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Family Reunification in South African Refugee Law: a Critical Appraisal

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Abstract: Family reunification and family unity are not provided for in international refugee law. During refugee flight, family members often separate due to the circumstances that force them to leave their country and seek asylum in another country. Spouses, as well as children, often find themselves in different countries. Refugees and asylum seekers need to reunite with their families to ensure their protection and well-being. Some refugees and asylum seekers experience challenges in marrying persons of their choice as the country of asylum may not facilitate the realisation of their family unity and family reunification. In this paper, it is argued that South African law and state practice are inadequate in facilitating family reunions, hence it is submitted that there is a need for South African parliament to amend its laws in order to provide for family reunification and unity in refugee issues.

Keywords: Family reunification; refugees; asylum seekers; marriages; refugee integration

1. Introduction

Refugees often experience the challenge of separation from their families when they leave their countries of origin in order to seek asylum in other countries (NcNatt, 2018, p. 9; Wilmsen, 2011, p. 45; Roham, 2014, pp. 367-368). Khan (2011, p. 77) argues that families may adopt strategies in leaving their countries that lead to the separation of their family members. For instance, they can decide to

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send some specific family members first or leave the country at different times. Separated refugee families hope to reunite one day once they have found an asylum state.

Family unit is recognised under international and regional human rights law (Universal Declaration of Human Rights, 1948, Article 16; Convention on the Rights of the Child, 1989, Article 5 and African Charter on the Rights and Welfare of the Child, 1990, Article 18). However, international and regional refugee laws do not provide for the protection of family unit for refugees (Convention Relating to the Status of Refugees, 1951 and OAU Convention Governing the Specific Aspects of Refugee Problem in Africa, 1969). South African refugee law does not provide adequate provision for family reunification for refugees. This paper investigates the issue of family reunification and family unity under South African refugee law and proposes recommendations to improve the current situation.

2. Family Reunification for Refugees in International and Regional Laws

2.1. Refugee Family Reunification in International Instruments

Family reunification refers to families that have been separated and wish to reunite (Khan, 2011: 8). This often occurs to refugees during the flight when they seek asylum in a particular state. Refugees experience challenges when they want to reunite with their family members in the asylum state. The Convention Relating to the Status of Refugees, 1951 does not recognise the right of refugees to reunite with members of their families in the state of refuge. Nonetheless, there is a limited provision for children to reunite with their parents (Convention on the Rights of the Child (CRC), 1989: Article 22).

The CRC provides appropriate protection and humanitarian assistance for a child who is a refugee or an asylum seeker (Article 22 (1)). For this purpose, States Parties to the CRC cooperate with the United Nations and its other competent inter-governmental organizations and non-government organizations to protect and assist refugee children. The form of cooperation includes tracing the parents or other family members of any refugee child in order to obtain the necessary information to facilitate the reunification with his or her family (CRC, 1989: Article 22 (2)).

Assistance to refugees includes a peremptory mandate to prevent the separation of children from their parents or guardians (EF Abram, 1995, p. 399). The United

Nations High Commissioner for Refugees (UNHCR) promotes the reunification of families with special significance as refugees cannot return to their countries of origin (Expert Roundtable, 2001: para 10). Furthermore, the requests for family re-unification should be informed by the best interest of the child (para 11). In the course of their activities, host states should seek to re-unite refugee families without unreasonable delays ((para 11). They should take a realistic approach when they require appropriate documents to prove relationships for the purpose of family reunification (para 12). For instance, refugees may be unable to obtain documents from their country of origin.

2.2. Refugee Family Reunification in African Regional Laws

In Africa, the main legal instrument dealing with refugee matters is the Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 (OAU Refugee Convention). This Convention does not provide for family reunification for refugees. Nevertheless, there are some African conventions that assist refugee children to reunite with their families (African Charter on the Rights and Welfare of the Child (ACRWC), 1990: Article 23).

The ACRWC creates an obligation on States Parties to cooperate with international organisations that assist refugees in order to protect refugee children. They have a duty to trace the parents, other close relatives or unaccompanied refugee children in order to acquire the necessary information to ensure the reunification of the families (ACRWC, 1990: Article 23 (2)).

3. Family Unity in International Law and Regional Laws

3.1. Family Unity in International Law

The right to family unity is recognized and accepted under international legal instruments (Anderfuhren-Wayne, 1996, p. 347). The Universal Declaration of Human Rights (UDHR) provides the right to marry and found a family (UDHR, 1948: Article 16 (1)). It also states that the family is the natural and fundamental group unit of society and creates an obligation for the state and society to protect it (UDHR, 1948: Article 16 (3)). There is a prohibition of arbitrary or unlawful interference with the family and everyone is protected against any unlawful attack or interference in his or her family activities (International Covenant on Civil and Political Rights (ICCPR), 1966: Article 17). States Parties to the ICCPR have a

duty to take appropriate steps to safeguard equality of rights and responsibilities between spouses during the duration of marriage and at its dissolution. They have to ensure the necessary protection of the children at the dissolution of the marriage (ICCPR, 1966: Article 23 (4)).

Article 10 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that States Parties shall recognise the widest possible protection and assistance to the family especially for its establishment. The family has a duty to care and educate its dependent children (ICESCR, 1966: Article 10 (1)). Mothers should be specially protected for a reasonable period before and after childbirth. There is a provision for working mothers to acquire paid maternity leave or leave with adequate social security benefits (ICESCR, 1966: Article 10 (2)). States Parties to the ICESCR have a duty to take special measures to protect and assist all children without any discrimination of any kind. The employment of children in working conditions that are harmful to their health and wellbeing is prohibited and punishable by law (ECESCR, 1966: Article 10 (3)). States should set age limits at which children are prohibited from working and any employer that disobeys such provision must be punished by law (ICESCR, 1966: Article 10 (3)). The provisions of ICESCR ensure the protection of the family, specifically mothers and children.

The CRC creates an obligation for States Parties to prohibit the separation of children from their parents against their will, unless the competent authorities determine that such separation is necessary for the best interest of the child (CRC, 1989: Article 9 (1)). This may often occur in a case that involves an abuse or neglect of the child by the parents. In addition, it may also arise in a situation where parents are living in separate areas and there is a need to decide the place of residence for the child (CRC, 1989: Article 9 (1)). There is a duty on States Parties to "respect the right of the child who is separated from one or both parents to maintain personal relationships and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests" (CRC, 1989: Article 9 (2)).

When the separation of a child occurs as a result of an action created by a state party, including exile, it has a duty to provide the parents, the child or another relevant family member with the crucial information regarding the location of the absent family members (CRC, 1989: Article 9 (4)). There is an exception to this rule if the provision of such information will be detrimental to the well-being of the child (CRC, 1989: Article 9 (4). Furthermore, States Parties are required to provide

protection to the persons concerned to ensure that they are not adversely affected. (CRC, 1989: Article 9 (4)).

In the case of a separated child, States Parties to the CRC have a duty to deal with the applications for family reunification in a positive, humane and expeditious manner (CRC, 1989: Article 10 (1)). Such applications can be done by the child in person or his or her parents. Furthermore, the States Parties shall ensure that the applicants, as well as their family members, are not adversely affected by such applications (CRC, 1989: Article 10 (1)).

A child has the right to maintain regular personal relationships and direct contacts with both parents if they reside in different states. (CRC, 1989: Article 10 (2)). States Parties have a responsibility to respect the right of the child and his or her parents to leave any country and to enter their own country (Article 10 (2)). However, the right to leave any country can be restricted by law to protect national security, public order, public health and morals (CRC, 1989: Article 10 (2); Danica & Marija, 2020, p. 553). As there is no automatic right to enter any country, refugees and asylum seekers must comply with immigration and other laws of the specific country. Despite the COVID-19 pandemic, there are limited initiatives for the relocation of unaccompanied refugee minors from Greece to some European Union countries (Guadagno, 2020, p. 9; MacGregor, 2020; Willis, 2020). This humanitarian gesture will have a significant impact on the lives of children concerned.

Article 74 of Protocol Additional to the Geneva Convention of 1949 provides for the reunion of dispersed families. The High Contracting Parties and Parties involved in the conflicts have a duty to facilitate, in a reasonable manner, the reunification of families displaced as a result of armed conflicts. They particularly encourage the appropriate humanitarian organizations to work in conformity with the provisions of the conventions and of this Protocol to ensure the reunion of displaced families. They have to respect security regulations in specific areas (Article 74 of Additional Protocol 1 of 1977).

3.2. Family Unity in Regional Laws

3.2.1. African Provisions for Family Unity

The defunct Organization of African Unity (OAU) created a legal framework to ensure the protection of the family. For instance, Article 18 (1) of the African Charter on Human and Peoples' Rights (ACHPR) creates a duty for member states to protect the family and safeguard its physical health and morals. Member states are required to eliminate all kinds of discrimination against women and strive to protect the rights of women and the child as stipulated in the relevant conventions (ACHPR, 1981: Article 18 (3)). Furthermore, the aged and disabled persons have the right to special measures of protection in order to keep their physical and moral needs. (ACHPR, 1981: Article 18 (4)). These rights apply to everybody without any distinction with regard to his or her status.

There are special protection and assistance measures for any child who is temporarily or permanently deprived of his or her family environment for any reason (African Charter on the Rights and Welfare of the Child (ACRWC), 1990: Article 25 (1)). States Parties have a duty to provide alternative family care for every child who is an orphan, or who is permanently or temporarily deprived of his or her family environment. This provision also applies to a child who, according to his or her best interests, cannot be brought up or allowed to remain in the family environment. The alternative family care can also include foster placement or placement in suitable institutions that care for children (ACRWC, 1990: Article 25 (2) (a)).

States Parties have a responsibility to take all necessary measures to trace and reunite children with their parents or relatives. This arises where armed conflicts or natural disasters have orchestrated internal and external displacements that caused the separation of families (ACRWC, 1990: Article 25 (2) (b)). In deciding the alternative family care and the best interest of the child, one should consider the continuity of the child's upbringing and his or her ethnicity, religion and language (ACRWC, 1990: Article 23 (4)). There is a peremptory provision for states to protect and support the establishment and development of the family. Furthermore, States Parties have a duty to take appropriate measures to ensure equality of rights and responsibilities between spouses and the protection of the children. The maintenance of every child is always necessary regardless of the marital status of his or her parents (ACRWC, 1990: Article 18 (2) and (3)).

3.2.2 European provisions for family unity

European Union has legal framework for the protection of the family. Article 8 of the European Convention on Human Rights provides for the right of everyone to respect for his or her private and family life. The state cannot interfere with this right unless it is in the interest of national security, public safety or economic wellbeing of the country. Such exception also exists to prevent disorder or crime, to protect health or morals, or protect the rights and freedoms of others (European Convention on Human Rights, 1950: Article 8 (2); Lambert, 1999: 427).

The European Social Charter (1996) provides for the right of the family to social, legal and economic protection (Article 16). There are provisions for family housing, social and family benefits to ensure the full development of the family (European Social Charter, 1996: Article 16). In addition, children and young persons are protected to ensure that they are not engaged in employment that is harmful to their health and wellbeing (European Social Charter, 1996: Article 7). The employed women have right to maternity leave to perform the childbearing and nurturing at the early stage of childbirth and they also have access to enjoy the adequate social security benefits (European Social Charter, 1996: Article 8). Furthermore, workers with family responsibilities have the right to equality of opportunities between men and women. States Parties have a duty to develop the child daycare services and other childcare arrangements to promote the upbringing of children (European Social Charter, 1996: Article 27). These provisions aim to promote the development of children and engender family unity, including refugees.

3.2.3 Inter-American provision for family unity

Article 17 (1) of the American Convention on Human Rights (ACHR) provides for the protection of the family by society and the state. There is a right to marry and to raise a family for men and women of marriageable age (ACHR, 1969: Article 17 (2)). States Parties have a duty to take appropriate steps to promote the rights and responsibilities of spouses during marriage and at its dissolution. The best interests of the children are paramount in considering their appropriate protection at the dissolution of the marriage (ACHR, 1969: Article 17 (4)). Every child has the right to be protected by his or her family, society and the state (ACHR, 1969: Article 19). Having traversed regional treaty provisions, the next step intends to examine the South African law and state practice for refugee families.

4. Family Reunification for Refugees in South Africa

The preamble of the Refugees Act 130 of 1998 (Refugees Act) domesticates the UN Refugee Convention, the 1967 Protocol to the Refugee Convention, the 1969 OAU Refugee Convention and other international instruments into South African law in order to receive and accommodate refugees on its territory. The interpretation of the Refugees Act must be consistent with any relevant international convention to which South Africa is a party (section 1A of Refugees Act). The UN Refugee Convention does not recognise family reunification for refugees or asylum seekers. The same applies to the 1969 OAU Refugee Convention. However, South Africa recognises civil marriages (Civil Marriages Act 25 of 1961), customary marriages (Recognition of Customary Marriages Act 120 of 1998), civil partnership (Civil Union Act 17 of 2006), and marriages concluded in terms of the laws of a foreign country (s 1 of Refugees Act). This means that refugees and asylum seekers who are legally married in accordance with these laws are recognised as family and are entitled to benefit from the Refugees Act.

South Africa recognises the existence of an extended family in terms of its asylum law. Section 3 (c) of the Refugees Act provides that a spouse or dependant of a refugee is also a refugee. A refugee is a person who has a well-founded fear of persecution by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular group, or due to external aggression, occupation, foreign domination or other events seriously disturbing public order is compelled to leave his or her country and seek asylum in another country (section 3 (a) and (b) of the Refugees Act). The definition of the dependant for a refugee or an asylum seeker includes any unmarried minor dependant child, a spouse or any destitute, aged or infirm parent of such a refugee or asylum seeker who is dependent on him or her. Furthermore, an asylum seeker must include his or her dependants in the asylum application (section 1 of Refugees Act). This requirement is detriment to the dependants who came to South Africa to join the asylum seekers or refugees when they were not included in the application for asylum. This can often occur for a person who did not know that he had a child with another woman and did not include him or her in his application for asylum.

In *Mubake and Others v Minister of Home Affairs and Others* 2016 2 SA 220 (GP), the applicants were minor children whose parents were either killed in the conflicts in the Democratic Republic of Congo (DRC) or abandoned them. They lived together with adults or close relatives who were asylum seekers or refugees in

South Africa (para 4). The Department of Home Affairs declined to recognise them as asylum seekers or refugees as they were not biological children of their adult caregivers. It argued that they had first to apply for guardianship with the assistance of a social worker (para 6). The applicants argued that the definition of the term "dependant" in the Refugees Act should be inclusive so as to include separated children who accompanied their alleged caregivers in South Africa (para 7). Makgoka J investigated the international and regional laws on refugee children and found that in some situations, separated children could be accompanied by close relatives (para 19 and 24). The court extended the definition of the term 'dependant' in section 1 of the Refugees Act and held that separated children were dependants of their primary caregivers. It also ordered the Department of Home Affairs to issue a departmental directive and inform all refugee reception offices to issue the relevant permits to children who were dependants of their caregivers (par 28). This extension promotes the best interests of refugee children as more often than not they are separated with their parents during the conflicts and live with adult caregivers.

4.1. Marriages for refugees and asylum seekers in South Africa

Ideally any refugee or asylum seeker in South Africa can marry any person of their choice regardless of the nationality of the prospective spouse. The right to dignity (Constitution of South Africa, 1996, section 10) and the right to freedom and security of the person (Constitution of South Africa, 1996, section 12) are implicated when someone gets married. Specifically, a spouse in a marriage relationship has the right to his or her "bodily and psychological integrity, which includes the right (a) to make decisions concerning reproduction and (b) security and control over their body" (Constitution of South Africa, 1996, section 12 (2) (a) and (b)). In *Minister of Home Affairs and Others v Watchenuka and Another* 2004 4 SA 326 (SCA), para 25, the court held that human dignity has no nationality and is inherent in all people regardless of their citizenship simply because they are human. Furthermore, the Constitutional Court most recently observed that "the right to family life is not a coincidental consequence of human dignity, but rather a core ingredient of it" (*Nondutu and Others v Minister of Home Affairs and Others* 2019 5 SA 325 (CC), para 1).

The importance of marriage has been extensively discussed in different court decisions. In *Satchwell v President of the Republic of South Africa and Others* 2002 6 SA 1 (CC), para 22, Madala J opined that in terms of South African

common law, marriage created a physical, moral and spiritual community of law which imposed reciprocal duties of cohabitation and support. In addition, the formation of such relationships was a matter of profound importance to the parties, and to their families and was of great social value and significance. In *Fourie and Another v Minister of Home Affairs and Others* 2005 3 SA 429 (SCA), para 14, Cameron JA held that marriage and the capacity to get married remained central to the self-definition of human beings. However, he indicated that it was not everyone who choose to get married. The capacity to choose to get married enhanced the liberty, the autonomy and the dignity of a couple committed for life to each other. It offered them the choice to enter an honourable and profound estate that was adorned with legal and social recognition, rewarded with many privileges and secured with automatic obligations (para 14, *Harksen v Lane NO and Others* 1998 1 SA 300 (CC), para 93 and *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC), para 30). He indicated further that marriage offered "a social and legal shrine for love and commitment for a future shared with another human being to the exclusion of all others" (para 14).

Asylum seekers and refugees in South Africa experience a number of challenges when they want to get married. In *Mzalisi NO and Others v Ochugwu and Another* 2020 3 SA 83 (SCA), the first respondent was an asylum seeker from Nigeria who wanted to be recognised as a refugee in South Africa. The Refugee Status Determination Officer rejected his application for asylum and his appeal was pending at the time of judgment. The asylum seeker permit allowed the first respondent to live, work and study in South Africa (para 1). The respondent married the second respondent in 2015 under customary law and they had a child in 2016. In the same year, the respondents went to the Department of Home Affairs in Port Elizabeth and sought to register their customary law marriage and conclude a civil marriage. In order to be successful, they were requested to prove their customary law marriage and the asylum seeker permit had to be verified. They duly comply with these requirements (para 3).

In 2017 the respondents went to the Department of Home Affairs again, but they could neither register their customary law marriage nor marry as the law had changed and asylum seekers were no longer allowed to get married (para 4). The Deputy Director-General for Civic Services in the Department of Home Affairs had issued a circular on 12 September 2016 (Circular No. 4 of 2016: Consolidated

Procedures for Solemnisation and Registration of Marriages (the Circular)). Paragraph 2.1 (b) (iii) (dd) of the Circular introduced an impediment for asylum seekers and refugees to conclude a valid marriage contract (Paras 5 and 22).

The respondents challenged the validity of Paragraph 2.1 (b) (iii) (dd) of the Circular in the High Court on the ground that it proscribed the rights of all asylum seekers to get married; its contradiction and vagueness in the wording, the equality provisions of the Constitution, and its conflict with international and regional legal obligations for South Africa towards refugees and asylum seekers (para 7). The first appellant questioned the existence of customary law marriage between the respondents and argued that the only purpose for the respondents to get married was to enable the first respondent to change his status and secure a spousal visa, ultimately permanent resistance and citizenship. He indicated that the entire procedure was orchestrated to undermine the asylum appeal process for the first respondent that was pending before the Refugee Appeal Board (para 8). The conduct of the first appellant and the Department of Home Affairs is shocking as there is no link between marriage and citizenship and ignores the duties of the married couples as well as the best interest of the child.

Petse DP held that the prohibition of asylum seekers and refugees from getting married violated their constitutional rights of personal liberty and dignity (para 23). Paragraph 2.1 (b) (iii) (dd) of the Circular was declared invalid, unlawful and set aside (para 25). The implication is that asylum seekers and refugees are now allowed to marry. In the course of its judgment, the Supreme Court of Appeals set aside the structural interdict ordered by the High Court (para 15). The structural interdict is generally designed to assist the courts "to retain judicial supervision after a remedy has been granted to ensure satisfactory compliance with their orders" (para 13). Given the culture of the Department of Home Affairs to disrespect court orders (*Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 6 SA 421 (SCA); and *Minister of Home Affairs and Others v Somali Association of South Africa and Another* 2015 3 SA 545 (SCA), the SCA should have retained the structural interdict to ensure that its orders were complied with so as to safeguard the rights to personal liberty and dignity of the respondents.

The Refugees Act and other domestic laws in South Africa do not provide adequate birth registration of children born out of wedlock. If parents are legally married, they can easily register the birth of their children. However, if the child is born out of wedlock and the father is a South African or has a foreign citizenship, there are

some challenges in the registration of the child in order to acquire the birth certificate of the new born child. This is because children obtain citizenship by birth in South Africa. Section 10 of the Births and Deaths Registration Act 51 of 1992 deals with the birth of a child born out of wedlock. It envisages three situations: (a) giving notice under the surname of the mother; (b) giving notice under the surname of a person who acknowledges himself in writing to be the father but at the joint request of him and the mother; and (c) giving notice under the surname of the mother if the alleged father, with the consent of the mother, acknowledges in writing that he is the father (sections 10 (1) (a), (b) and 10 (2)). In all these three scenarios, the mother must be involved either through her presence or by giving consent.

In *Centre for Child Law v Director – General: Department of Home Affairs and Others* 2020 8 BCLR 1015 (ECG), the court declared that section 10 of the Births and Deaths Registration Act was inconsistent with the Constitution and invalid to the extent that it did not allow an unmarried father to register the birth of his child in the absence of the mother (p. 1017). This case has been sent to the Constitutional Court for the confirmation of its constitutional invalidity (s 172 of the Constitution). This case is relevant to female refugees and asylum seekers who give birth to children out of wedlock and are absent before the birth registration of the children. This may occur, for instance, when the mother dies while giving birth or when she dies after the birth of the child, but before the birth registration materialises. The father will be able to register the birth of the child. The best interests of the child are safeguarded as the child is registered and acquires the citizenship by birth with all its benefits.

4.2. Family Reunification for Refugees inside South Africa

There is no problem for dependants who come to South Africa with the main applicant for asylum as the Refugees Act states that a dependant of a refugee is also a refugee (section 1 of the Refugees Act). Both individuals receive the same status depending on the outcome of the main applicant. However, dependants of refugees or asylum seekers who come to South Africa to join their families may experience problems as there is no specific family joining system in place (Khan, 2011, p. 85). The applicants have to prove their relationship with the dependants (Khan, 2011, p. 85). Most refugees lack documentary evidence to prove their relationship with the dependants and experience challenges in these issues.

Refugee Regulations (Regulations, 2018: Regulation 11) provide for the termination of dependency of children of refugees and asylum seekers. Upon reaching the age of majority, a refugee child will have to apply to remain in South Africa for the period of his or her refugee status and must apply for asylum. Upon termination of dependency, asylum seekers will have to apply for their own asylum (Refugee Regulations, 2018: Regulation 11). These provisions do not promote asylum rights and have a tendency to separate and divide family members. It is submitted that refugee children should continue to maintain their refugee status when they reach majority.

4.3. Family Reunification for Refugees outside South Africa

Family members of a refugee can be in their own countries of origin or in another country. Parents may leave their children behind with relatives in the hope that they will join them once they arrive in the asylum country (Khan, 2011: 86). This can only occur if the government of the asylum country or the UNHCR have laws and policies to facilitate family reunification. In South Africa, the Refugees Act and other domestic laws do not provide platform for family members of refugees to join them. This has potential for individuals to use illegal means in order to reach South Africa.

The onerous task of seeking asylum has potential of separating family members. Most refugees in Africa leave their countries of origin to escape persecution perpetrated in conflicts or wars. Under these circumstances, family members may find themselves in different countries. If the host countries allow family reunification, they can use the legal means to meet again. In South Africa, there is no provision for family members living in other countries to join their refugee relatives. It is submitted that South Africa should promote family reunification by making provisions to enable refugees to bring their family members. The UNHCR should also promote family reunification in South Africa and other countries. Furthermore, refugees should be allowed to leave South Africa and join their families in other countries.

4.4. Unaccompanied Refugee Children

Refugee Regulations (Regulations, 2018; Regulations 10 (1)) provide for an unaccompanied child to be assisted by a social worker and a person appointed by

the children's court may assist him or her to apply for asylum. An adoptive parent must prove his or her relationship with the child to the satisfaction of the Director – General (Refugee Regulations, 2018: Regulations 10 (7)). Refugee children cannot be returned to a country where they are likely to face persecution. They have the right of access to basic education services, health care services and social security (Boniface & Rosenberg, 2019, p. 55). The Refugees Act and asylum policies are silent as to whether refugee children should be placed in foster families. It is submitted that unaccompanied refugee children should be placed in foster families wherever it is possible and efforts must be made to reunite these children with their family whenever it is possible.

5. Concluding Remarks

Refugee Conventions and regional legal instruments do not provide for family reunification for refugees. However, other international conventions contain the right to family reunification. These instruments and conventions include the UDHR, Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child, and African Charter on Human and Peoples' Rights. They provide the legal framework for separated individuals to reunite with their families.

South African refugee law enshrines the family unity as dependants of a refugee are also refugees. In practice, this provision only applies for family members who come to South Africa with the principal applicant for asylum. Family members who come to South Africa after the main applicant has been recognised as a refugee face challenges to reunite with him or her. There is no provision in South African law allowing a family member of a refugee to join him or her. This situation has a potential to undermine family reunification and does not promote integration of refugees in South Africa. As a result, family members of refugees have no other alternatives but to use illegal means to come to South Africa.

It is submitted that South Africa has to improve its refugee law and allow family reunification for refugees with their family members who arrive in the country after the main applicant has received his or her refugee status. A humanitarian visa should be introduced to facilitate family reunification with dependants of a refugee who are outside South Africa to travel in order to join their relatives. These recommendations will promote family reunification or unity and stimulates the integration of refugees in South Africa.

References

Literature

Abram, E. F. (1995). The Child's Right to Family Unity in International Immigration Law. 17 (4) *Law and Policy*, pp. 397 – 440.

Anderfuhren-Wayne, C.S. (1996). Family Unit in Immigration and Refugee Matters: United States and European Approaches. 8 (3) *International Journal of Refugee Law*, pp. 347 – 382.

Boniface, A. & Rosenberg, W. (2010). The Challenges in Relation to Undocumented Abandoned Children in South Africa. 1 *TSAR*, pp. 41 – 62.

Danica, S. & Marija, A. (2020). Serbia in the Time of COVID-19: Between "Corona Diplomacy", Tough Measures and Migration Management. 61 (4-5) *Eurasian Geography and Economics*, pp. 546 – 558.

Expert Roundtable (2011). Global Consultation on international protections. https://www.unhcr.org/protection/globalconsult/3c3d556b4/summary-conclusions-family-unity.

Guadagno, L. (2020). Migrants and the COVID-19 Pandemic: An Initial Analysis. 60 *Migration Research Series*, pp. 1 – 25.

Khan, F. (2011). Reunification of Refugee Family in South Africa: a Legal Right? 28 (2). *Refuge*, pp. 77 – 91.

Lambert, H. (1999). The European Court of Human Rights and the Rights of Refugees and Other Persons in Need of Protection to Family Reunion. 11 (3). *International Journal of Refugee Law*, pp. 427 – 450.

MacGregor, M. (2020). Luxembourg to take in first children from Greek migrant camps. https://www.infomigrants.net/en/post/23922/luxembourg-to-take-in-first-children-from-greek-migrant-camps.

NCNat, Z.; Boothby, N.; Al-Shannaq, H.; Chandler, H.; Freels, P.; Mohmoud, A.; Majdalani, N. & Zebi, L. (2018). *Impact of Separation on Refugee Families Syrian Refugees in Jordaan*, pp. 1 – 25.

Rohan M. (2014). Refugee Family Reunification Rights: a Basis in the European Court of Human Rights' Family Reunification Jurisprudence. 15 (1) *Chicago Journal of International Law*, pp. 347 – 375.

UNHCR. (2001). *Summary conclusion on family unit*, pp. 1–3. https://www.unhcr.org/protection/globalconsult/3c3d556b4/summary-conclusions-family-unity.html.

Wallis E. (2020). *Who will be on the list of 1,600 refugees relocated from Greece?* https://www.infomigrants.net/en/post/23468/who-will-be-on-the-list-of-1-600-refugees-relocated-from-greece.

Wilmsen B. (2011). Family Separation: the Policies, Procedures, and Consequences for Refugee Background Families. 30 (1) *Refugee Survey Quarterly*, pp. 44 – 64.

Legislation

Births and Deaths Registration Act 51 of 1992.

Civil Marriages Act 25 of 1961.

Civil Union Act 17 of 2006.

Recognition of Customary Marriages Act 120 of 1998.

Refugee Regulations 2018 (27 December 2019).

Refugees Act 130 of 1998.

Case Law

Centre for Child Law v Director – General: Department of Home Affairs and Others 2020 8 BCLR 1015 (ECG).

Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 3 SA 936 (CC).

Fourie and Another v Minister of Home Affairs and Others 2005 3 SA 429 (SCA).

Harksen v Lane NO and Others 1998 1 SA 300 (CC).

Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others 2013 6 SA 421 (SCA).

Minister of Home Affairs and Others v Somali Association of South Africa and Another 2015 3 SA 545 (SCA).

Minister of Home Affairs and Others v Watchenuka and Another 2004 4 SA 326 (SCA).

Mubake and Others v Minister of Home Affairs and Others 2016 2 SA 220 (GP).

Mzalisi NO and Others v Ochogwu and Another 2020 3 SA 83 (SCA).

Nandutu and Others v Minister of Home Affairs and Others 2019 5 SA 325 (CC).

Satchwell v President of the Republic of South Africa and Others 2002 6 SA 1 (CC).

International Instruments

African Charter on Human and Peoples' Rights, 1981.

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

American Convention on Human Rights, 1969.

Protocol Additional to the Geneva Convention, 1949.

Convention on the Rights of the Child, 1989.

Convention Relating to the Status of Refugees, 1951.

European Convention on Human Rights, 1950.

European Social Charter, Revised, 1996.

International Covenant on Civil and Political Rights, 1966.

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

OAU Convention Governing the Specific Aspects of Refugees in Africa, 1969.

Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), of 8 June 1977.

Universal Declaration of Human Rights, 1948.