EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Courts incorrectly refused refugee family-reunification requests on basis of social-welfare dependence

In today's **Chamber** judgment[1] in the case of B.F. and Others v. Switzerland (application nos. 13258/18, 15500/18, 57303/18 and 9078/20) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights in respect of the **refused family-reunification requests of B.F., D.E., J.K., and S.Y.**

no violation of Article 8 in respect of the **refused family-reunification request of S.M.**, and

no violation of Article 8 in respect of the **length of proceedings in S.M.'s case.**

The applicants entered Switzerland at different points in time between 2008 and 2012 and were recognised as refugees within the meaning of the 1951 United Nations Convention relating to the Status of Refugees. They were granted provisional admission to the country, not asylum, since the grounds – fear of persecution – for their refugee status were deemed to have arisen as a result of their illegal exit from their States of origin. The case concerned the authorities' refusal of family reunification as their entitlement to that procedure, which had been discretionary and subject to certain conditions being met, in particular non-reliance on social assistance.

In the cases in which it found that the refusal of the requested family reunification constituted a violation of Article 8 of the Convention, which concerned gainfully employed applicants in two cases and an applicant subsequently determined medically unfit to work in a third case, the Court found, in particular, that the authorities, when they had applied the requirement of non-reliance on social assistance in the way they had done, had not struck a fair balance between, on the one hand, the applicants' interest in being reunited with their immediate family members in Switzerland, and on the other hand, the interest of the community as a whole in controlling immigration with a view to protecting the economic well-being of the country.

In S.M.'s case, however, the Court found that the authorities had not overstepped their discretion ("margin of appreciation") when they took the lack of initiative of applicant, who was able to work at least part-time, in improving her financial situation into account when balancing the competing interests and refusing her application for family reunification.

A legal summary of this case will be available in the Court's database HUDOC (link)

Principal facts

The applicants are four Eritrean nationals, B.F., D.E., S.Y., and S.M., and one Chinese national of Tibetan ethnicity, J.K. They live in Switzerland.

Under section 51 of the Asylum Act refugees who are granted asylum are entitled to bring immediate family members with the same nationality to Switzerland without a waiting period or other conditions.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

By contrast, for provisionally admitted refugees, family reunification is subject to certain conditions, including a three-year waiting period and non-reliance on social assistance.

The applicants were all recognised as refugees owing to the risk of ill-treatment they might face in the event of their return to their countries of origin. However, as this risk stemmed from the manner of their leaving their countries of origin and were of their own making, they were accorded "provisional admission" rather than asylum, in accordance with Swiss law. They subsequently sought to bring immediate family members to Switzerland via family reunification.

In the proceedings that followed, the Federal Administrative Court found that the requirement of non-reliance on social assistance was not met and the applications were dismissed. B.F. was found to be entirely dependent on social assistance and was deemed unfit for work by the competent Swiss authorities after the conclusion of the family reunification proceedings; S.M. was also entirely reliant on social assistance but was deemed fit for part-time work; J.K. was working full time as a nurse in a care home; S.Y. was working part-time and also looking after her three children. The court held that the applicants had *de facto* settled status in Switzerland but concluded that the refusal of the applications for family reunification did not breach Article 8 of the Convention (right to respect for private and family life). They noted that all the applicants' claims that they had had to leave their countries of origin owing to persecution had been correctly rejected as not credible.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), all the applicants complained of having been denied family reunification in Switzerland. S.Y., J.K., and S.M. also complained under Article 8 of the duration of the family-reunification proceedings. Relying on Article 14 (prohibition of discrimination) in conjunction with Article 8, B.F., D.E., J.K., and S.Y. alleged that the refusal of their family-reunification applications had been a result of discrimination.

The applications were lodged with the European Court of Human Rights on 15 and 29 March and 30 November 2018, and 10 February 2020.

The Governments of Germany and Norway and the United Nations High Commissioner for Refugees were given leave to intervene as third parties.

Judgment was given by a Chamber of seven judges, composed as follows:

Pere **Pastor Vilanova** (Andorra), *President*,
Jolien **Schukking** (the Netherlands),
Georgios A. **Serghides** (Cyprus),
Darian **Pavli** (Albania),
Peeter **Roosma** (Estonia),
Ioannis **Ktistakis** (Greece),
Andreas **Zünd** (Switzerland),

and also Milan **Blaško**, *Section Registrar.*

Decision of the Court

Article 8 concerning refusal of family-reunification requests

The Court considered that member States enjoyed a certain discretion ("margin of appreciation") in relation to requiring non-reliance on social assistance before granting family reunification in the case of refugees who had left their countries of origin without being forced to flee persecution and whose grounds for refugee status had arisen following their departure and as a result of their own actions. Nevertheless, the particularly vulnerable situation in which refugees *sur place* find themselves

needed to be adequately taken into account in the application of a condition (such as the requirement of non-reliance on social assistance) to their family reunification requests, with insurmountable obstacles to enjoying family life in the country of origin progressively assuming greater importance in the fair-balance assessment as time passed. The requirement of non-reliance on social assistance needed to be applied with sufficient flexibility, as one element of the comprehensive and individualised fair-balance assessment. Refugees, including those whose fear of persecution in their country of origin had arisen only following their departure from the country of origin and as a result of their own actions (such as the applicants), should not be required to "do the impossible" in order to be granted family reunification. Where the refugee was unable to meet the income requirements despite doing all that he or she reasonably could to become financially independent, applying the requirement of non-reliance on social assistance without any flexibility as time passed could potentially lead to the permanent separation of families.

The authorities ruled that although J.K. (application no. 15500/18) had been in employment, he would not be able to meet the income requirements for his family of four if they moved to Switzerland. The final ruling came seven years after J.K. had been recognised as a refugee. The Court concluded that he had been integrated into the labour force in that time and had done all that he could be expected of him to earn a living to cover his and his family's expenses. It held that the Swiss authorities, in refusing his family-reunification request, had not struck a fair balance between J.K.'s interest in being with his family and the community's interest in controlling immigration to protect the economic wellbeing of the country.

S.Y. (no. 57303/18) had been working part time while awaiting a family-reunification decision. The Federal Administrative Court found her largely reliant on social assistance. The Court held that she had done all that could reasonably be expected of her to support herself and her three children. Applying the requirement of non-reliance on social assistance without flexibility would constitute a permanent bar on family reunification in her case. The authorities had not struck a balance in her case between her and her daughter's needs and those of the community as a whole.

The situation for B.F. and D.E. (no. 13258/18) was different in that B.F. had never been in employment in Switzerland. During the family reunification proceedings, she had submitted that she had suffered from various health problems; after the conclusion of those proceedings, the competent Swiss authorities recognised her as being 100% unfit to work. In these circumstances, the Court was not satisfied that the Federal Administrative Court had sufficiently examined whether the applicant's health would enable her to work, at least to a certain extent, and consequently whether the impugned requirement needed to be applied with flexibility in view of her health. The authorities had therefore not correctly balanced the needs of the applicants for family reunification with the needs of the community to control expenditure.

Regarding the case of S.M. (no. 9078/20), the Court noted that she had also never in employment in Switzerland. However, in this case, the Federal Administrative Court had determined, on the basis of medical reports, that the applicant could at least work part time, but found that she had made no effort to find employment. In these circumstances, the Court considered that the Federal Administrative Court had not overstepped its discretion ("margin of appreciation") when it had taken S.M.'s lack of initiative in improving her financial situation into account when balancing the competing interests and refusing her application for family reunification.

The Court therefore found a violation of Article 8 of the Convention in applications nos. 15500/18, 57303/18 and 13258/18, and no violation in no. 9078/20.

Article 8 as concerned the duration of the family-reunification proceedings

Given its findings as regards the refusal of family reunification in B.F.'s and D.E.'s (no. 13258/18) and J.K.'s (no. 15500/18) cases, the Court held that it was not necessary to examine those complaints.

As regards S.M.'s application (no. 9078/20), the Court noted that the State Secretariat for Migration had rendered its decision about three years and four months after S.M.'s request, which had been partly a result of her failure to provide information. The Federal Administrative Court had had to repeatedly request information from her, and had delivered its judgment one year and ten months after she had appealed, but only two months after S.M.'s last submissions in the case. The Court considered that the overall duration of the family reunification proceedings did as such raise concerns as to the compliance with the procedural requirements of Article 8, but, having regard to the aforementioned circumstances, the Swiss authorities had not failed to comply with those requirements. There had therefore been no violation.

Article 14 in conjunction with Article 8

Having regard to its findings in the relevant applications, the Court concluded that there was no need to examine these complaints separately.

Just satisfaction (Article 41)

The Court held that Switzerland was to pay the applicant 5,125 euros (EUR) each to B.F. and D.E. and EUR 15,375 to J.K. in respect of non-pecuniary damage, and EUR 15,325 to B.F. and D.E. jointly and EUR 10,788 to J.K. in respect of costs and expenses.

The judgment is available only in English.

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