

## **Therapeutic jurisprudence in an asylum and refugee family reunion clinic**

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## **Part 2 Chapter 3**

### ***Therapeutic jurisprudence in an asylum and refugee family reunion clinic***

**James Marson, Katy Ferris and Anna Kawalek<sup>1</sup>**

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#### **Introduction**

The refugee crises across the world has led to an influx of individuals entering and settling in many countries including our own, the UK. In establishing their new lives, they naturally wish to be reunited with their existing families, often living abroad. National and international law protects refugees' rights to be reunited with their pre-existing and nuclear families, but following enactment of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, free-to-access legal advice to complete the necessary applications was removed in England and Wales. This had an adverse effect not only on the numbers and quality of applications from refugees, but also on the legal sector and the firms providing refugee family reunion services. Hence legal deserts were created. As part of a solution to this problem, university law clinics stepped in to establish centres to help the refugee community. This not only provides free-to-access support and guidance, but also affords tremendous learning opportunities for student advisors to develop their understanding and engagement with such a potentially vulnerable client group. It further allows students to be exposed to a pedagogic philosophy we examine here known as Therapeutic Jurisprudence (TJ) which, as will be seen, underpins our approach to learning and teaching.

This chapter explores the development and operation of a refugee family reunion clinic based on this experiential or clinical legal education model. It offers an explanation of the induction and training provided to the students, of how a TJ philosophy is infused into their development and their interactions with the clients, and of the experience and reflections of

the students following their involvement. The chapter explores how the ideas that TJ exhorts are becoming an increasingly important skills-base for graduates, and particularly for those students who will become the next generation of lawyers, judges and advisors. It is asserted that such philosophies are universally applicable to global legal education.

### **Refugee family reunion in a university law clinic**

The coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) in England and Wales had a profound effect on the ability of refugees residing in the UK to apply to be reunited with their families. Refugees<sup>2</sup> (typically male) who had settled in the UK with disunited spouse and children were, and are, in particular need of help, ranging from advise in general to assistance with the completion of the necessary applications to have their pre-existing family to join them in the UK. Prior to LASPO, such individuals would have been able to seek assistance from a solicitor, although this did not necessarily guarantee availability or quality. However, the government, underpinned by its austerity initiatives, considered these applications to be ‘straightforward’ and thus not requiring legal (and free) help. This led to organisations including the British Red Cross to call for help from university law clinics to help fill the lacunae of accessible legal advice centres. Following this the authors established a Refugee Family Reunion Law Clinic (RFRLC).

Refugee family reunion (RFR) enables individuals who have arrived in the UK and are granted<sup>3</sup> the status of refugee to be reunited, following the completion and acceptance of an application, with their nuclear and pre-flight family members. This typically refers to applications made by spouses and civil partners,<sup>4</sup> unmarried / same sex partners,<sup>5</sup> and the (biological, adopted and *de facto* adopted) children of the refugee.<sup>6</sup> These applications apply where the family resides abroad.<sup>7</sup> The application form is supplemented by the presentation of

various supporting documents relating to the previous and subsisting family relationship between the refugee in the UK (who completes the form on behalf of the family applicants and is known as the ‘sponsor’) and the family members living abroad. The completed bundle of evidence and the application form are assessed, first, by an Entry Clearance Officer (ECO), a civil servant, who will decide whether to approve or refuse the application. Where refused, the decision is reviewed by an Entry Clearance Manager (the ECO’s superior). Where family reunion is denied, the ECO or Visa Application Centre staff will communicate this decision and issue a ‘reasons for refusal’ letter..

The RFR Law Clinic was established in 2015 at Sheffield Hallam University and operates to help the refugee sponsor to complete the application form(s) for each of their family members intending to join the refugee in the UK. They work with the refugee to collate the available and supporting documents establishing the family relationship, to help them make sense of the application form (which is a ‘standard’ immigration form, not one designed specifically for RFR and thus has aspects to it which are not applicable to RFR, yet remain on the form), and to give the refugee and their family member applicants a ‘voice.’ This last aspect is particularly important. Whilst not a formal part of the application process, we strongly encourage the refugee sponsor to prepare a covering letter to their application. It offers a narrative of their relationship with the family; how the separation happened; how they have attempted to maintain contact; it provides an opportunity for the refugee to express their feelings; and, it is a useful channel to explain any gaps in the contact and/or the available corroborating evidence presented in the supporting bundle.

### **TJ as an underpinning philosophy for clinical education**

If a lawyer has only legal solutions, everything begins to resemble a legal problem. As therapeutic jurisprudence teaches, however, legal solutions can at times be counterproductive. Therapeutic jurisprudence can assist clinical legal education by broadening the view of what a lawyer is and does (Berkheiser, 1999, 1155-56).

When beginning to operate a university law clinic with a focus on reuniting refugees with their families living abroad, given that this was not only a clinical activity but also one to be underpinned by pedagogical and theoretical philosophies, the authors had to consider the most appropriate perspective to achieve its aims. TJ is a legal philosophy emphasising the importance of overlooked areas of the law/legal process in respect of individuals' 'human, emotional, psychological side[s]' (Winick & Wexler, 2003; and Wexler, 2011). Hence, according to TJ, the law and its associated legal rules, procedures, and roles can have therapeutic and anti-therapeutic effects on people, irrespective of the intention or whether one 'knows it or not' (Wexler, 1999). TJ seeks to develop approaches to help maximise positive (psychological/emotional) effects. It has a broad scope, encompassing legal domains including criminal law, employment, family law, juvenile law, immigration, torts and trusts and so on. It is therefore applicable to numerous stakeholders (victims, offenders, practitioners and family members – see Wexler, 2013; and Gal & Wexler, 2015). TJ was the most appealing and applicable of the comprehensive law approaches for our 'clinical' intent. Here, viewing the law as a therapeutic agent (Wexler & Winick, 1996) with its focus on the impact of the law on individuals' emotional state, their life and their physical and psychological well-being was the perfect antidote to the trauma and negativity of the experience of being an asylum seeker or refugee. Further, and of the utmost importance for the student volunteers working in the clinic, was TJ's non-transgression of legal norms or of it

undermining legal principles (which, of course, have been taught to law students throughout their undergraduate degree programme and which were not to be undone). TJ works in concert with legal principles but instils an inquisitive approach where the effects of the law, of its application, focus the attention of the practitioner to examine the law and adopt a sceptical, critical perspective to its effects. Having discovered, often hitherto, undiscovered and negative effects, the practitioner may work positively with legislators, with the judiciary, with members of the applicable civil and criminal justice systems, and with the client and other court-users, for the positive benefit of the end-user. This is why David Wexler, one of the founders of the TJ philosophy (Backhouse, 2016), has concentrated on the law ‘in action’ rather than law ‘on the books’ perspective, thereby dividing the law into the following categories: legal rules; legal procedures; and thirdly the roles of the legal actors. TJ is therefore almost uniquely suitable for law clinics, given the emphasis of the practical application of law and non-law factors.

### **Legal rules**

We used the ‘legal rules’ category as the starting point for the induction and training of our student advisors as they were to assist refugees in the UK to be reunited with their existing family members.. This required knowledge of the law and how to navigate through the various legal and administrative provisions facing the applicant and their sponsor. In respect of RFR, these are often complex and applied in a manner that might, at best, be described as user-unfriendly. Wexler (2014) established the metaphor of a ‘bottle’ and ‘liquid’ to demonstrate how TJ operates in practice. The bottle represents the legal rules and law under which the parties operate. The rules may be therapeutic and thus TJ-compliant, or they may have anti-therapeutic features. The ‘liquid’ or other contents you could use in the metaphor relates to the practice of the actors in the system who may, through their techniques, skills and

approaches, either add to the existing therapeutic framework or, in the alternative, they may mitigate against anti-therapeutic effects of the existing law. The immigration rules under which refugees must make their application is complex, counter-intuitive and often harsh in respect of the requirements placed on those completing the application form. For instance, the law is very prescriptive on which members of a refugee's family may join them (not their ascendants, no children over the age of 18 or who are supporting themselves) unless exceptional cases may be made. The use of the European Convention on Human Rights should be used in the application form to enable the applicant to raise broader issues in the event of an appeal. And, most controversially, children as refugees are not able to be reunited with their parents through this law and application process (Ferris, Marson & Kawalek, 2019).

The legal rules under which the student advisors and the refugee sponsor operate are not easily changed (hence the reason for Wexler referring to this aspect of the law as a bottle – once made, it is not easily malleable). However, through the students' understanding the law and its failures and with the opportunity, under supervision, to address these problems and to discuss how they might be overcome, learning is promoted and supported, developing in students a critical analysis of legislation in practice.

### **Legal procedures**

Refugee family reunion clinics emphasise the practical effects on clients and applicants and can use TJ-based tools to mitigate against the worst and most anti-therapeutic elements of the legal system into which all are thrust. The application process is a paper-based exercise with little opportunity for the applicant or their sponsor to engage with the ECO who makes the initial decision as to whether the family is to be reunited. It is very easy for mistakes to be made in the application process. It is not uncommon for dates of birth to be mixed between

applicants (each member of the refugee-sponsor's family must make a separate application, which is actually made by the sponsor as though they are the applicant)); for families to have performed a de facto adoption of a child as a baby but have no legal guardianship or responsibility of the child as recognised in English law; and, for one of the children applicants not to be the biological descendant of the sponsor (a fact not known until after DNA evidence is provided in the application process). The result under these circumstances may be a refusal by the ECO of the family being reunited. The letter of refusal is typically very negative, and whilst seemingly prepared from a template, this will be the first experience the sponsor and applicant have of such correspondence from the UK government. The contents of the letter are often accusatory, asserting for example that the applicant and sponsor have never met each other or that there is no evidence of their relationship. This is based often on a simple mistake in the details in the form (which is not uncommon where for example the sponsor's first language is not English, where names may be commonly shared by multiple individuals and/or if they lack experience of completing on-line applications) or a lack of evidentiary material either due to the problematic circumstances of their refugee status or the culture of the parties. The resultant refusal can be addressed through an appeal (which are rarely successful), the submission of another application rectifying errors in the previous application (if this is possible) or an appeal to the Immigration Tribunal. However, and corroborating the findings of Weinstein (1999) in respect of child custody disputes, this process is traumatic for all the parties, can further damage an already fractured family relationship, and can foster distrust, alienation and resentment with the state (which, lest we forget, will be the new home for the refugee).

## **Legal actors**



The third category, legal roles or actors, is one of the areas in which the students have limited possible influence (at this stage of their careers) but is one where we feel infusing a TJ-compliant philosophy to their experience will resonate in future interactions and will provide much by way of learning in the context of ethics and professional responsibility. All actors in the legal and administrative stages of the refugee family reunion process may positively or negatively influence the sponsor and applicants' experience. For the student advisors, they are trained as to the experience of many refugees in getting to the UK, their displacement, their asylum/substantive interview with Home Office's asylum interviewer at the border when claiming asylum and their possible detention until status is established. The students are provided with an appreciation of the political landscape of many countries from where refugee clients derive, the cultural issues and experiences of clients (through talks by former refugees in an attempt to dispel myths and to challenge pre-conceptions) and in relation to the use of interpreters. The students role-play interactions with clients, learning how to develop and maintain trust and, very importantly, to avoid paternalistic approaches which are the antithesis of TJ. The clients, as refugees, may suffer from Post-Traumatic Stress Disorder, they are often vulnerable, may be experiencing survivor guilt and are typically the father of the family feeling responsibility for reuniting the family. For such a person to hand the burden of the application to another person, to not feel as though they are in control and have personally helped the family to be reunited to start their new lives in the safety of the UK can have very negative effects. The TJ approach enables the client to feel empowered and supported, but in control and responsible for the fate of the family. They have first-hand knowledge of what is happening in the application and can relay this information in an informed way to the family living abroad (at least where the family members are easily contactable).

The students are also invited to attend First-tier Tribunal (Immigration and Asylum Chamber) hearings with pro bono lawyers when clients challenge refusals through the appeals process. Here they gain a first-hand understanding of how the judge and other actors in the court, including the Home Office's lawyers, influence the experience of the client. The judge may take the time to explain to the refugee sponsor what is happening in the case and the evidence relied upon in the reasoning of the Home Office in its refusal to the application for reunification. Even if the judge upholds the Home Office decision in such circumstances, the students observe the effect on the sponsor. The refugee will naturally be upset, but the time taken to explain to them the reasoning and deficiencies in the evidence they provided allows them to explain this to their family, to reassess the application with their advisors, and perhaps formulate a strategy to move forward. The sponsor may be otherwise unaware of what is happening in the case, having to rely on legal representatives (if they have them) to explain outcomes and implications, and often perceive an unfairness to the proceedings which is exacerbated by the impersonal approach of yet another state agency.

The refugee family reunion process is designed to facilitate refugees to enjoy the universal human right of family life. To expect a refugee to leave their home and their family and begin a new life in the UK without their family seems particularly cruel. The system as it currently operates is not therapeutic and certainly not TJ-compliant. The laws under which it functions are not designed to help refugees in their quest to reunify families, rather it seems to establish as many barriers and obstacles as possible to deter applicants in their pursuit. It feels adversarial in nature, it does not advance a collaborative approach to problem-solving and dispute resolution and negatively affects vulnerable individuals who are already displaced from their home and family, and to have this situation made permanent and inescapable. The legislative measures governing refugee family reunion are the very definition of Wexler's

(broken) bottle metaphor. The process does not aid the refugee's healing, does not help them to feel welcomed and safe in their new home, and does not allow the rehabilitation of their life to begin until they are reunited with their loved ones. This is also exacerbated post-arrival of the family. Until the refugee sponsor has news that the application(s) has been successful and they are to be reunited they are not permitted to access appropriate housing in expectation for the family's arrival. Under national law, housing made available to, for example, a male living on his own will be just that, suitable for him (perhaps a one-bedroom apartment). When his family do join him (for example his wife and young children) they will initially reside in this accommodation until the family are re-housed. This can cause stress and unconsciously or consciously accentuates the difficulty in re-establishing the family unit. This has been a distinct focus of the clinic and postgraduate research taking place.. Whilst the clinic is supported predominately by law student advisors, the broader issues of non-legal rules, of instilling in advisors the requirement to see the client as a person who will need assistance beyond the formality of completing an application and how the legal and non-legal systems can affect their healing process (and being critical of ways to change / mitigate and ameliorate these where possible) are crucial aspects to their education.

### **Placing the client at the heart of clinical activities**

A particularly important aspect of delivering a law clinic service to the refugee population is that often the client can be 'lost' in both the legal curriculum and clinical instruction (Capulong, 2016). It is argued that legal and clinical education may dehumanize the study of law and its effects on the client (Lopez, 1996). Being mindful of this possibility we attempt to expose students to a broad range of issues and approaches from which they can help the client through enabling the client to help themselves. The students appreciate the importance of empowering the client through control over their destiny by participating actively in the

management of their application (case). By providing the client with options from which to choose, by discouraging a paternalistic approach where the student takes over the application process and complete the application (and ancillary matters) in the absence of the client, and by exposing students to the cultural backgrounds of clients reduces much of the clients' previous negative experience and embedded frustrations that many exhibit. At all stages, the client is aware that it is for them (through appropriate advice and information sharing) to decide how and when to proceed. This process addresses many of the problems to which a large number of clients have been exposed.

Empathy, such an important aspect of TJ, is addressed in the students' training and reflected upon throughout their time at the clinic. Adopting Margulies' (1999) micro-version of empathy, where interpersonal relationships are paramount, and a macro-version of empathy where distributive issues in society are the focus, students can develop empathy for the refugee client as a person who wishes to be reunited with their family, trapped as they often are in non-ideal circumstances. Training on societal and political issues in respect of the countries of origin of clients (Davis, 2004); sessions with refugees and interpreters to understand the dynamics between the people involved in the application process; and, studying the law and national immigration system and its limitations promotes engagement with, and hopefully an understanding of, the social world of the clients and their perceptions of the legal world (Genty, 2000-01).

We have witnessed that this training has built student self-awareness (Elman & Forrest, 2007) and empathy.

‘Specifically empathy can aid the lawyer in building a rapport with her client and thus foster a more beneficial relationship; foster open and complete communication; lead to more thorough legal analysis; improve the image of the legal profession; and, satisfy client expectations’ (Gerdy, 2008, 18).

These factors are crucial when assisting a refugee through the RFR application process.

### **The broadening of the students’ skill-set.**

To move away from simply engaging in exercises in doctrinal analysis (the typical home of the law student) and to embrace other approaches and disciplines, in the context of a rounded clinical service, produces advisors with an enquiring yet understanding mind. An advisor who searches, creatively, for solutions to problems and develops tools and techniques to help clients to live their lives positively in new if alien (even at times hostile) environment is our aim and, in many respects, we feel confident that we have begun the steps of producing just that.

### **Conclusions**

TJ is an all-encompassing philosophy which understands that law is a social force. There are often intended and unintended consequences of its application for the mental health and psychological functioning of the actors involved. It is because of its central aim, the removal or mitigation against the anti-therapeutic consequences of the law, that makes it applicable to law clinics and clinical legal education globally. Our work has attempted to show this through publications in China, Singapore and the UK – the teachings of TJ travel effectively throughout the world. In using TJ’s tools and applying its principles, student advisors in all law clinics can positively assist clients’ satisfaction, they can enhance the reputation of the

clinic, and they can promote the competencies aspired to, and required of, their professional bodies. Students also gain much from a TJ based clinical experience. Jones (2015, 27) observed that such an approach rewards the students through ‘... personal happiness, increasing job satisfaction, avoiding burn-out, contributing to another person’s well-being, and other tangible rewards.’

TJ philosophy is, we maintain, of relevance to everyone involved in clinical legal education as well as in wider legal practice.

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<sup>2</sup> Which includes persons granted humanitarian protection status. See paras 352FA, 352 FD and 352 FG of the Immigration Rules which provide parallel provisions of family reunion for individuals granted humanitarian protection (on or after 30 August 2005) as well as refugees. Indeed, individuals with humanitarian protection status are considered as refugees by the office of the United Nations High Commissioner for Refugees (UNHCR).

<sup>3</sup> An individual may arrive in the UK with refugee status through the Gateway or Protection programmes. Typically, the individual arrives in the UK, claims asylum and may or may not be granted refugee status or humanitarian protection for five years. This may be granted on the basis of first tier decision making or granted post a tribunal hearing.

<sup>4</sup> Para. 352A of the Immigration Rules.

<sup>5</sup> Para. 352AA of the Immigration Rules.

<sup>6</sup> Para. 352D of the Immigration Rules.

<sup>7</sup> In-country applications are also possible where the family members already reside in the UK, although these applications are subject to different applications (and is a paid route, rather than free as per refugee family reunion).