

## Summary of

# “Family Reunification for Refugees in Switzerland: Legal Framework and Strategic Considerations”

by Stephanie Motz

This paper highlights the legal obstacles for family reunification which refugees and persons with temporary admission encounter in Switzerland and identifies areas where family reunification law and practice in Switzerland may not be compatible with international human rights law. The author suggests to address these problems through strategic international litigation and provides asylum lawyers with advice on which case profiles might be successfully appealed at international human rights bodies.

## **1) National framework for family reunification for refugees and F-permit holders**

After a short introduction, the legal criteria of family reunification for recognised refugees (B permit), temporarily admitted refugees (F permit) and temporarily admitted persons (F-permit) in Switzerland are presented. Swiss law only allows nuclear family members to be reunited with relatives in Switzerland (Art. 51 (1) AsyIA). Family reunification to unaccompanied children in Switzerland is excluded. The time limit for family reunification applications is five years (Art. 47 (1) FNA; Art. 74 (3) ARE). The application for children above the age of 12 years must be lodged within a year (Art.47 (1) FNA; Art. 74 (3) ARE). Applications made outside the time limit can only be accepted for significant family reasons (Art. 47 (4) FNA; Art. 74 (4) ARE). In addition, family ties with the family members and the existence of a family life need to be made credible (Art. 7 AsyIA).

The criteria then differ depending on the type of permit and whether the family has been established pre- or post-flight and were separated during flight. Nuclear family members of a recognized refugee, who was granted asylum and a B-permit, have a right to family reunification if the family was established pre-flight and separated during flight within the territory of the country of origin (Art.51 (1) and (4) AsyIA).<sup>1</sup> In contrast, the grant of family reunification is at the discretion of the authorities and subject to further requirements for the following groups of persons:

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<sup>1</sup> Editorial note: According to case law, a separation during flight can only be assumed if the family members have separated solely due to the flight circumstances and thus involuntarily. Contrary to its previous jurisprudence, the Federal Administrative Court ruled in judgment E-2178/2017 of 8 September 2017 that a separation in a transit country is not voluntary under certain circumstances.

- Families of refugees with a B-permit separated during flight but outside the country of origin<sup>2</sup> or where the family was formed after the refugee left his country of origin (Post-flight families);
- Recognized refugees who have not been granted asylum but a temporary admission and an F-permit (Art. 53 (1) AsylA and Art. 54 AsylA) and other persons in need of international protection who were not granted refugee status, but a provisional admission (F-permit holders), can only apply for family reunification three years after the grant of the permit (Art. 85 (7) (a-c) FNA).

Among other requirements, both groups need to demonstrate that they live independently from social aid. This criterion is difficult to fulfil for many persons - given that even among recognised refugees employment rate is low during the first three years (only approx. 20 percent are employed after three years).

## **2) International law**

The 1951 Convention Relating to the Status of Refugees does not itself guarantee refugees a right to family reunification. However, the Final Act of the UN Conference of Plenipotentiaries recommends national governments to take the necessary measures for the protection of the refugee's family. In addition, the Executive Committee of the UNHCR (ExCom) has adopted several conclusions to ensure or facilitate the reunification of separated refugee families.

In addition, the right to family life is guaranteed in Article 16 (3) of the Universal Declaration of Human Rights and Article 23 (1) of International Covenant on Civil and Political Rights. The Convention on the Elimination of All Forms of Discrimination Against Women prohibits any discrimination against women who should be accorded the same rights as men to have their spouses, partners and children join them (Art. 2 and 15 (4) CEDAW). The Convention on the Rights of the Child (CRC) takes the best interests of the child as a primary consideration in all actions concerning children and contains several provisions and obligations towards the States for the purpose of family reunification.

## **3) Council of Europe**

Article 8 of the European Convention on Human Rights (ECHR) Convention provides for the right to respect for private and family life. In addition, the Committee of Ministers of the Council of Europe and the Parliamentary Assembly of the Council of Europe (PACE) adopted several recommendations calling on Member States to promote family reunification and deal with the applicants in a positive, humane and expeditious manner.

The jurisprudence of the European Court of Human Rights (hereafter: ECtHR/Court) on the interpretation of Article 8 ECHR with regard to family reunification has been evolving over the past thirty years mainly concerning family reunification applications made by migrants but recently also concerning applications by refugees.

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<sup>2</sup> See Footnote 1.

The main criteria which can be distilled from the ECtHR's case law on family reunification are the following:

(i) Voluntary or involuntary family separation

The Court examines whether the concerned individual made a conscious decision to leave family members behind and settle in the destination country. For humanitarian permit holders, family separation could generally not be considered voluntary. A flight due to a fear of persecution (recognised refugees) does also not constitute a voluntary separation. However, the refusal of an asylum application is not necessarily decisive for the question of whether separation was voluntary.

(ii) Insurmountable obstacles or major impediments to the right to family life in the country of origin

The second core factor regarding family reunification is whether there are "insurmountable obstacles" or "major obstacles" to enjoying family life in the country of origin or elsewhere. According to the Court, the grant of refugee status or a permit based on humanitarian grounds and the existence of further children in the destination country are decisive factors in the context of insurmountable obstacles. This means that there are insurmountable obstacles to the right to family life in the country of origin due to a fear of persecution for recognised refugees and F-permit holders. Where children are already living in the destination country a lower threshold may apply and the Court asks whether family reunification in the destination state "would be the most adequate means for the applicants to develop family life together".

(iii) The Best Interests of the Child

Furthermore, national authorities must give precedence to the best interests of the child when assessing the proportionality of the interference with family life. The age of the child and the delay in making the application are factors influencing the assessment as well as custody rights and the dependence on applying family members or other family members.

Further criteria under Article 8 ECHR:

In family reunification proceedings, family ties and the existence of a family between the applicant and his family usually need to be proven. The Court recognised, however, the difficulty for refugees to access to documents from their country of origin and therefore applies a lower standard of proof to refugee family reunification applications. The family reunification procedure must provide for sufficient "flexibility, promptness and effectiveness". The quality of the family reunification procedure particularly depends on its promptness - three-and-a-half years and above were, for example, found to be excessive by the Court. The Court has repeatedly emphasised that it will only intervene where the domestic courts have failed in their assessment of the relevant aspects of the case; in particular where the best interests of the child are concerned, the Court sets high standards for the domestic assessment.

#### **4) Potential Conflicts between Swiss Family Reunification Practice and Article 8 ECHR**

In the following three groups of case scenarios the Swiss family reunification law respectively practice may violate Article 8 ECHR and/or other provisions of international human rights law. An appeal to the ECtHR or other human rights treaty bodies might, therefore have chances of success upon exhaustion of domestic remedies:

The **first group** includes:

- 1) F-permit refugees seeking family reunification prior to expiry of the three-year ban for family reunification;
- 2) so-called “working poor” refugees with F-permit.

First of all, the three-year ban for F-permit holders always causes a delay of more than three and a half years. This could be considered excessive by the Court and in violation of Member States’ positive obligation to provide prompt procedures. In addition, the differential treatment of two groups of refugees (B-permit refugees and F-permit refugees) can amount to a violation of the right of non-discrimination on the basis of “other status” (Art. 14 in conjunction with Art. 8 ECHR).

The assessment of the main criteria established by the ECtHR’s case law on family reunification for the above-mentioned case scenarios is the following:

- (i) **Voluntary or involuntary family separation:** Separation of refugee families through flight is considered by the Court to be involuntary;
- (ii) **Insurmountable obstacles or major impediments to the right to family life in the country of origin:** It is accepted that that refugee generally face insurmountable obstacles to enjoy family life elsewhere and family reunification is here often “the only means by which family life can be resumed”;
- (iii) **The Best Interests of the Child:** If the family reunification involves children, the case has more chances to be successful before the ECtHR – arguments relating to the best interests of the child would speak in favour of family reunification obligations under Art. 8 ECHR. The Court stressed that prompt reunification with children is important.

As the case scenarios fulfil the main criteria of the Court to confirm a positive obligation to grant family reunification, there are strong grounds to believe that the three-year ban on family reunification for F-permit refugees may constitute a violation of Art. 8 ECHR. For the first case scenario, a case is likely to succeed for an F-permit holder who applies for family reunification as quickly as possible and is likely to meet the financial requirements upon expiry of the three years, so that the negative impact of the ban is evident. For the second case scenario, a case is likely to succeed for an F-permit refugee with children who seeks reunification with pre-flight spouse, due to the far more restrictive law for post-flight family reunification, where the best interests of the child would have an important impact if the person seeking entry is a parent. In addition, for both scenarios, it may make a difference whether the applicant has either made efforts to work or is unable to meet the financial requirement because of a medical condition or disability. The quality of the reasoning of the federal administrative court (FAC) is also important and particularly the question of whether refugee rights and children’s rights were adequately considered by the FAC.

The **second group** involves:

- 1) B-permit refugees relying on social assistance and seeking family reunification with post-flight spouse (and/or post-flight child(ren));
- 2) Female refugees with child(ren) reliant on social assistance and seeking family reunification with post-flight family (spouse and/or child(ren));
- 3) Disabled/ ill refugees reliant on social assistance seeking family reunification with post-flight spouse and/or child(ren);
- 4) Late Family Reunification application cases for children over 12 years of the age.

For these scenarios, the differential treatment of post- and pre-flight family members constitute unjustifiable discrimination on the basis of their other status as a refugee (Art. 14 ECHR in conjunction with Art. 8 ECHR). Secondly, the Court considers it reasonable to apply a financial requirement only for three years and if the applicant unsuccessfully tried to find work. Swiss law provisions on family reunification with a post-flight family are far more restrictive.

The assessment of the main criteria established by the ECtHR's case law on family reunification for the above-mentioned case scenarios is the following:

- (i) **Voluntary or involuntary family separation:** States are not required to respect the post flight spousal choice which is voluntary. Separation during flight in a transit country, might be, though, considered an involuntary separation in the context of Art. 8 ECHR;
- (ii) **Insurmountable obstacles or major impediments to the right to family life in the country of origin:** It is accepted that that refugees generally face insurmountable obstacles to the enjoyment of family life elsewhere and that family reunification is "the only means by which family life can be resumed";
- (iii) **The Best Interests of the Child:** If children are involved, the case is more likely to succeed - arguments relating to the best interests of the child would speak in favour of family reunification obligations under Art. 8 ECHR. Prompt reunification with children should be provided in the best interests of the child.

These case scenarios also fulfil the main criteria established by the Court for a violation Article 8 ECHR so that there are chances for successful claims before the ECtHR.

The first case scenario, is likely to succeed if the applicant either unsuccessfully tried to obtain employment or formed family life during flight and was separated from his spouse during flight in a transit country. In addition, it would strengthen the argument under Art. 8 ECHR if post-flight children are also involved.

For the second case scenario, a case is likely to succeed if the post-flight spouse would likely to find work in Switzerland in order to alleviate the burden on social funds. In addition, if statistical data can demonstrate prejudicial situation for women regarding family reunification this could amount to *de facto* discrimination against women, so that this situation can be brought before the CEDAW Committee. One example of this is, if the authorities actively discourage refugee women with small children from working, because the costs for publicly funded childcare would be higher than the cost of social assistance.

For the third case scenario, a case is likely to succeed if the disability or illness is a special circumstance due to which the applicant requires the support of his family (in particular if children involved) to attain a minimum psychological and social equilibrium. In addition, the UN Convention on the Rights of Persons with Disabilities (CRPD), which prohibits discrimination against disabled persons, is pertinent.

For the fourth case scenario, a case is likely to succeed if an F-permit refugee is seeking family reunification with pre-flight children (possibly traumatised) for whom the applicant sought a clear interest of reunification at the earliest opportunity, but have failed due to the financial requirements.

The **third group** case scenario consists of family reunification rights from children. Swiss law does not provide any legal basis for the family reunification of migrant children with their parents abroad. The only situation in which the FSC has granted rights under Art. 8 ECHR is that of Swiss children seeking family reunification with their non-Swiss parent. However, the ECtHR held that states are under positive obligations to facilitate the reunification of children with their parents in such situations. In addition, the CRC Committee stressed that, where family reunification is not possible in the country of origin, states parties are obliged to allow for family reunification under 10 CRC. Switzerland has entered a reservation to Article 10 (1) CRC on family reunification.<sup>3</sup> However, Article 22 CRC, *lex specialis* to Art. 10 CRC, also imposes positive obligations to trace the parents and facilitate family reunification. This scenario presents strong grounds in favour of a violation of the ECHR, both of Art. 8 and of Art. 14 taken with Art. 8 ECHR. In addition, the Committee on the Rights of the Child might also confirm a violation of the CRC.

For all three groups: Insisting on documentation which is not reasonable and would lead to a significant delay in the family reunification, may in itself constitute a violation of Article 8 ECHR.

## 5) Conclusion

The restrictive legal framework and family reunification practice of refugees in particular for B-permit refugees who seek reunification with post-flight family members and F-permit holders is of concern from a human rights and refugee protection perspective.

As discussed in detail above, various individual case scenarios could well be litigated successfully at the international level. The ECtHR has found violations of Article 8 ECHR in several family reunification cases of refugees. These cases all involved children, but criteria, which the Court developed in these cases, show that the Court might also find Article 8 ECHR violations in other cases. In some case scenarios the Court might also confirm violations against the prohibition of discrimination (Article 14 ECHR in conjunction with Article 8 ECHR). Cases concerning family reunification of children with their parents, women and disabled persons with their family members might also be brought before UN human rights treaty bodies. Given the restrictive national jurisprudence, recourse to the ECtHR and UN treaty bodies could be a way to change the restrictive national laws or their interpretation and application.

The complete study in English is available at the following address: [www.unhcr.org/dach/ch-de/was-wir-tun/asyl-in-der-schweiz/familienzusammenfuhrung/studie-zum-recht-auf-familiennachzug](http://www.unhcr.org/dach/ch-de/was-wir-tun/asyl-in-der-schweiz/familienzusammenfuhrung/studie-zum-recht-auf-familiennachzug)

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<sup>3</sup> The legality of Switzerland's reservation is questionable, both because it is vague and does not specify which categories of immigrants are concerned, and because Switzerland has failed to enter reservations to other rights impacting on the same situation.