



HIGH EVIDENTIARY THRESHOLDS IN FAMILY REUNIFICATION PROCEDURES THREATENING THE RIGHTS OF REFUGEE CHILDREN

Submission to the Office of the United Nations High Commissioner for Human Rights

By Equal Rights Beyond Borders and the International Refugee Assistance Project

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This is a joint submission by Equal Rights Beyond Borders (Equal Rights) and the International Refugee Assistance Project (IRAP). The submission is co-authored by Dr Daniel Mekonnen¹ and Sara Palacios-Arapiles,² acting as independent consultants on the basis of instruction received from the two organisations. The submission builds on some major findings and conclusions of a previous consultancy work (hereinafter 'the Expert Report') Mekonnen and Palacios-Arapiles wrote for the two organisations in April 2021.³

The Expert Report was initiated against the background of an increasing number of rejections of family reunification applications from East Africa.⁴ Due to their practical experience in representing a high number of individuals in their family reunification procedures (especially unaccompanied minors aiming to reunify with their parents in the EU), Equal Rights and IRAP had identified the lack of official documentation to be the main reason for rejections. It was therefore found to be necessary to initiate in-depth research on the practical possibilities for refugees to obtain official documentation.

In preparation of the Expert Report the authors conducted semi-structured interviews with a total of 39 interlocutors located in the following countries: Canada, Egypt, Ethiopia, Germany,

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³ Daniel Mekonnen and Sara Palacios-Arapiles, 'Access to Official Documents by Eritrean Refugees in the Context of Family Reunification Procedures: Legal Framework, Practical Realities and Obstacles', April 2021, https://equal-rights.org/site/assets/files/1286/report_access_to_official_documents_eritrea_equal-rights_irap_may-2021.pdf. It is important to note that the main findings of the Expert Report were also presented (by both authors) in various official meetings and/or consultations of experts working in the area of family renunciation, such as a formal meeting of experts of UNHCR's Global Refugee Family Reunification Network (FRUN), of 2 June 2021.

⁴ While in the first quarter of 2017 still 82,8% of family reunification applications by Eritrean refugees had been accepted by German authorities, this number decreased to 29,9% in 2018, 28,3% in 2019 and 19,02% in 2020 of the cases being accepted. See Bundestag-Drucksache 19/2075, 19/11849 and 19/29014, available at: <https://www.bundestag.de/drucksachen>. The numbers refer to the German embassy in Ethiopia where the majority of Eritrean refugees seek international protection.

Kenya, the Netherlands, Norway, Sudan, Sweden, Switzerland, the UK, the USA, and Uganda. The interviewees included: asylum seekers and refugees in cross-border situations, as well as legal professionals (former judges and public prosecutors), diplomats, asylum lawyers, academics, and staff members and representatives of independent organisations working for the protection of refugee rights.

The primary focus of the Expert Report was on the challenges and security risks that Eritrean refugees and asylum seekers face when trying to meet the documentation requirements demanded by some EU Member States, including Germany, to prove their identity and family link in the course of their family reunification procedures. However, some of the challenges identified in the Expert Report may have a bearing over similar procedures by other groups of refugees and asylum seekers from other nationalities or places of origin.

In order to prove their identity or family relationship in family reunification applications, refugees are often requested to submit national ID cards, passports, birth and/or marriage certificates, in addition to their application for family reunification. For Eritreans, including unaccompanied minors, meeting this high evidentiary threshold often necessitate appearing in person before Eritrean diplomatic missions. This happens in the context of a well established fact, as shown by the Expert Report, that leaving Eritrea with the intention of seeking asylum in a foreign country is rendered a criminal offence which is often punished by arbitrary and extrajudicial forms of punishment, often of a life-threatening nature. In most cases, therefore, citizens leave the country without any documents. This is coupled with the fact that Eritrea does not have a harmonised official documentation system; for instance, in rural areas access to official documentation is restricted or inexistent, and the use of records of vital events is not a common practice in the country.⁵ Some Eritrean children are therefore at best in possession of a religious baptism certificate or a health card. Such 'alternative' evidence, however, is often not (sufficiently) considered by the concerned national authorities in family reunification proceedings.

Approaching Eritrean diplomatic missions in order to obtain official documents poses serious risks to both Eritrean applicants and their relatives (in third countries and in Eritrea). The procedure entails, among other things, the signature of a so-called 'regret form' in which Eritreans are compelled to make written self-incriminating statements with far-fetching implications on their fundamental rights, in order to get any consular service. In the statement, they have to admit that by leaving Eritrea 'illegally' (mainly in order to seek asylum and potentially also by avoiding the country's national service programme), they have committed a crime for which they will be held accountable whenever they return to Eritrea.⁶

The practice of strict evidential requirements in the contexts described above often hinder the realisation of the right to family reunification, resulting in the violation of the right to family unity and family life, and the principle of the best interest of the child. In the case of unaccompanied refugee children, such practices are not conducive for processing of applications that need to be done 'in a positive, humane and expeditious manner', as stipulated by Article 10(1)

⁵ On the law and practice of the official documentation system in Eritrea, see Section 3 of the Expert Report.

⁶ On a discussion of the practical realities and risks of obtaining official documents, see generally Section 4 and Section 5 of the Expert Report. On the procedure for obtaining official documents for unaccompanied minors, and its associated challenges and risks, see Subsection 4.7. of the Expert Report.

of the Convention on the Rights of the Child. The same provision also enjoins States parties to ensure that the submission of requests for family reunification by children 'shall entail no adverse consequences for the applicants and for the members of their family'. In the context of the European Union, the Court of Justice of the European Union (CJEU) states that the EU Charter of Fundamental Rights and the EU's Family Reunification Directive require EU Member States to assess applications for family reunification in the interests of the children concerned and with a view to promoting family life (*O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L*).

This practice is not compliant either with international and national jurisprudence that urges European national authorities to consider 'other' evidentiary standards where refugees are unable to provide official documentary evidence. In addition, Article 11(2) of the EU's Family Reunification Directive provides that '[a] decision rejecting an application may not be based solely on the fact that documentary evidence is lacking,' a provision which according to the CJEU does not leave a margin of appreciation to the Member States 'in obliging EU Member States to take into account other evidence of the existence of the family relationship' when there is no documentary evidence (*E. v Staatssecretaris van Veiligheid en Justitie*, para. 69). This consideration, as explicitly noted by the CJEU, is compliant with the European Commission's Guidelines for the application of the Family Reunification Directive. In addition, according to the CJEU, Article 11(2) of the Family Reunification Directive if read in the light of Article 7 (right to respect for private and family life) and Article 24(2) and (3) (the rights of the child) of the EU Charter of Fundamental Rights, implies that 'the national authorities may, depending on the circumstances of the particular case, be required to carry out the necessary additional checks, such as holding an interview with the sponsor', in order to rule out cases of child abduction or human trafficking, and thus makes sure that the application of family reunification is genuine (*ibid.*, para. 79).

The foregoing was determined by the CJEU in a preliminary ruling of 2019 that arose from the rejection of an application for family reunification lodged by an Eritrean beneficiary of subsidiary protection in the Netherlands. The applicant affirmed to be the aunt and the guardian (since the death of the biological parents) of an Eritrean minor residing in Sudan, at the time of application. The application was rejected by the competent authorities in the Netherlands on the grounds of (i) lack of official documentary evidence of the family relationship and (ii) the sponsor's inability to explain the absence of such evidence. In addition to the deliberations stated in the above paragraph, the CJEU urged national authorities to pay particular attention to the situation of refugees and this implies that it is 'often impossible or dangerous for refugees or their family members to produce official documents, or to get in touch with diplomatic or consular authorities of their country of origin' (*ibid.*, para. 66). It further noted that 'the national authorities must also take account of the personality of the sponsor or the member of his family concerned by the application for family reunification, the specific situation in which they find themselves and the particular difficulties they are facing, with the result that the requirements which may be set [...] for the purpose of establishing that it is not possible to provide official documentary evidence of the family relationship, must be proportionate and depend on the nature and level of the difficulties they are facing' (*ibid.*, para. 65). Lastly the CJEU noted that the 'national authorities are entitled to reject an application' in cases where 'the sponsor flagrantly fails to fulfil his obligation to cooperate or if it is clearly apparent, on the basis of objective information [...], that the application for family reunification is

fraudulent’ (*ibid.*, para. 67). However, ‘in the absence of such circumstances’, the CJEU emphasised that the concerned national authorities must comply with their obligations laid down in Article 11(2) of the Family Reunification Directive and take ‘other evidence’ into account (*ibid.*, para. 68).

On the basis of these considerations, the CJEU noted that the sponsor did not have the official documents she was asked to provide by the respective national authorities in the Netherlands because she came from a rural area where the possession of specific official certificates was unusual. Further, the CJEU came to the conclusion that the applicants did fulfil their obligation to cooperate with the national authorities by informing them that ‘it would be impossible to obtain those certificates today’, since the Eritrean minor (the applicant) left the country illegally, with the result that requesting such certificates by means of local acquaintances ‘would have engendered dangers’ for them and for their family residing in Eritrea (*ibid.*, para. 75). Lastly, the CJEU noted that the concerned national authorities did not consider the applicant’s age, his situation both as a refugee in Sudan and before, in Eritrea, or the child’s best interests (*ibid.*, para. 77). Here, the CJEU explained that ‘while the competent national authorities are permitted to take steps for the purpose of detecting fraudulent applications for family reunification, occurring in a context of child abduction or even human trafficking, [...] that fact does not free those authorities from the obligation to have regard to the best interests of a child potentially finding himself in conditions such as those described by [the applicant]’ (*ibid.*, para. 78).

A judgement of 2018 by the Swedish Migration Court of Appeal (the highest judicial organ in Sweden for matters of asylum and immigration) is also of particular importance. In this judicial decision, the Swedish Migration Court of Appeal emphasised the need to consider ‘alternative’ proof of identity for Eritrean refugees in the context of family reunification applications. The case concerned an Eritrean woman and her child, both registered as refugees in Ethiopia and who applied for family reunification to join the woman’s husband (and father of the child) and her other child, in Sweden (Migration Court of Appeal, UM 2630-17, 5 March 2018). The Migration Court, on appeal, found that it was disproportionate to require the Eritrean applicants to obtain Eritrean passports from an Eritrean embassy abroad given the risks this would pose to them and their relatives in Eritrea.

For instance, the Swedish Migration Court of Appeal stated that the applicants would be compelled to sign the ‘regret form’ (discussed above) wherein they would accept punishment for not having completed their military and national duties. In addition to this, the Swedish Court noted that by approaching an Eritrean embassy, the family would make the Eritrean government aware of their illegal exit, which would put their relatives still living in Eritrea at serious risk including reprisals in the form of, for instance, deprivation of liberty (*ibid.*, para. 4). Consequently, the Swedish Migration Court of Appeal held that the appellant and the children would enjoy an alleviation of evidentiary burden with regard to their identities and that it would fall upon the Swedish Migration Agency to complete a DNA test on the family’s affiliation (*ibid.*). In ruling so, the Swedish Court referred to the case of *Mugenzi v. France*⁷ and the

⁷ In *Mugenzi v. France*, the European Court of Human Rights reiterated that family unity was an essential right for refugees and that family reunification was a fundamental element in enabling persons who had fled persecution to resume a normal life. It emphasised that the applicant’s refugee status meant that their application for family reunification should be dealt with ‘speedily, attentively and with special care, considering that the

Family Reunification Directive, underlining that both the European Court of Human Rights and EU law require domestic authorities to take into account ‘other evidence’ of the existence of family ties, where the refugee is not able to present official documents (*ibid.*, para. 2.2).

Lastly, with regard to family reunification procedures that involve children, the Committee on the Rights of the Child (CRC) has criticised the procedures on family reunification that impose excessively demanding documentary requirements and recommends to take into account ‘all necessary measures to safeguard the principle of family unity for refugees and their children, including by making administrative requirements for family unification more flexible and affordable’ (Concluding Observation to Poland, 2015, as cited in Council of Europe, Commissioner for Human Rights, ‘Realising the right to family reunification of refugees in Europe’, June 2017 p. 19).

In our view, strict adherence to the rulings, observations and recommendations cited above, namely that of the EU’s Family Reunification Directive, the CJEU preliminary ruling, the Swedish Court’s judgement, as well as the CRC’s Concluding Observation, are crucial in ensuring less cumbersome administrative procedures for the processing of family reunification requests by unaccompanied minor refugees.

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acquisition of an international protection status in proof that the person concerned is in a vulnerable position’. As cited in in Council of Europe, Commissioner for Human Rights, ‘Realising the right to family reunification of refugees in Europe’, June 2017, p. 22. See also *Mugenzi v. France*, Application No. 52701/09, ECtHR, 10 July 2014, para. 54 (in French). In the cases of *Mugenzi v. France*, *Tanda-Muzinga v. France* and *Senigo Longue and Others v. France*, the ECtHR also found that the procedure for examining applications for family reunification had to contain a number of elements, including regard to the applicants’ refugee status and the best interests of the children, so that their interests as guaranteed by Article 8 of the European Convention on Human Rights were respected. See ECtHR, ‘Family reunification procedure: Need for flexibility, promptness and effectiveness’, Press Releases Issue by the Registrar of the Court, ECHR 211/2014, 10 July 2014.