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

Legal summary

July 2023

B.F. and Others v. Switzerland - 13258/18, 15500/18, 57303/18 et al.

Judgment 4.7.2023 [Section III]

Article 8

Positive obligations

Article 8-1

Respect for family life

Refusal of family reunification requests, for not fulfilling financial independence requirement, of provisionally admitted refugees fearing persecution because of their illegal exit from their country of origin: *violation; no violation*

Facts – The applicants residing in Switzerland were all recognised as refugees within the meaning of the 1951 Convention relating to the Status of Refugees (the 1951 Convention). In line with domestic law, they were granted provisional admission rather than asylum, since the grounds for their refugee status arose following their departure from their countries of origin and as a result of their own actions, namely their illegal exit from those countries. Accordingly, under domestic law they were not entitled to family reunification (unlike refugees who were granted asylum) which, however was discretionary and subject to certain cumulative conditions being met. Their applications for family reunification (with minor children and/or spouses) were rejected because one of these criteria, namely non-reliance on social assistance, was not satisfied and because the refusals were deemed not to breach Article 8 of the Convention.

Law – Article 8:

The principles under Article 8 in respect of family reunification recently summarised by the Court in *M.A. v. Denmark* [GC] were relevant. The crux of the matter in the present case was whether the Swiss authorities, when refusing the requests for family reunification because the families, if reunited in Switzerland, would not be financially independent, had struck a fair balance, subject to their margin of appreciation, between the competing interests of the individuals and of the community as a whole. The applicants had had an interest in being reunited with their family members, whereas the Swiss State had had an interest in controlling immigration as a means of serving the general interests of the economic well-being of the country.

(a) *Scope of margin of appreciation* – In *M.A. v. Denmark* [GC] the Court had concluded that member States should be afforded a wide margin of appreciation in deciding whether to impose a waiting period for family reunification requested by persons who had not been granted refugee status but who enjoyed subsidiary protection or, like the applicant, temporary protection. As in that case, the Court had so far not dealt with the question before it in the present case, notably whether, or to what extent, member

States might make family reunification conditional upon the family being financially independent, with regard to those refugees within the meaning of the 1951 Convention whose fear of persecution in their country of origin had arisen only following their departure from this country and as a result of their own actions.

Although, certain factors on which the Court had relied on in *M.A. v. Denmark* [GC] in determining that the margin of appreciation afforded to members States was wide were also present in the instant cases, other important factors differed. The applicants, unlike the ones in *M.A.*, had all been recognised as refugees within the meaning of the 1951 Convention. That Convention did not distinguish between persons who had fled their country for reasons of persecution and persons who became refugees at a later date, there was no hierarchy among refugees, and no objective criteria justified the provision of different treatment for refugees *sur place*, such as the applicants, including as regards their right to family unity. At European Union level – a standard by which Switzerland was not bound – family reunification of refugees within the meaning of the 1951 Convention was not subject to conditions, provided that the application for family reunification was submitted within three months after the granting of refugee status, and no distinction was made between different refugees under that Convention. Common ground could be discerned at national, international and European levels in terms of not distinguishing between different refugees within the meaning of the 1951 Convention as regards requirements for family reunification. That common ground reduced the margin of appreciation afforded to member States and refugees within the meaning of the 1951 Convention, as did the consensus at international and European level that refugees under that Convention, such as the applicants residing in Switzerland, needed to have the benefit of a more favourable family reunification procedure than other aliens.

The respondent State's disputed approach in the present case – to differentiate in respect of the requirements for granting family reunification, depending on whether a recognised refugee under the 1951 Convention had had a well-founded fear of persecution in his or her country of origin prior to fleeing that country and had thus been forced to flee, or whether his or her fear of persecution had subsequently arisen after his or her departure and as a result of his or her own actions – thus appeared to be unique in the international, European and comparative spectrum. That approach had been criticised by various independent bodies (the Committee on the Elimination of Racial Discrimination, the Council of Europe's Commissioner for Human Rights and the UNHCR).

Another factor which had an impact on the scope of the margin of appreciation was the quality of the parliamentary and judicial review in question. The Government had argued that the legislative distinction had been justified on two grounds.

The first one, namely, the difference, in terms of nature and duration, between the stay of refugees who were granted asylum, whose stay was meant to be permanent from the outset, and of provisionally admitted refugees, whose stay was precarious and not meant to be permanent, did not appear to be sufficiently supported by evidence. The majority of provisionally admitted persons had remained in Switzerland for a long time. Since 2017 the Federal Administrative Court had considered that recognised refugees, whether provisionally admitted or granted asylum, were, as a rule, unable to return to their countries of origin in the long run, and that the former therefore had *de facto* settled status in Switzerland, unless the revocation of their status was foreseeable. The applicants had arrived in Switzerland between 2008 and 2012 and had been provisionally admitted as refugees between 2010 and 2014, and the Federal Administrative Court had found that they all had *de facto* settled status, as their provisional admission had not been likely to be revoked. Their stay thus emphasised that the stay of provisionally admitted refugees tended to be of long duration. Accordingly, and in view of the fact that provisionally admitted refugees were recognised as having refugee status under the 1951 Convention, the Government's first argument had not been convincing. The situation differed from that in *M.A. v. Denmark* [GC] and *M.T. and Others v. Sweden*,

where the Court, in respect of family reunification waiting periods, had seen no reason to question the distinction made between persons granted protection owing to an individualised threat (persons with refugee status under the 1951 Convention) and persons granted protection owing to a generalised threat (temporary protection or subsidiary protection status).

Secondly, the Government had argued that provisionally admitted refugees had left their countries of origin and separated from their family members voluntarily, whereas refugees who were granted asylum had been forced to flee. The applicants had maintained that they had been forced to flee. The Court was not in a position to question that their departure from their countries of origin and their separation from their family members had occurred in different circumstances from those of refugees who had been forced to flee persecution in their countries of origin. While the Court's case-law did not require that the circumstances in which the departure and separation had occurred be taken into account as an element in the assessment as to whether a State was under a duty under Article 8 to grant the family reunification which had been requested, it was not manifestly unreasonable to do so *per se*.

The Court thus considered that member States enjoyed a certain margin of appreciation in relation to requiring non-reliance on social assistance before granting family reunification in the case of refugees who had left their countries of origin without being forced to flee persecution and whose grounds for refugee status had arisen following their departure and as a result of their own actions. However, that margin was considerably narrower than that afforded to member States for introducing waiting periods for family reunification when that was requested by persons who had not been granted refugee status, but rather subsidiary or temporary protection status.

The particularly vulnerable situation in which refugees *sur place* found themselves needed to be adequately taken into account in the application of a requirement to their family reunification requests, with insurmountable obstacles to enjoying family life in the country of origin progressively assuming greater importance in the fair-balance assessment, as time passed. That requirement needed to be applied with sufficient flexibility, as one element of the comprehensive and individualised fair-balance assessment. Having regard to the waiting period applicable to the family reunification of provisionally admitted refugees under Swiss law, that consideration was applicable by the time provisionally admitted refugees become eligible for family reunification under domestic law as interpreted by the domestic courts. More generally, refugees, including those whose fear of persecution in their country of origin had arisen only following their departure from their country of origin, should not be required to "do the impossible" to be granted family reunification. Notably, where the refugee present in the territory of the host State was and remained unable to meet the income requirements, despite doing all that he or she reasonably could to become financially independent, applying the requirement of non-reliance on social assistance without any flexibility as time passed could potentially lead to the permanent separation of families. Although domestic law and practice provided a certain flexibility in the application of the impugned requirement , there were also conditions circumscribing that flexibility. Only a low number of family reunification requests by provisionally admitted persons were granted every year .

(b) *The applicants' individual cases* –

(i) *The duration of the applicants' stay, their status in and their ties to Switzerland* – All the applicants had resided in the country for a significantly longer period than the applicant in *M.A. v. Denmark* [GC] and the second applicant in *M.T. and Others v. Sweden*. Indeed, the Federal Administrative Court's finding that the applicants had *de facto* settled status in Switzerland illustrated that the stay of provisionally admitted refugees in Switzerland generally tended to be of long duration. That weighed in favour

of finding a positive obligation on the part of the respondent State to grant family reunification.

The domestic authorities had also assessed their ties to the country, focusing primarily on their professional integration and their efforts to learn an official language. Their conclusions varied among the different applicants. In all the applications, the family members abroad in respect of whom family reunification had been requested had never been to Switzerland and had no ties to the country, except to their family members residing in Switzerland as provisionally admitted refugees.

(ii) *The time when the applicants' family life was created* – The applicants present in Switzerland had a long-standing family life with their family members abroad in respect of whom they had applied for family reunification, which also weighed in favour of finding a positive obligation to grant family reunification.

(iii) *The possibility to enjoy family life elsewhere* – The authorities had recognised the applicants residing in Switzerland as refugees within the meaning of the 1951 Convention on account of the ill-treatment they were at risk of experiencing in their countries of origin in the event of their return. It followed that there were insurmountable obstacles in the way of the families living together in the countries of origin of the persons requesting family reunification. As the family members in respect of whom family reunification had been requested were not in their countries of origin, but in third countries, the Federal Administrative Court and the Government had considered, in essence, that they could remain in these countries and that the applicants residing in Switzerland could at least visit them there, as they had done in the past, or, in respect of one of the applications, even live together in the third country. The applicants residing in Switzerland had submitted that their family members had not been staying in the third countries lawfully, and that they themselves could not lawfully reside there.

The Court had previously dealt with cases of applicants who had been recognised as refugees in the respondent State and had lodged requests for family reunification in respect of their family members who had been refugees in a third country at the time. In those cases, the Court had found that the arrival of the applicants' family members in the respondent State had been the only means by which family life could resume. In the circumstances of the present cases, there were a number of considerations regarding the families' opportunity, or lack thereof, to live in the third countries concerned reinforced the finding that the arrival in Switzerland of the applicants' family members was the only means by which family life could resume. Those also weighed in favour of finding a positive obligation to grant family reunification.

(iv) *The best interests of the children* – In three of the applications (13258/18, 57303/18 and 9078/20) the other parent of the children in had been established, presumed or not disputed as missing or dead. That aspect had not been address by the Federal Administrative Court and in the absence of any indications to the contrary, it appeared to be in the children's' best interests in those applications to be reunited with their sole parent who was alive in Switzerland, regardless of whether the children were or had been living with other relatives in the third countries or could apply for a placement in a foster family there. Moreover it appeared to be in the best interests of the children in the remaining application (15500/18), to be reunited with their father in Switzerland and live there with both of their parents. Those considerations weighed in favour of finding a positive obligation to grant family reunification.

The statutory three-year waiting period meant that it was inevitable that families would be separated for several years prior to a final domestic decision on their family reunification request, especially if they waited for the completion of that period before lodging their request; the waiting period only started to run from the moment the asylum application was adjudicated and the person was provisionally admitted as a

refugee. Children would inevitably grow older in the meantime, and in those circumstances only very limited weight could be attributed to the fact that the children in some of the applications had reached an age when they had been increasingly independent by the time the final domestic decisions in the family reunification proceedings had been taken.

Moreover, the applicants had shown that they had been particularly dependent on each other and/or that they had particular difficulty in living apart.

(iv) *The requirement of non-reliance on social assistance* – In three of the cases the Court was not satisfied that the domestic authorities, when applying the requirement of non-reliance of social assistance, had struck a fair balance between the competing interests at stake, notwithstanding their margin of appreciation. In two of the cases (15500/18 and 57303/18), the applicants had been gainfully employed and had done all that could reasonably be expected of them to earn a living and to cover their and their family members' expenses. In the third case (13258/18), the Court was not satisfied that the Federal Administrative Court had sufficiently examined whether the applicant's health would enable her to work, at least to a certain extent, and consequently whether the impugned requirement needed to be applied with flexibility in view of her health. In contrast, in the remaining application (9078/20), the Court found that that court had not overstepped its margin of appreciation when it took the applicant's lack of initiative in improving her financial situation into account when balancing the competing interests. The applicant, although suffering from medical problems, had been determined to be able to work at least part-time and had not demonstrated that she had made any efforts to find such employment.

Conclusion: violation in applications 15500/18, 57303/18 and 13258/18 (unanimously); no violation in application 9078/20 (unanimously).

The Court also found unanimously that the duration of the family reunification proceedings in application 9078/20, having regard to the circumstances and the State's margin of appreciation, did not breach Article 8.

Article 41: EUR 5,125 to each of the applicants in application 13258/18, and EUR 15,375 to the applicant in application 15500/18, in respect of non-pecuniary damage.

(See also *Gül v. Switzerland*, 23218/94, 19 February 1996, Legal summary; *Chandra and Others v. the Netherlands* (dec.), 53102/99, 13 May 2003, Legal summary; *Haydarie v. the Netherlands* (dec.), 8876/04, 20 October 2005; *Konstatinov v. the Netherlands*, 16351/03, 26 April 2007; *Hode and Abdi v. the United Kingdom*, 22341/09, 6 November 2012, Legal summary; *Hasanbasic v. Switzerland*, 52166/09, 11 June 2013, Legal summary; *Tanda-Muzinga v. France*, 2260/10, 10 July 2014, Legal summary; *Jeunesse v. the Netherlands* [GC], 12738/10, 3 October 2014, Legal summary; *M.A. v. Denmark* [GC], 6697/18, 9 July 2021, Legal summary; *M.T. and Others v. Sweden*, 22105/18, 20 October 2022, Legal summary)
