

ILPA BRIEFING FOR WESTMINSTER HALL DEBATE**REFUGEE FAMILY REUNION IN THE NAME OF THANGHAM DEBBOAIRE****29 NOVEMBER 2016**

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.

For further information please get in touch with Alison Harvey, Legal Director, ILPA Alison.Harvey@ILPA.org.uk or Zoe Harper, Legal Officer, Zoe.Harper@ilpa.org.uk or on 020072518383

Rights to family reunion for refugees

The Immigration Rules, made under section 3 of the Immigration Act 1971, and periodically laid before parliament, make provision for refugee family reunion in Part 11, at paragraphs paragraphs 352A to 352G.¹ These rules are amended with effect from 24 November 2016.² Refugees and persons granted humanitarian protection enjoy the same rights to family reunion.

Refugees can be joined by 'pre-flight' family members: spouse, civil partner, unmarried or same sex partner or minor children, under 18, not married or in a civil partnership, not living an independent life and part of the family unit of the refugee or person with humanitarian protection at the time when the refugee fled. A married couple must have married pre flight, or (with effect from 24 November) been in a relationship pre-flight although they married subsequently. Family members meet the requirements a refugee has to meet as to not having been involved in war crimes, or in serious non-political crimes. The Home Office guidance now states that a baby born conceived pre-flight and born post flight is eligible for family reunion. This was a necessary clarification: we had seen a refusal on this basis.

The requirements of the rules are further glossed in guidance.³ Thus the marriage or civil partnership must be valid; the parties have met and their relationship be both genuine and subsisting: they must intend to live together permanently. The treatment of those in polygamous marriages is as elsewhere in the Immigration Rules: the marriage must be valid and where it is only one person to whom the refugee or person with humanitarian protection is married can be

¹ Immigration Rules, Part 11 <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>

² Statement of Changes in Immigration Rules HC 677.

³ Home Office Guidance Family reunion: for refugees and those with humanitarian protection Version 2.0

Publication date: 29 July 2016

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/541818/Family_reunion_guidance_v2.pdf

reunited with them as the spouse, and it is not possible to “flip” between spouses. Unmarried or same sex partners must have met, and their relationship be both genuine and subsisting: they must intend to live together. In cases of adoption, an adoption order is required.

Problems with the definition

No provision is made for dependants over 18 and this can, and has, resulted in, for example, a sole 18 year old girl left behind in a country fled or in a refugee camp.

A Syrian girl aged 18 years and four months was refused because she is over 18. At the time of the application she was in Damascus with her grandmother.

Two Afghan girls aged 19 and 21 whose father is a refugee in the UK following distinguished service for the UN for which he had been targeted by the Taliban, were refused family reunion and left separated from the rest of the family.

While parents have a right to be reunited with their minor children, a minor child has no right to be reunited with a parent. The House of Lords EU Select Committee, the latest to examine this argument, in its report *Children in Crisis*⁴ said:

We found no evidence to support the Government’s argument that the prospect of family reunification could encourage families to send children into Europe unaccompanied in order to act as an ‘anchor’ for other family members. If this were so, we would expect to see evidence of this happening in Member States that participate in the Family Reunification Directive.

*Instead, the evidence shows that some children are reluctant to seek family reunification, for fear that it may place family members in danger.*⁵

These children are not being given discretionary leave because they are unaccompanied; they are being recognized as refugees because they are at risk of persecution by reason of their race, religion, nationality, political opinion or membership of a social group in the country of origin. They have as much right to international protection and to respect for their rights as refugees as any adult. Many people will recognize the choice of parents, forced to pay smugglers because of a lack of safe and legal routes to safety and not having enough money to bring the whole family out, to get their child to safety first and put the child’s needs before their own. We have seen the dangerous journeys parents make both with and without their children to try to get them to safety. There is nowhere else that the family can be together. **We urge MPs to call on the government to allow unaccompanied refugee children to be reunited with their parents in the UK.**

Nor is there a right to be reunited with a sibling. In one case two orphan Afghan siblings are separated; one has been recognised as a refugee in the UK but as a child is not entitled to family reunion.

⁴ House of Lords Select Committee on the European Union: Children in Crisis: unaccompanied children in the EU, second report of session 2016-2017, HL paper 34, 26 July 2016

<http://www.publications.parliament.uk/pa/ld201617/ldselect/ldcom/34/34.pdf>

⁵ Paragraph 62, and conclusions and recommendations at 59.

No provision is made for wider family relationships, for example for grandparents to be reunited with grandchildren, even where parents have died. The family cannot be together in the country fled.

ILPA is currently in discussion with the Home Office about errors in the drafting of the latest statement of changes in immigration rules as they apply to unmarried and same sex partners. This problem may have been resolved by the time the debate occurs. The difficulty is that amendments may, inadvertently we trust, created a requirement for refugee and partner not only to have been in a relationship, but to have cohabited, for two years prior to the refugee's flight.⁶ This would be a most problematic requirement for refugees to meet: for example in the case of a refugee persecuted because s/he is gay or lesbian where the cohabitation was prohibited, or where persecution and the need to hide interrupted cohabitation.

Those who cannot meet the rules must rely upon the general discretion of the Home Secretary under s 3(1) of the Immigration Act 1971 to grant any person leave to enter the United Kingdom and to impose such terms and conditions on that leave as she sees fit, or must meet the rules for 'post-flight' family members, which impose the same requirements as to minimum income, speaking English etc. as apply to a British citizen or a person settled in the UK. Provision is made for post-flight family members alongside provision for the family members of British citizens and the settled in Appendix FM of the Immigration Rules. They must meet the same requirements, which include financial thresholds and language tests.

UNHCR states⁷:

"Family reunification plays a significant role in meeting the long-term needs of resettled refugees ...The family is often the strongest and most effective emotional, social and economic support network for a refugee making the difficult adjustment to a new culture and social framework."

Legal challenge

In *AT and another (Article 8 ECHR – Child Refugee – Family Reunification) Eritrea* [2016] UKUT 00227 (IAC) the Upper Tribunal held that while the Immigration Rules make no provision for family reunification in the United Kingdom in the case of a child who has been granted asylum, a refusal to permit the family members of such child to enter and remain in the United Kingdom may constitute a disproportionate breach of the right to respect for family life enjoyed by all family members under Article 8 of the European Convention on Human Rights. This case offers hope to those who cannot meet the requirements of the Immigration Rules.

Difficulties in making an application

Difficulties arise because refugees are treated as any other applicant in terms of the overseas visa application centre to which they must apply. A number of countries have no visa facility and the UK Visas and Immigration website directs the applicant to the relevant visa application centre⁸. For example:

⁶ See *Fetle (Partners: two year requirement)* [2014] UKUT 267 (IAC) (3 June 2014) [http://www.bailii.org/uk/cases/UKUT/IAC/2014/\[2014\]_UKUT_267_iac.html](http://www.bailii.org/uk/cases/UKUT/IAC/2014/[2014]_UKUT_267_iac.html)

⁷ June 2010 *Background Note for the Agenda Item: Family Reunification in the Context of Resettlement And Integration: Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, for the Annual Tripartite Consultations on Resettlement, Geneva, 20-21 June 2001.

⁸ See <https://www.gov.uk/find-a-visa-application-centre>

Afghanistan - Pakistan
Chad – Cameroon
Guinea - Sierra Leone
Iran - Turkey or the United Arab Emirates
Somalia - Kenya
Sudan Kenya
Syria - Lebanon or Jordan

A family member of a refugee may have to make a dangerous journey, including in cases where they could have reached a different visa application centre with fewer problems. They may have to cross international borders, including unlawfully where they have no documents, and remain unlawfully, including in hiding, in a country waiting for the case to be processed.

Those applying for refugee family reunion should be allowed to submit their applications in the countries in which they find themselves and not required to make hazardous journeys to reach designated posts.

Proving the relationship to the satisfaction of the Home Office can also be a problem. An Iranian refugee has been married for 34 years. He has his marriage certificate and numerous photographs. He left Iran in 2007 and was in Greece, unable to get out, working to subsist, unable to be in touch with his family for a period. He developed mental health problems. He has helped by the church to come to the UK where he applied for asylum. He was refused but succeeded on appeal. His application for family reunion with his wife and minor daughter was refused. Legal representatives tried again and the second application has just been refused on the basis that because there was a gap of contact around 2007 for some years, the marriage is not subsisting. They have been in regular touch since 2012. He says it is usual to be away from the family for periods, but when you marry you marry for life, there is no question that marriage is not subsisting and he has never stopped thinking about them. His lawyer writes “But you can’t prove that.” See further on the report of the Chief Inspector below.

Delays can have a huge effect in these cases, exposing family members overseas to threats from violence or from disease. Representatives have had the experience of one or more family members on the original application, in particular children, dying before they can come to the UK.

Report of the Independent Chief Inspector of Borders and Immigration into refugee family reunion

The Chief Inspector of Borders and Immigration issued a report on family reunion in September 2016⁹ and it is critical. He finds that the Home Office treat these as immigration applications and do not show sensitivity to the protection elements of the cases: family members may be in danger and the person waiting in the UK has been found to be in need of international

⁹ Report of the Independent Chief Inspector of Borders and Immigration An inspection of family reunion applications January to May 2016 – 14 September 2016 <http://www.ilpa.org.uk/resource/32493/independent-chief-inspector-of-borders-and-immigration-icibi-calls-for-an-improvement-of-the-home-of>. See further British Red Cross Report: The Complexity of Family Reunion, August 2013 <https://www.scribd.com/document/172691514/The-complexity-of-refugee-family-reunion>

protection, yet this does not appear to affect how the Home Office deals with these cases. He calls for more understanding and compassion. The Home Office told the Chief Inspector that plans are being formulated to consolidate decision making for Family Reunion applications into one team based in the UK. Will this result in officials being even more divorced from the situation of family members on the ground?

The Chief Inspector finds that the Home Office is too ready to reject applications on the basis that the person has provided insufficient evidence of their eligibility, without giving them the opportunity to provide such further evidence. The Home Office previously had a policy of commissioning and funding DNA tests in cases where this was its only reason for refusing an application. The Chief Inspector found that a change in policy so that it no longer did this, although its published guidance continued to say that it did, was a major reason for an increase in refusals of applications, and further that it the change was not publicized to applicants. The Government has agreed to review its policy on commissioning and paying for DNA evidence, which was one of the recommendations of the report and **we urge MPs to call for the Government to recommence paying for DNA evidence to facilitate family reunion.**

An otherwise good report is marred by a finding that Home Office decisions were ‘correct’ in the majority of cases, where the word correct is put in inverted commas. The inverted commas are supplied because, while decisions were stated to be correct in terms of the immigration rules and Home Office guidance, the inspection found a number of cases where supporting evidence had been misread or misinterpreted, or where not all the positive evidence had been considered when deciding to refuse. In other cases, inadequate record keeping made it difficult to ascertain whether decisions were correct, and there was evidence of apparent inconsistency. In one case, a minor had been refused for failing to provide evidence of their contact post-flight with the UK sponsor, and other applications had been refused for failure to provide documentary evidence not specified in the guidance. In short, ‘correct’ but not as we know it.

The Chief Inspector documented a case in which a minor had been refused for failing to provide evidence of their contact post-flight with the UK sponsor and applications had been refused for failure to provide documentary evidence not specified in the guidance.

Refusal of family reunion attracts a right of appeal on the grounds that the decision breaches human rights. The Chief Inspector found a sharp decline in appeals between 2014 and 2015 and hypothesized that reapplication, which is free, was quicker than appealing which was taking between nine and 11 months. Subsequently, in October 2016, new fees were introduced in the Immigration and Asylum Chamber of the Tribunal, £800 for an appeal. Refugee family reunion does not fall within the scope of legal aid. If legal aid is granted on an exceptional basis under the “exceptional case funding scheme” then there is no fee. If the family are in the UK and being supported by a local authority under section 17 of the Children Act 1989, section 22 of the Children (Scotland) Act 1995, article 18 of the Children (Northern Ireland) Order 1995 or section 37 of the Social Services and Well-being (Wales) Act 2014 (or if family members had claimed asylum and are receiving asylum support) there is no fee. Otherwise, a refugee will need to apply for a reduction or remission of the fee on an exceptional basis.

The government has accepted all ten recommendations of the Chief Inspector.¹⁰

Legal Aid

¹⁰ Home Office response to the report <https://www.gov.uk/government/publications/home-office-response-to-the-report-an-inspection-of-family-reunion-applications-january-to-may-2016>

The House of Lords Select Committee on the European Union expressed particular concern at the lack of legal aid for immigration (as opposed to asylum)¹¹ cases. There is no legal aid for family reunification. It said:

*We recommend that the UK Government reconsider its restrictive position on family reunification. Legal aid should be available to unaccompanied migrant children for the purposes of proceedings for family reunification.*¹²

We urge MPs to call on the government to reinstate legal aid for refugee family reunion. Legal aid was preserved for asylum cases because of what was at stake. But family members of refugees are very often in just as much danger as the person who has been granted asylum in the UK. The Government said in its response to the consultation on legal aid:

“Applications to join family members are treated as immigration cases, and are generally straightforward because they follow a grant of asylum. Respondents argued that these cases are akin to claims for asylum but if a person wishes to claim asylum it is open to that person to do so either as a dependant of a primary asylum claimant or to do so in his or her own right. Legal aid for any such asylum claim will be in scope.”

This is incorrect. The family members are outside of the UK and hence cannot claim asylum. It would be unlawful¹³ to assist them to do. To deny family reunion increases the risk that family members make hazardous and clandestine journeys to the UK.

Refugee family reunion cases frequently take a long time. Often family members must be traced. Communication may then be indirect and very slow. Even when they can be reached, they may be in a camp and unable under their own steam to travel to interviews at embassies or consular posts etc. Even submitting the application may be a matter of considerable difficulty. It is too often the case that not all family members survive long enough to be reunited in the UK. In the leading cases on the inadequacy of the exceptional funding regime for cases that fall outside the scope of legal aid, the courts examined a family reunion case.

Case of B, *Gudanaviciene et ors v SSHD* [2014] EWCA Civ 1622

Following her departure from Iran, B’s husband and their son, who was born on 2 June 1997, were arrested and interrogated. They were beaten and threatened and ordered on release to give the authorities information about the B. The Court of Appeal records

...In the ordinary course the applicants and sponsor would be expected to provide proof of marriage, proof of parentage, proof of a de facto pre-flight family relationship which was still subsisting, and proof of the sponsor’s UK refugee status. ... (a).. the family did not have access to all documentation required to satisfy the requirements of the rules, on account of their separation and dispersal, (b) the son was a 16 year old now living separately from his parents and it could be contended that he was living an independent life, so that assistance was required with preparing a witness statement to set out what had happened, and submissions were required on the point of continued dependency; and (c) evidence was needed on the psychological/psychiatric impact of separation on

¹¹ Paragraph 168.

¹² Paragraph 291 and conclusions and recommendations at 60.

¹³ Immigration Act 1971, s25A

members of the family. In addition, the family would need legal advice and assistance in order to make a concurrent application to expedite the family reunion applications, on the basis of factors including the best interests of the son.

B's son had no passport and there were no facilities available in Iran to enable a visa to allow entry to the UK to be obtained there. B feared that if he approached the Iranian authorities for a passport he would be arrested or ill-treated. The High Court records "The only way he could apply for the necessary documentation to enable him to achieve entry to the UK was to go unlawfully to Turkey and apply there".

This he did. He was staying in Turkey unlawfully, afraid to go out, very distressed and suffering from mental health problems. The husband was at that time hiding in Iran and it was not clear when he would be able to go to Turkey. They had no financial resources.

Yet an application for exceptional case funding was refused. The refusal was the subject of a review decision. It took six months for the application, prepared without funding, to be decided. B's son was refused. The High Court comments "Apart from the inexcusable delay in dealing with the application having regard to the circumstances in which the applicants were living in Turkey, the decision was extraordinary." The reasons for refusal were:

"You have not fully completed your Annex 4 of your application form, but according to your claimed father's application form you last saw your sponsor in February 2013. ... You have provided a birth certificate, however apart from this, you have not provided any evidence that you were or are in a relationship with your sponsor. You have provided no photographs of the two of you together or any evidence of any contact ... I acknowledge that you have provided your sponsor's Screening interview, but this does not mention you by name. If you had been in a relationship since you were born I would expect there to be overwhelming evidence of this. I am therefore not satisfied that you have been part of a family unit of your father at the time he left his country of his habitual residence in order to seek asylum."

The Court of Appeal concludes

... It is striking that even though the application on behalf of the son was prepared with legal advice and assistance, it was refused at first on the ground of failure to satisfy the entry clearance officer that the son was part of the family unit – ... The resulting appeal and request for reconsideration added to the overall procedural complexity of the exercise. In relation to all of this, B was wholly unable to represent herself or her other family members. It was not simply that she was unable to speak English but that "[s]he did not have the first clue", as it was graphically put by IKWRO. Without legal advice and assistance it was impossible for her to have any effective involvement in the decision-making process"

It found the refusal of exceptional case funding to be unlawful.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 makes provision for legal aid to be further extended, or further withdrawn, by secondary legislation. Thus the Lord

Chancellor could extend legal aid to refugee family reunion cases by making an order under s 9(2)(a) of the Act. This she should be encouraged to do.

Family reunion for British citizens and the settled with their relatives in need of international protection

At the same time as refugees in the UK seek family reunion, there are British citizens and settled persons who never were refugees, or who are no longer refugees, but who have close family members who are suffering or fleeing persecution, stuck in refugee camps.

The government has expressed interest in community sponsorship schemes. Schemes that build on existing family relationships are likely to be more stable and raise fewer safeguarding concerns. Persons with British or settled relatives have a ready-made support network in the UK and a real prospect of integrating and in their turn supporting the “most vulnerable” refugees, whom the government intends to resettle, to integrate. British citizens and persons with indefinite leave to remain in the UK are suffering because of their fear for the lives of family members and their knowledge of the distressing conditions in which they are living. Many, MPs’ staff are describing the constituents who come to their surgeries because they can find no way to bring their family members to safety.

The current rules on bringing spouses, partners and children to the UK¹⁴ require that the sponsor in the UK demonstrate that they have an income of at least £18,600 per year plus an extra £3,800 for one dependent child and extra £2,400 for each additional child. Only specified sources of income and evidence specified in the Immigration Rules can be taken into account. Thus the income of the UK sponsor can be taken into account, the spouse’s income overseas, income they would derive from offers of employment in the UK, and offers of third party support cannot. A person looking to sponsor a spouse, partner or child cannot look to other members of the family, friends or concerned community members to put up the relevant sums.

Refugee relatives of British citizens and settled persons, whether inside or outside the EU, should not be expected to meet the requirements of the immigration rules as to fees, minimum income thresholds, language and other requirements of the rules.

What of relatives other than spouses, partners and children? The current rules for adult dependant relatives, the category into which the child of a refugee who has turned 18 will fall, to come to the UK require that the applicant must, as a result of age, illness or disability, require long-term personal care, described in Home Office guidance¹⁵ as requiring help performing everyday tasks. The applicant must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living because it is not available and there is no person in that country who can reasonably provide it, or because it is not affordable. The Entry Clearance Officer must be satisfied that the applicant will be maintained adequately, accommodated and cared for in the UK by the sponsor without recourse to public funds.

¹⁴ See House of Commons Briefing Paper no. 06724, 16 July 2015 *The financial (minimum income) requirement for partner visas*. See also the June 2013 report of the All Party Parliamentary Group on Migration, available at <http://www.appgmigration.org.uk/family-inquiry>

¹⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263241/section-FM-6.0.pdf

The All Party Parliamentary Group on Migration recommended¹⁶:

Adult dependent relatives

7. Government should review the rules affecting adult dependents. Consideration should be given to amending the rules to ensure that:

- Where the UK sponsor can demonstrate their ability to provide full financial support to an adult dependent relative in the UK, or where the relative themselves has the means to financially support themselves, they are able to do so;*
- An adult dependent relative can be eligible for sponsorship where they are in need of support from the UK sponsor, but before they become fully physically dependent.*

The Secretary of State could make new rules now. She does not require an amendment to primary legislation to do so. She should be urged to do so.

¹⁶ http://www.appmigration.org.uk/sites/default/files/APPG_family_migration_inquiry_report-Jun-2013.pdf