wishes would be considered as a violation of the state's positive obligations. Yet, the reasons for Faven's refusal of an interpreter are unclear. Systematic interpretation, in light of non-discrimination provisions, might require ensuring that patients really mean what they say, that Faven's refusal of interpreters is a true wish and not connected with coercion or threats to her human rights due to her vulnerability.[23] Non-discrimination can signify the need for adjustments, such as gender or culture sensitive approaches when using interpreters. Human rights treaty bodies have not yet decided on situations involving interpreters imposed against patients' wills. If Faven's life is in danger without interpretation, the treaty bodies are likely to recognise the interference with Faven's privacy – by imposing interpreters – as lawful and proportionate.[24] Therefore, Faven's wish to refuse interpretation is not decisive, and interpreters can be imposed to protect her life or health.

In the case of Ivan, where neither healthcare professionals, nor the patient requested interpretation, whether a state ought to have known about the danger to Ivan's life or health is questionable. The answer

21 Supra note 17, paras 153–159.

22 Supra note 17, para. 151; European Commission of Human Rights (ECHR), Dhoest v. Belgium, application number 10448/83, report of 14 May 1987, para. 124.

23 Supra note 12.

24 ECtHR, Haas v. Switzerland, application number 31322/07, Judgment of 20 January 2011, paras 56–57; ECtHR, Arskaya v. Ukraine, application number 45076/05, Judgment of 5 December 2013, paras 87, 90. UN HRC, Concluding Observations of the Human Rights Committee the Netherlands, CCPR/CO/72/NET, 27 August 2001. para. 5(a–d);

depends on the circumstances of communication with the patient and the gravity of his health condition. The analysis of the treaty bodies' practice provided above indicates that the obligation to use interpreters is not strongly formulated; a state may decide when to provide interpreters, as long as its healthcare systems protect the rights to life, privacy and provide available, accessible, and acceptable healthcare of a good quality.

The analysis in this section indicates that there is a human rights obligation to use interpreters in healthcare, and that this obligation does not necessarily depend on patients' wishes. The decisive factor is rather, whether the absence of interpreters for migrants can render the realisation of their human rights ineffective.

3. Swedish Legislative Landscape on the Use of Interpretation Services in Healthcare

3.1 Does the Administrative Act Apply?

After discussing the human rights obligations, we turn our attention to the formulations of the obligation to use interpreters in Swedish law. The national law, namely the Administrative Act (2017:900) contains an explicit obligation to use interpretation services for people who have difficulties with communicating in Swedish. Whether this act is applicable for healthcare providers is debatable. This section will examine and explain whether the provisions of the Act are in fact applicable for healthcare providers. In section 3.2, the substance of the obligations under the Administrative Act will be explained.

In accordance with Section 1 of the Administrative Act, the provisions for the obligation to use interpreters are applicable only in situations where "*handling of the case*" (*handläggning av ärende*) is conducted. Therefore, it is relevant to answer the question whether handling of the case occurs when asylum seekers or irregular migrants seek healthcare.

Handling of the case, in Swedish law, is usually clarified by linking it with an administrative decision: this process (the handling), results in a decision in an administrative law sense.[25] Decisions in Swedish admin-

25 von Essen, U., Bohlin, A., & Warnling Conradson, W., Förvaltningsrättens grunder, 3 uppl. Norstedts Juridik, Stockholm, 2018 pp. 58–59; Johansen, T.O., Förvaltning

istrative law are statements that affect rights, or obligations; they also clarify how a question is to be resolved.[26] Generally, a person has the right to appeal administrative decisions. On the other hand, concrete administrative activity (*faktiskt handlande*) is something that happens in the everyday life of authorities and as a general rule, is not considered a lawful subject of complaint.[27] Legal sources often provide similar examples of decisions (handling of a case) and concrete administrative activity in healthcare. The "classic" example of *handläggning av ärende* is deciding whether a patient must pay for an operation.[28] In this example, the authority issues a statement that affects patients' obligations: patients must either pay or not pay a certain amount of money, and their right to property (their income in this case) is affected. The "classic" example of concrete administrative activity is operating on a patient.[29] In this example, a healthcare professional performs a service, and the example is formulated in a way that raises no question of whether a patient has a right to the service. An operation is something that can be deemed as a concrete administrative activity.

Does the statement about (not) providing care to asylum seekers or irregular migrants constitute a decision in administrative law sense? This question has not yet been answered in legal sources, however, in my view that answer is positive. A decision to provide care – or refuse providing it – significantly affects the rights of individuals. Such as the right to health, the right to life, and freedom from discrimination or inhumane treatment. Moreover, in relation to adult asylum seekers and irregular migrants, the legislator demands that healthcare providers offer

som verksamhet – bidrag till offentligrättens allmänna läror, Handelshögskolan vid Göteborgs Universitet, Göteborg, 2019 p. 111; Vahlne Westerhäll, L., Hjälper eller stjälper myndighetsutövning patienten? – hälso- och sjukvård i ett myndighetsutövningsperspektiv, Nordisk Administrativt Tidsskrift, Vol. 96, No. 2, pp. 21–22, 2019; SOU 2010:29 p. 97.

26 SOU 2010:29 p. 97; prop. 2016/17:180 p. 24; RÅ 2004:8.

27 Prop. 2016/17:180 p. 23.

28 SOU 2010:29 p. 97 och Scheutz, S., När börjar ett betygsärende?: Till skillnaden mellan faktiskt handlande och handläggning av ärenden, i Bull, T., Lundin, O., Rynning, E., & Marcusson, L. (Red.) Allmänt och enskilt – offentlig rätt i omvandling: festskrift till Lena Marcusson, Uppsala: Iustus, Uppsala, 2013 p. 321.

29 Prop. 1985/86:80 p. 58; Scheutz, supra note 28, p. 321; SOU 2010:29 p. 97.

at least certain types of subsidised healthcare services.[30] Minimal special services that shall be offered are stated in the Act on Health and Medical Care for Asylum Seekers and Others (2008:344), and the Act on Health and Medical Care for Certain Foreigners Staying in Sweden without the Necessary Permits (2013:407). The types of care that are subsidised by the state include, maternity care and care that cannot wait. Whether the care that a patient needs is subsidised – in accordance with Swedish legislation – is decided depending on the type of care, for example, care during childbirth or abortion, or if it concerns care that cannot wait in each individual case based on information collected by healthcare practitioners. Medical practitioners' and healthcare providers' decisions about patients (not) needing subsidised care significantly influence financial obligations of a migrant: care subsidised by the state costs a lot less for migrants than non-subsidised treatments.[31] I therefore conclude that procedures leading to a decision regarding provision of medical services can be regarded as "handling of the case" and that the Administrative Act is applicable in these legal relations.[32]

3.2 When Interpretation Services are Needed Under the Administrative Act

Section 13.1 of the Administrative Act requires administrative authorities to use interpreters when needed, for individuals who do not have a command of Swedish to be able to exercise their rights. The provisions are currently formulated as a strict obligation – authorities must (*ska* in Swedish) use interpreters. Before 2018, the provisions on interpretation

30 Asylum-seekers and undocumented migrant children are entitled to the same care as Swedish children.

31 Another feature that strengthens the conclusion that (not) providing care is a decision in the administrative law sense, is that Article 26 of Directive 2013/33/EU establishes the right for asylum seekers to appeal the decisions about refusal to provide certain medical services.

32 Cf. National Board of Health and Welfare (Socialstyrelsen), Din skyldighet att informera och göra patienten delaktig. Handbok för vårdgivare, chefer och personal, Socialstyrelsen.se 2015, pp. 36–37. The Administrative Act applies only when special law does not establish divergent provisions. Neither EU law nor Swedish healthcare legislation establishes direct requirements to use interpretation services for migrants. Therefore, the Administrative Act is applicable.

were formulated as a desirable conduct of authorities (*bör* in Swedish).[33] Yet the obligation to use interpretation services arises only *when it is needed* for the purposes mentioned above. The meaning of this provision is discussed below.

Preparatory works to the Administrative Act contain considerations about when an authority needs (not) to use interpretation services, and what kind of interpreters should be employed. It is deemed that professional interpreters are not needed if an authority has some degree of command of the language of an applicant. For example, for applicants speaking Norwegian, Danish or other languages typically learned during the education in school (such as English or Spanish) professional interpreters may not be necessary, because some employees of the authority might be able to understand these languages.[34] These statements in the preparatory works can be seen as in line with the wording of the Act, which does not refer to use of professional interpreters, but rather, any interpreters. Preparatory works and the Parliamentary ombudsmen's (hereafter the JO) practice, before enaction of the new Administrative Act, consider that an authority must ensure that interpretations or translations are reliable, but the sources do not provide a straightforward guidance as to how this quality assurance should be realised in practice.[35] Some indirect guidance can be found in the JO decisions that contemplate the weight of a person's interests in each case. The JO considers that if a person's interests are more significant, there is a greater need and obligation to use professional interpretation services, instead of utilising an authority's own resources.[36] In particular, the JO reasons that it is not appropriate for an inmate in prison to translate the information during a healthcare investigation.[37]

One question that arises is whether all healthcare decisions should be regarded as a person's significant interest, and therefore always require

33 See discussion on the reasons for reformulation of the obligations compared to the previous Administrative Act in SOU 2010:29 p. 311, prop. 1985/86:80 p. 27; see also Chancellor of Justice, decision of 12 March 2018 dnr 11873-17-2.4.

34 SOU 2010:29 p. 312; prop. 2016/17:180 p. 82; see also JO 2003/04:JO1 p. 174; prop. 1985/86:80 p. 27.

35 SOU 2010:29 p. 312; JO 2003/04:JO1 p. 416.

36 JO decision of 3 April 2009 dnr 5203-2007; JO 2015/16:JO1 p. 209.

37 JO decision of 3 April 2009 dnr 5203-2007; cf. supra note 10.

that authorities use professional interpreters? In the JO's decision on significant interests mentioned above, the patient had severe eyesight problems and a fear of going blind.[38] The JO has not stated that for every healthcare need, a professional interpreter should be used, but rather that a professional interpreter might be needed if there are significant health concerns or other interests at stake. Such interests can be related to privacy considerations and the need to make well-informed choices – which are pertinent to the vast majority of healthcare decisions. However, the danger here could be that without the possibility for proper communication, an authority might be unable to objectively identify the interests at stake.

It is debatable whether the JO's statements on the need to use professional interpreters when significant interests are at stake, has been codified in the new Administrative Act. Section 13.1 of the Act requires using interpreters when they are needed for individuals *to be able to exercise their rights*, rather than, as the JO put it, when there are significant interests at stake. The preparatory works are silent as to whether the term "rights" shall be seen in a narrow sense as justiciable rights only, or as any significant interests as the JO suggested. The Swedish legislator has been reluctant to recognise that patients have legal rights to obtain information about the medical services they need.[39] Although, patients do not have those justiciable rights, it is legislated that healthcare personnel and providers are obligated to provide information to patients. In my view, the "rights" in Section 13.1 of the Administrative Act should be understood in a broad sense, as with human rights according to the ECHR, which is also domestic law. Obtaining accurate information about healthcare services and consideration of privacy clearly falls within the ambit of Article 8 ECHR.[40] Yet, the provisions of the Administrative Act do not explicitly require using professional interpreters, but any interpreters.

38 Ibid.

39 Prop. 2013/14:106 p. 41; Lind, A-S., Right to Health in Sweden, in Flood, C M., & Gross A. (Red.) The Right to Health at the Public/Private Divide: A Global Comparative Study, Cambridge University Press, New York, 2014 p. 52.

40 ECtHR, Csoma v. Romania, application number 8759/05, Judgment of 15 January 2013, para. 42; ECtHR, Juhnke v. Turkey, application number 52515/99, Judgment of 13 May 2008, para. 76; ECtHR, L.H. v. Latvia, application number 52019/07, Judgment of 29 April 2014, paras 50–51.

"Interpreters" can thus be understood as a professional interpreter or any employee or layperson who provides oral translation.[41]

The sources for interpretation of Section 13.1 of the Administrative Act do not focus on the right or the desires of a person to use interpretation services. Instead, the decision is supposed to be based on assessment of the situation by an authority.[42] A person claiming that he or she needs access to interpretation is not a deciding factor for the obligation to use interpretation services.[43] Put differently, it is an authority that decides whether a person can safeguard his or her rights.[44]

In the preparatory works to the Administrative Act, the issue of using interpreters is contemplated as a balance between the interests of society in preserving budget, and the interests of individuals.[45] The above-mentioned statement can be regarded as problematic. Provisions that existed before 2018 allowed authorities to find a balance between different interests: the old Administrative Act gave some discretion to authorities, stating how authorities *ought* to act, but did not impose a strict obligation. The formulation in the new Administrative Act does not give such a discretion to authorities. The literal interpretation of the Section makes it explicit that when an individual is unable to exercise their rights due to language barriers, the interpreter *shall* be provided by authorities. The purpose of the reformulation appears to be for strengthening the legal security for participants of administrative procedures. Therefore, I conclude that the resource considerations in the modern

41 von Essen, supra note 25, pp. 118, 120; cf. supra note 10.

42 Prop. 2016/17:180 p. 299.

43 JO 2006/07:JO1 p. 351; JO 2015/16:JO1 p. 209; JO decision of 9 May 2019 dnr 2349-2018; see also Socialstyrelsen, Vissa bestämmelser i förvaltningslagen (2017:900) av betydelse för handläggning och dokumentation inom socialtjänsten, Nr. 2/2018, juni 2018 p. 3.

44 Gustafsson, H., Taking Social Rights Seriously (I): Om sociala rättigheters status, Tidsskrift for rettsvitenskap, Vol. 118, No. 4–5, pp. 446–447, 2005. In relation to the old Administrative Act, the JO held that if authorities assessed that a person was able to communicate sufficiently in a second language that the authority was able to understand, interpretation services were not a requirement. JO 2015/16:JO1 p. 209; JO decision of 9 May 2019 dnr 2349-2018.

45 SOU 2010:29 p. 312; prop. 2016/17:180 p. 82; see also Socialstyrelsen, supra note 43, p. 3; JO 2008/09:JO1 p. 192.

Section 13.1 of the Administrative Act are not as relevant as they used to be.

To summarise, the overall conclusion is that desires to have – or refuse having – an interpreter appear to be irrelevant from the perspective of the Administrative Act: it is an authority's assessment of the need that matters. The provisions on the use of interpretation services are not formulated as a right of a party (a patient), but as the obligation of an authority connected with the legal security of an administrative procedure. It can be also concluded that resource considerations are supposed to be less relevant by virtue of the changed wording of the Act.

3.3 Healthcare Legislation on Using Interpretation Services

Swedish healthcare regulation can impose requirements concerning communication between patients and healthcare. However, the duty to use interpreters for communication with migrants has not been explicitly formulated in special legislation. The Health and Medical Service Act (2017:30) hereafter the HSL, and the Patient Act (2014:821) directly mention the obligation of healthcare providers to make use of interpretation services for persons with hearing disabilities, but not migrants. The HSL and the Patient Act contain several principles and obligations of a broader character that may indirectly demand healthcare providers and personnel to use interpretation services. The question of whether the obligation to use interpreters stems from these principles and obligations is analysed below.

The need for interpreters can be derived from the overall goal of healthcare, described in domestic law as: good health and care with equal opportunities for the entire population. The preparatory works to the HSL, explain that creating equal opportunities for all also means that special considerations for the most vulnerable in society – including those with communication difficulties – must always be given.[46] The reasoning for special considerations in the preparatory works is principally connected with resource considerations; or, put differently, it is accepted that more resources should be spent on creating equal opportunities for

46 Prop. 1996/97:60 pp. 20, 53.

vulnerable persons. A more detailed guide on how the broad goal shall be achieved is provided in Chapter 5 Section 1 of the HSL. This provision demands that healthcare is of a good quality, satisfies patients' need for security, continuity and safety, builds on respect for patients' self-determination and integrity, promotes good contacts between the patient and healthcare provider, and be easily accessible. All of the above-mentioned principles may have relevance for understanding when the obligation to use translators arises, and they have been cited in the practice of authorities related to the need of using interpreters in healthcare.[47] However, depending on the situation and a person's wishes, some of these principles can be given different meanings: requiring use of interpreters, or hindering authorities' actions. For example, if no interpreters are available in a specific case, it may jeopardise all the above-mentioned principles.[48] Yet, if a patient – as in Faven's case – demands not to have an interpreter but the service is imposed against their wishes, the principle of respect for self-determination and integrity, accessibility, and a patient's need for security can be jeopardised.[49] It is therefore difficult to estimate the results of weighing these principles in Faven's case; but for Reem, who wants interpretation services to communicate, and Ivan's case, who is not able to communicate himself, these principles emphasise the need to use interpreters.

The provisions in respect for self-determination, have been further developed in the Patient Act. Chapter 5 of the Patient Act emphasises the patient-centric approach towards providing healthcare services: healthcare must be designed and provided in consultation with the patient. Provisions in Chapter 3 Sections 1–3, read in conjunction with Chapter 6 Section 6 of the Patient Safety Act (2010:659), establish that healthcare personnel have an obligation to disclose to patients an extensive list of information of medical, social and legal character. According to the preparatory works, the information must also be accurate and

47 See e.g. Health and Social Care Inspectorate (IVO) decision of 19 November 2014 dnr 8.2-9419/2014-10.

48 Prop. 1996/97:60 pp. 20, 53; IVO decison of 19 November 2014 dnr 8.2-9419/2014-10.

49 See also prop. 1996/97:60 p. 23.

based on science.[50] The obligation to disclose the information may be broader, depending on the individual needs of a patient.[51] Chapter 3 Section 6 of the Patient Act, the preparatory works and doctrine stress the requirement for individual adjustments of information for the specific needs, including language background of the patient.[52] The provisions of Chapter 3 Section 7 of the Patient Act also emphasise an obligation for those who provide information, so far as it is possible, to make sure that a patient understands its substance and significance. In the preparatory works and practice of the Health and Social Care Inspectorate, it is specifically clarified that this obligation means that healthcare personnel should use interpreters, when the patients need such services to understand information.[53]

The provisions of healthcare legislation accentuate the need for personalised communication with each patient, which might often be impossible without using interpretation services. Providing accurate, detailed and personalised information about medical treatment, without communicating in the same language, appears to be an insurmountable task. The requirement of a patient's participation, with the principle of respect for self-determination and ensuring the patient's needs of security and safety are met, demand that interpretation services are provided when requested. This conclusion contrasts with the interpretation of Section 13.1 of the Administrative Act, where the wishes of a person are irrelevant. It means the requirement to use interpreters "when needed" in Section 13.1 of the Administrative Act, specifically in situations arising in healthcare, shall be understood as, when patients consider interpretation essential for obtaining medical information.

50 Prop. 2013/14:106 p. 48.

51 Prop. 1998/99:4 p. 24.

52 Prop. 2013/14:106 p. 53; prop. 1998/99:4 p. 24; Rynning, E., Samtycke till medicinsk vård och behandling. En rättsvetenskaplig studie, Uppsala: Iustus förlag, Uppsala, 1994 pp. 197 ff.; prop. 1998/99:4 pp. 23–25; see also Swedish Agency for Health and Care Services Analysis, Lag utan genomslag. Utvärdering av Patientlagen 2014–2017, Rapport 2017:2, Vardanalys.se 2017, pp. 55 f.

53 Prop. 2013/14:106 p. 53, IVO decision of 26 januari 2018 dnr 8.2-32687/2017-13; IVO decision of 18 mars 2019 dnr 8.2.1-3922/2018-13; Socialstyrelsen, supra note 32, pp. 19–20 and 25 ff; Socialstyrelsens decision of 6 May 2013 dnr 9.2-38966/2011.

Therefore, in Reem's case, when patients demand access to interpreters, the healthcare provider and personnel have an obligation to seek interpretation services. In cases like Ivan's, when patients neither demand nor reject interpretation services, but healthcare provider and personnel cannot be certain that patients understand the information provided, the considerations of respect for self-determination, can necessitate using an interpreter.

When patients refuse interpretation services (as described in Faven's case), they will be fully or partially unable to receive the information about their medical care. Refusal of interpreters appears to achieve the same result as refusal of receiving information. Chapter 3 Section 6 of the Patient Act states that a person can refuse receiving information about medical intervention. Yet, the provisions of the national legislation are not explicit whether such "uninformed" consent can be accepted by healthcare professionals and further treatment provided. Preparatory works to the Act clarify that if information *necessary for making a decision* has not been given, consent to intervention is invalid.[54] However, considerations about what information is *necessary for making a decision* may differ depending on the individual needs of each patient: as emphasised above, the standard of disclosure in Sweden is supposed to be person-centric. This means that for some cases it may be enough to receive information that the care will be provided, whereas other cases require providing more sophisticated information. If such essential information for making decisions cannot be provided, further intervention may contradict the principle of legality and obligation to provide care of a good quality.

Even if the result of rejecting interpretation services is the same as refusal to receive information, a patient's reasons behind the decision may be different. A patient might want to receive information but refuse interpretation services for various reasons. These reasons may be related to considerations of privacy, previous poor experience, or any other reasonable or unreasonable beliefs. The explicit provisions that allow questioning the reasons for refusal are currently not established by

54 Prop. 2013/14:106 p. 119; see also Garland, J., On Science, Law, and Medicine: The Case of Gender-"normalizing" Interventions on Children Who Are Diagnosed as Different in Sex Development, Uppsala: Department of Law, Uppsala University, Uppsala, 2016 p. 301; Rynning, supra note 52, p. 168.

domestic legislation. It seems reasonable for healthcare providers and/or the National Board of Health and Welfare to offer detailed guidance to staff as to what should be done in situations when a person refuses interpreters. It may be sensible for healthcare staff to attempt to ensure that a patient understands what it really means when refusing interpretation services and/or receiving medical information. It appears necessary to explain the possibility of using telephone interpreters, which may be less intrusive on privacy. Interpretation conforming to human rights, also involves implementing gender, age and culturally sensitive approaches, which often means considering a person's individual needs. Yet, due to difficulties with communication, such attempts to investigate and provide information may not always lead to successful or comprehensible results.

In cases like Faven's, healthcare personnel face a dilemma. On the one hand, a patient needs treatment, and without it, their life or immediate health might be in danger. The fact that a patient turns to healthcare facilities and indicates with the body or basic spoken language a desire to receive treatment, might suffice to consider their actions as tacit consent. On the other hand, providing treatment could jeopardise patient safety and integrity, because information necessary for deciding a course of action is problematic to communicate.[55] In Faven's case, a patient might need complex post-operational medication or care, or amputation of a body part, which means communication of complex information is essential and impossible at the same time.

The analysis of Swedish legislation provides the following reasoning about the legal obligation of medical providers and personnel in cases like Faven's. If necessary, information required for making a decision can be provided without an interpreter, and a patient's wishes can be respected, it can be stated that interpretation is not needed, due to the specificity of the needs of an individual patient. On the other hand, if vital information cannot be communicated, the provisions of the Admin-

55 Example of practical implications can be seen in the practice of the Health and Social Care Inspectorate. The case concerns the situation where information about a pre-operative procedure was not understood by a patient due to absence of interpreters, which resulted in significant complications during the operation. A patient in the case did not refuse receiving interpretation services. IVO decision of 18 March 2019 dnr 8.2.1-3922/2018-13.

istrative Act, discussed in the previous section, should be understood as requiring the use of interpreters, disregarding patient's wishes. The latter situation may result in interference with a patient's privacy, and patients rejecting medical interventions, which can mean significant implications for life and health. Yet, the provisions of Swedish legislation do not consider patients' wishes as paramount in all cases. The above-mentioned reasoning resonates with the principle of proportionality (Section 5 Administrative Act). Interfering with a patient's privacy by imposing interpretation services should not be more invasive than necessary to achieve protection of health and life.

4. Language Interpretation in Documents of County Councils

Swedish county councils have a primary responsibility for delivering healthcare services and are governed by the constitutional principle of municipal self-government. This implies that county councils have the responsibility of distributing resources in healthcare – including whether to allocate funding for professional interpreters. They may also establish or increase obligations and provide clarification for how healthcare personnel should act in specific cases. Practical realisation of the obligations for using interpreters often rests upon these actors. To examine how these obligations are interpreted by county councils, I addressed a question on 16th of June 2020 to all twenty-one county councils in Sweden, about whether there are any written documents (for example, guidelines, policy or routines) for how to handle situations in healthcare when patients do not have a command of Swedish. They were also asked to provide these documents – if any such existed. Seventeen county councils responded to my requests.[56]

The analysis of responses indicates that one county council – Västerbotten – does not provide any language interpretation services, except

56 Dalarna, Gävleborg, Gotland, and Kalmar counties did not provide any answer to the request.

to persons with hearing disabilities.[57] The other county councils, appear to recognise the obligation to use interpreters in healthcare for migrants.

The vast majority of the county councils that responded to the requests provided some form of information concerning the usage of interpretation services for migrants. The information was predominantly in four forms that may co-exist as a separate document on the usage of interpreters, as information on county councils' webpages, internal web-portals or as a part of overarching guidelines for healthcare practitioners.[58] It appears that the search for information for healthcare personnel about the possibilities and requirements to use interpreters may be problematic in some county councils, due to information being scattered throughout many documents.

Additionally, the information about interpreters is often directed towards different groups: interpreters, patients, healthcare providers or healthcare professionals. Some county councils have provided information for only one of these groups, such as, interpreters. If information is intended for healthcare personnel, then it mostly includes data on what companies can be used for interpretation services, how to order the services through webpages or apps and how to approach billing. Sometimes information regarding types of interpreters that are desirable to use is also provided. Information for patients usually mentions that patients have *the right to use interpreters*.[59] The documents that provide

57 In order to avoid misinterpretation, the citation of the reply in the original language is considered to be necessary: "Tyvärr hanterar vi enbart tolknings för personer som inte kan höra. Det handlar alltså om teckenspråkstolkning skrivtolkning och tolkning via beröring." Letter of 17 June 2020. Notably, the webpage of the county council mentions the possibility of using interpreters that are hired by healthcare personnel, but does not specify whether the county council pays for the services. Region Västerbotten, Vård till asylsökande, papperslösa och migranter, regionvasterbotten.se 2020, https://www.regionvasterbotten.se/for-vardgivare/samverkan/vard-till-asylsokande-papperslosa-och-migranter.

58 Examples of the overarching guidelines are: the Requirements and Quality Book of Örebro and Västra Götaland county councils or Assignment Description and Rules Book in Blekinge.

59 This information is provided by 1177 portal and Blekinge, Värmland, Västernorrland, Jönköping and Jämtland Härjedalen county councils. Västmanland county council considers the access to interpreters is a right of healthcare professionals and patients. 1177 vårdguiden Region Blekinge, Tolkning till mitt språk, 1177.se 2018, https://www.1177.se/Blekinge/sa-fungerar-varden/vard-om-du-kommer-fran-ett-annat-land/

guidelines to healthcare personnel and/or healthcare providers regarding their obligations to use interpreters are not common. Such documents were found in Blekinge, Jämtland Härjedalen, Skåne, Sörmland, Örebro, and Östergotland. Yet, they rarely provided extensive information for staff about factors that should be considered for using interpreters. The county councils that do not have any written guidance replied that obligations of healthcare personnel are governed by the provisions of national legislation. They appear to consider that further guidance is unnecessary.

In the letters and the documents received, there are several lines of reasoning explaining why the obligation to use interpreters exists. These lines of reasoning are sometimes combined. Some county councils consider that the use of interpreters is necessary by virtue of provisions of the Administrative Act and/or the HSL. Some of the references provided were to provisions of acts that are no longer valid and/or apply to interpreters for persons with disabilities. Occasionally, the county councils referred to provisions of the Patient Act or the Patient Safety Act directly; meaning that they have an obligation to ensure patients understand information about medical interventions and that the care ensures patient safety.

County councils describe the strength of the obligation to provide interpreters differently. The guidelines from the region of Sörmland establish a strict obligation to use interpreters in all cases of contact with asylum seekers and irregular migrants to ensure patient safety and

tolkning-till-mitt-sprak/; 1177 vårdguiden Region Västernorrland, Vård om du är asylsökande eller saknar tillstånd för att vistas i Sverige, 1177.se 2019, https://www.1177.se/vasternorrland/sa-fungerar-varden/vard-om-du-kommer-fran-ett-annat-land//vard-om-du-ar-asylsokande-eller-saknar-tillstand-for-att-vistas-i-sverige/; Region Jämtland Härjedalen, Rutin för beställning av språktolk, centuri.jll.se 2019, http://centuri.jll.se/ViewItem.aspx?regno=46593; Region Västmanland, Talat språk, regionvastmanland.se 2020, https://regionvastmanland.se/vardgivare/behandlingsstod/tolktjanster/talat-sprak/; 1177 vårdguiden Region Uppsala, Tolkning till mitt språk, 1177.se 2018, https://www.1177.se/Uppsala-lan/sa-fungerar-varden/vard-om-du-kommer-fran-ett-annat-land/tolkning-till-mitt-sprak/; 1177 vårdguiden Region Jönköpings län, Språktolk, 1177.se 2019, https://www.1177.se/Jonkopings-lan/sa-fungerar-varden/vard-om-du-kommer-fran-ett-annat-land/spraktolk-i-jonkopings-lan/; 1177 vårdguiden, Tolk, 1177.se 2020, https://www.1177.se/globalassets/1177/nationell/media/dokument/tolkkarta/tolkkarta-med-tecken.pdf.

avoid misunderstandings.[60] Skåne county council affirms that healthcare personnel must use interpreters if patients have difficulties in understanding or speaking Swedish.[61] In Jämtland Härjedalen it is considered that patients have a right to an interpreter, although the strict obligation to invite interpreters is not formulated, healthcare professionals may invite interpreters if they think it is necessary.[62] Some county councils maintain that using children, relatives or friends as interpreters is either strongly prohibited, or at least discouraged.[63]

The majority of the county councils have procured interpretation services, others have established municipal organisations that provide them.[64] Most of the county councils have one or two interpreter organisations they work with, whereas Norrbotten provided information about nine companies that can deliver such services. Most of the time the interpreters provide services via telephone, computer, or at a hospital or clinic. They can be invited to certain places – yet this procedure presupposes informing interpreters and patients far in advance about the need for their services. The interpretation services provided at a specific place may be relevant, for instance, when there is a conversation with children or persons who get easily distracted by telephone sounds, or when there is a need to show certain processes (especially, for rehabilitation services). The county councils usually recommend using telephone interpretation as a first choice.[65] The reasons for this are that it is easier to quickly get

60 Region Sörmland, Beställning av tolk till Asylsökande och papperslösa/gömda, dnr 19-269, LS-LED18-0971-2 edilprod.dll.se 2019, https://edilprod.dll.se/GetPublicFile.ashx?docid=422453.

61 Region Skåne, Tolk och översatt patientinformation, vardgivare.skane.se 2020, https://vardgivare.skane.se/patientadministration/vard-av-personer-fran-andra-lander/migration-asyl/tolk/.

62 Region Jämtland Härjedalen, Rutin för beställning av språktolk, centuri.jll.se 2019.

63 Region Skåne, Tolk och översatt patientinformation, vardgivare.skane.se 2020; 1177 vårdguiden Region Västernorrland, Vård om du är asylsökande eller saknar tillstånd för att vistas i Sverige, 1177.se 2019; Region Östergotland, Tolkanvändning, dnr 03434 den 12 augusti 2019); Region Västenorrland, Språk- och teckentolk, rvn.se 2018, https://www.rvn.se/sv/For-vardgivare/Asylsokande-och-flyktingar/Om-vard-for-asylsokande/Tolk/.

64 Examples of companies used after public procurement are DigitalTolk, Transvoice, Språkpoolen Skandinavien, Språkservice, Språktolkförmedlingen. Västra Götaland region is using services of Tolkförmedling Väst.

65 Cf. Socialstyrelsen, supra note 32, p. 37.

access to interpreters of the necessary language, it might be less invasive to a patient's privacy, or that this choice is more ecologically friendly. In Västmanland, it is specifically recommended to use interpretation services either by phone, or an interpreter a patient is comfortable with, if they have experienced domestic violence – specifically, honour-based violence.[66] Due to the COVID-19 outbreak, county councils and providers of interpretation services emphasise the need of conducting interpretations via phone. Moreover, most of the providers offer the possibility of using acute interpreters via phone, meaning that interpretation takes place within five minutes from the moment of contact. Acute interpretation services are usually available for the most common languages among asylum seekers, such as Arabic, Persian, Russian, Somali, and Dari.

The discussion in this section indicates that most of the county councils, have ensured the possibility of using interpretation services for migrants. However, the straightforward guidance as to when such obligations arise are rarely provided. The analysis shows that there are significant differences in understanding when the obligations arise, and the cases provided at the beginning of the article will help to illustrate these differences. Reem, who asks for an interpreter, would not be able to access such services in Västerbotten, but might have access to acute telephone interpreters in most of the other county councils, if she is lucky enough to speak one of the languages common among asylum speakers. Reem's chances of getting an interpreter in her own language might be higher if she gives birth in Norrbotten, which has the potential to work with many interpretation companies. Situations like Faven's have not yet been addressed in the guidelines, documents, and webpages analysed. It is also unclear, what the county councils mean by referring to "a right" to use interpretation services: if it is a right, it can be interpreted that a patient has a choice to exercise it or not. If this interpretation of the county councils' understanding of "a right" to an interpreter is correct, Faven is likely to be able to refuse using interpreters in Jämtland Härjedalen or in Värmland. However, if Faven happens to be in Sörmland,

66 The county council recommends finding where a patient lives or lived in Sweden, and attempting finding interpreters from other parts of the country. The county council also acknowledges that this method does not guarantee that a patient and interpreter do not know one another.

the county council has explicitly formulated stricter requirements for personnel. It is likely that in Sörmland interpreters will be imposed regardless of Faven's wishes. As for Ivan's case, the interpreters are likely to be provided for him in Skåne and Sörmland due to the formulation of the obligations in the county councils' documents. Yet both Faven's and Ivan's cases are most likely to be confusing for healthcare personnel in most parts of Sweden due to the absence of straightforward guidelines and difficulties with finding information.

5. Concluding Discussion

This article has analysed the obligated use of language interpreters in situations where patients demand, reject, or express no opinion over the use of interpretation services. The analysis has been conducted on three levels: human rights law, Swedish legislation, and in county council guidelines. To explain the circumstances that obligate the use of interpreters, I will return to the cases, presented at the beginning of the article.

From an international human rights law perspective, Reem's request to have an interpreter is related to the realisation of her rights to life, privacy, health, freedom from inhumane and degrading treatment. Yet the right to interpretation services in healthcare as a distinct right is not acknowledged in international treaties. Human rights treaty bodies contest that the effective realisation of a patient's rights is problematic without access to interpretation services, and that states are obliged to ensure that qualified interpreters are available. Reem's wish to use an interpreter is not paramount, but it does inform the state that the patient has needs in protecting her rights. If the absence of interpreters can render the realisation of Reem's rights ineffective, states have a duty to offer this service (unless states can prove that the duty constitutes impossible or disproportional burden). From the perspective of the Administrative Act, Reem's desire to have an interpreter is rather irrelevant: it is the assessment of needs provided by personnel that are under scrutiny. Yet, the provisions of special healthcare legislation require a redefinition of the focus, to concentrate instead on both the needs and desires of patients to obtain information and make adjustments relevant for their

care. Therefore, due to the requirements of special healthcare legislation, Reem's wish to have access to an interpreter must be respected to achieve the goal of good health. In other words, patients' desires to have access to interpretation services should be accepted in the administrative law sense, and the obligation to provide interpretation exists. From the perspective of national law (Section 13.1 of the Administrative Act), resource considerations do not waive the obligation to provide interpretation services in healthcare. Most county councils also consider the obligation to be immediately realisable in Sweden. Reem might have the prospect of access to interpretation services in most parts of Sweden – yet not everywhere. However, straightforward guidance concerning the obligation to engage interpreters exists only in a few county councils, which may signify various levels of awareness of healthcare staff about this obligation.

With respect to Faven's situation, the ECtHR has expressed that states do not have an obligation to provide interpretation services if patients refuse to cooperate with healthcare staff. Yet, whether Faven did not wish to cooperate or was simply afraid of interpreters is intentionally unclear from the fictive case described in the beginning of this article. The prohibition of discrimination and positive obligation to protect people from inhumane and degrading treatment may signify a need to investigate reasons for refusal, and possible adjustments in the best interests of a patient. Such adjustments might be, but are not limited to, introducing gender or culture sensitive approaches when using interpreters. However, treaty bodies are unlikely to find imposing interpreters to protect life or health to be a disproportional infringement of Faven's privacy. National law requires the use of interpreters if, according to healthcare staff, communication of necessary information is impossible without them, and a patient has not refused information about medical intervention. Provision of interpreters against a patient's wishes may result in patients rejecting necessary medical care. An approach compliant with human rights calls for understanding the reasons behind any refusal to use interpreters, and an attempt to accommodate the needs of a patient accordingly. The paradox is that without proper communication, it is problematic to make an objective assessment of the reasons for refusal and thus accommodate a person's needs. An application of

requirements for administrative legislation, where the focus is the legal certainty of the procedure, may, in a healthcare context, lead to difficult moral dilemmas. Faven's situation is rarely discussed in the guidance notes of county councils, only in Sörmland is it suggested that healthcare personnel have a strict obligation to provide interpreters to ensure a patient's safety. Västmanland county council provides some guidelines to personnel on how to ensure an absence of conflicting interests in cases of gender-related violence. County councils often refer to the requirements of Swedish legislation as a reason why further guidance is not needed. However, as shown in Section 3, requirements of Swedish legislation are rather complex and spread throughout different acts. Expectations that healthcare personnel will be able to provide a qualified interpretation of such complex provisions of national law is unrealistic. It appears that situations like Faven's are liable to bring a sense of confusion for healthcare personnel and providers about how to address them.

Cases like Ivan's, when a patient neither refuses, nor consents to interpretation services, international human rights law requires measures are taken to protect a patient's life and health. Exactly how that should be done, is left to a state's discretion, provided protection is effective. The national administrative legislation allows healthcare personnel to determine whether interpreters are needed, but special healthcare legislation emphasises the need for communication with patients. Therefore, the obligation to use interpretation services without explicit consent may be stronger in healthcare, compared to other public law areas. As mentioned above, county councils rarely provide guidance on how the need for interpreters should be determined. In the vast majority of Swedish county councils (except for Sörmland and Skåne), this question is left to the discretion of an individual healthcare practitioner.

One of the common themes found in international and national law discussions in this article is that the right to use interpretation services in healthcare is not recognised as a right with an independent existence. It is rather a positive duty of authorities to act. Like other social rights in Sweden, particularly those related to the accessibility of healthcare services, the possibilities for a person to claim that the duty to act was

not fulfilled are limited.[67] Using Hohfeld's terminology, the obligations to use interpreters are not seen as claim-rights in Swedish national law, but can be claim-rights in international law. It is relevant to address the question of how the absence of legal remedies to obtain interpreters on a patient's request correlates with the legal and patients' security of these vulnerable groups. The article also raises another principal question related to the interpretation of Swedish administrative and healthcare legislation. In particular, it has been shown that the Administrative Act can be applicable in cases when decisions to (not) provide care are made. Therefore, it calls to reassess the previously established assumption that medical decision-making should be viewed as concrete administrative activity, rather than handling of cases.

The obligation to use interpreters in healthcare is regulated at various levels that provide rather complex answers to the question when that obligation arises. International law asks national law to safeguard the quality of interpretation services, and to take action to ensure protection of rights. National legislation does not contradict international law requirements, yet it passes the question to healthcare providers and practitioners. As shown in section 4, most of the county councils, at least, undertook some measures to ensure that the formal possibility to access qualified interpreters exists. Yet exactly how personnel should act in specific situations, may often be unclear. To ensure a migrant patient's safety and fulfil positive human rights obligations, healthcare practitioners who apply the law, may need more straightforward guidance. This can be found at various levels, including the state, county councils and municipalities, or at the level of a specific hospital. Yet, in my opinion, the understanding of the requirements and dispersed nature of the legislation by county councils, demonstrates a need for national guidance from the National Board of Health and Welfare. Such guidance should ensure that the best practices of patient-centric care are implemented throughout the country, and that healthcare personnel understand how to deal with complex realities. This article has addressed just one question

67 Vahlne Westerhäll, L., Sociala rättigheters konstruktion och värden – exemplet rätten till hälsa, in Erhag, T., Leviner, P., & Lind A-S. (Red.) Socialrätt under omvandling: Om solidaritet och välfärdsstatens gränser, Liber, Stockholm, 2018 pp. 27–28; 40; Gustafsson, supra note 44, pp. 446–447, 470–471.

of when the obligation to use interpreters arises, but the issues that occur in real life are numerous and remain unanswered.

Although, the focus of this article has been on two groups of patients – asylum seekers and irregular migrants – communication challenges between healthcare professionals and patients are as common for many other groups. These includes persons with intellectual and sensory disabilities, patients with foreign background, or those refusing obtaining information about medical treatment for any reason. It is hoped that the reasoning on the obligations to inform and support contributes to the broader discussion on the valid consent to medical treatment and positive obligations related to non-discrimination and offers clearer guidance to healthcare professionals.