Dispute Resolution in Refugee Family Reunion Law. Could Mediation Provide a More Therapeutic Solution?

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Dispute Resolution in Refugee Family Reunion Law. Could Mediation Provide a More Therapeutic Solution?

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ABSTRACT

Refugee family reunion is a mechanism whereby refugees residing in a safe host-country may apply to have their families, typically residing abroad, join them to live and restart their lives in safety. This system operates under international and domestic laws which, in relation to the United Kingdom (UK), suffers from frequent tensions between the two. The problems exist due to the nature of immigration laws and the political dimension to expansion of the rights of individuals to enter and live in the UK; the (often) limited cultural, linguistic and technological skills of the applicant; and the practical system of applying for family reunion which exposes the applicant to a Byzantine procedural and legal process. In sum, this is a particularly anti-therapeutic mechanism to provide an individual with their most basic human right – the right to a family life.

This paper uses therapeutic jurisprudence as a philosophic approach considering the emotional effects of the law. It explores how a more humanitarian direction to judicial decision-making and the administration of justice, or alternatively the use of mediation as a dispute resolution technique, may provide tangible benefits to applicants and their refugee sponsor accessing the legal system in England and Wales.

KEYWORDS: Dispute resolution; judicial intervention; mediation; refugee family reunion; therapeutic jurisprudence.

1. INTRODUCTION

The law relating to refugee family reunion comprises several sources. The most important of these are international obligations, conventions, EU legislation (at least until 31 December 2020) and national laws. Collectively they provide a framework for refugees' rights and state obligations whilst the refugee resides in the host state. Beginning with international sources of obligations on the UK, the 1951 United Nations Convention Relating to the Status of Refugees[1] and the 1967 Protocol Relating to the Status of Refugees, these instruments establish a framework for international refugee protection.[2] Importantly, in respect of the topic of this paper, '[t]he object and purpose of the 1951 Convention implies that its rights are in principle extended to the family members of refugees.'[3] Further, the principle of family unity is referred to in the United Nations High Commission for Refugees (UNHCR) Handbook.[4] This does not extend directly to refugee family reunion but does provide, that as a minimum, the spouse and children (before reaching the age of majority) of the refugee should benefit from the provisions establishing family unity. The European Convention on Human Rights similarly ensures for the rights and fundamental freedoms of individuals in the Member States, and since 2006 the UK has been bound by the EU Refugee Qualification Directive 2004/83/EC.[5] The Directive, albeit subject to possible disapplication following the end of the transitional period, stipulates for the protection of family unity and for reciprocal rights to be provided to qualifying family members in relation to State benefits.[6] These provisions mirror those included in Part 11 of the Immigration Rules. The EU Dublin Regulation[7] control state responsibility for determining asylum claims lodged in an EU Member State,[8] and in Iceland, Liechtenstein, Norway or Switzerland. The Regulation

requires Member States to either maintain the close family members (spouse and children) or to bring them together when individuals seek asylum. The Regulation differs somewhat from existing national legislation as it extends the right to family reunion of unaccompanied minors where this is in the best interests of the child. It also extends the application of the right to other relatives beyond the child's parents or siblings, where these extended family members may be in a position to care for the child. One requirement in the Regulations is that the extended family members seeking reunification must be legally present in the Member State. Asylum seekers awaiting a decision on their application are, for the purposes of the Regulation, considered legally present in the Member State. This focus on the child, missing in the national Immigration Rules, can be seen most clearly in the United Nations Convention on the Rights of the Child (UNCRC) where, at Article 3(1), obligates signatory States that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' This source of international law, however, has not been incorporated into national law in the same way as has been the European Convention on Human Rights (ECHR), although its relationship to ECHR Article 8, and the overriding obligation on the judiciary to adopt a purposive interpretation to existing legislative sources, has been acknowledged.[9]

In respect to the national law governing refugee family reunion, several sources apply and impact on the decision-making relevant to refugees. The Immigration and Asylum Act 1999 established the provision for asylum support and the creation of the regulatory body which campaigns on relevant issues and oversees the appointment of qualified immigration advisors.[10] The Nationality, Immigration and Asylum Act 2002 provides for rights of appeal for refused refugee family reunion applications and the Asylum and Immigration (Treatment of Claimants) Act 2004 guides decision-makers on the application of rules regarding issues affecting an applicant's credibility. The Borders, Citizenship and Immigration Act 2009 enables the Secretary of State, the Director of Border Revenue and officials designated by them to provide for functions relating to immigration, asylum or nationality. It also provides for the State's duties towards children, which, at s. 55, introduces a duty for the safeguarding and the promotion of the welfare of children 'who are in the United Kingdom.'

Beyond those legislative sources noted above, the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, transpose into national law aspects of the Refugee Qualification Directive 2004/83/EC. Perhaps most significantly for the purposes of this paper and refugee family reunion are the Immigration Rules, Part 11: Asylum which outline the procedures for determining asylum claims, the granting of leave to remain and rules relating to family reunion (although provisions in Parts 8 and 9 may be relevant in certain circumstances). The provisions pertinent to refugee family reunion are:

- paras 319X - 319XB which set out the requirements for leave to enter the UK or to remain as the child (and under the age of 18) of a relative who has refugee status or humanitarian protection;
- paras 320 - 322 which establish the grounds on which a refusal of family reunion may be made;
- paras 339A - 339AC and 339BA which establish when the status of 'refugee' may be revoked or renewed. Similar rules are provided for in paras 339G - 339GD for individuals granted humanitarian protection; and
- paras 352A - 352FJ[11] which identify the rules on which the granting of refugee family reunion is made. This applies to the spouses and civil partners,[12] unmarried / same sex

partners,[13] of the refugee and the children (biological, adopted and *de facto* adopted, and dependent children under the age of 18) of the refugee[14] who are 'sponsored' by the refugee living in the UK.

The outcome of the decision-making of the Home Office civil servants in Part of the Immigration Rules is subject to a strict appeals procedure, made all the more onerous by the application of the Immigration Act 2014 s. 15 which reduced access in this regard. An appeal may be sought when the decision is in effect to refuse a human right, a protection claim or is a decision to revoke protected status. The Nationality, Asylum and Immigration Act 2002 s. 82(1)(b) concerns a refusal of human rights claim which is based on the grounds that the decision reached is unlawful in respect of the requirements identified in the Human Rights Act 1998 s. 6. The refusal of an application for leave to enter or to remain in the UK on the basis of refugee family reunion rules is considered a human rights claim for the purposes of this section of the Act.

Thus, the families of refugees and individuals granted humanitarian protection status are entitled, as a matter of international law, to apply to be reunited with their spouse or parent residing in the UK. This system is known as refugee family reunion and enables the refugee, via an application process, to be reunited in the new 'safe' country with their nuclear and pre-flight family members. For the purposes of refugee family reunion, the recognised 'family' refers to spouses and civil partners, unmarried / same sex partners, and the (biological, adopted and de facto adopted) children (under the age of 18) of the refugee.

The process requires the submission of the application, including a bundle of documentary evidence supporting the assertion of the family ties before the refugee left their home country. The applicants are the family members living away from the refugee (who is known as the sponsor in the UK application process). They are required to demonstrate a subsisting relationship following the separation of the family, and (advisably) a statement from the applicant explaining any gaps in the available evidence or explanations of the family circumstances which may not have been included in the application form. This completed and submitted application is assessed and verified by a member of the UK civil service (as part of the UK's Home Office government department). This individual is called an Entry Clearance Officer (ECO) and it is their job to assess and determine whether the application for refugee family reunion should be approved or refused. Where refused, the decision is reviewed by an Entry Clearance Manager (ECM). Having confirmed that the application has not satisfied the tests for refugee family reunion, a 'reasons for refusal' letter is sent to the refugee's applicant family members. The applicant, often actioned through their sponsor based in the UK, is entitled to appeal the decision of the Home Office and this is heard in the First-tier Tribunal (Immigration and Asylum Chamber) which is part of HM Courts & Tribunals Service.

It was in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 where, complementing the austerity measures introduced by the coalition government, a decision was made to remove the legal aid previously made available to refugees to complete their application for family reunification. For the government, completing the application was a straightforward process, although this was not a universally accepted position[15] and several commentators considered it to be a system fraught with practical impediments which work to prevent the reunification of the refugee with their disunited spouse and children.[16] Language and cultural barriers;[17] limited technology skills; and differences in approach to common Western activities such as chronicling, collecting and maintaining details of births, deaths and weddings exist to disrupt the process of making the application with sufficient supporting

documentary evidence. All refugees exhibit some signs of post-traumatic stress[18] and this trauma is exacerbated in poverty,[19] problems in accessing services,[20] in the resultant feelings surrounding the processing of immigration claims,[21] and the continued uncertainty surrounding the refugee and their family's future treatment.[22] These legal and non-legal issues have significant psychological and anti-therapeutic effects on the parties concerned. The resolution to problems which have a justiciable solution has evolved following reviews and public criticism. Lord Woolf, who in 1996 produced the Access to Justice report identifying comprehensive law approaches in legal systems which resulted in a changing philosophy[23] to be applied in these jurisdictions[24] including criminal law, family law, and employment. This resulted in the formation of creative problem-solving courts, holistic justice, preventive law and restorative justice. These additions are unique in their aims and scope, although they do of course share commonalities.

The academic literature is subject to much discussion and the presentation of theoretical models, such as Castles[25] using migration theory to explain how economic and sociological concepts can be used to understand migration flows. The Scottish Refugee Council[26] used a grounded theory approach when reporting on the current state of refugee family reunion. From an international perspective, Boswell[27] critiqued several theoretical models and positions in exploring migration. For instance, macro theory was found useful when assessing the forced displacement of migrants; micro theory, rational choice theory, and meso theory, which examines the systems and networks involved in refugee migration,[28] provide a discourse for the causes of refugee movements. These theories, whilst contextualising many of the factors affecting migration generally and refugees specifically did not assess the effects of the law and administrative processes on the refugees in the UK and their family members' emotional state. This is where therapeutic jurisprudence (TJ), a philosophy built upon the works of Wexler and Winick (1991;[29] 1996;[30] and 2006)[31] and Perlin[32] (among others), through which the emotional effects of the law could be viewed and assessed, is a most helpful lens through which to view existing laws and legal processes. TJ not only allows an assessment of the negative psychological effects experienced by refugees separated from their families, but also, adopting its problem-solving central theme, provides for a critical assessment of both the legal and non-legal processes impacting on the refugees' experience when in the UK.[33]

2. ADMINISTRATIVE PROBLEMS – THE DEFINITION OF ANTI-THERAPEUTIC PROCESSES

There are many aspects of the refugee family reunion system which are flawed, anti-therapeutic and often cause dismay and distress to applicants. We have discussed many of these deficiencies in previous papers[34] but to give just a few examples there is the current problem with the use of 'country of origin' information which is used as background materials to guide judgements on asylum decisions. It will be remembered that a refugee may be held as such because it is unsafe for them to reside in their home country. Such evidence to determine the safety of the country would derive (in part at least) from the country of origin documents (Country of Origin Information Report and Country Policy and Information Note) as used by the Home Office. As recently as 5 December 2018 the Independent Chief Inspector of Borders and Immigration noted in his Inspection Report that the country of origin information used in decision-making was frequently deficient in its qualitative depth and accuracy (referring to the information on Iran); the lack of speed and timeliness in which the situation in some countries is changing (in reference to the Democratic Republic of Congo (DRC)); and an overreliance on second-hand English language sources (in relation to

both the DRC and to Turkey).[35] Indeed, the Chief Inspector noted that he sent the report to the Home Office in August 2018 and it took no action on the findings for four months before issuing him with an 'equivocal response' to the recommendations made.[36] This, the Chief Inspector concludes, demonstrates a lack of seriousness on the part of the Home Office to consider the Report or the issues raised in it.

This situation, however, is certainly not uncommon. In September 2018 the same Chief Inspector, David Bolt, criticised the Home Office for being 'far too slow' in acting to implement his ten recommendations for improvements to the refugee family reunion system from a 2016 report.[37] Of the eight recommendations which had yet to be addressed, three are of particular significance and which cause delays to decision-making, particularly problematic and negative in relation to the impact on the lives of the refugees and their families, and/or lead, unnecessarily, to cases having to be solved in the courts. These are 1) a need to improve the timeliness of the decision-making of the ECO; 2) an improvement in the quality of decision-making, record keeping and the ECM quality assurance system and its refusal notices; and 3) improvements needed in the collection and interpretation of information relevant to the applications.

Another problematic area is the increasing movement towards the requirement for, and use of, DNA evidence to establish the connection of the family. Refugee family reunion enables the parent who resides in the UK to sponsor their child to apply to join the refugee to live in the UK. Typically a birth certificate, as an official state document, will be presented to establish parentage. It may be the case that given the non-ideal circumstances through which the individual has become a refugee, and perhaps because such documents are not readily sought in the refugee's home country, such a certificate does not exist. To circumvent this problem the sponsor may present DNA evidence to establish that he is the parent of the child applicant. Whilst this is an accessible route, and it is often valued by the ECO as it involves less sifting through documentary evidence to try and establish the sponsor as the applicant's parent, it is not without problems. The current system of refugee family reunion embodies a culture of disbelieving, in the first instance, that the sponsor is the applicant's parent and instead requires scientific proof (and the profound negative connotations that this approach establishes). Where the ECO rejects an application for refugee family reunion on the basis that parentage cannot be established, an anti-therapeutic relationship begins. It necessitates a request by the applicant to their sponsor (typically the father) and their mother to undergo a test which may be demeaning, could call into question the fidelity of the parent's relationship, and indeed may possibly result in establishing the child applicant as not being the biological child of the sponsor. This is potentially devastating to the family unit and may even expose the mother and child applicant to danger where it is established that the sponsor is not the biological father. It may also be questioned as to what the result may be if the sponsor is not the biological father of just one child. It is feasible that the sponsor is applying to be reunited with his spouse and children, and if one child is not biologically his, does this child get left behind? Does the sponsor accept the child as his and continue to raise the child as his own? How do the siblings react to the news that this child does not share the same father as them? Further, how do the siblings react to the news that the mother has had a child with another man – this may have been through some form of infidelity, although it is not uncommon in family reunion cases for the mother to have been a victim of a rape resulting in a pregnancy.

The results of the DNA evidence are issued to those involved in the application. In fairness to the Home Office, whilst it is not compelled to offer sensitivity in communicating the

rejection of an application on this basis, it did provide direction to ECOs. Here the ECO was instructed to be aware that it may not be obvious whether the husband or other family members were aware of the true relationship of the illegitimacy of the child and that there could be serious repercussions for the wife and child were this information to be disclosed. In relation to illegitimacy, the ECO was instructed to try and establish the state of the family circumstances by interviewing the child's mother discreetly and with sensitivity – a reference to UK Visas and Immigration Department to conduct an interview with the sponsor was to be avoided. Further, the ECOs were told not to routinely disclose this information to the sponsor or other family members, yet due to the UK Data Protection laws, the sponsor and applicants have a right to access the personal information about themselves which is held by the Home Office.

It is important to recognise that because the sponsor is not the biological father of the child, but the child has been brought up as a member of that family, will not prevent a successful application for family reunion. The Home Office has provided instruction to this effect to the ECOs reminding them that it is normally appropriate to admit the child under para. 297(i)(f) of the Immigration Rules. At some level this appears to be a therapeutically friendly approach. Applying Wexler's wine and bottle metaphor,[38] the Immigration Rules may necessitate DNA evidence and access to it by the parties – which may be problematic, yet the application and interpretation of those Rules is an attempt to avoid the harshness and anti-therapeutic potential therein. This is until it is recalled that the instruction just noted from the Home Office to ECOs was presented in 2015 and, at the time of writing, is no longer provided in the UK government website, nor is it presented in any current guidance. Thus, newly appointed ECOs or those who are looking for guidance on this matter will not find the instruction or be in a position to provide, necessarily, a consistent method of interpreting and communicating news of the legitimacy of the child.

3. INFUSING A THERAPUTIC PHILOSOPHY INTO REFUGEE FAMILY REUNION THROUGH JUDICIAL INTERVENTION?

Following the refugee's application to be reunited with their sponsor living in the UK, it is assessed and then the result is communicated to the applicant. The sponsor, where this process has been successful, will make arrangements with their family members, often assisted by an organisation such as the Red Cross, for the family members to leave the country in which they presently reside and enter the UK to live with the sponsor. In the event that the application is unsuccessful, the applicant may appeal and/or make a resubmission (in an attempt to rectify the deficiencies in the previous application). However, there may exist a suspicion, often borne out of experience of users of the system, that once an ECO has rejected an application, further applications may be similarly (almost systematically) rejected. The appeal route may be the chosen method by the applicant as the case is heard in the Tribunal before a judge, and by appearing before a judge and being allowed to have their situation and circumstances explained, the client's application may be accepted.[39] Yet the legal process, following the negative experience of the first administrative stage, may not necessarily provide the positive and therapeutic dispute resolution forum envisaged by the applicant or their refugee sponsor (who often will be the party in attendance to offer information, explanation and evidence in the case). Evidence of proceedings of the parties from court cases and judicial processes is difficult to obtain due to reporting restrictions of those in the court room. However, anecdotal evidence from practitioners and clients obtained over several years has provided many examples of anti-TJ practices in immigration cases. This includes child applicants being subject to practices which were interpreted as bullying

from state-representatives. Ineffective control of courtroom procedures by the judge, members of the judiciary with a dismissive attitude, those who often fail to make or maintain eye-contact with individuals in the courtroom, judges with a passive aggressive / disapproving attitude to caseworkers and claimants, and ineffective legal representation of the client lead to a very negative experience and poor perception of access to justice.

It would be wrong to suggest that all judges who hear refugee family reunion cases do so in an anti-therapeutic manner. Many do apply the interpersonal skills based on the psychology of procedural justice (a theory heavily relied upon by TJ pioneers in the context of therapeutic judging).[40] Meaningful and effective interactions that form therapeutic judging are characterised by empathy, including relating events to the participants' lives; acknowledging emotional responses to cases and events; possessing a sense of care, compassion and respect to enforce validation; acting in a trustworthy manner and credibly; and being aware of their own bias (for example in relation to appearance). The judges could also demonstrate respect through referring to the parties by the designation 'sir' or 'madam', using effective body language techniques including maintaining eye contact, listening carefully and attentively to the parties, they can speak slowly and ensure the parties (especially refugees whose understanding of English may be less strong than other parties to the court) understand the proceedings and the questions being asked / evidence being sought. The judges can speak effectively to the parties, refraining from the use of paternalistic tones, sarcasm and by not interrupting the answers given by the refugee or rushing them through a response. This also involves an acceptance, and the exercise of active listening and an appreciation of the judge's non-verbal forms of communication. Matters as simple as whether the judge looks interested in the responses of the refugee, their tone of voice and whether they take notes during evidence giving to demonstrate interest and listening can have significantly positive effects on the administration of justice.

Finally, the judge can enter into a conversation with the refugee and Home Office representative. Here the First-tier Tribunal (which hears all cases relating to immigration and asylum matters, including deportation cases) would adapt to a more problem-solving court approach, as advocated by Goldberg[41] whereby rather than the traditional feature of the courts resolving legal disputes (such as whether the ECO had correctly applied the procedures for determining whether to accept or decline the application for family reunion), they would instead have the goal of resolving the underlying problem of why the application failed, the system of a re-application or an appropriately explained reason for refusal letter had not been communicated with the parties. We have argued elsewhere the positive examples from the judiciary who attempt to use their powers of interpretation and interactions with court personnel and litigants to minimise the negative effects of the law and legal process. This we referred to as 'judicial Canutism'.[42] However, this is not a policy adopted by all members of the judiciary and it would be concerning if it were left to the sensibilities of the judiciary to mitigate against the defects in the legal system and the policies which underpin its development.

The nature of refugee family reunion is based on the assessment and application of legal principles, but if this legal outcome is the focus, the therapeutic outcome may be lost. To deny an applicant the most fundamental right to reside with their family should be a decision taken with the upmost seriousness and only be denied in circumstances where the applicant has not been able to demonstrate the family ties. The significance of the removal of legal aid in England and Wales to refugees seeking reunification has been profound. The result was the creation of advice 'deserts.' The consequence of the reduction in law firms offering refugee

family reunion services[43] lead to the establishment in their place of university run law clinics[44] and, of greater concern, the advent of unregulated services which charged fees with no control over the quality or correctness of the help provided to the client. This resulted in access to necessary assistance for the sponsor/applicant(s) being impractical. This Act also had a direct and anti-therapeutic implications for DNA testing. Not infrequently, the sponsor in the UK has to use DNA evidence to establish the family relationship, yet the evidence accepted by the Home Office (through the ECO) has to be from a list of approved immigration DNA suppliers (since 2014 the Home Office ceased DNA testing (and paying for these tests)). These suppliers typically charge approximately £800 for the test (Briefing Paper on Refugee Family Reunion – GMIAU[45] which can, obviously, involve more than one child) and will have to be paid by the sponsor/applicants unless a successful Exceptional Case Funding application is made (which have fallen significantly following the removal of the Home Office paying for testing). For instance, Bolt[46] reports the increases of refusals of family reunion applications between 2013 and 2015 to be from 15% to 46% for Eritrean applicants; 17% to 80% for Somalian applicants and from 9% to 34%, 35% and 36% for Sudanese, Syrian and Iranian applications respectively.[47]

The consequence is that many sponsors are denied the right to be reunited with their families because of the application of rules without an effective means of reviewing the decision. Judges can assist in these circumstances not by changing the rules under which they have to operate as this would extend the doctrine of statutory interpretation beyond the limits as permitted even via a purposive or teleological approach. A therapeutic approach must occur within the constraints of the legal system. Rather the judges may act as a facilitator for collaboration between the parties, to encourage participants and stakeholders to work in establishing the remediation of underlying problems, and to adopt a commonsensical rather than legalistic approach to the resolution of the problem. TJ recognises that legal processes will have an impact in any event, and that the impact can be harnessed to achieve a positive outcome.[48] Therapeutic outcomes should be sought so that they do not undermine standards of good court performance, as articulated in Trial Court Performance Standards.[49]

The inconsistency of approach by the judiciary in cases involving refugees, and evidence of a lack of appreciation of the problems experienced by refugees and how these may manifest themselves in terms of, for example, testimony in court proceedings, remains. In a case heard by the Court of Appeal (*R(PA)(Iran) v Secretary of State for the Home Department*)[50] it was held that adverse findings made by the First-tier Tribunal judge (who considered the refugee as having 'cynically manipulated' the legal system and the use of medical evidence accepted in court) would not be displaced merely because the judge did not have the benefit of knowledge that the refugee was suffering from cognitive impairment as proven through psychiatric and psychological evidence. Further issues here which are troubling is that the case involved a Kurdish child and one who had been smuggling goods including alcohol across the Iran boarder with Iraq. Despite evidence being presented as to the commonplace nature of this situation, and the use of protection rackets to commandeer participants, the Tribunal accepted the Home Office Country Information Reports as being more authoritative than such in-country expertise on the political and pragmatic nature of operations. A postscriptum in the case remarked on the overly long judgments from First-tier Tribunals which also contain unnecessary detail. These, it continues, cause problems with consistency and cogency. This is compounded by the First-tier Tribunal which conducts many cases as closed hearings with no reporting or public gallery.

Winick and Wexler[51] and Petrucci[52] have identified interactional principles that should be adopted by the judiciary when providing a TJ compliant approach. These include acceptance, empathy, empowerment, hope and expectancy, a future focus, self-expression, warmth and respect. In Goldberg's[53] judicial training manual, active listening, a positive focus, non-coercion, non-paternalism, and clarity were additional features for incorporation. Of course, these are aspirational qualities and indeed, as noted by Perlin,[54] the charisma of the judge is essential in the running of a case and its outcome. Despite such aims, this does not prevent problems occurring such as the misapplication of procedural rules and its anti-TJ effects. For example, in *R (Help Refugees) v Secretary of State for the Home Department*[55] and *R (Citizens UK) v Secretary of State for the Home Department*[56] the government's implementation of Immigration Act 2016 s. 67 (referred to as the "Dubs amendment")[57] was found to be in breach of the common law duty of procedural fairness. It failed to provide adequate reasons to affected unaccompanied asylum seeking children who were rejected for transfer to the UK through s. 67.

These points are presented here to demonstrate a number of problems with the current judicial system involving refugees and how a different approach is needed to avoid some of the worst examples of poor practice and unhelpful determinacy in cases of the upmost importance – reuniting families and respect for family life as a human right.

4. THE ANTI-TJ EFFECTS OF THE LAW…

At present, a refugee sponsor and his family applicants who find the application fails in some way is informed of this through a letter from the ECO (as agreed by the ECM). In reality, many of these read as though copy and pasted from a template and frequently they are written in accusatory language and without definitive instruction as to what the applicant may do to rectify the defects. For example, in a case of which the authors have experience, a client was refused family reunion. As part of his family's application, in the absence of a birth certificate, the applicant included a Baptismal Certificate. The response from the ECO was '… this is not an official record of your birth… it is therefore of no evidential value as evidence that you are related as stated to your sponsor.' Further in the letter was reference to a photograph included to demonstrate the pre-family ties between the sponsor and the applicant. Again, the response from the ECO was 'I am unable to identify either you or your sponsor in this picture and as such *I am not satisfied that you have ever met your sponsor in person*' (authors' emphasis). The letter of refusal concludes '… I am not satisfied that you are the child of a parent who currently has refugee status granted under the Immigration Rules in the UK or that you were part of the family unit of a person granted asylum…' It is important to recall at this point that this letter is drafted to a child and one which is living away from the person (that they at least) consider to be their father. It is understandable how a civil servant needs to consider the evidence supporting an application. They may also reasonably conclude that such evidence is inconclusive or is not acceptable to support evidence of the family connection. However it is in the wording of the response, the allegation of deception about the family connection, the lack of engagement with the applicant about the evidence or what evidence is required to satisfy the test for family reunion which makes the rejection so unfair, negative and anti-therapeutic.

There is also little opportunity to effectively challenge the decision in a conversation with the ECO, and the refugee's family are faced with a choice. They may accept the decision and live apart (or the family may attempt to make the journey to the UK and claim asylum in their own right). They may make a re-submission of the original application and try to remedy the

defects so as to satisfy the ECO as to the veracity of the documentary evidence submitted along with their application. They may submit a 'fresh' application and seek guidance to improve on the first submission and hope a different ECO may conclude differently from that of the ECO in the first application. Finally, the applicants may choose to appeal the decision of the ECO and have this challenge heard by a judge (in the First-tier Tribunal). Litigation, then, is the only real option in which to have the decision of the ECO challenged by an independent adjudicator. This form of dispute resolution is not necessarily the most effective, impartial and effective means of resolving disputes in refugee family reunion cases (as noted above). However, at present and in relation to refugee family reunion, alternative forms of dispute resolution are not available.

The training of judges in the UK is of a high standard and is likely comparable to those around the world. There is instruction to them on helping litigants and particularly litigants in person (those not legally represented at hearings). Of course, whilst mindful of the needs of all litigants, the judges are not permitted to assist the litigant to make legal arguments or on how to ensure documents to be relied upon have been submitted correctly. Further, there is anecdotal evidence of judges, as noted above, acting in anti-therapeutic ways when dealing with cases involving refugees. This exists, not only in the UK (see Marson, Ferris and Kawalek);[58] but is also seen in a US context (see for instance the report presented in the Washington Post).[59]

In recent research, judges in the UK's only 'drug court' were found to be acting in a largely therapeutic way (at least to the best of their abilities), but this was in the context of laws and methods of operating which were not conducive to a TJ-compliant philosophy.[60] It replicated effectively the distinction between Wexler's 'wine' and 'bottle' metaphor[61] where the judiciary were attempting, of their own volition, to minimise the harmful effects of the UK's laws when dealing with individuals facing criminal charges due to their relationship with, and use of, illegal drugs.[62] Therefore, whilst it is undeniable that individual and even groups of like-minded judges will share information and act in a TJ friendly manner, this is not widespread practice and TJ principles are not fully included in the training received by a lawyer or judge.

5. …AND TACTICS THAT CAN BE ADOPTED TO MITIGATE AGAINST THESE

As noted, the communications between the refugee applicant, the sponsor and the Home Office are often fraught with negativity and the use of accusatory language. The sponsor is preparing for their new life in a new country and to do this successfully, they should be joined by their existing family members. Unless there is a good reason, the overriding principle should be on the Home Office assisting the sponsor and applicant(s) to establish their right to reunification, not to adopt a position of distrust and obfuscation as to defects in thee application. Thus, what current activities should the Home Office avoid in adopting a TJ-compliant philosophy? Do not disregard the negative emotional consequences of a refusal letter to the sponsor and applicant(s). The refusal might be necessary, and the application may be deficient which means it is not possible to enable the reunification of the family at this time. Yet these are people, they have vulnerabilities and may be experiencing a number of emotional issues, and the deficiencies in the application and bundle of supporting evidence may be due to the results of the sponsor's mental health, their non-ideal travel to the UK, their lack of English language skills, their lack of experience of completing government application forms and so on.[63] A reasons for refusal letter should be constructive, supportive and helpful for the sponsor and applicant(s) to remedy the defects in the application or to,

gently and with compassion and empathy, explain why the law currently does not allow the family to be reunited. For the sake of the future relationship between the sponsor and their new home country (embodied here in the form of the state authority), the typical refusal letter should be changed so as not to possibly destroy future cooperation and effective integration of the sponsor in the UK. Secondly, the ECO and ECM should not assume the worst of the sponsor and applicant and conclude that errors or defects in the application are due to mistruths. Applications can be flawed due, for example, to the paucity of contemporaneous supporting evidence, the applicant providing the information (answers) they think the state (Home Office) wants to hear and in so doing having manufactured evidence to 'fill in the gaps' in their prior or subsisting relationship with the sponsor, or they may not wish for the sponsor/applicant to have knowledge that a child is not the biological descendant of their sponsor. A third point is for the ECO/ECM to work in concert with the applicant(s) and sponsor to avoid court proceedings through communication. Engaging in dialogue with the applicant(s)/sponsor can resolve many of the issues which cause the applications to fail, it can (often easily) resolve the misunderstandings or problems in the application or in the way supporting materials are presented, and it can stop any potential (and unnecessary) appeals being lodged through a discussion as to why national rules preclude the family's reunification.

Ultimately, once lawyers and courts become involved in the process, it is taken out of the control of the parties and matters are determined by a judge. The parties can no longer, and with certainty, determine issues or resolve their differences but require an independent third party to do this for them. One way of preventing this course of action and a way in which they can be encouraged to work cooperatively together is through the adoption of mediation. Through mediation the parties are no longer adversaries seeking to 'win' their case against the opposing side. For family reunion, the consequences are too great and fundamental to be reduced to winning or losing a legal or, more frequently, a factual argument. Neither does the applicant(s)/sponsor wish for the matter to be reduced to a factual or legal argument made to a judge. The sponsor/applicant(s) enter the legal process as a last resort and typically will exhibit fear and mistrust of authorities (often stemming from their experience in them becoming refugees). They may be aware that the UK's legal system is adversarial, and they are challenging the state's decision to be reunited with their family, and therefore they are adversaries in court/tribunal. Adversarial systems do not tend to promote cooperation between the parties. The parties are deemed to pursue their own interests in a single-minded manner, and they do not have to consider the effect of their conduct on the other party. Thus, it can be seen with the refusal letter to the applicant(s)/sponsor; the general lack of engagement with the applicant(s) about deficiencies in the application which led to the refusal; the Home Office defending an appeal against such a decision; perhaps not attending the hearing to defend its decision (without informing the applicant(s); and with the Home Office appealing a decision of the court even where it has not attended the initial hearing to present and defend its decision-making.

The above points will be true to a greater or lesser extent depending on the handling of the case by the parties, the members of the court and the judge in charge of proceedings. As we have spoken of previously,[64] the judge can have a meaningful influence on these issues and with careful case management may reduce the anti-therapeutic aspects of the court hearing. The parties can be reassured from the outset that they are not adversaries and that the case is needed to identify the contentious points and to help determine the issues. Most appeals regarding refugee family reunion are based on factual issues rather than legal argument. Thus, it is more common for the cases to be determined on their facts rather than in the

application or establishing of doctrine. A TJ approach can be infused into the existing refugee family reunion process. The parties can be encouraged to work cooperatively, and empathy and respect can be shown to the applicant(s) being represented by the sponsor in the hearing. A support mechanism, interpreters who are specifically trained for family reunion cases and can communicate nuanced and detailed facts with clarity, and court personnel who recognise the fear of the applicant(s)/sponsor – fear of not being reunited with their family, fear of letting down their family members living abroad, fear of the unknown in a future living in a new country without their friends and wider family members. These approaches can mitigate against the worst negative effects of the law, but it does not alter the fact that cases in court are based on litigation. TJ, in the alternative, is based on problem-solving and by establishing a system for the parties to meet, outside of a court setting, and for dialogue and conversations to resolve discrepancies in the application, a more therapeutic system will be the result. This, we propose, might be achieved through the introduction of mediation.

6. MEDIATION AS A POTENTIAL SOLUTION

Therefore, there must be a movement away from litigation as a mechanism to resolve the dispute between the sponsor, their applicant family members and the Home Office which has refused the application for those family members to join their sponsor in the UK. There has not been, thus far, such a movement, as seen internationally in relation to family courts in the US, of a shifting philosophy to creative, supportive, collaborative and interest-based dispute resolution processes.[65] Further, the gamut of forms of mediation available have not yet surfaced in relation to disputes of this nature, such as psycho-educational programs; non-confidential dispute resolution and assessment; early neutral evaluations;[66] collaborative law;[67] and cooperative negotiation agreements.[68] Thus, significant limitations apply to the forms that resolution of disputes here may take, despite the very broad nature and complexity present in the cases. Importantly, the services noted above are available through the court services and thus would not incorporate the costs and difficulties that may be present where dispute resolution mechanisms are administered through private organisations.

What is needed in the UK is a system of adjudicating refugee family reunion disputes which adopts a new way of thinking about the resolution of problems of applications. An appreciation of the non-ideal circumstances refugees find themselves in when travelling to the UK and that their families may lack coherent documents regarding parentage, marriages and contacts. It has always seemed somewhat incredulous that the ECO will accept a record of telephone communications from a mobile telephone number associated with the sponsor and a second number associated with the family member (spouse and/or child) without any details of the nature of the calls or indeed whether they are genuinely linked to the persons claimed. However, they will often find fault with, and thereby reject the veracity of, documents which may have been defaced (a birth certificate may have been written on by the applicant when an administrative error has been identified after the issue of it and they have sought fit to provide a correction), or those issued for the purposes of an application (such as producing a birth certificate of a child which had, previous to the application for family reunion, been unnecessary and is not as ubiquitous a document as may be the case in Western jurisdictions) which are subsequently held as non-contemporaneous. Where an ECO is faced with non-contemporaneous documents they frequently conclude that these are of ‘little evidential evidence’ and necessitate a fresh application which supplements this with DNA evidence.[69] These problems are systemic and enable the rejection of applications without an examination of the underlying problems of why the issue has led to a challenge in the courts. There is a lack of mutual interest in examining the problems within an application and

understanding how the applicant and the ECO working collaboratively could resolve these. It would further be helpful for the parties to move away from the adversarial system entrenched in the UK legal system, one which has been engrained in students who then become lawyers and ultimately progress to sit as a judge. It is understandable how, when the applicants, through the refugee sponsor, appoint a lawyer to fight their case against the ECO who, through the Home Office, appoints their lawyers to argue the decision was correctly made, problems in the system remain. The lawyers trained in the English adversarial system of law will battle on the points of law with the aim to win, to push their advantages regardless of the negative effects on the opposing party.[70] A movement to problem-solving and collaboration is needed. As explained by Edwards[71] when referring to family cases of divorce, there lies

> 'the harm that engaging in adversarial tactics can bring—harm in the use of cross-examination on vulnerable[72] witnesses, in the expense of engaging in prolonged discovery, and the ultimate harm created when there are winners and losers in each case leading to mounting distrust and alienation…'[73]

Of course, mediation as a dispute resolution tool has been subject to critical appraisal and is certainly not universally popular.[74] Nolan-Haley,[75] for instance, identified the trajectory in the US of mediation to a new form of arbitration (referred to as 'legal mediation') which facilitated the development of '… aggressive behaviors of lawyers as mediation advocates, operating in a weak ethical regime that permits some forms of deception…'[76] Here the lawyers consider the mediation process to be one of a private judicial settlement conference which results in their adversarial behaviour.[77]

Mediation is not being suggested to enable applicants to avoid the scrutiny of the legal system. Nor is it presented as a means to circumvent the application of strict rules on family reunion. Rather it empowers parties to hear each other's arguments,[78] to engage in a conversation where issues may be explored and solutions considered. It removes the powerlessness felt by many refugee sponsors, typically male (in the case of fleeing war or when the family face persecution the male is often the strongest and most able to reach a safe country and then send for the family to join him) and the patriarch of the family who is unable to unilaterally provide for the reunification of the family. It allows for the Home Office to explain in greater depth why an application has to fail but perhaps explore methods of ensuring the safety of the family living abroad and provide reference to services to help the refugee manage the transition to acceptance of the decision. This mechanism may also help to integrate the needs of the family more sensitively than a ruling issued by a judge and based on arguments having been orchestrated by the team of lawyers involved. The refugee sponsor would be placed at the heart of the process and the resolution of the dispute rather than a largely passive bystander awaiting the decision from a process many will not understand. They may also be better able to accept the decision made as their needs and interests have been a central component of the process. They will feel better able to explain this to their rejected family members, who cannot join them in the UK, and be able to begin a conversation with them about the defects in the application and what happens next in their lives. Integration is a matter which is often overlooked when dealing with the sponsor/applicant(s) on the basis of the legal issues surrounding their application for reunification. However, as noted by the Refugee Council and Oxfam, prolonged separation from their family not only 'dominates the lives' of the sponsor in the UK, but it is easier to integrate, it is quicker and more successful when the families are reunited.[79]

Arguments have been presented regarding the use of mediation in legal (and non-legal) settings. Mediation is not currently used in refugee family reunion cases and thus we are envisioning how the current problems existing in the process could be removed or at least reduced through the adoption of mediation as a dispute resolution technique. In so doing, we can look to mediation's use in family proceedings as a model which impacts the emotional state of potentially vulnerable litigants,[80] being replicated in a similarly emotional, personal and family-orientated system as occurs in refugee family reunion. The characteristics in family law chime with the refugee clients seeking reunification with their family members and therefore parallels may be drawn from the findings of previous research with families using mediation. According to Beck and Sales,[81] mediation provides benefits for both litigants and the legal system generally. It is of course trite comment to say that the power relationship that currently exists between the Home Office and the refugee and their family member applicants is heavily in favour of the Home Office. The UK government (here in the guise of the Home Office) establishes the rules (legislative and administrative) that determine whether reunification may be granted. It also is the body which determines whether these rules have been satisfied. Thus, the refugees and the applicant family members may find themselves in a very unevenly matched battle with only an adversarial court system (which too may be inaccessible due to costs and other practical issues) to provide a forum for discussion about the problems inherent in their application and what might be done to explain these. For the refugee sponsors who are seeking to be reunited in their new 'home' country with their families (who are often living abroad), mediation may benefit the claimant/litigant through empowerment and self-determination.[82] This is manifested in the mediator who has the ability to help the parties (the refugee and the Home Office) to reach a cooperative solution to the dispute. Hence, if the concern of the Home Office relates to the contemporaneous nature of the documentation presented by the refugee claimant of their relationship with their sponsor, mediation could enable the refugee to take control of this problem, ascertain exactly what is needed and present this for the satisfaction of the Home Office representative (and thereby enable a conversation to be initiated which allows more effective communication between the parties than currently exists). Or, in the absence of this material, evidence on the country of origin and the reason for the non-existence of such material could be explored along with the expert and independent verification of these explanations which may lead to a thorough examination of the matter to be concluded.[83] The value of the ability for the airing of grievances, which is not readily enabled in court proceedings, and for each side to communicate and for thorough explanations to be issued and discussed is invaluable to remove the sense of unfairness that currently exists when an application for refugee family reunion is refused. Where the reunion application must fail, perhaps for failures due to policy or the application of the law, given the nature of the communication avenues available this can be explained to the refugee sponsor more effectively than through a letter or court case and this in turn is more likely to lead to acceptance, compliance and will limit the psychological damage that may accompany an unexplained decision which will otherwise be perceived as being unfair. And, evidently, mediation is a far less adversarial environment than a court case – being litigated by advocates which removes the control from the refugee, may lead to arguments being presented which the refugee does not understand or which they would not raise, and could further lead to information which they feel is relevant (but which may not be part of the legal issue in question) being not presented. This again, cumulatively, instils a negative and anti-therapeutic feeling to the legal and administrative process of refugee family reunion.

Mediation may also be a benefit for the Home Office, the ECO and ECM which, if engaged with in a positive spirit, could lend itself to significant learning opportunities. Whilst locally

based ECO's and ECM's will have experience of some cultural issues affecting applicants and may appreciate the nuances of claims before them, there is a possibility that without engaging on a personal basis with the applicant that such matters become merely procedural. It can be quite easy for administrators to follow rules and apply them without the full consideration of an individual's circumstances and reasons why there may be problems with what they have included or omitted in an application or bundle of evidence. Coupled with regular debriefings amongst local, national and internationally based staff, the ECM's could collate case studies, share evidence of good practice and generally create a positive refugee family reunion system with benefits for all. Further, if this could be coupled with an holistic and multi-disciplinary methodology where other parties, here it would include counsellors, local advisors, country experts, lawyers practicing in the area, interpreters (ensuring, for instance, on appropriate quality levels), doctors, members of relevant charity sectors, and local authority representatives,[84] could feed into the training and resultant evidence following mediation, there would be a system which could feed into changes in the law itself and in its application.[85] The very complex system of refugee family reunion, based as it is on highly charged emotions in non-ideal circumstances, could be reformed through mediation. As with the properly conducted application system run by, for instance, university law clinics, avoiding paternalistic tendencies and enabling the refugee sponsor to help their family members through the application process empowers such sponsors. They remain in charge of their destiny (to some extent at least) and can work towards resolving disputes which are visible and clear (through the direction and help of those legally and non-legally qualified advisors helping them). This problem-solving approach lends itself to the next level of dispute resolution in mediation where, again, faced with difficulties the sponsor and applicant(s) family members can feel part of resolving their own disputes, to become cooperative members of this process, and to make use of the support systems available and mentioned above to help establish a future for them and their families. Each party in the process, the sponsor/applicant(s) and the ECO/ECM would take personal responsibility for their actions, their decisions and how to resolve the situation until its conclusion.

In respect of the benefits for the legal system, by removing refugee family reunion claims from a legal setting presided by a judge to mediation, where the mediator might be a mental health professional or someone specialising in conflict and dispute resolution techniques, many of the potential anti-therapeutic effects of the traditional dispute resolution system can be avoided. Further, and a benefit often attributed to all forms of alternative dispute resolution, is the speed and inexpensive nature of mediation over the court system. Many months are likely to pass between the applicant being refused their reunification with the refugee sponsor and the appeal to this decision being heard in the Tribunal (and once legal aid[86] or pro bono legal representation has been secured). Mediation removes this tier and allows the parties to determine issues and reach a resolution far quicker – and generally with less need for lawyers.[87] Terms such as claimant/appellant and defendant/respondent would be removed from the lexicon of family reunion claims. Instead, they would be replaced by names, humanising the refugee/applicant(s) and re-establishing the nature of what is at stake – a new life for a refugee in a safe home from where they will, along with their families, begin the long process of rebuilding their lives.[88]

5. CONCLUSIONS

The reunion of the family is a central component in a refugee creating a new life following the trauma associated with refugee status. The current administrative requirements of the application procedure may place substantial barriers to successful reunification. The online

process requires technical know-how and a relatively high proficiency in English to be able to successfully navigate through the system. Many applicants lack these skills. Where applications fail, the applicant is faced with submitting a revised or fresh claim (of which many are unsuccessful) or a legal challenge may be made. The legal process is fraught with hurdles for the applicant and the possibilities of a lack of understanding of the decision, a sense of helplessness for the applicant, and an arrangement where the applicant is challenging the state through an adversarial system. Despite the best efforts of some therapeutically-minded judges, the practice and the rules under which decisions are made is not conducive to resolving the underlying problems in the administration of refugee family reunion. They are about the correct application of a set of broken rules. Mediation could enable the engagement, problem-solving, and collaborative approach which would help to establish genuine and deserving cases. It would also reduce the burden on an already stretched judicial process trying to deal with the consequences of an increased rate of refused applications and the legal appeals this brings. Alternative forms of dispute resolution must be brought into effect to stop the deep-seated anti-therapeutic effects experienced in applications for refugee family reunion.

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[1] Although note Goodwin-Gill's (2001) comments on the Convention at pp. 1-2, where it is '… functionally inefficient, overly legalistic, complex, and difficult to apply within a world of competing [and changing] priorities…'

[2] The right to family reunion arises from the 1951 Refugee Convention. It is only a right given to recognised refugees who have been granted refugee status or, after October 2006, five-years' limited leave to remain under the Humanitarian Protection mechanism. The right to family reunification is written into Part 8 and FM (Family Dependants) Immigration Rules (not under the Part 11 Asylum section).

[3] UNHCR (2001), para. 7.

[4] At chapter VI, paras 181-188.

[5] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. This Directive provides an interpretation for how the term "refugee" should be defined and how a person who is not deemed a refugee may qualify for subsidiary protection.

[6] Articles 24 - 34.

[7] (EU) No. 604/2013 (sometimes referred to as the Dublin III Regulation).

[8] The UK will leave the EU and the transitional period on 31 December 2020 and thus will no longer be a Member State of the EU. The government has insisted that it wishes to enter into a deal with the EU to continue its relationship on matters including its obligations regarding refugees and asylum seekers. However, despite opposition from the House of Lords on its passage through Parliament, the government was keen to include s. 37 of the European Union (Withdrawal Agreement) Act 2020 which merely requires a Government Minister to make a single policy statement to Parliament in relation to any future arrangements between the UK and EU about (in this instance) unaccompanied (refugee) children. The intention, outlined in this piece of legislation, does not appear positive for the protection (let alone extension) of protective rights for refugees seeking a home in the UK.

[9] See *LD (Article 8 best interests of child) Zimbabwe* [2010] UKUT 278. Per para. 27 'Although questions exist about the status of the UN Convention on the Rights of the Child in domestic law, we take the view that there can be little reason to doubt that the interests of the child should be a primary consideration in immigration cases.'

[10] The Office of the Immigration Services Commissioner.

[11] Paragraphs 352FA, 352 FD and 352 FG of the Immigration Rules provide parallel provisions of family reunion for individuals granted humanitarian protection (on or after 30 August 2005). Individuals with humanitarian protection status are considered as refugees by the UNHCR.

[12] Para. 352A of the Immigration Rules.

[13] Para. 352AA of the Immigration Rules.

[14] Para. 352D of the Immigration Rules.

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[33] Per Inter-Governmental Consultation on Asylum, Refugee and Migration Policies in Europe, North America and Australia "Report on Family Reunification: Overview of Policies and Practices in IGC Participating States", 1997, p.17 "Even if in most [European] States family reunification is ruled by legislative instruments, administrative regulations are often used to complete legislation with practical aspects and can result in a tougher or more favourable implementation of the law."

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