

FAMILY REUNIFICATION FOR REFUGEES: A COMPARATIVE STUDY

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Abstract

Refugees have a potential to separate with their family members when they flee in order to seek asylum in other countries. This often occurs as many refugees do not have time to plan for their flight. Family unit is a fundamental group unit for society and is essential for refugees. For this reason, the refugee status is also extended to family members of a recognised refugee. International refugee law does not specifically provide for family reunification for refugees. However, some international and regional instruments contain specific provisions dealing with family reunification for refugees. States should have a duty to allow family members of refugees to enter the country of asylum for the purpose of family reunification. Furthermore, asylum states should allow refugees to marry persons of their choice and promote the integrity of the family. This indicates that states should provide humanitarian visas to individuals to join their family in refugee matters. Special attention should be given to minor children and unaccompanied refugee children to ensure that they grow in a family environment through guardianship and adoption. This study investigates the reunification of refugees in South Africa, United Kingdom, Bosnia Herzegovina and Belgium.

Keywords: *refugee family, reunification, refugee children, unaccompanied refugee children, adoption, guardianship.*

JEL Classification: K33, K38

1. Introduction

Refugees often experience the destruction of their family unit when they flee and seek asylum in other states. Indeed, family members take different routes to save their lives due to available opportunities or resources.² As a result, some persons find protection from persecution in another country without their families and they are deprived from enjoying family life.³ The issue of family unity becomes crucial for refugees to integrate themselves into the country of asylum. Rohan argues that the state is under a positive obligation to allow family members of a refugee to enter the country of asylum for the purpose of family reunification.⁴ The person who flees from persecution must satisfy or fall within the definition of a refugee in order to benefit from the international protection. The UN 1951 Refugee Convention defines a refugee as a person who is outside the country of his/her nationality owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and he/she is unable or unwilling to return to his/her country.⁵ Furthermore, the term refugee also applies to a person who is compelled to leave his/her own country and seek refuge in another country due to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his/her country of origin or nationality.⁶ Persons who are refugees need to be reunited with their family members in order to maintain the principle of family unity.

Family unit is the natural and fundamental group unit of the society and is an essential right of refugees⁷ that should not be unnecessarily restricted. The rights granted to a refugee are also extended to the members of his or her family. As a result, states should take necessary measures to maintain the unity of refugee families specifically where the head of the family qualifies for a refugee

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² Brooke Wilmsen, “Family Separation: the Policies, Procedures, and Consequences for Refugee Background Families”, *Refugee Survey Quarterly*, vol. 30, no. 1 (2011): 45.

³ Mark Rohan, “Refugee Family Reunification Rights: a Basis in the European Court of Human Rights’ Family Reunification. Jurisprudence”, *Chicago Journal of International Law*, vol. 15, no. 1 (2014): 367 – 368.

⁴ *Ibid*, p. 368.

⁵ Convention Relating to the Status of Refugees, 1951, Article 1 A (2).

⁶ Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, Article 1 (2).

⁷ Convention Relating to the Status of Refugees, 1951, Recommendation B (Principle of unity of the family).

status.⁸ The special protection should also be accorded to refugee minors, unaccompanied refugee children and measures should be arranged to ensure guardianship and adoption of refugee children.⁹ Refugees should also be allowed to form and create a new family. In this regard, marriages of refugees and citizens of the host state should be facilitated and not hindered. They should also be allowed to marry individuals from their own country and the asylum state should facilitate family reunification. This is currently not the case. The study will look at the provisions of family reunification for refugees in international law, family reunification in South Africa, United Kingdom, Bosnia Herzegovina, and Belgium in order to ascertain the best practices.

2. Family reunification for refugees in international and regional laws

International refugee law does not contain a substantive right to family reunification or unity.¹⁰ Nevertheless, there are some international legal instruments that provide the right to family unit and family reunification. For instance, the Universal Declaration of Human Rights (UDHR) establishes a duty on states and society to protect the family as a natural and fundamental group unit of society.¹¹ Article 17 of the International Covenant on Civil and Political Rights (ICCPR)¹² prohibits the arbitrary and unlawful interference with the family. Furthermore, Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹³ contains the provision that the protection and assistance should be accorded to the family. This places certain obligations on states to assist families living on their territories. Children should be protected and assisted to live in a family environment.¹⁴

Article 22 of the Convention on the Rights of the Child (CRC)¹⁵ provides that states parties shall cooperate with other agencies in order to ‘trace parents and other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family’. This right implies that states should facilitate refugee children to move from one country and relocate in another state for the purpose of family reunification. It ensures that children are raised in a family environment. Article 9 (1) of the CRC encourages states parties to ensure that no child shall be separated from his or her parents against their will. Furthermore, Article 10 (1) creates a positive obligation for states parties to deal with the applications by a child or his/her parents to leave or enter a country for the purpose of family reunification in a positive, human and expeditious manner. This implies the issuing of travel documents and visas to refugees in order to ensure the family reunification in different countries.

Article 23 (2) of the ICCPR contains explicitly the right to marry and form a family. This right implies the possibility to live together and procreate.¹⁶ As a result, states have a duty to provide appropriate measures to simplify the possibility of married refugees to live together. In many instances, refugees choose to marry individuals from their country of origin as they share the same values such as culture, religion and language.¹⁷ It is submitted that family life should include one’s fiancée for the intended family and states should facilitate them to join their partners in order to promote the family lives.

On regional levels, different continents have created legal provisions to ensure the protection of the family.¹⁸ In Africa, Article 18 of the African Charter on Human and Peoples’ Rights

⁸ Ibid.

⁹ Ibid.

¹⁰ Convention Relating to the Status of Refugees, 1951.

¹¹ Article 16 (3) of the Universal Declaration of Human Rights, 1948.

¹² International Covenant on Civil and Political Rights, 1966.

¹³ International Covenant on Economic, Social and Cultural Rights, 1966.

¹⁴ Article 23 of International Covenant on Civil and Political Rights, 1966.

¹⁵ Convention on the Rights of the Child, 1989.

¹⁶ Alice Edwards, “Human Rights, Refugees, and the Rights ‘to Enjoy’ Asylum”, *International Journal of Refugee Law*, vol. 17, issue 2 (2005): 316.

¹⁷ Ibid, p. 316.

¹⁸ Jean Chrysostome Kanamugire and Melvin Leslie Mbaio, “Family Reunification in South African Refugee Law: a Critical Appraisal”, *Acta Universitatis Danubius Juridica*, vol. 17, no. 1 (2021): 91 - 92.

(ACHPR)¹⁹ protects the family and prevents any discrimination against women and children regardless of their status. Furthermore, Article 25 of the African Charter on the Rights and Welfare of the Child (ACRWC)²⁰ contains the provisions to protect children who are deprived of family environments. It creates an obligation on states to create alternative family care for children in order to ensure the achievement of the best interest of the child. This can include foster placements or other institutions that care for children.²¹ Children who are separated from their parents during armed conflicts can be reunited with their parents.²² This facilitates the reunification of refugee children with their parents and ensure the unity of refugee family.

3. Family reunification for refugees in South Africa

South African Refugees Act provides for the existence of an extended family in refugee matters.²³ Section 3 (c) of the Refugees Act²⁴ indicates that a dependant or spouse of refugee is also a refugee. Section 1 of the Refugees Act provides the definition of a refugee to include any unmarried minor dependant child, a spouse, or any destitute, aged or infirm parent of such a refugee who is dependant on him or her. In *Mubake v Minister of Home Affairs*,²⁵ the court extended the definition of 'dependant' in section 1 of the Refugees Act to include separated children who were dependants of their primary caregivers.²⁶ This extension ensures that separated refugee children live in a family environment and safeguards protection of the family and best interest of the child.

South African refugee law does not contain a specific joining family system to facilitate dependants of refugees to reunite with their families.²⁷ As a result, dependants of refugees who come to South Africa to join their family experience challenges as they do not have documentary evidence to prove their relationships. It is submitted that South Africa should create a clear joining family system for refugees and asylum seekers to reunify with their family. This will promote the rights of refugees and family issues. Unaccompanied refugee children should get special attention and be placed in foster families²⁸ to ensure their well-being and promote their best interest.²⁹ This will strengthen the asylum system in South Africa.

4. Family reunification for refugees in the United Kingdom

The situation of refugees entrenches the separation of family as they leave their countries under difficult conditions and sometimes only one family member is subject to persecution.³⁰ The integration of refugees in the host country is much harder if there is no family support. Rohan argues that the state is under a positive obligation to allow the family member of refugees to enter the asylum country for the purposes of family reunification.³¹ This promotes refugee policies and has potential to benefit the host states.

The jurisprudence of the European Court of Human Rights favours generally the reunification of families. This court has developed a balancing test: each state has right to control its borders and has a sovereign power to allow individuals to come in its territory. At the same time, refugees are

¹⁹ African Charter on Human and People's Rights, 1981.

²⁰ African Charter on the Rights and Welfare of the Child, 1990.

²¹ Jean Chrysostome Kanamugire and Melvin Leslie Mba, *op. cit.*, 2021: 91.

²² Article 23 of the African Charter on the Rights and Welfare of the Child, 1990; Jean Chrysostome Kanamugire and Melvin Leslie Mba, *op. cit.*, 2021: 91 – 92.

²³ Jean Chrysostome Kanamugire and Melvin Leslie Mba, *op. cit.*, 2021: 93.

²⁴ Refugees Act 130 of 1998.

²⁵ *Mubake v Minister of Home Affairs* 2016 2 SA 220 (GP).

²⁶ *Ibid*, para 28.

²⁷ Fatima Khan, "Reunification of the Refugee Family in South African: a Legal Right?", *Refuge*, vol. 28, no. 2 (2011): 85; Jean Chrysostome Kanamugire and Melvin Leslie Mba, *op. cit.*, 2021: 97.

²⁸ Jean Chrysostome Kanamugire and Melvin Leslie Mba, *op. cit.*, 2021: 99.

²⁹ Julia Sloth-Nielsen and Marilize Ackermann, "Unaccompanied and Separated Foreign Children in the Care System in the Western Cape – a Socio-Legal Study", *Potchefstroom Electronic Law Journal*, vol. 19 (2016): 21.

³⁰ Mark Rohan, "Refugee Family Reunification Rights: a Basis in the European Court of Human Rights' Family Reunification Jurisprudence", *Chicago Journal of International Law*, vol. 15, no. 1 (2014): 368.

³¹ *Ibid*, p. 368.

unable to enjoy any right anywhere except in the country of asylum.³² The 1951 UN Refugee Convention implies that a legally recognised refugee does not have a home country where he or she can enjoy family unity. In such a case, the interest of family reunification for refugees outweighs the interest of sovereign power that a state has to control its borders.³³ There are reasons to believe that family reunification promotes refugee integration in the host state and contributes to the national interests.

Shah, an expert witness in refugee cases in the United Kingdom (UK), discusses four cases where the refugee spouses, as sponsors, wanted their partners to join them in the UK.³⁴ All the partners were married according to Muslim rites and were located in Ethiopia, Kenya, India and Iran.³⁵ The four incidents of marriage include a telephonic marriage, a proxy marriage, an unregistered nikah and a temporary marriage. For the first case, a Somali man who was in Saudi Arabia, concluded a telephonic marriage with his wife who was in Somalia as he could not return to his country. The family members of both spouses organised the marriage, and the telephone and a loudspeaker were used to conclude the marriage. He was expelled by the Saudi Arabia and lived together with his wife before he successfully applied for asylum in UK.³⁶

The second case is a proxy marriage. The husband was a Somali origin with a Dutch citizenship who lived in the UK. His marriage was arranged to a Somali woman who resided in Kenya. He could not attend his wedding as he failed to secure a leave from his employer. The marriage proceeded with his family members where they arranged a person to stand for him. He later obtained leave and came to Kenya to spend few weeks with his wife.³⁷ The third case involves an unregistered nikah. A Bangladeshi woman lived in the UK as a psychiatrist under the High Skilled Migrant Programme. She went to India where she met a businessman and decided to marry each other. She went back to India and they got married in a mosque in New Delhi where they received a turned nikah certificate. The marriage occurred in the presence of relatives from both families.³⁸ The fourth case was a temporary marriage.³⁹ The husband was a recognised refugee in the UK from Iran. Before coming to the UK, he concluded a marriage under the Islamic institution of mut'a or sikhed valid for a period of three years. At the expiration of the marriage, the couple arranged to meet in Turkey. However, this did not materialise as the wife could not obtain a visa. They extended telephonically the contract of their marriage for one year. Both family members of the spouses participated in the extension of the marriage and it was registered according to Muslim laws.⁴⁰

In all the above four incidents, the UK authorities refused to grant spousal visas for the partners to join their spouses.⁴¹ They argued that their marriages were not valid as they did not establish a valid relationship between the spouses. Both spouses were not present during the marriage ceremonies; the marriages were not registered officially and they were not celebrated in Christian terms which require the permanence of relationships between spouses for its validity.⁴² The conduct of the UK authorities is problematic as all the above spouses were married according to Muslim laws and their marriages were recognised in their countries of origin where they occurred. The marriages were also recognised in Islamic law as they were validly concluded according to Muslim rites. However, the UK recognises the family reunification for refugees where the spouses can produce a valid marriage certificate.⁴³ This development is welcome and promotes the integration of refugees in the UK. It is submitted that the UK should also recognise Muslim marriages and allow family members of refugee Muslim spouses to join or reunite with their families who are living in UK. This

³² Ibid, p. 372.

³³ Ibid, p. 372.

³⁴ Prakash Shah, "Inconvenient Marriages, or What Happens When Ethnic Minorities Marry Trans-Jurisdictionally", *Utrecht Law Review*, vol. 6, issue 2 (2010): 22 – 23.

³⁵ Ibid, p. 23.

³⁶ Ibid, p. 24.

³⁷ Ibid, p. 25 – 26.

³⁸ Ibid, p. 27 – 28.

³⁹ Ibid, p. 30.

⁴⁰ Ibid, p. 30.

⁴¹ Ibid, p. 22.

⁴² Ibid, p. 32.

⁴³ *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, Application nos 9214/80, 9473/81 and 9474/81, 28 May 1985.

should also apply to all refugees in the UK in order to promote the integrity of spouses and protect the refugee family.

5. Family reunification for refugees in Bosnia Herzegovina

The refugee law in Bosnia Herzegovina provides for family reunification for a refugee with his or her family members who are outside the host country.⁴⁴ As a procedure, the refugee has to submit his or her application for family reunification to the Ministry together with available documentary evidence to prove his or her relationship with the family member. If there is no evidence to prove the family relationship, the Ministry will consider the circumstances that make it possible to establish such relationship.⁴⁵ The Ministry decides on the application for family reunification within a period of nine months from the date of the application. The successful individuals for family reunification with a refugee are granted refugee status when they enter Bosnia Herzegovina.⁴⁶

However, family members of a refugee who are excluded from refugee status cannot qualify for family reunification.⁴⁷ They include individuals who have committed international crimes such as a crime against peace, war crime or crime against humanity; or a serious non-political crime.⁴⁸ The persons who have participated in acts contrary to the principles and purposes of the United Nations, or constitute a danger to the national security of Bosnia Herzegovina are also excluded from family reunification with a refugee.⁴⁹ These provisions ensure the sanctity of asylum and preclude criminals from benefiting for asylum provisions. The sanctity of family reunification for refugee is ensured. It is submitted that qualifying individual members for family reunification in the asylum country should receive humanitarian visas to facilitate their safe entry into Bosnia Herzegovina.

Every unaccompanied minor who is an asylum seeker or a refugee benefits from the guardianship policy.⁵⁰ For asylum seeker, the Ministry submits a request to appoint a guardian to a center for social work. As for an unaccompanied minor refugee, the Ministry of Human Rights and Refugees submits a request to appoint a guardian to the centre for social work.⁵¹ The guardian has an obligation to perform his or her duties according to the best interests of the child.⁵² Guardianship ensures that unaccompanied refugee minors are nurtured in a family institution and promotes the family unity among refugees, especially refugee children.

6. Refugee family reunification in Belgium

Belgium is a popular destination for refugees in Europe⁵³ and has provision to allow family reunification. The Minister or Secretary of State for asylum and immigration has a discretionary power to issue visas or residence permits for humanitarian reasons.⁵⁴ These residence permits can also be granted to family members of refugees who live in Belgium. The individuals who qualify for family reunification can make or submit their applications at the Belgium diplomatic post or consulate in the country of their residence.⁵⁵

The Secretary of State often issues discretionary visas to the applicants when they have very close relationships with people in Belgium; and when the sponsor can demonstrate his or her financial

⁴⁴ Law on Asylum, 2016: Article 13.

⁴⁵ Law on Asylum, 2016: Article 13 (2).

⁴⁶ Law on Asylum, 2016: Article 13 (3).

⁴⁷ Law on Asylum, 2016: Article 13 (5) and Article 21.

⁴⁸ Law on Asylum, 2016: Article 21 (a) and (b).

⁴⁹ Law on Asylum, 2016: Article 21 (1) (c) and (d).

⁵⁰ Law on Asylum, 2016: Article 12.

⁵¹ Law on Asylum, 2016: Article 12 (2).

⁵² Law on Asylum, 2016: Article 12 (3).

⁵³ Toktas, S *et al*, "Transit and Receiving Countries: Refugee Protection Policies in Belgium, Slovenia, Greece, and Turkey", *Alternatives Turkish Journal of International Relations*, vol. 5 nos. 1 & 2 (2006): 28.

⁵⁴ EMN Belgium *et al*, "Family Reunification with Third Country National Sponsors in Belgium", 2017: 27. Available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/02a_belgium_family_reunification_en_0.pdf (accessed on 13 October 2020).

⁵⁵ *Ibid*, p. 27.

ability to assist the family members.⁵⁶ Furthermore, there is a provision for humanitarian visas that can be granted with specific conditions of renewal. In 2016, the Belgium authorities have issued humanitarian visas to individuals from Syria, Somalia, Afghanistan, Iraq and Burundi.⁵⁷ These countries often produce refugees worldwide as they experience perennial conflicts that subject people to persecution. The other countries that benefited from humanitarian visas in 2017 were DR Congo, Morocco, Guinea, Russia and Armenia.⁵⁸ Thus family members of refugees use the humanitarian visas to join their relative in Belgium. Foster children and children from polygamous parents are also included in the humanitarian visas to facilitate their entry into Belgium.⁵⁹

European Union provides for state members to establish a waiting period for two years (or three years by specific derogations) for the sponsor to facilitate his or her family members to reunite with him or her.⁶⁰ Belgian law contains a waiting period with some exceptions, including situation or situations where the sponsor has unlimited right to stay, is a student and has limited right to stay.⁶¹ As a general rule, the sponsor who has unlimited right to stay must have legally resided in Belgium for a period of twelve months.⁶²

There is no waiting period for the sponsor who has unlimited right to stay where the marriage or similar partnership existed prior to the flight of the sponsor to Belgium; the couple has a common child; and the sponsor benefits from the international protection such as refugee status or subsidiary protection.⁶³ This last category includes family members of refugees who reside outside Belgium. In this circumstance they can join their family member who is a refugee in Belgium on humanitarian grounds.

The existence of family relationship can be proved in Belgium or abroad by the civil status records or judgments.⁶⁴ Family members of refugees benefit from a more flexible regime if their relationship existed prior to their arrival in Belgium. In this case, the asylum authorities deliver or issue civil status records and the lack of documents cannot be the only valid reason to decline family reunification.⁶⁵ Thus refugees in Belgium are in a good condition to success in their application for family reunification.

7. Concluding remarks

International refugee law does not provide for family reunification and family unit. However, there are some international legal instruments that contain substantive rights to family issues.⁶⁶ They create a duty on states and society to protect the family and prohibit unlawful interference with the family. They protect children and ensure that they are raised in a family environment. Individuals may be separated from their families when they flee and seek asylum in other countries. In these circumstances, the host states and NGOs have to take necessary measures to ensure that refugee children reunite with their family. Unaccompanied refugee children should receive special attention and be placed in foster families to ensure that they are raised in a family environment.

South African refugee law does not provide for a joining system for individuals who want to reunite with their refugee families. Section 1 of the Refugees Act extends the refugee status to the dependants of a refugee. Refugee children who have been separated from their parents during the flight are dependants of their primary caregivers. It is submitted that unaccompanied refugee children should be placed in foster families to ensure that they grow in a family environment. In this way, the

⁵⁶ Ibid, p. 28.

⁵⁷ Ibid, p. 28.

⁵⁸ Ibid, p. 28.

⁵⁹ Ibid, p. 29.

⁶⁰ Directive 2003/89/EC, Article 8.

⁶¹ EMN Belgium et al, "Family Reunification with Third Country National Sponsors in Belgium", 2017: 40 - 41. Available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/02a_belgium_family_reunification_en_0.pdf (accessed on 13 October 2020).

⁶² Ibid, p. 40.

⁶³ Ibid, p. 40.

⁶⁴ Ibid, p. 49.

⁶⁵ Ibid, p. 49.

⁶⁶ Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966; and International Covenant on Economic, Social and Cultural Rights, 1966.

best interests of the child are safeguarded. Furthermore, South Africa should provide a joining system for refugee families to ensure family reunification and promote family unity for refugees.

The countries that promote the reunification of refugees with their family members include the UK, Bosnia Herzegovina and Belgium. There are legal provisions to facilitate family reunification for refugees in the UK. However, the applicant must successfully prove the relationship with his or her family members. Such relationship must exist prior to the arrival of the refugee in the UK. This inhibits refugees to create new relationships. Bosnia Herzegovina has provisions to allow family reunification for refugees with their members who are outside of the country. They can obtain humanitarian visas to use for travel purposes in order to reach Bosnia Herzegovina. Belgium also provides for the family reunification for refugees with their family members and a humanitarian visa can be granted for this purpose.

In order to protect the rights of refugee families, states should ensure the family reunification and unit in refugee matters. For instance, states should grant travel documents and issue humanitarian visas to members of the refugee family in order to facilitate family reunification or unity. This should also extend to intended fiancés who are planning to form a family with refugees.

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