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A CROSS-COUNTRY COMPARISON ON THE RIGHT OF REFUGEES TO FAMILY REUNIFICATION

ELIGIBLITY AND ACCESS OF THE PROCEDURE IN CANADA, AUSTRALIA AND THE UNITED KINGDOM

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LIST OF ACRONYMS

ADR	Adult Dependent Relative
CCR	Canadian Council for Refugees
CMW	Committee on Migrant Workers
CoE	Council of Europe
CRC	Convention on the Rights of the Child
DIMA	Department of Immigration and Multicultural Affairs (Australia)
DIPB	Department of Immigration and Border Protection (Australia)
ECF	Exceptional Case Funding (UK)
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EXCOM	Executive Committee of the High Commissioner's Programme
EWCA	England and Wales Court of Appeal (UK)
H&C	Humanitarian and compassionate considerations
HRC	Human Rights Council
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IMA	Illegal Maritime Arrival (Australia)
IRB	Immigration and Refugee Board (Canada)
IRCC	Immigration, Refugees and Citizenship Canada
IRPA	Immigration and Refugee Protection Act (Canada)

IRPR	Immigration and Refugee Protection Regulations (Canada)
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act (UK)
NGO	Non-Governmental Organisation
OYW	One Year Window of Opportunity (Canada)
PACE	Parliamentary Assembly of the Council of Europe
PAM	Procedure Advise Manual (Australia)
RAILS	Refugee and Immigration Legal Service (Australia)
RCOA	Refugee Council of Australia
SHP	Special Humanitarian Program (Australia)
UAMs	Unaccompanied minors
UDHR	Universal Declaration on Human Rights
UKSC	United Kingdom Supreme Court
UKVI	United Kingdom Visa and Immigration
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
VAC	Visa Application Centre (UK)

INTRODUCTION

The family is undeniably the most important aspect of most people's lives, it is the basic and fundamental unit of our social structure, and it is one of the links between individuals and society. International human rights instruments, including those concerned with the rights of refugees and children, explicitly recognise the importance of the family. Family reunification is a safe and legal pathway available for refugees to reunite with their family members, close or extended, in the country of asylum. Indeed, when many refugees flee conflict or persecution in their home countries, families are often separated along the route or left behind for a variety of reasons (e.g. limited opportunities or resources). The separation can be traumatic and have harsh consequences both on the family members left in dangerous situations, and on the refugees, who often lose contacts with their relatives and lack the support inherent to the family life to settle. Indeed, family reunification plays an important role as an effective emotional, social, and economic support for the integration of refugees in the country of asylum. On the contrary, the worry and the anxiety people carry about their families left behind is likely to increase their vulnerability. Moreover, family reunification can be seen as a safe and legal route for refugees, who often are smuggled or trafficked and put themselves in danger to escape their country of origin. According to the UNHCR, maintaining and facilitating family unity and family life can have numerous benefits on individual refugees and their communities, as it helps to ensure their physical care, emotional well-being, and economic support. Moreover, in host countries, family unity enhances refugees' independence and self-sufficiency, as they rely less heavily on external social and economic assistance in the long-term, and they do not have to worry about sending remittances home and can enjoy the benefits of the family network, in particular that of sharing work and child-care responsibilities. In addition, giving effect to the right to family unity through family reunification may help to reduce the number of unauthorised and illegal arrivals, as well as to reduce unnecessary adjudication of claims for refugee status[1]. In other words, family unity can promote durable solutions for refugees and their families, especially in terms of local integration. The significant role that families play in

[1] UNHCR, *Summary Conclusions on Family Unity*, 2001, para. 6.

building a unified and inclusive society is also recognised by national governments, which often provide for family reunification programmes in their immigration policies.

With this in mind, the present work looks at the challenges in law and practice to the enjoyment of the right to family reunification for recognised refugees in three notoriously welcoming countries across the world: Canada, Australia and the United Kingdom, by looking specifically at the categories of close family, extended family and family members of unaccompanied minors. On one hand, we are going to analyse the conditions for family reunification country by country; on the other we are going to compare and contrast these findings. Indeed, despite the differences in the regional and national systems, it was possible to find some common features which will be addressed throughout the text. Finally, one last aim of this work is to highlight the existing gaps between state practice and international human rights law on the matter.

In terms of methodology, it was necessary to consider a vast range of primary and secondary sources, as well as of the main literature. Thus, a review of the fundamental treaties and conventions, as well as other non-binding instruments both in international, humanitarian and refugee law was a useful starting point for this research. The next necessary step was to delve deeper in the national legislation of each country to see how they interpreted and, eventually, guaranteed this right to recognised refugees. In this case, the main sources of information were national acts and regulations concerning immigration and refugee matters, but also reports and statements from the governments, civil society, and international organisations, such as the Red Cross, UNICEF and Amnesty International. Case law, both from international and national courts, also made a significant contribution towards a more comprehensive analysis of state practice. Indeed, through a variety of valuable examples, we saw how courts tackled potential gaps in interpretation in specific cases. The work has been divided into two macro areas, the first being that of eligibility, meaning the different criteria used to select whether family members are eligible to apply for family reunification, and the second being that of procedural requirements, so all the conditions imposed by States that refugees and their family members must fulfil to reunite.

The first chapter starts by investigating the extent to which the right to family unity and family life applies to refugees under international law and whether hard law

principles, instead of simple guidance, have been established. Indeed, there is no internationally recognised right of refugee to family reunification, and thus it is necessary to build up on a range of more general norms and policies that have consolidated over time. Subsequently, we moved onto exploring the different definitions of family. We questioned how broad are these definitions and which are the eligibility criteria applied at the national level in the three countries under scrutiny. In particular, each country distinguishes between close family members, such as spouses and minor children, and extended family members, for example parents and grandparents. Each State also has its own criteria to determine children's age of dependency, as well as whether post-flight family members can be considered part of the family unit. Thus, a second enquiry regarded how the States implement the dependency criteria, if it is limited to physical and economic reliance or if it also includes emotional dependency. A separate issue emerged during the research is that of unaccompanied minors who wish to reunite with their parents. Indeed, in the process it became necessary to question whether States provide UAMs with this possibility or if they limit themselves to accept cases on humanitarian grounds. At the end of each sub-section a comparison among State's legislation and practices offers an overview of their different approaches. But that was not the only aim, as the final part of the chapter wishes to compare the standards established at the international level with the regulations put in place by States for each category, highlighting gaps and good practices.

The second and last chapter starts by recollecting the main recommendations made by international authorities, especially the UNHCR, about procedural requirements. Notably, in all circumstances States are invited to consider the particular situation refugees come from and meet their needs without unduly delaying the reunion. Among the numerous requirements, the most common ones which cause delays and difficulties for the majority of applicants have been chosen for a more in-depth analysis. Indeed, as the subject of accessibility of the procedure is multidimensional and can be considered from various perspectives, it we decided to concentrate on what appeared as the most striking aspects. In particular, the second part of the chapter is going to investigate what documents are required as proof of the family link and the alternatives available when doubts arise, such as interviews and DNA testing; the level of income and the accommodation conditions requested to the hosting refugee; how family members are

supposed to lodge their application and the issues that arise in meeting the deadlines; finally, the expenses these families have to support and whether or not they can benefit from legal advice during the reunification procedure. As in the previous chapter, here we also tried to compare and contrast these issues among the selected countries. Lastly, in line with the methodology of this work, the final section is dedicated to evaluating the level of compliance of State practice with international norms. To conclude, considering the density of this research, we thought it could be useful to build up a table summarising the most important information at the end of each chapter, to have a visual and immediate understanding of the main findings.

1. ELIGIBILITY: FROM INTERNATIONAL LAW TO STATE PRACTICE IN CANADA, AUSTRALIA AND THE UNITED KINGDOM

1.1. International and regional legal frameworks

1.1.1. The right to family life and family unity

International human rights law does not define a right to family reunification *per se*, but it establishes a right to family life and family unity as a fundamental human right. Indeed, the very first commitment to the protection of the family was made by the international community in the 1948 Universal Declaration on Human Rights, precisely in Article 16(3), which states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State". Being a right inherent to all human beings, it applies to everyone regardless of their status, and thus, it applies also in the refugee context[2]. Similar provisions can be found in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights. Together with the right to self-determination and non-discrimination, the right to family life is the only other right protected under both instruments. Article 17(1) of the ICCPR imposes a negative obligation on the State not to interfere with a one's privacy, family, and home, while Article 23 reaffirms the provision of the UDHR. Moreover, Article 10(1) of the ICESCR affirms, in a more discretionary way, that "the widest possible protection and assistance should be accorded to the family", reiterating the positive obligations on the States. Regarding Article 23, the Human Rights Committee commented that "the possibility to live together implies the adoption of appropriate measures […] to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons"[3]. Furthermore, under international humanitarian law, both the First and the Second Additional Protocols to the 1949 Geneva Conventions clearly affirm, in Articles 74 and 4(3)b respectively, the

[2] Ibid. fn 1, para. 1.
[3] HRC, *CCPR General Comment No. 19: Article 23 on the Protection of the Family, the Right to Marriage and Equality of the Spouses*, 1990, para. 5.

necessity for the contracting States and the parties to the conflict to facilitate the reunion of families dispersed or temporarily separated by the war.

Compared to human rights law and humanitarian law, the 1951 Convention relating to the Status of Refugees is completely silent as to the right to family reunification, and only refers to "the refugee", without any mention of the refugee's family. However, the issue has been acknowledged in the Final Act of the Conference of the Plenipotentiaries section IV(B), which recognized the unity of the family as an essential right of the refugee and recommended governments "to take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that the unity of the family is maintained … [and for] the protection of refugees who are minors, in particular unaccompanied children and girls, […]". This recommendation was adopted upon the suggestion of the representative of the Holy See who noted that, although it was obvious that assistance to refugees implied assistance to their families, "it would be wise to include a specific reference"[4]. Prior to being unanimously adopted, the recommendation was revised to also include an express mention to the official comment of the *ad hoc* Committee on Statelessness, according to which the same rights granted to the refugee should be extended to the immediate family too[5]. The UNHCR reiterated this concept in its 2001 Summary Conclusion by stating that family members should be allowed to remain in the same country as the refugee and enjoy the same rights, granting them the so-called "derivative status". Moreover, it reminded that, because the obligation to respect the right of refugees to family unity is a basic human right, it applies irrespective of whether a country is a party to the 1951 Convention[6]. Additionally, the UNHCR Executive Committee has adopted on several conclusions, which, although not binding, try to provide an even more unified approach to the right to family unity and family reunification. In particular, it reiterated the importance of the principle of family reunion and the need to coordinate the work between governmental and non-governmental organizations; it recommended countries of origin to "facilitate family reunification by granting exit permission to family members of refugees to enable them

[4] UNHCR, *The Refugee Convention, 1951: The Travaux Préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, pp. 269-271.
[5] ECOSOC, *Report of the ad hoc Committee on Statelessness and related problems*, 1950, p. 40.
[6] Ibid. fn. 1, para. 7 and 4.

to join the refugee abroad"; and it underlined the importance of prioritizing family unity issues at an early stage in all refugee operations[7].

Additional protections to the family unity have been included in the Convention on the Rights of the Child, which requires State parties to respect the right of the child to preserve his or her family relations without unlawful interference, and to not be separated from his or her parents against their will[8]. Moreover, with respect to refugee children, the CRC has gone a step further then the ICCPR and the ICESCR, by including specific provisions addressing this issue. Article 22 ensures that both children seeking refugee status or already recognized as refugees, whether accompanied or not, receive appropriate protection and assistance in the enjoyment of their rights, with particular consideration given to the process of reunification with his or her family members. In this regard, the CRC Committee has also stated that the search for durable solutions for children begins precisely by analysing the possibility for family reunification[9] in consideration of the preservation of the family unit, especially when the relations with their parents and/or sibling(s) are interrupted by migration and when assessing their best interest[10]. Finally, the most recent commitments at the international level, namely the 2016 New York Declaration for Refugees and Migrants and the 2018 Global Compact on Refugees, highlight how family reunification can "facilitate opportunities for safe, orderly and regular migration"[11] and how it can be a "complementary pathway for admission"[12], protecting refugees and their family members from being smuggled or trafficked and from embarking in dangerous journeys, while opening a safe and legal route to settle in the host country.

Thus, there is a wide range of human rights instruments available to create a comprehensive system of protection and assistance for the family. However, there still lacks a unified approach, which is shown in the different terminology used, starting from "family" in the UDHR, ICCPR and ICESCR, "family environment" in the CRC, and

[7] EXCOM, *Family Reunion No. 9 (XXVIII)*, 1977, paras. 1-2; EXCOM, *Family Reunification No. 24 (XXXII)*, 1981, para. 4; EXCOM, *Protection of the Refugee's Family No. 88 (L)*, 1999, para. B(iv).
[8] Arts. 8(1), 9(1) and 16(1), CRC.
[9] CRC Committee, *General Comment No. 6 on the Treatment of unaccompanied and separated children outside their country of origin*, 2005, para. 79.
[10] CMW, *Joint General Comment No. 4 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 Committee on the Rights of the Child*, 2017, para. 32.
[11] UNGA, *New York Declaration for Refugees and Migrants*, 2016, para 57.
[12] UNGA, *Global Compact on Refugees*, 2018, para. 95.

"family unity" in refugee law. In this regard, it is important to note that, although there is no explicit right to family reunification in international law, family unity is a fundamental element of the right to family life. Therefore, family reunification might be the only practical way to realise the right to family life in the case of separated refugee families[13]. Likewise, as the UNHCR has argued, "refusal to allow family reunification may be considered as an interference with the right to family life or to family unity, especially where the family has no realistic possibilities for enjoying that right elsewhere"[14]. Indeed, even if the refugee has not yet established strong ties with the host community and has not lived in the country of asylum for a considerable time, the latter might be the only place where the refugee is able to enjoy the right to family life.

In terms of regional standards on the right to family unity and family life, the American Convention on Human Rights and the European Convention on Human Rights provide for a comprehensive set of rights and resulting State's obligations. In the American context, we have to keep in mind that Canada is not a member of the Organisation of American States and has not ratified the American Convention; nonetheless, it is still worth looking at the convention, as it has established key provisions in the granting of family reunification. Indeed, Article 11(2) protects against arbitrary or abusive interference with one's family, while Article 17(1) recognises the family as a fundamental group unity of society entitled to protection, in line with international standards. Moreover, Article 17 goes on also protecting the right to marry, form and raise a family, in compliance with the right to non-discrimination, and the right of children to be protected in their best interest, regardless of whether they were born in or out of wedlock. In addition, the IACtHR found that effectively recognising the right to seek and enjoy asylum, as set in Article 22(7) of the Convention, entails also to proceed to carry out family reunification procedures, if refugee status has been granted[15]. Indeed, the States not only have to abstain from acts that involve the separation of families, but also have a positive obligation to take the necessary steps to keep the families united or reunite

[13] Edwards, A., "Human Rights, Refugees, and the Right "to Enjoy" Asylum", 2005, p. 314.
[14] Ibid. fn. 1, para 5.
[15] IACtHR, *Advisory Opinion on Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, OC-21/14, 2014, para. 261.

them if they have been separated, especially if refugees unaccompanied minors are involved[16].

In the European context, Article 8 of the ECHR establishes the right of individuals to respect for private and family life and the obligation on public authorities not to interfere with this right, unless there are compelling reasons of national security and public safety. The notion of "family" under Article 8 is not confined to marriage-based relationships and it may include other *de facto* family ties where the parties are cohabiting or have a stable union, including same-sex couples. Children and parents have the right to the mutual enjoyment of each other's company and domestic measures preventing such enjoyment may amount to an interference with Article 8. There is no difference between children born in or out of marriage, as natural parents have the same right to take care of the children. Moreover, the Court found that, although Article 8 does not provide for a right to adopt, the relation between adoptive parents and an adopted child are of the same nature as the family relations protected by the article. However, States have a certain margin of appreciation in the recognition of culturally different types of guardianship. Family life can also exist between siblings, aunts/uncles and nieces/nephews, and grandparents and grandchildren, since such relatives can have an important role in the family. Of course, these relations have a lower degree of protection than those between parents and children, unless there are evidence suggesting a degree of dependency involving more than normal emotional ties[17]. Up until recently, the jurisprudence of the ECtHR has provided more protection against the expulsion of long-settled migrants, then to the rights of family members to enter the country of asylum. This translated into more focus being put on State's negative obligations not to divide families, than on their positive obligations to reunite family members so that individuals were able to enjoy their right to family life and family unity. In this regard, the Court has ruled that there must be a balance between the competing interests of individuals and the community as a whole, while keeping in mind the in such contexts the State has a certain margin of appreciation in controlling the entrance of individuals in its territory. However, while the State's exercise of this right is generally quite broad, it is nonetheless circumscribed by a range

[16] IACtHR, *Advisory Opinion on Juridical Condition and Human Rights of the Child*, 2002, OC-17/02, pp. 35-36.
[17] CoE, *Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life, home and correspondence*, August 2020, pp. 65-88.

of factors, as reiterated in numerous ECtHR judgments. In particular, the Court has set out a range of criteria to be taken into account when deciding expulsion, such as the seriousness of the offence, the nationalities of the people concerned, the family situation (e.g. marriage duration and genuineness), the age and best interest of the children, if involved, and the solidity of the social and family ties developed in the host country. On the other hand, according to Nicholson in the context of family reunification the starting point of the Court is very much a statist one that refusing admission does not normally require a positive justification[18]. Moreover, the jurisprudence of the ECtHR in this context mostly regards immigrants, rather than refugees. Indeed, in the immigration context, the Court generally finds that where family members can enjoy family life elsewhere, there is no obligation to admit them. This so-called "elsewhere approach" cannot be possible for refugees, who come from conflict areas and have often suffered persecution and various human rights violations. However, the Court has found this to not be always true. The case of *I.A.A. and Others v. United Kingdom*, for example, concerned a Somali woman who had joined her refugee husband in the UK, and who applied for family reunification for her five children, who had been living in Ethiopia alone for nine years. The Court ruled that "while it would undoubtedly be difficult for [her] to relocate to Ethiopia, there is no evidence before it to suggest that there would be any 'insurmountable obstacles' or 'major impediments' to her doing so". Although the domestic courts had accepted that it would be in the children's best interests to be allowed to join their mother in the UK, the ECtHR reiterated that the best interest of the children could not be a "trump card" requiring their admission. While their situation was "certainly 'unenviable'", the ECtHR found they had "in the meantime reached an age where they were presumably not as much in need of care as young children and are increasingly able to fend for themselves", had all "grown up in the cultural or linguistic environment of their country of origin, and for the last nine years they have lived together as a family unit in Ethiopia with the older children caring for their younger siblings"[19]. The absence of a risk of ill-treatment was thus a decisive factor in the case in the Court's decision that family life could be enjoyed elsewhere, while the weight to be accorded to the children's best

[18] Nicholson, F., "The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification", *Legal and Protection Policy Research Series*, 2018, pp. 13-16.
[19] *I.A.A. and Others v. United Kingdom*, Application no. 25960/13, ECtHR, 31 March 2016, paras. 44-46.

interests was not found to be sufficient. On a positive note, according to a recent CoE report, the Court has been adopting a more sensitive approach to the particular situation of refugees compared to migrants and has strengthened its level of protection. Firstly, the Court recognises that there are *ipso facto* "insurmountable obstacles" to establishing family life in the country of origin. Secondly, while in cases involving migrants, the Court usually considers whether parents have voluntary left their children behind; in cases involving refugees, the Court acknowledges that they are often compelled by circumstances to leave family members behind[20]. Recently, in *M.A. v. Denmark* for the first time the ECtHR was called on to consider whether and, to what extent, the imposition of a statutory waiting period before being eligible for family reunification to people with temporary protection status is compatible with Article 8 of the Convention. The case concerned a delay of three years imposed by the Danish law on the applicant's right to family reunification due to his temporary protection status. On one hand, the Court reiterated the State is entitled to control the entrance of aliens on its territory and their residence. On the other, it was found that a waiting period of three years was too long to be separated from one's family and that that period did not include the actual decamping, resulting in further delays. Also, the Court found that the government's policy failed to strike a fair balance between the interests of the individual to be reunited with his family and the economic well-being of the community, thus violating Article 8. Finally, the ruling importantly underlines that all refugees have a right to family reunification, regardless of whether they have temporary protection or convention status, since as it was rightly held by the applicant "the need for family unity should not be dependent on a person's status, but on the gravity of the obstacles preventing that person from enjoying family life in his or her country of origin." [21].

Overall, gathering from the numerous case law of the ECtHR, factors to be considered relevant in the context of family reunification include: whether family separation was voluntary or not; whether family life can be enjoyed elsewhere or not as a result of lack of protection in the country of origin; whether the authorities have taken into consideration the vulnerability and the difficult personal history of the applicants; whether children are involved, their age, level of dependency on the care of the parents

[20] CoE, *Realising the right to family reunification of refugees in Europe*, June 2017, p. 21.
[21] *M. A. v. Denmark*, Application no. 6697/18, ECtHR, 9 July 2021, paras. 83 and 124-195.

and best interest; and the level of attachment to the country of origin of the host country of the applicants[22].

1.1.2. The definition of family and the concept of dependency

As Van Bueren argues, family is still "a concept in transition"[23]. Indeed, there is no internationally agreed definition of "family" and the interpretation of the concept varies between regions and countries. Despite this, there is quite a substantial body of recommendations which serve as a useful guide to interpretation. The question of whether a family exists or not is essentially a question of fact, depending on the existence in practice of close personal ties and to be determined on a case-by-case basis, but the definition of which should be as "open and adaptable, inclusive and non-prescriptive"[24] as possible. To protect the rights of all family members adequately, international law must both accommodate a wide range of different family structures, while advancing a comprehensive and universally accepted minimum standard on the rights of those family members. A good example could be the concept of "family environment" used in the CRC, which unfortunately has received little attention, but which could be important because it focuses on the significant social relationships formed within the family, overcoming the narrower notion of biological family.

Nonetheless, on many occasions, the international community has called upon States to apply a broad definition that would go beyond strictly including the members related by blood and living together in the same household. According to the International Committee of the Red Cross "common sense must prevail" and "all those who consider themselves and are considered by each other, to be part of a family, and who wish to live together, are deemed to belong to that family" [25]. Under Articles 17 and 23 of the ICCPR, the concept of family must be understood in the context of the legislation and practice of the State party concerned; where different concepts of family exist, the State should

[22] Ibid. fn. 18, p. 23.
[23] Van Berne, G., "The International Protection of Family Members' Rights as the 21st Century Approaches", 1995, p. 733.
[24] UNHCR, *Summary Conclusions on the Right to Family Life and Family Unity in the Context of Family Reunification of Refugees and Other Persons In Need Of International Protection*, 2017, para. 9.
[25] Comment on article 74 of the First Additional Protocol, ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, *Martinus Nijhoff Publishers*, 1987, para. 2997.

indicate the degree of protection afforded to each, as well as whether and to what extent families, composed for example by unmarried couples and their children or by single parents and their children, are recognised and protected by domestic law[26]. The Committee on the Rights of the Child has expanded further on the term "family", stating that it "must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (Art. 5)"[27]. Furthermore, the Committee has also affirmed that the protection under Article 9 of the CRC, concerning family separation and preservation of the family unity, also extend "to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship"[28]. Finally, in a broader but still relevant context, Article 4 of the 1990 Convention on the Protection of the Rights of All Migrants Workers and Members of their Families includes both married spouses and spouses having a relationship that "produces effects equivalent to marriage", dependent children and other dependent persons "who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned".

In the refugee context, the UNHCR recognises the family to be composed at the very minimum by the so-called nuclear family (spouse and minor children)[29]; in practice, however, it advocates for the application of liberal criteria, regardless of age, level of education, marital or legal status, which consider cultural variations and economic and emotional dependency factors, with the view to promote a comprehensive framework for the reunion of family members[30]. Indeed, the concept of dependency is at the very core of the UNHCR policy: it recognises that, in most circumstances, familiar relationships go beyond blood lineage, and, in many societies, extended family members such as parents,

[26] HRC, *CCPR General Comment No. 16 on Article 17 on the Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 1988, para. 5 and *CCPR General Comment No. 19 on Article 23 on the Protection of the Family, the Right to Marriage and Equality of the Spouses*, 1990, para. 2.
[27] CRC Committee, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, 2013, para. 59.
[28] Ibid., para. 60
[29] Ibid. fn. 1, para 8 and UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 2019, para. 185.
[30] Ibid. fn. 1 and 7; UNHCR, Resettlement Handbook, 2011, section 5.1.2.

brother and sisters, adult children, grandparents, uncles and aunts, nieces and nephews, etc. are financially and emotionally tied to the nuclear family unit. Indeed, given the traumas of the refugee experience and the stress associated with the flight, refugee families' relationships are often based on the survival of and the mutual support from various households' members. For this reason, the definition of family should depend on the different cultural roots and societal norms and States should adopt a sensitive and situation-specific understanding of family to prevent further separation. Moreover, because refugees are often separated from their families for many years, the UNHCR promotes a proactive application of the concept of dependency, to avoid the exclusion of family members based on the lack of economic, emotional, or physical ties due to the prolonged separation[31]. As to how to determine the degree of dependency, UNHCR recommends States to take into account the quality of the relationship and of the dependency, not limiting it to financial ties, but including affectional, psychological and social bonds. Indeed, States tend to focus on economic dependency since it is easier to access to documentary evidence of money transfers[32]. On the contrary, a more diverse approach allows for the definition to evolve as the society develops and provides for a much more comprehensive concept. In addition, States should take account of the fact that today the refugee experience protracts for long periods of time, which leads them to live on the move for many years before finding a durable solution to their situation, and they may form family relationships during this time[33]. Conversely, applying a narrow definition might lead to more hardship on those members of the family that are left behind in the country of origin in dangerous locations and in precarious conditions. In practice, the UNHCR recognises[34]:

a) **Spouses**: legally married spouses, couples engaged, who have entered a customary or common-law marriage, or who have established a long-term partnership (whether physically living together or not and including same sex couples). Regarding polygamous marriages, if contracted in a valid manner in the

[31] UNHCR, *Background Note on Family Reunification in the Context of Resettlement and Integration. Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, 2001, para. 16.
[32]Ibid. fn. 18, p. 63.
[33]Ibid. fn. 24, paras. 10 and 12.
[34] UNHCR, *Guidelines on Reunification of Refugee Families*, 1983, para. 5 and UNHCR, *UNHCR RSD Procedural Standards - Processing Claims Based on the Right to Family Unity*, 2016.

country of origin, UNHCR considers polygamy in its criteria for eligible unions. However, many host countries forbid polygamy and will only accept one spouse. Even the HRC expressed a negative opinion on the matter, commenting that "equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. […] Consequently, it should be definitely abolished wherever it continues to exist"[35].

b) **Parents and children**: most countries of asylum distinguish between minor children and those who have come of age, however, the UNHCR promotes the reunification with parents of all dependant and unmarried children, regardless of age. In this context, children include the biological or adopted children of the refugee and of his or her spouse, as well as children under the legal or customary care of the refugee and those born in the host country.

c) **Unaccompanied minors and parents or siblings**: reuniting children with parents or siblings is a high priority task especially because of their need of a stable environment to ensure their personal and social development. However, the UNHCR recognises that there might be situations with the potential for abuse and neglect, so their reunification should always be assessed taking into consideration the "best interest" of the child.

d) **Dependent parents and other dependent relatives**: based on humanitarian and economic considerations, reunification should be carried out for parents and other relatives such as single adult siblings, aunts, uncles, cousins, etc. who originally lived with the refugee, or who's situation has changed in such a way as to make them dependent upon the refugee.

e) **Other dependent members**: in some cases, families have cared for unattached persons, such as friends or foster children, to whom they are not blood related. If these persons are in the same situations as the dependent relatives, then they should also be entitled to family reunification.

In conclusion, the definition of family member should be sufficiently broad and flexible to include both the nuclear family, but also adults with *de facto* family ties, as

[35] HRC, *CCPR General Comment No. 28: Article 3 on the equality of rights between men and women*, 2000, para. 24.

promoted by the international community and for States to uphold their obligations to respect the right to family life and family unity under international human rights law. In this regard, the concept of dependency is an important tool to determine who may qualify as a family member beyond the nuclear family. It acknowledges the different concepts of family that apply in different societies, and it also considers the impact that the persecution and the flight might have on the composition of the refugee family, which often does not include only blood relations and formally married spouses, but families born out of choice or circumstance.

1.2. Eligibility criteria in Canada, Australia and the UK

The UNHCR's Executive Committee and UNHCR itself have called upon States to expressly implement the right to family unity and reunification in their national legislation[36]. However, the absence of an agreed definition of "family" at the international level has meant that States may define the term according to their own interests, culture, and system. As Edwards has observed: "the failure to agree a definition of, or to elaborate guiding principles, on what constitutes a family unit, has produced a dichotomy. On the one hand, this absence has allowed States to circumvent their obligations under international law, while on the other hand, it has given scope for the recognition of culturally influenced, as well as evolving forms, of the 'family' beyond the Eurocentric 'nuclear family'"[37]. The aim of this section is to analyse and compare the different approaches take by Canada, Australia and the United Kingdom in order to determine who is considered a family member and is thus eligible for family reunification under domestic law; what are the potential gaps in interpretation and how these have been tackled by international and national courts; and is the concept of dependency been applied by these States.

[36] EXCOM, Conclusion on International Protection No. 85 (XLIX), 1998, para. (x): "Encourages States, which have not already done so, to consider developing the legal framework to give effect at the national level to a right to family unity for all refugees, taking into account the human rights of the refugees and their families"; Ibid., no. 22, para. 1(b): "This requires that States take measures, including national legislative efforts, to preserve the unity of the family. It also requires corollary measures to reunite families that have been separated, through programmes of admission, reunification and integration".
[37] Ibid., fn. 13, p. 313.

1.2.1. Nuclear family

In **Canada**, the legal framework for family reunification is outlined in the Immigration and Refugee Protection Act and the Immigration and Refugee Protection Regulations. One of the objectives of the IRPA is exactly "to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada"[38]. Under Canadian law, close family members are the spouse or common-law partner of a person (including same-sex couples); a dependent child of a person or of a person's spouse or common-law partner; a dependent child of a dependent child[39]. Concerning marriages contracted outside Canada, they must be valid under both the jurisdiction where it took place and under Canadian law[40]. Common-law partner is defined as "an individual who has been in a conjugal relationship with a person for at least one year, but is unable to co-habit with the person due to persecution or any form of penal control"[41]. Dependent child refers to a child who is the biological or adopted child of the parent or who has not been adopted by a person other than the spouse or common-law partner of the parent; moreover, it has to be less than 22 years of age and unmarried or, if older then 22 year-old, it is dependent substantially on the financial support of the parent since before attaining the age of 22 years and is unable to be economically self-sufficient due to a psychological or mental condition[42]. No distinction is made between pre- and post-flight spouses or families, the focus being rather on whether the relationships are genuine or formed for the purposes of establishing a status in Canada. The concept of genuineness has been explored by national tribunals in a number of cases, we are going to provide some examples, even though not entirely related to refugees. In *Manjit Singh Sarai v. Canada*[43] the issue of "bad faith"[44] was raised, as Mr. Sarai, an Indian refugee, appealed against the decision of a visa officer to refuse his third wife's

[38] Canada, *Immigration and Refugee Protection Act* (IRPA), SC 2001, c. 17, current to 21 April 2020, last amended on 21 June 2019, section 3(2)f. Since 2002, same-sex and common-law relationships are accorded the same status.
[39] Canada, *Immigration and Refugee Protection Regulations* (IRPR), SOR/2002-227, current to 10 March 2021, last amended on 30 April 2020, section 1(3).
[40] Ibid., section 2.
[41] Ibid., section 1(2).
[42] Ibid., section 2. Prior to 2002 the age threshold was to be under 19-year-old.
[43] *Manjit Singh Sarai v. Canada (Minister of Citizenship and Immigration)*, VB0-02646, Canada: Immigration and Refugee Board of Canada, 23 November 2011.
[44] Ibid. fn. 39, section 4(1).

application for permanent residence multiple times. Indeed, under Section 4 of the IRPR, the officer found that "the marriage was entered primarily for the purpose of acquiring any status or privilege under the Act" and the evidence were not enough to prove the genuineness of the relationship. A similar issue was raised in *Céline Frechette v. Minister of Citizenship and Immigration*[45], a Canadian citizen who had married a Moroccan citizen and wanted to bring him to Canada. In this case, contrary to the opinion of the visa officer, the Immigration and Refugee Board (IRB) found both the testimonies to provide reasonable explanations and the evidence (e.g. photos, phone calls records and plane tickets) to support such statements. The judge concluded that this was not an arranged marriage and that there was no doubt that the couple wanted to reside permanently together.

Persons accepted as refugees in Canada and who have obtained the permanent residence permit can be reunited with their family members under the "One-Year Window" (OYW), a programme intended specifically for refugees and their non-accompanying family members. Sections 141 and 142 of the Regulations set out the eligibility requirements for the principal applicant, namely the family member abroad, to apply for the OYW. Under the OYW the family definition applied includes essentially only close family members, who have to meet the definition outlined above from the time the application is made up until it is finalised (the lock-in date for the age of that child is the date on which the refugee submitted the application for permanent residence[46]). Most importantly, to be eligible the family member must have been included in the refugee's own permanent residence application at the time the application was made, otherwise the family member is excluded. This means that the permanent resident in Canada must have at some point during the application (e.g. on the refugee referral form from the UNHCR or during the interview), told IRCC about his or her family members, even if their location was unknown or they were thought to be deceased. Finally, after having meet the first two requirements, the OYW application must be submitted to the IRCC within one year of refugee receiving permanent residence in Canada.

[45] *Céline Frechette v. Minister of Citizenship and Immigration*, MA0-11240, Canada: Immigration and Refugee Board of Canada, 23 November 2001.
[46] Ibid. fn. 39, section 25.1(8).

To conclude, data from the recent IRCC Annual Report on Immigration[47] show that, in 2019, among the 48.530 refugees admitted, 18.443 individuals obtained permanent residence under the category of protected persons and their dependants abroad.

Immigration Category	2019 Planned Admission Ranges		2019 Admissions			
	Low	High	Female	Male	Gender X	Total
Federal economic – Skilled[43]	76,000	86,000	42,702	47,540	0	90,242
Federal economic – Caregiver[44]	8,000	15,500	5,747	4,060	0	9,807
Federal economic – Business[45]	500	1,500	634	702	0	1,336
Atlantic Immigration Pilot Program	1,000	5,000	2,019	2,122	0	4,141
Provincial Nominee Program	57,000	68,000	31,848	36,799	0	68,647
Quebec skilled workers and business immigrants	21,100	23,500	10,806	11,678	1	22,485
Economic Total	**174,000**	**209,500**	**93,756**	**102,901**	**1**	**196,658**
Spouses, partners and children	66,000	76,000	40,433	28,376	0	68,809
Parents and grandparents	17,000	22,000	13,045	8,966	0	22,011
Family – Other[46]	-	-	251	240	0	491
Family Total	**83,000**	**98,000**	**53,729**	**37,582**	**0**	**91,311**
Protected persons in-Canada and dependants abroad	14,000	20,000	8,936	9,506	1	18,443
Blended visa office-referred refugees	1,000	3,000	480	513	0	993
Government-assisted refugees	7,500	9,500	4,862	5,088	1	9,951
Privately sponsored refugees	17,000	21,000	8,746	10,397	0	19,143
Refugees and Protected Persons Total	**39,500**	**53,500**	**23,024**	**25,504**	**2**	**48,530**
Humanitarian and Other Total[47]	**3,500**	**5,000**	**2,563**	**2,116**	**2**	**4,681**
TOTAL	**310,000**	**350,000**	**173,072**	**168,103**	**5**	**341,180**

Source: IRCC, CDO, Permanent Resident Data as of March 31, 2020.

Table 1. Permanent residents admitted in Canada 2019.

Unfortunately, the government does not provide further data showing the disaggregate number of dependants and the division between spouses, common-law partners, and children. However, from the graph below shows a steady increase in the last five years, according to which numbers have gone up by just over 6.000 in the overall trend.

[47] Immigration, Refugees and Citizenship Canada, *Annual Report to Parliament on Immigration*, 2020.

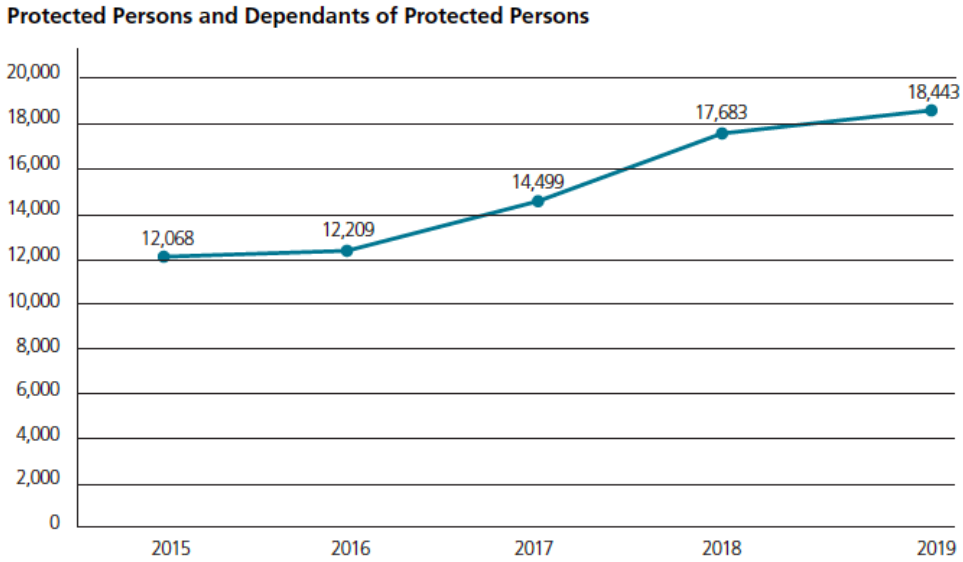


Figure 1. Number of protected persons and their dependents admitted in Canada between 2015 and 2019.

In **Australia**, the legal framework for family reunification applications is set out in the Migration Act and its Regulations[48]. Only members of the immediate family, defined in Regulation 1.12AA as a spouse or de facto partner, a dependent child or stepchild and, if the sponsor is a child under 18, a parent or step-parent, can apply for a permanent humanitarian visa to join a refugee under the Offshore Humanitarian Programme (comprising both the Refugee Program and the Special Humanitarian Program)[49]. These are known as "split-family cases" and the proposer must be a permanent resident. As a general rule, family members are eligible if the person was already a member of the family when the refugee was granted visa; the refugee disclosed the relationship with the person before getting the visa; the person is still a member of the family; the proposal for family reunification was submitted within 5 years of having granted visa; both the refugee and the family member did not arrive by boat as an Illegal

[48] Australia, *Migration Act 1958*, Act No. 62 1958, last amended in 2018 and *Migration Regulations 1994*, Statutory Rules No. 268 1994, last amended in 2021.

[49] https://immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program/about-the-program/resettle-in-australia. The Refugee Program component provides resettlement for those living outside their home country and are subject to persecution in the home country (they are usually recommended by UNHCR). The SHP is the component for those who have been subject to substantial discrimination (e.g. deprivation of basic human rights such as access to education and employment, freedom of speech and freedom to practice one's religion) amounting to gross violation of their human rights in the home country, are living outside their home country and have links with Australia (they need a proposer in Australia willing to sponsor them).

Maritime Arrival (IMA) on or after 13 August 2012. In particular, Section 5F of the Migration Act defines a person as the spouse of another person if the two are in a married relationship; have made a mutual commitment to a shared life; the relationship is genuine and continuing and they live together (or they live separately occasionally). Regulation 1.15A outlines the circumstance to consider in determining the existence of a married relationship, meaning the financial and social aspects, the nature of the household and of the parties' commitment to each other. Section 5CB of the Act defines a de facto partner (including same-sex partners) as two people having made a mutual commitment to a shared life; in a genuine and continuing relationship; living together and not related by family, meaning that one is not the child of the other, nor a descendent, nor have a parent in common (5CB(4)). Moreover, Regulation 2.03A(2) requires both parties to be over 18, while Regulation 1.09A outlines the conditions to determine whether a de facto relationship exists, same as for the spouse. In the case *Hendrick Winata and So Lan Li v. Australia*[50], the HRC was asked to review the case of Mr. Winata and Ms. Li, under Articles 17, 23 and 24 of the ICCPR. The applicants were two Indonesian nationals who had been in a de facto relationship for fourteen years and had a 13-year-old son born in Australia. They had applied for refugee status based on a claim that they faced persecution in Indonesia owing to their Chinese ethnicity and Catholic religion, but the Department of Immigration and Multicultural Affairs (DIMA) refused to grant them the visa. The Committee found the couple to be in a longstanding relationship "akin to marriage", which had resulted in the birth of a child, who had acquired Australian citizenship, and that their deportation would amount to interference with their family life as they had been long-settled in the country. The Guidelines on visa application and procedure (PAM3) advise officers to familiarise with the legal or cultural norms regarding de facto relationships in the home countries of the refugee applicants. In this regard, even if many refugee applicants come from countries where polygamy is legal or accepted under local custom, Australian national legislation does not recognise polygamous marriages. Although polygamy is not defined under the Migration Act, Australian migration law keeps up with the broader provisions of the Marriage Act, which does not allow for polygamous marriages. Indeed, if either party to a married or de facto relationship is involved in another relationship, then neither parties can satisfy the definition of spouse

[50] *Hendrick Winata and So Lan Li v. Australia*, CCPR/C/72/D/930/2000, UNHRC, 16 August 2001.

of de fact partner. And this is because section 5F, mentioned above, requires the mutual commitment of the parties must be "to the exclusion of others"[51].

Section 5CA of the Act defines a child as the biological (also if conceived through artificial conception procedures), adopted (either formal or customary adoption, if formal adoption was not available in the country where it took place) or step-child of a parent. The child is a dependent if has not turned 18, or if it has, is dependent on the parent or is incapacitated to work due to physical or mental illness (Regulation 1.03). A child who is engaged to be married or has already a spouse or de fact partner is excluded. Under Regulation 2.08, if a refugee applicant gives birth to a child after the application is made, but before it is decided, by law the child can be added to the family reunification application; however, this does not apply to adopted children. Nonetheless, Regulation 2.08A allows for dependent children or a partner to be included after the application has been lodged, but before it is decided, if the applicant requests this in writing. Unfortunately, there is no provision for extended family members to be added to an existing application. Finally, "split family" applicants proposed under the Offshore Humanitarian Program do not need to meet the so-called "primary criteria" of being subject to persecution or substantial discrimination in their home country, as all other applicants must do.

According to the data provided by the Australian government, a total of 70.671 applications were lodged between 2019 and 2020, a number slightly lower than the previous years, with 43.0% of applications for the Refugee category and 57% for the SHP[52]. However, in the end, only around 10% of the applicants were actually granted a visa under the Refugee and Humanitarian Program, showing how the number of places available (around 18.000) is inadequate in respect to the number of applications, and making the prospects for achieving family reunification very low. Table 2 below shows the number of persons included in the applications by age. A single application can include members of the family unit such as children, a spouse, and other dependent relatives of the primary applicant. There is no separate allocation for family reunification places, so it is not possible to have disaggregate data for each of the above categories or

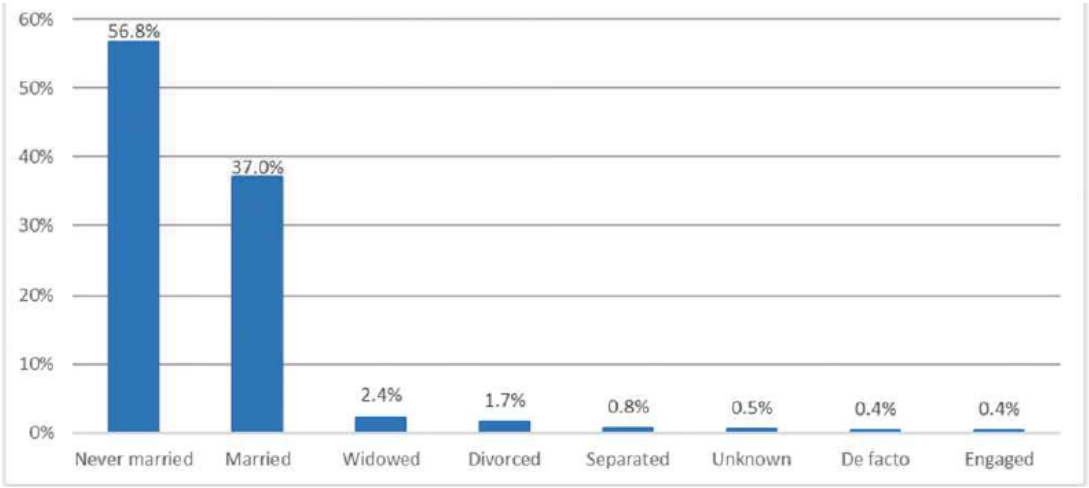
[51] Australia, Department of Immigration and Border Protection, *PAM3: Refugee and Humanitarian Offshore humanitarian program – Visa application and related procedures*, 2017, p. 29.
[52] Australia, Department of Home Affairs, *Australia's Offshore Humanitarian Program: 2019-20*, last revised in September 2020 following a minor amendment.

to establish to which age group the primary applicant belonged. Nonetheless, between 2019 and 2020, the majority of applications included minor children (35.8%), followed by people aged between 30 and 49 (28.1%) and those aged 18-29 (25.7%), in line with the trend set in the past years. Out of the total, the is not much difference between the number of male and female included in the applications, with around a 3% variation. Figure 2 shows the number of people included in the applications by marital status only in the past year. The highest percentage were people never married (56.8%), probably due to the high number of children included in the applications. Among the people eligible as partners, the majority declared to be married (37%), while only a very small portion (0.4%) applied as de facto partners.

	2015–16		2016–17		2017–18		2018–19		2019–20	
	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent
Age group										
0–17	30,814	39.7%	33,861	37.1%	29,130	39.3%	28,877	38.2%	25,254	35.8%
18–29	16,257	20.9%	20,068	22.0%	16,868	22.8%	18,320	24.2%	18,173	25.7%
30–49	20,602	26.5%	25,137	27.6%	19,422	26.2%	20,817	27.5%	19,859	28.1%
50–69	8,363	10.8%	10,357	11.4%	7,369	9.9%	6,500	8.6%	6,176	8.7%
70+	1,604	2.1%	1,754	1.9%	1,291	1.7%	1,142	1.5%	1,159	1.6%
Total	**77,640**	**100%**	**91,177**	**100%**	**74,080**	**100%**	**75,656**	**100%**	**70,621**	**100%**
Gender										
Male	39,584	51.0%	46,897	51.4%	37,983	51.3%	38,574	51.0%	36,432	51.6%
Female	38,048	49.0%	44,278	48.6%	36,096	48.7%	37,070	49.00%	34,176	48.4%
Indeterminate	8	<1%	2	<1%	1	<1%	12	<1%	13	<1%
Total	**77,640**	**100%**	**91,177**	**100%**	**74,080**	**100%**	**75,656**	**100%0**	**70,621**	**100%**

Notes:
1. Visas counted include subclass 200 (Refugee), 201 (In–Country Special Humanitarian Program), 202 (Global Special Humanitarian Program), 203 (Emergency Rescue) and 204 (Woman at Risk).
2. Data was extracted from departmental systems on 06 July 2020.

Table 2. Number of persons included in visa applications by age group, gender, and year of lodgement in Australia, 2015-60 to 2019-20.



Notes:
1. Visas counted include subclass 200 (Refugee), 201 (In–Country Special Humanitarian Program), 202 (Global Special Humanitarian Program), 203 (Emergency Rescue) and 204 (Woman at Risk).
2. Data was extracted from departmental systems on 06 July 2020.

Figure 2. Number of persons included in visa applications by marital status in Australia, 2019-20.

In the **United Kingdom**, the eligibility criteria for family reunification are outlined in the Immigration Rules[53], which constitute a statement of practice to be followed in the administration of the Immigration Act of 1971[54]. Adults lawfully residing in the UK, who have not yet obtained citizenship and with refugee status may be joined by immediate family members (partner and children) as defined in Rules 352A to 352F. In particular, to join as a spouse or partner, the applicant must be over the age of 18; the marriage or civil partnership must have taken place before the refugee left the country of origin or, alternatively, the parties have to prove to have been living together in a relationship akin to either marriage or civil partnership for at least two years before the refugee left to seek asylum; the parties intend to live permanently together in a genuine and subsisting relationship, and finally, the relationship does not fall within the "prohibited degree of relationship", meaning that your spouse cannot be a child, parent, sibling, uncle or aunt, niece or nephew. In the European context, most of the jurisprudence clarifying the criteria under which family members can be admitted has been ruled by the ECtHR. These judgments are relevant to understand some of the concerns raised by the family reunification policy in the UK. In *Abdulaziz, Cabales and Balkandali v. UK*, the

[53] UK Home Office, *Immigration Rules*, 1994, last updated in January 2021.
[54] UK, *Immigration Act*, c. 77, 1971, last amended in April 2015.

ECtHR was called to decide whether the applicants' relationships amounted to "family life"[55]. The Court noted that various factors may be relevant, including whether the couple lives together, the length of their relationship and whether they have demonstrated their commitment to stay together. As a result, even if Mr. and Mrs. Cabales had entered a purely religious marriage not recognised under UK domestic law, the Court confirmed that "they believe themselves to be married and wished to cohabit and lead a normal family life"[56]. Moreover, it stated that, although Article 8 presupposes the existence of a family, it does not mean that "intended family life falls outside its ambit", meaning that the lack of a fully established family life or cohabitation must not prevent individuals from enjoying their right[57]. However, considering the other circumstances of the case, namely that the parties must have known that their husbands' visas were to expire, the court found the government not to be in breach of Article 8.

Regarding children, the Rule 352D require them to be under the age of 18 at the time of application (if the child reaches the age of 18 before the application is decided the caseworker must consider the eligibility of the child as if he/she is still under 18); not leading an independent life, meaning unmarried and without and independent family unit; and they have to be part of the family from before the refugee fled to seek asylum. In regard to adopted and foster children, they are not mentioned expressly in the rule above, however, according to the caseworker's guidance of family reunification, applicants must be able to demonstrate that the child has been adopted pre-flight and must hold an adoption order issued in the country of origin or where the child is living[58]. Interestingly, the courts in the UK have considered the status of children who, under the Islamic procedure called "*kafalah*", is under the parental responsibility of a family member other than the parents. The case of *AA (Somalia) v. Entry Clearance Officer - Addis Ababa* concerned an Somali orphan separated from the rest of the family during the fighting and who was taken in by her brother-in-law under the *kalafah* procedure. Later, he and his family fled to the UK to seek asylum, but, while their application was approved, AA's request was refused. The Court of Appeal overturned the decision based on a previous

[55] *Abdulaziz, Cabeles et Balkandali v. the United Kingdom*, Application no. 9214/80; 9473/81; 9474/81, ECtHR, 28 May 1985. Reference to ECHR art. 8 on the right to respect private and family life.
[56] Ibid., para. 63.
[57] Ibid., para 62.
[58] Home Office, *Family reunion: for refugees and those with humanitarian protection*, 2020, p. 17.

statement of the Home Office maintaining that "given the nature of the Somali family we are prepared to be flexible and if a refugee is able to show that a person not covered by the policy was a dependent member of the refugee's immediate family unit before the refugee came to the United Kingdom, then we would be prepared to consider exceptionally extending the refugee family reunion provision to cover that person."[59].

As we have seen, the family members must have been part of their family before the refugee left to claim asylum. As a result, post-flight family members, as well as children over 18, have to meet income and other requirements just like those considered extended family. The same applies if a refugee becomes a British citizen, as they will lose the right to refugee family reunification and will need to apply for family members using the normal immigration rules[60]. However, in 2011 the government introduced paragraphs 319L to 319R in the Immigration Rules, which made family reunion available to post-flight spouses or partners and children of refugee with limited leave to remain in the country, provided that the applicant satisfies the English language requirements in the former case, and that parents will accommodate and maintain them adequately in the latter.

After having outlined the national provisions regarding the definition and eligibility of immediate family, it is now possible to highlight some of the differences and similarities in their national policies. Regarding nuclear family, all three States apply a strict definition of close family, comprising the spouse and the children; Australia is the only country which also recognises the parents of minor children. In all three States the spouses need to have a valid marriage under the national law and polygamy is banned. When it comes to partners, same-sex partners are always included in the definition; the couples are required to have been together or to have been living together for a certain amount of time that is between one and two years. Finally, all three counties require the couples to show commitment to the relationship and the willingness to be living together. Children can be both biological and adopted, but they must be unmarried. What changes is the age threshold to be considered a dependent. While in Australia and the UK the child must be under 18, Canada has a higher threshold of being under 22-year-old. All three

[59] *AA (Somalia) v. Entry Clearance Officer - Addis Ababa*, [2013] UKSC 81, Supreme Court, 18 December 2013, para. 20.
[60] https://www.freemovement.org.uk/refugee-family-reunion-a-users-guide/.

countries allow for children who have reached majority, but are still dependent on the parent due to lack of economic self-sufficiency or mental or physical conditions, to be considered as close family. Both Australia and the UK only recognise applicant who were part of the family before the refugee was granted visa, while Canada does not distinguish between pre- and post-flight relationships. The restrictive definition of "immediate family" seems to be based on the Western concept of family, which does not reflect the family composition that results in many refugee communities subsequently to conflict and persecution in the country of origin or to the many years refugee spend in refugee camps. Furthermore, in Canada and Australia members of the family must be disclosed at the time of the original application, in the UK this is not necessary. However, in Australia there is the possibility to add a close family member to the application at a subsequent stage. Finally, in the UK there is no deadline imposed within which refugee have to submit the application for family reunification in order to be exempted from income and other requirements; in Australia this has to be done within five years; in Canada within one year. These types of policy, on one hand, fail to acknowledge all the different reasons why refugee may wish not to reveal their family members in the beginning, on the other, give refugee limited time, especially in the case of Canada, to settle and integrate in the community and to be financially stable enough to support their family.

1.2.2. Extended family

In **Canada**, people excluded from the close family member definition, can apply for reunification under the Family Class. This type of sponsorship is open to Canadian citizens and permanent residents, including recognized refugees, provided the sponsor is 18 years of age or older. The Family Class, however, has proven to be quite problematic for several reasons. To begin with, not only the family member must be eligible on grounds that we are going to explore below, but also the sponsor has to satisfy a number of criteria regarding income and accommodation. Eligible sponsors cannot receive social assistance and need to provide for the basic needs of any person they want to sponsor[61].

[61] https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/family-sponsorship/spouse-partner-children/eligibility.html.

More details on this issue are going to be provided in the next chapter, at this stage we are going to focus on the eligibility criteria of family members. Legislation defines persons eligible for family reunification as a member of the Family Class on a broader basis as "the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident"[62]. Other family members who can be sponsored under this class include the sponsor's parents; grandparents; and the dependent children of dependent children as well as brothers, sisters, nephews, nieces, or grandchildren who are orphans, under the age of 18, and not married or in a common-law relationship[63]. Indeed, in this regard, in *Jama Warsame v. Canada*, the HRC found that relations between parents and adult children can constitute family relations. The case concerned an adult man of Somali origin living in Canada from a very young age as a dependent of his mother and who was sentenced to deportation because of his multiple convictions. However, he claimed that being deported would separate him from his mother and sisters and would put his life at risk due to the lack of family support and the dangerous situation in the country. Under Article 23 of the ICCPR, the Committee found that deportation would amount to interference with his family life and that such interference "would lead to irreparably severing his ties with his mother and sisters in Canada" and "would be disproportionate to the legitimate aim of preventing the commission of further crimes"[64]. On the contrary, in *Canada (Minister of Citizenship and Immigration) v. Vong* the Federal Court judge rejected the determination made by the IAD according to which the definition of "mother" contained in subsection 117(1) of the IRPR is not limited to biological and adoptive parents, but should also encompass step-parents. In the IAD's opinion the traditional view of a mother had changed dramatically over the years, and such interpretation acknowledged the fact that Canadian society is now composed of a variety of different family relationships. Instead, according to the Federal judge the definition of "mother" in the English language corresponded to the French translated version of the text "*ses parents*", which "addresses the admission, as members of the family class, of those persons who stand in a parental relationship on the

[62] Ibid. fn. 38, section 12(1).
[63] Ibid. fn. 39, section 117(1).
[64] *Jama Warsame v. Canada*, CCPR/C/102/D/1959/2010, UNHRC, 1 September 2011, paras. 8.8 and 8.10.

basis of bloodline" and thus remitted the matter to a different panel of the IAD for redetermination[65].

However, as a limitation to the broader definition applied for the Family Class, the Regulations state that a person is not a family member, and thus cannot be sponsored, if they were not examined when the person sponsoring them immigrated to Canada as a result of not being disclosed on the application[66]. This clause was added in 2002 to combat fraud and misrepresentation on the presumption that non-disclosure is motivated by the deliberate intention to mislead the authorities. R117(9)d is the only regulation that imposes a lifelong ban against family reunification. Indeed, those who knowingly or unknowingly fail to identify all their dependents to a visa officer at the time of the original application face being permanently unable to apply for family reunification for such unnamed dependent family members. As the CCR noted, although R117(9)d affects all categories of immigrants, it has disproportionately negative effect on refugees[67]. Indeed, numerous cases have been identified where refugees coming to Canada have had to leave behind their vulnerable family members. The CCR has identified reasons for family members not being disclosed as including gender-based oppression that prevents some women from declaring a marriage or a baby, who may have been born out of wedlock or from another relationship; the applicants were in danger and needed to leave as soon as possible for their safety; declaring a child would expose the family to political persecution; the applicant was unaware that the dependant existed or was alive at the time of application; and the applicant was misinformed[68]. For example, in *Azizi v. Canada*, the applicant had failed to disclose his wife and daughters on his application made prior to the entry into force of the new regulation. Mr. Azizi claimed that paragraph 117(9)d should not apply to non-accompanying family members of a Convention refugee applicant, especially if at the time of the application there was no requirement to be examined. The Court, however, dismissed the appeal arguing that he chose to make a misrepresentation to the immigration authorities and thus "he was the author of this

[65] *Canada (Minister of Citizenship and Immigration) v. Vong*, 2005 FC 855, Canada: Federal Court of Appeal, 15 June 2005, paras. 5-6 and 24-27.
[66] Ibid. fn. 39, section 117(9)d.
[67] Canadian Council for Refugees, *Excluded Family Members: Brief on R.177(9)d*, 2016, p. 1.
[68] Ibid., pp. 4-6.

misfortune"[69]. Furthermore, in *De Guzman v. The Minister of Citizenship and Immigration,* the appellant, who failed to disclose her husband and two sons in the application, claimed that regulation 117(9)d was inconsistent with the international human rights instruments to which Canada is a signatory and which protect the right of families to live together and the best interest of the child. However, the court dismissed the appeal maintaining that, when considered in the context of the legislative scheme as a whole, especially considering section 25, paragraph 117(9)d did not render the IRPA non-compliant with the international human rights instruments signed by Canada[70]. Indeed, in cases where applicants fail to disclose their family members, the only option available is to apply for a residence permit based on humanitarian and compassionate considerations (H&C) under section 25 of the IRPA. However, this possibility has been described as a "flawed remedy"[71] since the applicant has the burden of convincing the visa officer that the failure to disclose the family member is outweighed by humanitarian and compassionate considerations thus relying entirely on the discretion of the officer in charge[72].

According to the data provided in the 2020 Annual Report on Immigration[73], under the family category a total of 91.311 family members have been admitted[74], representing a 7.2% increase from 2018.

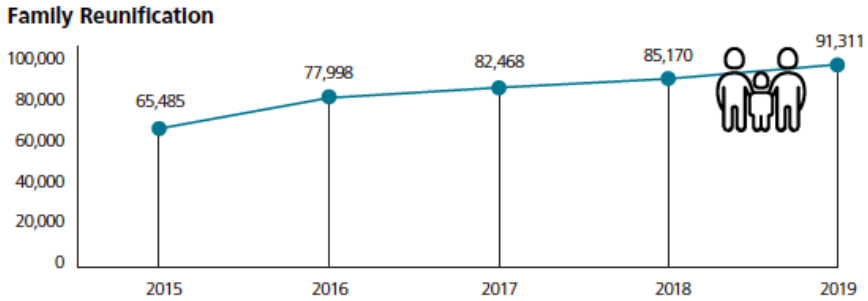


Figure 3. Total number of family members admitted in Canada between 2015 and 2019.

[69] *Azizi v. Canada* (Minister of Citizenship and Immigration), 2005 FCA 406; [2006] 3 F.C.R. 118, Canada: Federal Court of Appeal, 5 December 2005, paras. 27-29.
[70] *De Guzman v. The Minister of Citizenship and Immigration*, [2006] 3 FCR 655, Canada: Federal Court of Appeal, 20 December 2005.
[71] Ibid. fn. 67, pp. 6-8.
[72] For more detailed information on case examples and procedure see Canadian Council for Refugees, *Family Reunification: Practical Guide*, 2015 and *Excluded family members s. 117(9)d: Practical Guide*, 2018.
[73] Ibid. fn. 47.
[74] Family members include spouses, partners, children (biological or adopted), parents, grandparents, and other family. Other family includes orphaned – brother, sister, nephew, niece and grandchild, and other relatives. See figure 1.

Disaggregate data are provided for spouses, partners, and children and for parents and grandparents (not for other family members), however, numbers are not available to distinguish between refugees and the other categories under the Family Class.

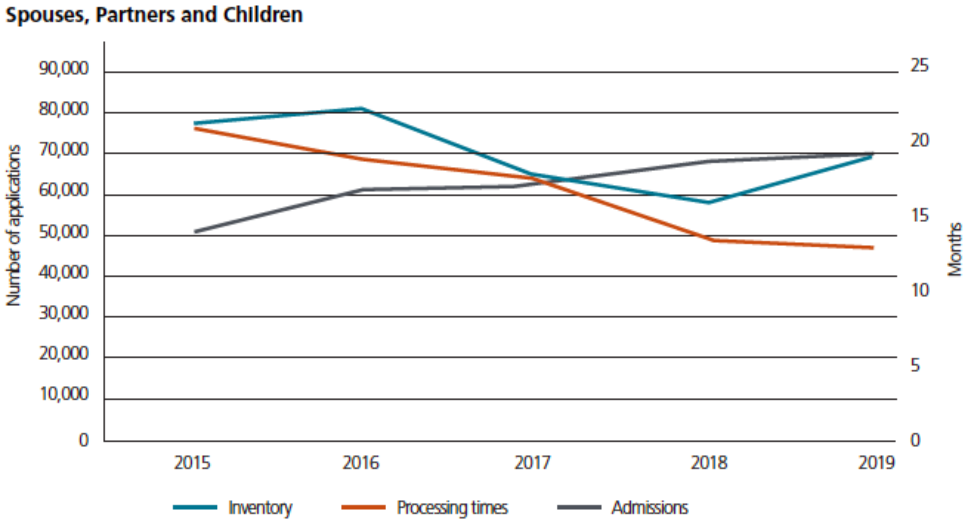


Figure 4. Number of spouses, partners and children admitted in Canada between 2015 and 2019.

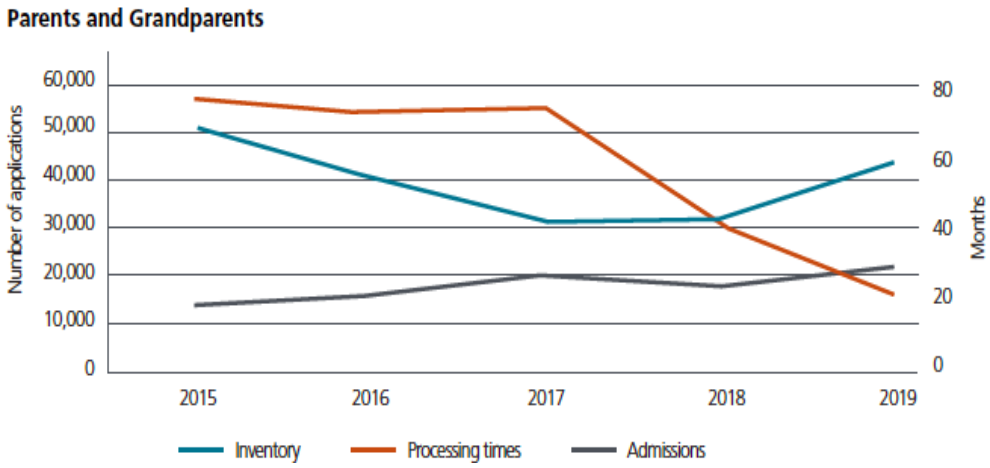


Figure 5. Number of parents and grandparents admitted in Canada between 2015 and 2019.

In **Australia**, if other family members wish to apply for a humanitarian visa, they must be a "member of the family unit" of the proposer. A member of the family unit comprises a spouse or de facto partner, a dependent child of the main refugee and/or their

partner, a dependent child of a dependent child, and a relative of the main applicant or their partner who does not have a spouse or de facto partner, is usually resident in the household and is dependent on the main applicant (Regulation 1.12). These cases are usually referred to as "non-split family" cases and family members need to also meet the definition of dependent, which includes dependency based on financial, psychological, or physical support on the main applicant (Regulation 1.05A). If a claimed family member does not meet the definition of member of the family unit or member of the immediate family, that applicant is separated from the original application, given their own file, and assessed for refugee status in their own right. They should also be considered against dependency based on financial, psychological, or physical support prior to any administrative separation. The cases are only assessed together where applicants are not members of the immediate family, but are under 18 years old, in particular where the applicants live as a family group and there are no other adults responsible for the children[75].

Furthermore, as mentioned in 1.2.1., as a general rule, people arrived by boat after 13 August 2012 are not eligible to propose any family member or to be sponsored as one (this restriction applies to both close and extended family members). For those who arrived before 13 August 2012, their family visa applications are given the lowest priority processing, regardless of their relationship, meaning in practice that they may never be able to reunite with their families as their visas may never be processed. This policy was first introduced by the Minister for Immigration in 2013 as Direction 62, with the aim of "remov[ing] the incentive for people to travel to Australia by boat with the intention of bringing out their families on humanitarian visas", as this created situations were "the head of a family would arrive in Australia alone, apply for asylum and then seek to bring out several members of his family as humanitarian migrants"[76]. In 2015 the Australian Human Rights Commission found that Direction 62 constituted and "arbitrary and unlawful" interference with family, violating Articles 17 and 23 ICCPR[77]. However, the Department of Immigration did not make any change following this finding. In 2016, an

[75] Ibid, fn. 51, p. 44.
[76] https://web.archive.org/web/20120926210201/http:/www.minister.immi.gov.au/media/cb/2012/cb190059.htm
[77] *CM v Commonwealth of Australia (DIPB)*, Australian Human Rights Commission, [2015] AusHRC 99, para. 101-102.

Afghan interpreter, who had helped the Coalition forces in Afghanistan and who had applied for a Protection visa in Australia, had his family reunification application placed at the lowest priority due to Direction 62. He made a complaint against the Minister for Immigration in the High Court, but before the final decision was taken, the government issued Direction 72 and the proceedings were discontinued[78]. The new Direction continued to give the lowest processing priority, however it allowed the decision makers to deviate from this policy if the application involved special circumstances of compassionate nature or if it would not be decided in a reasonable time. Such circumstances or timeframe are not defined neither in the Migration Act nor in the Direction. In 2018, Direction 72 was replaced by Direction 80, which has removed the requirement for an application to be "disposed of within a reasonable time", making it even more impossible for lowest priority application to be processed. For these people, the only viable options would be to apply for the Family Stream of the general Migration Program or to become eligible for family reunification having obtained Australian citizenship. However, the RCOA reported increasingly high costs and extended waiting times for the Family Stream and significant delays in the processing of citizenship application of refugee[79]. Furthermore, the Australian National Audit also reported that applications have not been processed in a time-efficient manner, as processing times have increased and there are long delays between the lodging of the application and the decision being taken[80]. As a result, refugees have little prospect of achieving family reunion using this pathway.

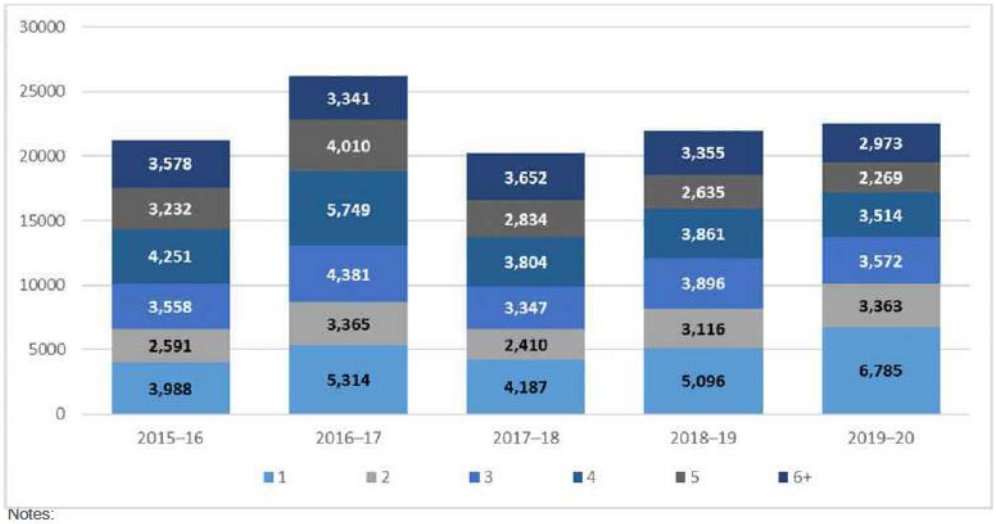
In addition to the long delays in processing times, many refugee families are being keep apart because, as part of the policy, refugees who arrive by boat are forcibly transferred to facilities in Manus Island (Papua New Guinea) and Nauru for processing their claims. Many of the refugees detained on the islands are separated from their family members in Australia and abandoned by the Australian government, which results in exacerbating tensions and further deterioration of their mental health[81]. The Guardian

[78] *Plaintiff S61/2016 v. Minister for Immigration and Border Protection*, Australia: High Court, 2016 and https://www.refugeecouncil.org.au/direction-80/.
[79] Refugee Council Of Australia, *Addressing the pain of separation for refugee families*, 2016, pp. 5-7.
[80] Australian National Audit, *Efficiency of the Processing of Applications for Citizenship by Conferral*, 2019, pp. 19-25.
[81] UNHCR, *Fact Sheet on Situation Of Refugees And Asylum-Seekers On Manus Island, Papua New Guinea*, 2018, pp. 1-2.

collected, among the many, the story of a Rohingya refugee who got separated from his family along the journey to Australia. His wife and children were able to get to Australia and settle in the community, while he remained behind. In 2013, when he finally was able to reach the Australian border on Christmas Island, he was transferred to Manus where he spent more than five years before being reunited with his family, after the detention centre where he was detained was found to be illegal by the Papua New Guinea courts[82]. Moreover, the UNHCR has reported of several parents held in Nauru whose spouses were transferred to Australia for medical reasons, including to give birth, and of children who have also remained on the island separated from an adult parent sent to Australia for medical care[83]. A recent report from the Human Rights Law Centre argues that the Australian government "deliberately and systematically separates family members and prevents them from reuniting where one family member has sought asylum at Australia's borders" by deprioritising family reunion applications for people who arrived by boat and by splitting families, either because they arrived on different dates and are subject to different laws, or because one family member is transferred to Australia for medical treatment and the others are not. This policy is having serious mental and wellbeing implications, contributing to the development of depression and anxiety in both spouses, parents and children who have been kept apart[84].

In its report[85], the Department of Home Affairs provided data regarding the number of cases lodged by size. Most of the applications throughout the years have been lodged by single applicants, except for 2016-17. Figures for 2 or more applicants have been steadily around 3.000 per year; in particular, applications comprising 6 or more claimants, thus presumably including also other members of the family unit such as relatives, have been quite substantial across the past five years, with an average of around 3.300 per year.

[82] https://www.theguardian.com/australia-news/2021/may/02/the-refugees-torn-from-loved-ones-by-australias-cruel-family-separations
[83] https://www.unhcr.org/en-au/news/briefing/2018/7/5b4daf354/unhcr-urges-australia-end-separation-refugee-families.html
[84] Human Rights Law Centre, *Together in safety. A report on the Australian Government's separation of families seeking safety*, 2021, pp. 4-5 and 16-25.
[85] Ibid. fn. 52.



Notes:

1. Visas counted include subclass 200 (Refugee), 201 (In–Country Special Humanitarian Program), 202 (Global Special Humanitarian Program), 203 (Emergency Rescue) and 204 (Woman at Risk).
2. Data was extracted from departmental systems on 06 July 2020.

Figure 6. Cases lodged by case size and year of lodgement in Australia, 2015-16 to 2019-20.

In the **United Kingdom** since July 2012 the immigration rules have become harsher for those who do not fit into the category of immediate family. Indeed, other family members, including dependent children over 18, adult dependent relatives, "post-flight" family members, family members of refugees who have naturalized as British citizens, are subject to the same family migration rules that apply to British citizens and people with indefinite leave to remain[86]. The sponsor must be over 18 and meet income, accommodation, language, and other requirements, which we are going to focus on in the next chapter. On the other hand, extended family members need to satisfy the rules set out in Appendix FM[87], which require the sponsor to be the parent aged 18 years or over; the grandparent; the brother or sister aged 18 or over; or the child aged 18 or over of the sponsor. If the applicant is the sponsor's parent or grandparent, they must not be in a subsisting relationship, unless the partner is also the sponsor's parent or grandparent and is applying for entry clearance (visa) at the same time as the applicant. In deportation case of *A.A. v. United Kingdom*, for example, the Court ruled that "an examination of the

[86] Limited leave to remain allows you to enter and stay in the UK for a specified period of time, while indefinite leave to remain will provide you with permission to permanently live and work in the UK (the person has already settled). Individuals holding refugee status are usually granted a limited leave upon arrival.

[87] Immigration Rules, Appendix FM, https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-family-members.

Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having family life"[88]. On the other hand, in the expulsion case of *A.H. Khan v. United Kingdom*, the Court did not find that the fact that the applicant was living with his sick mother and brothers constituted a sufficient degree of dependency to establish family life; and that, as he had three sisters living in the UK, he was not necessarily the sole carer of his mother[89]. Finally, the two provisions more likely to cause difficulties are rule E-ECRD.2.4, which requires the applicant (and the applicant's partner) to require long-term personal care in everyday tasks as a result of age, illness or disability, and rule E-ECRD.2.5, which compel the applicant (and the applicant's partner) to be financially dependent on the relative in the UK without recourse to public funds, and to not have other relative who could provide support in the country of origin. There is however a special provision in the Immigration Rules for a refugee to sponsor the entry of children related to the refugee, but who are not his or her own children, such as nieces or nephews or grandchildren. The relevant rule is paragraph 319X of the Immigration Rules, which requires the applicant to be under the age of 18 at the date of application; that hi/she is able to show there are serious and compelling family or other considerations which make the exclusion of the child undesirable and that suitable arrangements have been made for the child's care; that he/she is leading an independent life, is not married or in a civil partnership, and does not have an independent family unit; that can and will be maintained and accommodated adequately in the UK without recourse to public funds.

Looking back at eligibility criteria for adult dependent relatives with regards to rule E-ECRD.2.4, the Home Office updated its Immigration Directorate Instructions (known as "the Guidance"), considering the judgment of *Britcits v Secretary of State for the Home Department*. The appellant claimed that the new ADR rules were impossible to fulfil if, as provided by the government, the care could be provided by a paid carer (e.g. housekeeping, nurse or nursing home) in the parent's home country, and that the rules fail to take into account "the psychological and emotional needs of a parent"[90], which cannot be provided by a paid carer. The judge, however, dismissed the claim on the basis that,

[88] *A.A. v. United Kingdom*, Application no. 8000/08, ECtHR, 20 September 2011, para. 49.
[89] *A. W. Khan v. United Kingdom*, Application no. 47486/06, ECtHR, 12 January 2010, paras. 34-35.
[90] *Britcits v Secretary of State for the Home Department*, [2017] EWCA Civ 368, England and Wales Court of Appeal, 24 May 2017, para 20.

with regard to an adult, neither blood ties nor the affection that ordinarily goes with them are, by themselves or together, enough to constitute family life. Following this judgement, the updated Guidance made clear that "personal care" means requiring assistance with everyday tasks such as washing, cooking, or dressing and gives out a series of examples of cases that would or would not meet the criteria[91]. Similarly, to the aforementioned case, in *Kugathas v Secretary of State for the Home Department* the judge had found that more than the normal emotional ties must be shown even to establish that there is a family life in the first place[92]. At the end of 2016, the Home Office reviewed its policy and Guidance, including the ADR rules, finding that the number of visas issued to parents and grandparents plummeted from 2,325 per year to an average of 162 per year since the new rules were introduced. The review considered whether the rules were complying with their policy objectives and whether alternative provisions might be introduced. In the end, although better explanation was given about the circumstances in which extended family members could be admitted, no changes to the criteria were made, showing that there is little interest in the British government to allow elderly relatives to join their family members in the UK[93]. On this issue, if we look at the number of visas granted to family members in the last two years, we can see in Figure 6 that there has been a steady decrease in the overall number, especially for those aged 18 or over, who experienced a 35% decline. Figure 7 shows the quarterly data from the past 3 years. What strikes the most is the number of visas granted to people aged 70 or over, with an average of just above 10 per year, confirming the downward trend of recent years. The category of ADR is actually facing considerable challenges in getting their visas, which are around 0.19% of the total in 2018, 0.24% in 2019 and 0.27% in 2020, although a minor increase is showing. On the other hand, the overall number of minor children has witnessed a smaller decrease of 19%. Indeed, the number of entry clearance granted to children under 18 has been quite substantial throughout the period, with an average of 3.000 visas, around half of the annual total.

[91] Home Office, *Immigration Directorate Instructions, Family Policy: Adult dependent relatives*, 2020, p. 12.
[92] *Kugathas v Secretary of State for the Home Department*, [2003] EWCA Civ 31, England and Wales Court of Appeal, 21 January 2003, para. 19.
[93] https://www.freemovement.org.uk/out-with-the-old/.

Sum of Visas granted	Etichette di colonna											
Etichette di riga	2018 Q1	2018 Q2	2018 Q3	2018 Q4	2019 Q1	2019 Q2	2019 Q3	2019 Q4	2020 Q1	2020 Q2	2020 Q3	2020 Q4
Under 18	806	551	550	661	804	854	917	1.119	1.077	79	922	914
18-29	620	393	481	370	385	433	492	591	432	18	321	306
30-49	365	241	264	252	331	347	418	538	446	28	334	379
50-69	45	32	32	38	62	44	48	55	46	6	44	61
70+	5	3	1	2	10	3	3	2	5	0	3	7
Totale complessivo	**1.841**	**1.220**	**1.328**	**1.323**	**1.592**	**1.681**	**1.878**	**2.305**	**2.006**	**131**	**1.624**	**1.667**

Table 3. Total number of Family Reunion visa granted by age between 2019 and 2020 in the UK.

Family Reunion entry clearance visa grants, by age[1,2]				United Kingdom
Date of visa grant	Year ending Dec 2019	Year ending Dec 2020	Change in the latest year	% change in the latest year
Total grants	**7.456**	**5.428**	**-2.028**	**-27%**
Under 18	3.694	2.992	-702	-19%
18+	3.762	2.436	-1.326	-35%

Table 4. Quarterly data of Family Reunion visa granted by age between 2019 and 2020 in the UK.

Finally, with regards to the relationship between aunt/uncles and their nieces/nephews, which is not mentioned in the Rules for extended family, in *F.N. v. United Kingdom* the ECtHR found that family life existed between the Ugandan niece and her aunt living in the UK, as they were more than usually dependent due to the niece's vulnerable mental state (she was suffering from depression and suicidal thoughts due to being raped in Uganda) and the fact that the aunt was her only surviving relation. However, the Court also held that, when the niece was deported due to the refusal of her asylum claim, the aunt could have accompanied her back to Uganda and supported her there[94].

The definition and criteria for extended family are for the most part similar, with only few exceptions. The definition generally comprises all those relatives who claim to be part of the family, but do not fit into the definition of immediate family. Canada and Australia's regulations do not explicitly state who these relatives can be, but it can be inferred by the case law; the UK, instead gives a more precise and comprehensive definition. All three countries give the opportunity for family reunification to extended family members, however, none of them provides for specific programmes. Indeed, extended family's applications usually end up being processed under the regular immigration category. Various types of restrictions on eligibility have been introduced

[94] *F.N. v. United Kingdom*, Application no. 16580/90, ECtHR, 9 February 1993, paras. 36-37.

over the past decade. Mostly there are financial restrictions imposed both on the refugee, who must be able to support the family member, and on the relative, who needs to prove to be dependent on the refugee. Other restrictions are country-specific, for example, Australia is the only country among those examined that placed restrictions on the manner of arrival and which is valid for everyone who arrives in the county on a boat without a visa. Other restrictions include that the relative is unmarried or with no one left to care for them, as in the case of adult parents and grandparents in the UK.

1.2.3. Family members of unaccompanied minors

Unaccompanied minors are children who have not reached majority and "who arrive in the country of asylum separated from both their parents and are not being cared for by the adult who, by law or custom, has the responsibility to do so"[95]. Conflict, human rights abuses, and persecution leave these children no option than to flee their homes and leave their families behind.

In **Canada**, UAMs can only apply for permanent residence for themselves and are precluded from applying for family reunification as they fail to meet the criteria defining sponsor eligibility. Indeed, the Family Class provides for the sponsor to be over 18, while for the OYW parents are not included among members able to reunite[96]. The only option is for unaccompanied minors to have extended family already in Canada who can sponsor them under the Family Class. In accordance with the principle of the best interest of the child and in order to find long-term arrangements, the IRCC issued a Guardianship protocol to provide support to these children. Indeed, the IRCC in coordination with the appropriate local visa officers will contact the minor's relatives to determine their willingness and ability to provide support and act as guardians for the minor[97]. However, once the minor children have been assigned a guardian and have been accepted under the Family Class, they still have to wait until they reach majority and can demonstrate

[95] UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, 1997, p. 1.
[96] Luke, A., "Uncertain Territory: Family Reunification and the Plight of Unaccompanied Minors in Canada", 2007, pp. 74-75.
[97] https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/canada-role/guardianship.html.

financial self-sufficiency to apply for family reunification under the Family Class. Alternatively, they can pursue family reunification under H&C grounds and be able to be exempted from the sponsorship eligibility criteria. This provision can be particularly helpful for UAMs because the best interest of the child directly affected must be considered in the Minister decision. Notwithstanding this possibility, the discretionary nature of the decision cannot be sufficient compared to the lack of substantive legal provisions governing the right to family reunification of UAMs. This has devastating consequences on already extremely vulnerable children, who, after being forced to flee on their own leaving their families behind in the hope for a better future, are forced to remain separated from their loved ones and grow up without the emotional and psychological support of their close family members.

In **Australia**, UAMs can apply to by joined by their immediate family members. Minors under the Offshore Humanitarian Program can sponsor their parents for a permanent humanitarian visa and their applications will receive the highest processing priority. There are an annual allocation of 1550 places available for the category of women at risk and UAMs. The process is the same as for immediate family members, except that, in the case of applications involving minor sponsors, the immediate family members will receive a concession against the "compelling reasons" criteria, that is the degree of persecution or discrimination to which the applicant is subject in their home country; the extent of his or her connection with Australia; whether or not there is another suitable country, other than Australia, that can provide for the applicant's settlement and protection; and the capacity of the Australian community to provide for the permanent settlement of the applicant[98]. On the other hand, as we have previously seen, children who arrived by boat after 13 August 2012 without a valid visa are no longer eligible for family reunification, as they are granted only a temporary visa that does not allow them neither to apply nor to travel to their home country to visit their families. The only option would be for family members overseas to apply for a humanitarian visa in their own right. This has a strong negative impact on refugee children who will remain separated from their parents and siblings, compounding their anxiety for the future and leaving them alone navigating their new life in an unknown country.

[98] Ibid. fn. 18, p. 199.

In the **United Kingdom**, there is no provision permitting children recognized as refugees to bring their parents or siblings to the UK, leaving them without their families at a time when they need them the most or forcing their closest family to embark on dangerous journey to try to reach them. Moreover, research and interviews show that neither the children nor the families were aware of the policies in place in the country of asylum before starting the journey[99]. Since there is no rule allowing UAMs to apply for family reunification, children who want to make an application have to do it outside the Immigration Rules framework, on "exceptional or compassionate circumstances"[100], meaning that the refusal of leave to remain would cause unjustifiably harsh consequences for the applicant and the family. The applicant has to demonstrate what the exceptional or compassionate circumstance are, and each case has to be decided on its individual merits. However, very few children resort to this option as applications are usually refused, due to large discretion attributed to the Home Office, which fails to tackle the injustice cause by the exclusion of minors from family reunification. In 2016, a child successfully challenged the policy under Article 8 ECHR and his parent and sibling were brought to the UK to join him[101]. Whilst the judge was critical of the policy by pointing out that displaced children would be more likely to succeed if reunited with their families, the rules have not changed. Two Private Member's Bills have been introduced into Parliament between 2017 and 2019, however, the first did not pass the first round of debate and the second was not proceeded due to the lack of time from the Parliament. Furthermore, across the administrative jurisdictions of the UK there is no comprehensive system of legal guardianship for UAMs. Scotland and Northern Ireland provide for an independent guardian to all unaccompanied children, while England provides for and independent advocate only in case of trafficked minors. In addition, due to a lack of a formal court intervention regarding the duties of the local authorities under Section 20 of the 1989 Children Act, very few take on the care arrangements and no-one formally assumes parental responsibility for these children[102]. So, not only unaccompanied minors arriving in the UK as refugees do not have the possibility to be joined by their parents

[99] Amnesty International UK, the Refugee Council and Save the Children, *Without my family: The impact of family separation on child refugees in the UK*, 2019, p. 14.
[100] Ibid. fn. 58, p. 19.
[101] *AT (Family Reunification: Eritrea)*, [2016] UKUT 227 (IAC), Upper Tribunal, 24 March 2016.
[102] Ibid. fn. 99, p.18.

and siblings, but often they do not even have a formal legal guardian who is going to take care of them until they find a foster family or another alternative option.

To summarize, two out of three countries lack provisions regarding family reunification for unaccompanied minors, which in the governments' view is a deterrent for families from sending children to secure refugee status and then join them. However, even in the absence of opportunities for UAMs, States have different approaches. Indeed, Canada has given them the possibility to be cared for by relatives already in the country while they wait to become of age to sponsor their parents; the UK, on the other hand, leaves the children in the care of caseworkers and institutions and their only option is to apply for H&C under the discretion of the judge.

1.3. Does State practice comply with international and regional standards?

We have seen that in state practice there is no uniform approach on the eligibility criteria in regard to the right of refugees to family reunification. While the definition of family members is somewhat similar, in the sense that all three countries make a clear distinction between immediate and extended family, each country then applies its own criteria to determine dependency and eligibility. What emerges is that, in theory, the definitions as they are formulated by States, could potentially allow all members of the family, from spouses and children to grandparents and other relatives, to be eligible for family reunification. In practice, however, the provisions of the regulations and the guidance given to the caseworkers provide for a number of restrictions that make reunification more difficult to achieve and prolong the separation of refugee families.

One of the issues that arises and that pools together all the countries examined is that of polygamy. Indeed, none of the States recognises polygamous marriages in their national legislation and are willing to accept only one of the spouses in the refugees' applications for family reunification. However, in this case, the problem does not strictly come from the state practice, but from the lack of agreement at the international level. Indeed, as we have seen before, on one side the UNHCR encourages States to consider admitting polygamous spouses as a way to ensure more inclusiveness of those cultures

where this practice is permitted[103]; on the other, the HRC and the CEDAW Committee see polygamy as undermining women's dignity and their right to equal treatment and as having serious consequences on the emotional and financial well-being of a women and her dependents[104]. These contrasting views do not favour the establishment of a coherent and cohesive approach to this issue at the international level, leaving states a great margin of discretion. It is also important to consider that, since the provisions in place regarding polygamy are not specifically addressed to refugees, but polygamy is something banned at the national level, introducing measures to allow refugees to bring more than one spouse, could rise questions of discrimination between nationals and non-nationals.

Another important issue to highlight is that of the age threshold imposed on dependent children. UNHCR advocates for the reunification of children and parents to take place only based on the dependency criteria and despite the fact that the child has reached the age of majority. In practice, however, States do not always comply with such recommendations and require children to be under 18. In the UK the applicant must be under 18 at the time the application is lodged, while in Australia the applicant must be under 18 also when the application is decided in order to meet the requirement of "continu[ing] to be a member of the immediate family of the proposer" (Schedule 2 cl. 202.211 and 202.221). This type of policy has proven to be problematic. In *Shahi v Minister for Immigration and Citizenship* the plaintiff was an Afghan refugee who was trying to bring her mother to Australia. However, after the mother made the application, but before it was decided, the girl turned 18 and, as a result, the mother ceased to be a member of the plaintiff's "immediate family". The judge rejected the reading proposed by the Minister's delegate as it would lead to a "capricious and unjust" result given the unclear wording of the regulation and the fact that the result depended entirely upon how promptly the application was determined[105]. The case of Canada differs from the other two because is the only country with a much higher threshold, which is more in line with the recommendations of the UNHCR and grants refugees a larger timeframe to apply.

[103] Ibid. fn. 34, para. 5(i).
[104] UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994, para. 14.
[105] *Shahi v Minister for Immigration and Citizenship*, [2011] HCA 52, High Court of Australia, 14 December 2011, paras. 31-38.

Growing concerns have also been raised on the topic of post-flight family members, as States tend to be very strict on admitting only members who were part of the family before the refugee left to seek asylum, while excluding all the family relationships that were built during the flight. In terms of international standards, it is useful to recall that in international human rights law the right to marry and form a family applies regardless of when or where a marriage takes place. The members of a family formed after flight have the same right to respect for their family life and family unity as families formed before flight. Indeed, the provisions of Article 19(1) of the ICESCR which call for protection and assistance to the family "particularly for its establishment", in the refugee context may be taken to include family "formation"[106]. Thus, there may be concerns as to whether such a distinction breaches States' non-discrimination obligations under international human rights law. The ECtHR's judgment in *Hode and Abdi v. UK* is important on this issue because the Court ruled that the difference in treatment between the applicants, a recognized refugee, and his wife, whom he had married after being recognised as a refugee in the UK on one hand, and students and workers on the other, was not objectively and reasonably justified. It found that "no justification for treating refugees who married post-flight differently from those who married pre-flight"[107]. Indeed, when a State decides to allow for certain categories of immigrants to be joined by their spouse, it must do so "in a manner compatible with the principle of non-discrimination enriched in Article 14 of the ECHR"[108] and the UK had failed to prove that this difference in treatment had a legitimate aim to justify it. The scope of the judgment is limited to spouses and partners, but the same approach should be taken also about children conceived after the refugee fled, foster children and children who have come to be under the customary guardianship of a refugee due for example to their parents' death during the flight.

With respect to family reunification of other family members that do not fit into the definition of immediate family, for the most part States' policies on assessing dependency do not comply with the guidance given at the international level. Canada, Australia, and the UK all tend to focus on economic dependency, without providing guidance to assess

[106] Ibid. fn. 13, p. 312.
[107] *Hode and Abdi v. United Kingdom*, Application no. 22341/09, ECtHR, 6 November 2012, paras. 54-56.
[108] ECtHR, *Guide on the case-law of the European Convention on Human Rights - Immigration*, December 2020, p. 8.

emotional dependency or non-blood related family ties, and do not allow extended family members to apply under the same conditions as close members. For example, the narrow application of the OYW, while ensuring that nuclear family has the opportunity to unite as quickly as possible and under the same class, it does not offer the same possibility to extended family member and thus fails to meet the overall goal of the UNHCR to promote the reunification of dependent relatives. It is widely known that refugee families become separated along the journey to reach the country of asylum and yet may have been customarily part of the same household and normally reliant on the family for support. However, de facto family will not benefit from any special family reunification measures and will have to be assessed under the normal immigration rules. Moreover, the Family Class sponsorship requires that the sponsors have sufficient income to be able to support themselves plus their sponsored relatives without living on social assistance. For newly arrived refugees, this has been a significant barrier to their ability to sponsor their loved ones, especially for women head of households, who would benefit from family reunification and might no longer need social assistance support once their family re-join them and are able to support themselves. The same applies to the excluded family member rule, which contradicts the purpose of Canadian law "to see that families are reunited in Canada" and violates Canada's international human rights obligations to protect and assist the unity of the family. Even when other types of dependency are taken into consideration, as in the case of the UK which allows older relatives who have become not only economically, but also physically dependent on the refugee head of the family, requirements are almost impossible to meet. These provisions do not comply with the recommendations of the UNHCR to consider emotional ties as constituting family relationships and force family members abroad to leave their parents or grandparents to the care of people with whom they do not necessarily have family ties.

A separate matter is that of the Australian government policy which keeps apart family members if arrived by boat after 13 August 2012, as they are not allowed to enter the country, but, instead, are sent to facilities on the islands of Papua New Guinea, where they remain for years. According to the opinion of two leading international law barristers, Australia is in breach of its international law obligations, as the policy of family separation amounts to an arbitrary interference with the essential right to family unity found in international human rights instruments, including the UDHR, ICCPR, ICESCR

and CRC. The policy violates Australia's international law obligations under Articles 17, 23 and 24 of the ICCPR, as the hardship and injustice caused to families cannot be justified by the need for immigration and border protection as claimed by the government; and it violates Australia's obligations under Article 9 of the CRC, as no public interest, including immigration and border control measures, can justify the separation of a parent and a child[109].

Regarding unaccompanied minors, both Canada and the UK are at odds with international law. It appears that their policy is related to concerns regarding the possibility of families sending "anchor children" to secure refugee status and in the hope that other family members will be able to join them later. The UK government, for example, stated that this policy is "designed to avoid perverse incentives for children to be encouraged or even forced to leave their country and undertake a hazardous journey to seek to enter the UK illegally" and maintains that "allowing children to sponsor their parents would play right into the hands of traffickers and criminal gangs and go against our safeguarding responsibilities"[110]. However, two UK Parliamentary Committees have reported that the denial of family reunification for refugee children is perverse and recommended that the policy be changed since there is no evidence supporting the government's argument[111]. Numerous NGOs have denounced the restrictive policies, including the Refugee Children Consortium, which stated that "the failure to provide family reunion for children to be reunited with their adult family members is short-sighted, and does not include full consideration of a child's best interests. The best interests of a child require consideration of a durable solution, which includes reunification with parents and family members"[112]. Indeed, as State parties to the CRC, both Canada and the UK have an obligation under international law to ensure that all children under their jurisdiction have equal access to the rights contained in the convention, among which there are some of the strongest provisions for the protection of children's right to family unity. Immigration regulations that prevent the reunification of

[109] Ibid. fn. 84, pp. 26-33. The full version of the opinion is available at https://www.hrlc.org.au/family-separation-international-law.
[110] UK Parliament, *House of Lords debate*, 3 February 2016, column 1881, and https://questions-statements.parliament.uk/written-questions/detail/2018-11-20/193502.
[111] UK House of Common, Home Affairs Committee, *The Work of the Immigration Directorates (Q1 2016)*, Sixth Report of Session 2016–17, HC 151, 2016, para. 41 and UK House of Lords, EU Committee, "Children in Crisis: Unaccompanied Migrant Children in the EU", *HL Paper 34*, 2016, para. 62.
[112] UK Refugee Children's Consortium, *Briefing for Westminster Hall Debate*, 2016.

children with their parents and siblings have a direct impact on the physical and mental health of the child and are generally not in their best interest. The same applies for family reunification in the country of origin, which would put children in danger and violate their huma rights. Therefore, refugees unaccompanied children should be reunited with their families in the countries of asylum. The UN's Committee on the Rights of the Child has consistently raised the issue of family reunion for unaccompanied children in its Concluding Observations on various country reports. In 2012, the Committee found that, notwithstanding the previous recommendation, Canada still had not adopted a national policy on UAMs and the IRPA did not consider the best interest of the child[113]. More recently, in 2016, the Committee has also raised the same issue in the UK, recommending the government to "review its asylum policy in order to facilitate family reunion for unaccompanied and separated refugee children within and outside of the State Party"[114]. Many child refugees have experienced serious trauma and continuing separation from their families can only exacerbate this. Despite the risks children face are widely known both at the international and the national level, these governments have been unwilling to take into account in their policies the option of family reunification for children. Instead, allowing children to remain separated from their parents, leaves them at greater risk of exploitation and harm. Flexibility is required in all circumstance, but especially in regard of refugee children both in relation to their parents, but also in relation to other guardianship practices that may be customary in some countries of origin. Otherwise, as Nicholson has stated family reunification risks becoming the perpetuation of family separation[115].

[113] UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic report of Canada*, CRC/C/CAN/CO/3-4, 6 December 2012, para. 73. In its previous report from October 2003, the Committee had already expressed its concern on the lack of a policy for UAMs, UN Committee on the Rights of the Child, *Concluding observations: Canada*, CRC/C/15/Add.215, para 46.
[114] UN Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, CRC/C/GBR/CO/5, 12 July 2016, para. 77(e).
[115] Ibid. fn. 18, p. 199.

	CANADA	AUSTRALIA	UK
	NUCLEAR FAMILY		
Definition	Spouse (incl. same-sex partners) and children biological or adopted	Spouse (incl. same-sex partners), children biological or adopted, parents of minors	Spouse (incl. same-sex partners) and children biological or adopted
Age of children	22	18	18
Valid marriage/ genuine relationship	✓	✓	✓
Polygamy	✗	✗	✗
Married children	✗	✗	✗
Non-disclosed family members	✗	✗	✓
Post-flight relationships	✓	✗	✗
Restrictions on manner of arrival	✗	✓	✗
Time restrictions*	✓	✓	✗
	EXTENDED FAMILY		
Definition	Children over 22, grandparents, aunts/uncles, nieces/nephews	Children over 18, grandparents, aunts/uncles, nieces/nephews	Children over 18, grandparents, aunts/uncles, nieces/nephews
Physical/economic dependency	✓	✓	✓
Married relatives	✓	✓	✗
Restrictions on manner of arrival	✗	✓	✗
	FAMILY MEMBERS OF UAMS		
Family reunion of parents	✗	✓	✗
H&C exceptions	✓	-	✓
Restrictions on manner of arrival	✗	✓	✗

*See next chapter and *Table 8*.
Note: a tick means yes, a cross means no, a dash means not mentioned.

Table 5. Comparison of governmental provisions regarding eligibility for family reunification.

2. ACCESSIBILITY: FROM INTERNATIONAL LAW TO STATE PRACTICE IN CANADA, AUSTRALIA AND THE UNITED KINGDOM

2.1. International and regional frameworks

Over the years a number of procedural standards have been set for States when dealing with refugees' family reunification applications, with the purpose of establishing a process as equal, fair and effective as possible. In particular, the UNHCR requires States to deal with requests for family reunification in a "positive, human and expeditious manner, with particular attention being paid to the best interest of the child", meaning that refugee families should be reunited as soon as possible and without unreasonable or unjustified delays. Most importantly, when children are involved, the UNHCR specifies that "the applicable age of children for family reunification purposes would need to be determined at the date the sponsoring family member obtains status, not the date of the approval of the reunification application". Moreover, regarding the documentation proving family relationships, requirements should be "realistic and appropriate" both to the personal situation of the refugee and to the situation in the country of origin. Finally, to be prepared for the possible family reunification in case of recognition, the UNHCR recommends all family members to be listed on the application form at the earliest stage[116]. In 2017, a roundtable of experts organized by the UNHCR had the aim to update and develop further guidance on the subject of family reunification in the refugee context. The outcome of such discussion highlighted some of the practical issues that are still today preventing refugees from enjoying their right to family unity and family life. It reiterated that, when States require family members to have documents to prove their identity, their marriage or partnership and their filiation, they need not only to consider that these documents may have been destroyed or left behind, but also that asking them to turn to the authorities in their country of origin would only exacerbate the risks and their fear of persecution. On the contrary, it was suggested that other elements, such as family pictures, cash transfers, consistency of the account of family composition, should

[116] Ibid. fn. 1, paras 11-13 and fn. 7, paras. 2-6.

be considered, so that "if the family relationship can be made probable, it should be accepted". Another common concern was that some States impose high fees for submitting the application, but refugee families do not always have the financial resources available. For this reason, States should apply lower or no fees to refugee families in order not to make family reunification "impossible or excessively difficult". Furthermore, as we have previously seen, some host States impose time limits to apply for family reunification as a condition to benefit from exemption from income, accommodation, or healthcare requirements. However, this can have disproportionate consequences on the success of an application, as refugees may have lost contact with their family members, or it may take a long time to gather the documentation. Therefore, it has been argued that there should be flexibility in the system and family reunification should be allowed if the delay is justified. Refugees should also be able to access to "prompt, clear and accessible" information about the family reunification process and what is needed to substantiate the application, as well as to legal assistance in the more complicated cases, which can be ensured also through the support of civil society actors and *pro bono* legal advisers. Additionally, it emerged that refugee family members face enormous difficulties in accessing embassies and consulates to submit their applications, present themselves for interviews or pick up their visas, as they might be required to travel long distances, including to other countries, and to bear high costs and serious risks to their lives. Vulnerable people, such as children, older people, or people with disabilities, may not be able to take on the journey at all, making it is impossible for them to access family reunification procedures[117]. Sometimes it also becomes impossible for refugees to access the procedure when States impose high income and accommodation requirements, which a newly arrived refugee will not be able to provide considering they are probably lacking a stable salary and connections. The UNHCR has advised in the past that "family reunification should be facilitated by special measures of social and economic assistance" not to unduly delay the entrance of the family members in the country of asylum[118].

Going more in depth on certain aspects of the procedure, two important steps applicants have to undergo during the family reunification process are interviews and DNA testing. Indeed, when family members cannot be recognized as refugees in their

[117] Ibid. fn. 24, paras. 15-30.
[118] Ibid. fn. 7, EXCOM, *Family Reunification No. 24 (XXXII)*, 1981, para. 9.

own right and have to be granted derivative status on the basis of economic, social or emotional dependency, officers have to carry out personal interviews to each family member in order to assess "the exitance and nature of a family or other dependency relationship". The guidance on procedural standards recommends these interviews to be conducted separately between the recognised refugee and the family members and respecting the right to confidentiality; the officer in charge should advise the applicants to provide the original or best available copies of all documents supporting the family relationship claim (e.g. marriage and birth certificates); however, when the documents are not available due to the situation in the country of origin and the condition of the flight or there are credibility issues, the officer should question the close family members regarding the family composition, the living circumstances in the country of origin, and other relevant aspects that can prove the existence of the family relationship. The same should be done for persons other than close family members, by looking, for example, at the duration of the relationship, the living arrangements in the country of origin, any financial, legal, or social responsibilities of the applicants or any changes in the personal situation of the applicants since departure from the country of origin that may make them dependent on the refugee. The procedure, however, should be different in case young children are involved: they should not have separate interviews, unless the applicant is an unaccompanied or separated child; the age of the child and his/her level of psychological and mental development should always be taken into account, as well as his/her ability to remember and recount events occurred in the country of origin and the precise composition of the household; and also applications that involve UAMs should receive an accelerated procedure[119]. Article 12 of the CRC establishes the right of children to be heard as one of the four general principles of the Convention. It recognises that children have a right to express their views freely and that these must be taken into account when deciding on all aspects affecting the children live. In case of an asylum claim, the child must have the opportunity to present his or her reasons leading to the claim and must be provided with all relevant information, in their own language, about the process and the services available. Giving the traumatic experience refugee minors go through, authorities should also create a safe and trusted space for children to feel free to talk about

[119] Ibid. fn. 34, UNHCR *Procedural Standard*, pp. 10-12.

what has happened to them and problems they have experienced[120]. Regarding DNA testing, since the 1990s a growing number of States have been resorting to this procedure to establish family relationships for the purpose of admitting individuals for family reunification. The UNHCR considers it "a measure of last resort" to be used only where serious doubts remain after all other types of proofs have been exhausted and examined, or where there are strong indications of fraudulent intent, as it can have serious implications for the right to privacy and family unity. These is because DNA carries the most personal information about an individual's identity and there are serious risks of personal data being disclosed to unauthorized parties or stored and disposed of unproperly, thus violating the right to privacy of the person who has undergone the test. For these reasons, "documentary proof, registration records and interviews should normally be relied on first", and "the benefit of the doubt should be given where the evidence is overall corroborative of presumed relationships". However, when DNA testing is undertaken, this should not delay the already lengthy family reunification process. The cost of a DNA test should be borne by the State requiring the test, while if the refugee or the family members are required to cover the costs associated with DNA testing, the government should consider waiving the costs on humanitarian grounds, or, at least, reimbursing them. Moreover, when the DNA test is required to prove a parent/child relationship, the UNHCR recommends it to be done only on one of the claimed parents, normally the mother. If the mother/child relationship is established, a marriage certificate proving the relationship between the spouses should be considered sufficient to also prove the father/child relationship, without the father having to undergo another test[121]. In this respect, recently it has been noted that DNA tests can have both advantages and disadvantages. On one hand, it provides a basis for establishing biological relations not only between parents and children but also siblings and more distant family members, such as grandparents, aunts and uncles or nieces and nephews. On the other, it raises several ethical and human rights issues, as "it reduces the socio-biological

[120] CRC Committee, *General comment No. 12 on the right of the child to be heard*, 20 July 2009, paras. 1-2 and 123-124. For a more detailed analysis see UNICEF and Save the Children, *Every Child's Right to be Heard. A Resource Guide on the UN Committee on the Rights of the Child General Comment No 12*, 2011.
[121] UNHCR, *Note on DNA Testing to Establish Family Relationships in the Refugee Context*, 2008, paras. 5 and 13-32.

complexity of the family to a solely biological entity and has the potential to exclude family members that are only related socially and not genetically"[122].

Concerning applications made by minors or their parents to leave a country for the purpose of family reunification, Article 10 of the CRC affirms that these applications should, like all the others, be dealt with in a "positive, humane and expeditious manner". Moreover, a child whose parents resides in a different country has the right to keep direct contact and personal relationships on a regular basis with both parents, while States have to respect the right of the child and his/her parents to leave any country, including their own, and to enter in another[123]. The importance to respect children's right to family reunification has also been reaffirmed by both the CMW and the CRC in their join comment, which states that "measures should be taken to avoid undue delays in migration and asylum procedures that could negatively affect children's rights, including family reunification procedures"[124]. As we have previously seen, some States deny family reunification to unaccompanied minors, putting in jeopardy the family members left behind. This issue is of particular concern also because parents are often exposed to difficult decisions when States allow only parents and not minor siblings to reunite with unaccompanied children. The UNHCR noted that the right to family unity is a right attached to each member of the family, and thus "states should consider not only the position of family members in the country of asylum but also that of the other family members, especially where there are children who may be at risk of being left behind"[125]. Moreover, States should make every effort to trace back parents and other close relatives of unaccompanied minors and to clarify their family situation before starting resettlement or adoption procedures[126].

At the regional level the Inter-American Court and the Council of Europe have both expressed themselves on the necessity to make procedures less restrictive and more rapid with the aim to reunite families as soon as possible and facilitate integration. The IACtHR has paid particular interest on the situation of unaccompanied children by stating that it

[122] Heinemann, T. et al., "Verifying the family? A comparison of DNA analysis for family reunification in three European countries (Austria, Finland and Germany)", 2013, pp. 183-185.
[123] Ibid. fn. 9, para. 83.
[124] Ibid. fn. 10, para 15.
[125] Ibid. fn. 24, para. 40.
[126] Ibid. fn. 7, para 7.

is essential for States to trace back their family members, when this is in their best interest, as well as to smooth procedures not to delay the reunification[127]. In Europe, the CoE Commissioner for Human Rights has denounced the difficulties both immigrants and refugees encounter to be joined by their family members in Europe, as policies in host countries are becoming more and more selective and States are imposing increasingly strict income, language, accommodation, and other requirements every year. In several European countries problems also arise from slow processing of applications and intentional long delays, even in the most high-priority cases. According to the Commissioner, immigrants and refugees should be able to reunite with their families, without having to go through high-demanding procedures that make their lives more burdensome and integration more difficult[128]. State practice, however, seems to be different. In a recently published report, the UNHCR found that many European countries still require applications to be made within a certain time, without considering that embassies are difficult to access and only provide appointments after several months of wait. If applications are not made in time, additional self-sufficiency requirements may apply, however, it is often impossible for a newly arrived refugee, who is still learning the language and has yet to find an employment, to satisfy them. Previously, the Committee of Ministers had also expressed itself on the issue of the documentation available to refugees, stating that the absence of such documents should not be an impediment to the application for family reunification, as this limitation does not consider the peculiar situation of refugees and the circumstances that lead to the separation of the families. Indeed, on one hand, to gather the documents family members have to be able to reach one of the embassies that processes these types of applications and often they are forced to travel to neighbour countries, thus facing visa restrictions, protections risks and additional costs, that end up impacting especially female-headed families and other vulnerable people. On the other, evidence such as passports, marriage, birth, or adoption certificates can be missing or hard to access and this may delay or lead to a rejection of reunification. Also, in cases of single parent families, they may be required to prove the death of the other parents to avoid accusations of child abduction, but which may not be possible where the other parent has remained in a conflict zone, administrative services

[127] Ibid. fn 15, para. 105.
[128] https://www.coe.int/en/web/commissioner/blog-2011/-/asset_publisher/xZ32OPEoxOkq/content/restrictive-laws-prevent-families-from-reuniti-1.

are no longer available or are too costly. Finally, in case of applicants in a vulnerable position, such as unaccompanied minors, States should take on the responsibility to co-operate with children and their representatives to trace their family members[129]. In these cases, the best interest of the child should always be a primary consideration, thus procedures should be child-friendly, and information given on the applications should be adapted to the child's maturity, language, gender, and culture, irrespective of whether they are accompanied, separated or unaccompanied. Children also have a very limited understanding of the legal processes, and therefore it is important that they get appointed to a legal representative that can guide them through all stages of the procedure and to whom they can talk freely[130].

As it emerges from this overview of international and regional standards, when dealing with refugee family reunification applications there are many aspects to keep in mind and many obstacles to overcome in order to implement a procedure that is humane and expedited and that does not make the process more difficult for both refugees and their family members. In the next section we are going to see more in depth how Canada, Australia and the UK deal with the application process in practice and what are the similarities and differences in their approaches.

2.2. Accessibility of the procedure in Canada, Australia and the UK

Despite the recommendations made by the UNHCR and other international organizations, refugee and their families abroad still encounter a number of practical difficulties in the process to be reunited. The most common barriers faced by refugees in accessing family reunification procedures include: lack of access to the documents required to prove family links, as a result of the flight or poor registration systems in the country of origin, and lack of travel documents; the hardship many sponsors experience in meeting the financial requirements to prove they will be able to support their families; the difficulties for family members abroad to access embassies in order to complete

[129] CoE Committee of Ministers, *Recommendation N° R (99) 23 of the Committee of Ministers to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection*, 1999, Rec(99)23, paras. 4-5 and UNHCR, *Families Together*. *Family reunification for refugees in the European Union*, 2019, pp. 15-24.
[130] CoE, *Family reunification for refugee and migrant children. Standards and promising practices*, 2020, pp. 51, 56 and 60.

applications, receive their visas or undergo interviews, due to the lack of embassy presence or travel risks caused by conflict; the limited timeframes in which refugees need to apply to be exempted from fulfilling additional requirements; the lack of information and assistance in navigating the procedures and the lack of clarity on why applications have been refused; the high costs involved in the process, both in terms of fees and other expenses. Moreover, serious difficulties in receiving legal assistance in relation to the right of appeal against a negative decision have been reported, as well as increasingly longer and exhausting waiting times for processing applications, as long as a lifetime. However, although the latter two are important issues to keep in mind, we are going to leave them aside, as their investigation would be too broad for the scope of this work.

2.2.1. Documentation, interviews and DNA testing requirements

In **Canada**, officers have to consider any documentary and oral evidence that is provided in support of the family relationship claim. As we have said, it can be difficult in the refugees' context to obtain documentation, so it may be best to submit as much evidence as possible upfront to prove the family link and avoid delays. A wide range of proofs can be presented, such as letters from family and friends, affidavits, old photos, records of correspondence or financial support, etc. There is no requirement under the law to interview any refugee applicant or their family members, however, applicants may be interviewed where necessary, as it may be useful to acquire information that are not present on the paper file, assess the plausibility of the relationship and identify any special needs of the applicant. Officers can consider waiving the interview only when a case has been identified as urgent, the application is complete, and information are sufficient, or the country conditions are well understood, and excellent relationships have been established with referral organizations. When conducting an interview, officers should be aware that the procedure can be stressful, thus should keep questions short and simple, using a positive attitude and putting the applicant at ease. If the person interviewed is a minor, officers should demonstrate particular sensitivity and be able to communicate with the minor in a child-friendly manner. If the applicant is not able to understand and/or

speak English or French, the officer can request an interpreter accredited by the IRB[131]. During the interview, officers are allowed to take notes of the case, which can be used to prepare refusal letters, respond to enquires or as record in the case of appeals. These notes have to follow specific guidelines, have to dated and signed and entered onto the Global Case Management System immediately after the interview. There is no obligation to allow applicants to tape interviews, however, according to section 4(1) of the Access to Information Act every person who is a Canadian citizen, or a permanent resident has the right, on request, to be given access to any record under the control of a government institution[132].

If, after reviewing the documentary evidence submitted, the officer is still not able to determine the truthfulness of the relationship, they can ask the applicant to undergo voluntary DNA testing. If no notification of intent to undertake DNA testing is received within 90-days, the visa officer will make the final decision based on the information available on file[133]. DNA tests, however, can be a barrier to speedy family reunification, both because of the long waiting periods before the test results are received, and because of the high costs involved, which cannot always be easily afforded by the refugee sponsor or the family members. Departmental guidelines specify that DNA testing is a "last resort" option when an applicant cannot provide satisfactory documentary evidence, it can be done only at recognised laboratory and results must have an accuracy of 99.8% or higher to be accepted as proof of the family relationship[134]. However, it is often unclear why the documents presented are found insufficient, because officers do not provide an explanation for rejection. Moreover, the CCR found that, although DNA testing should be a measure of last resort, if family members manage to provide additional documentary evidence after the request for DNA testing has been made, this rarely leads to a

[131] IRCC, *OP 5 - Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Classes*, 2009, paras. 10.4 and 11.1; https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/interview/applicant/conducting-interviews.html.
[132] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/interview/applicant/recording-interview.html. The GCMS is a system used internally to process applications for citizenship and immigration services.
[133] *Communication from UNHCR Office*, Ottawa, 18 October 2017, in Nicholson, F., The "essential right" to Family Unity, above fn. 18, p. 80.
[134] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements/dna-testing.html.

withdrawal of the request, raising questions about how seriously the evidence is considered[135].

Since the adoption of DNA testing in the early 1990s, the policy has raised many serious concerns in several highly sensitive cases. One of the most emblematic, but also unfortunate examples is that of *M.A.O. v Canada*, as it shed light on the potential of this technology to disrupt a family unit and on the devastating impact it can have on children who learn that they are not biologically members of their families as they believed[136]. M.A.O., a Somali man, arrived in Canada as the sponsored husband of his second wife, a recognised refugee, and submitted sponsorship applications for the three children he had with his first wife, who had passed away. He was not able to provide documentary proof of the birth registrations of his children, due to the lack of bureaucratic infrastructure during the civil war in Somalia, so he only submitted his passport, which included the names and photos of his children and affidavits attesting the family relationship. However, the visa officer was not convinced with the material provided and "invited" them to undergo DNA testing, as "failure to undergo a DNA blood test will likely lead to the refusal of an application."[137]. The results showed that M.A.O. was not the biological father of his younger son, so the officer rejected his application, since he was not a member of the family class as defined in the former Regulations[138]. In the first appeal to the IRB, M.A.O. contend that such test had no impact on the fact that the child was is son, as under Islamic law a child born to a woman in a legal marriage is the husband's child; the judge, however, did not accept interpretations of foreign law and considered that, compared to DNA, all other evidence were rendered immaterial. The Federal Court judge, instead, accepted that M.A.O. was the legal father of the child, even if the relationship was not biological or adoptive, as the previous interpretation was inconsistent with the overall goal of the family reunification policy and with the principle of the best interest of the child. Moreover, the judge found that the way in which the DNA testing invitation was worder was improper and unfair, since it appeared that the test was the

[135] Canadian Council for Refugees, *DNA Tests: a barrier to speedy family reunification*, 2011, pp. 2-3.
[136] *M.A.O. v. Canada (Minister of Citizenship and Immigration),* T99-14852, Canada: Immigration and Refugee Board of Canada, 18 January 2002*; M.A.O. v. Canada (Minister of Citizenship and Immigration),* 2003 FC 1406, Canada: Federal Court of Appeal, 12 December 2003.
[137] Ibid., as cited in the Federal Court decision para. 81.
[138] Former Regulations, s. 2(1), "son" was defined as a) a male *who is the issue of the sponsor* and has not been adopted or b) who has been adopted by the sponsor before having attained 19 years of age.

only way to prove the family relationship, with no consideration given to other evidence. Thus, the judge ordered the reconsideration of the case, but ignoring the results of the test and focusing only on the previous and new documentary proofs provided by the applicant. Unfortunately, the new evidence submitted were inconsistent and not enough to prove the presence of the appellant in Somalia at the time the child was conceived, and his parental role in the child's life was proven to be minimal; thus, also the last attempt to reunite the family failed. While the definition has been revised by the current Regulations (the term "issue" was replaced with "biological child"), issues on the improper use of DNA testing and the narrow definition of "family" may still pose challenges today. Indeed, situations similar to that of M.A.O. and his child are becoming more common. For example, in *Deo v. Canada*, a refugee from India tried to sponsor his parents, but discovered that his father was not biologically related to him and, thus, could not be sponsored, while his mother's application was accepted. The appeal judge accepted the *de facto* family relationship between the refugee and his mother's husband, but noted that the mother could sponsor her husband as an accompanying family member and, therefore, did not need to be sponsored by the son[139]. Although the findings are a bit outdated, another example of misuse of DNA testing has been reported by the CCR for years and that is the fact that certain ethnic groups are asked to take the DNA test more often than others. On one hand, these requests are required by the absence of appropriate documentation in source countries affected by crisis or conflicts; on the other, CCR noted that officials are more ready to reject the documents provided by people coming from poorer countries in Africa, Asia, and the Caribbean, which, in conjunction with the high costs, creates significant barriers to family reunification and a potential discriminatory application for certain groups[140].

In **Australia**, the RCOA has reported some of the challenges faced by families regarding documentation requirements. In particular, the difficulties of sourcing documentation or evidence to substantiate the family relationship and the consequent denial of family reunification; the concern that in some cases the required documents

[139] *Deo v. Canada (Minister of Citizenship and Immigration)*, 224(QL), Canada: Immigrations and Refugee Board of Canada, 2004.
[140] Canadian Council for Refugees, *DNA Testing*, Resolution no. 16, 1995 and fn. 132, p. 1. Unfortunately, more up to date information could not be found.

never existed or has been lost during the flight; the challenge of obtaining identity documents for children born in exile and that of gathering evidence of ongoing relationships, such as phone or email records, due to the lack of access to communication technologies while displaced; and the difficulty of formally registering as refugees with the UNHCR and thus the impossibility for former refugees to sponsor their family members for resettlement[141]. According to departmental guidelines caseworkers must be satisfied that the family relationship meets the relevant definition and that it has not been misinterpreted or arranged. For this, applicants have to provide documentary evidence of their own identity and of their family members, as well as proofs of the family composition and of their relationship. Normally this evidence comprises passports, identity cards, birth certificates, marriage certificates, family registers and so on. If official evidence is unavailable or insufficient, applicants may submit other documents such as hospital, school or church records or whatever other evidence is available, like camp registration records, ration cards or documentation issued by UNHCR and other bodies.

Officers should also interview applicants to verify their identity, to confirm family relationships and to assess claims of dependency. They should be convinced that the identity of the applicants attending the interview match the details on the application form and that the ages and relationships are as claimed. In cases where family members have become separated and are missing, officers should document the circumstances of the separation and the biographical details of each family member. Whenever possible the interview should be conducted face to face. However, depending on the circumstances, when it may be unreasonable or not safe for the applicant to travel to the interviewing place (as in split family cases), interviews may be conducted on the phone. In this case the applicant must provide detailed biographical data or other key family information that only he/she would know, to prove his/her identity. The officer, on their part, must be aware of the ethnic, cultural, religious, gender or age issues that could limit the applicant's ability to respond freely to the questions, especially in the case of female and minors (in the latter case an adult relative or carer must be present). If needed, an independent interpreter can be requested, but not a friend or relative of the applicant as this may

[141] Ibid. fn. 79, p. 3.

compromise the integrity of the interview. These must be carefully documented electronically, and a record must be printed out and put on the applicant's file.

If there are doubts about the biological relationship that cannot be resolved by documents or interviews, the officer can ask applicants if they are willing to undergo DNA testing. Tests conducted to establish a parent-child relationship are usually definitive, while those of sibling and extended family relationships are not conclusive. DNA testing should only be used as a last resort, when all other options have been exhausted, as the financial and potential emotional cost to the applicant may be considerable. For example, if applicants are unable to provide evidence of their marriage relationship because they are not lawfully married or never had a marriage certificate, officers should be satisfied as to the nature of the relationship and may consider them against the requirements for de facto partners. Similarly, officers should bear in mind that, even if there is no direct biological relationship between a child and the main applicant, the child might nevertheless meet the definition of member of the family unit[142]. Unfortunately, the Manual notes that there are significant privacy and confidentiality issues associated with DNA testing and suggest that results should be handled accordingly, however, it does not provide guidance on protecting the privacy of genetic tests results, nor does it direct officers to warn applicants about the consequences of unexpected results[143].

In the **United Kingdom**, information and instructions on the procedure can be found in the UKVI Family Reunion Guidance. As stated, the policy objective is to deliver "a fair and effective reunion process", recognizing the stress that separation may cause, "ensuring application are properly considered in a timely and sensitive manner on an individual, objective and impartial basis", and taking into primary consideration the best interest of the child. Moreover, when applications do not meet the requirements, caseworkers must consider whether there are exceptional circumstances or any compassionate factor which can authorize family reunion outside the Immigration

[142] Ibid. fn. 51, pp. 25-27 and 32. For more information on DNA testing check the Governmental website at: https://immi.homeaffairs.gov.au/citizenship-subsite/Pages/Descent/DNA-testing.aspx.
[143] Australian Law Reform Commission, *Essentially Yours: the Protection of Human Genetic Information in Australia*, Report 96, vol. 2, part. I(37), 2003, para. 37.44.

Rules[144]. First of all, in all cases, caseworkers must be satisfied that the applicant is who they claim to be. For this reason, all applicants are required to give their biometrics (fingerprints and digital photograph for those over 5 years of age, only the photograph for those under 5). Applicants can submit all the original documents that they are able to provide (e.g. passport, national identity cards, school ID cards or UNHCR attestations). In the Immigration Rules, there are no requirements for specific evidence to support a family reunion application, however it's the applicants and their sponsor's responsibility to provide sufficient evidence to prove their relationship (any document not in English, must be submitted with a formal translation). Caseworker, on their part, must be aware of the difficulties that people may face in providing documentary evidence of their relationship and of the fact that is subsisting, they must carefully consider how the sponsor came to leave the family behind, what contact had and are they having with their family and what circumstances is the family currently living in. If original documents are not available, the applicant has the duty to provide a reasonable alternative or an explanation of their lack, including any attempt to obtain them, and to demonstrate that they are related as claimed. As we have seen in the eligibility criteria, evidence must establish that the relationship exists and it is genuine, that it existed before the flight, and that the applicant and the refugee intend to live together in the UK. Examples of documents to support the claim are marriage certificates, documents relating to accommodation or joint purchases, DNA evidence, birth or adoption certificates, family photos, wedding photos and invitations, witnesses' statements, and communication records (phone calls, emails, letters, or social media messages). Extremely important is whether family members have been mentioned in the asylum claim as it is considered a strong indication that the relationship was formed pre-flight. If information is not sufficient, in some cases it is necessary to arrange an interview. During the interview, caseworkers must ask appropriate questions to the sponsor or the applicant in a sensitive manner to test the evidence and any inconsistencies. Whenever necessary an interpreter must be provided at the expenses of the State. According to the interview recording policy, all interviews must be recorded, preferably through a digital software, and a copy

[144] Ibid. fn. 58, pp. 5-7.

of the transcript must be made available to the claimant in a timely manner to allow for an appeal[145].

However, the process in practice is not so clear and simple; studies found that significant barriers to family reunification emerge due to the high standards of proof required by the national authorities. In 2015, the British Red Cross issued a report based on 91 family reunion cases, which demonstrated how the application process in the UK is not so straightforward and that vulnerable family members are left in dangerous situations due to the difficulties in accessing family reunification. Regarding documentation, the study found that 74% of all cases were missing at least one form, 58% of sponsors did not have access to photographic evidence, 45% of sponsors were unable to provide evidence of communication with family members, 46% of children applicant did not have a birth certificate, and 34% of spouses were without a marriage certificate. This was the result of three main factors: first, the limited functions of the institutions compared to the UK, for which certificates did not exists as a matter of practice or were issued by non-state entities, such as religious institutions; secondly, the nature of the flight was a major cause of missing documentation; and finally, applicants and sponsors encountered procedural challenges, such as understanding how to extract text messages or print phone records. Concerning interviews, from the study it emerged that 25% of cases demonstrated discrepancies during the interview process, which undermined the credibility of the claim. Discrepancies were mostly due to variations between the documents provided and the interviews (e.g. names were spelled differently); variations in personal histories (e.g. dates of flight or arrival were inconsistent); and variations in the reported relationship with applicants or omissions of family members[146]. Moreover, a recent official inquiry conducted by the UK Chief Inspectors of Borders confirmed the complaints that the procedures are too demanding and rejections too frequent. Indeed, according to the report, the Home Office was too ready to refuse applications due to the failure to provide sufficient evidence and did not allow to defer decisions to let applicants have more time to produce the missing proofs. Another problem was related to DNA testing. Prior to June 2014, officers were able to commission DNA tests routinely for applications, including minors, that did not provide enough documentary evidence. In

[145] Ibid. pp. 21-23 and ibid. fn. 53 Rules 339NC-339NE.
[146] British Red Cross, *Not so straightforward: the need for qualified legal support in refugee family reunion*, 2015, pp. 37-42 and 48-49.

2014 the Home Office withdrew funding support for DNA testing, leading to a significant increase in refusals, as costs are prohibitive, and many applicants were unable to provide this type of evidence at their own expenses. Caseworks cannot require DNA evidence and applicants are not obliged to submit them during their application process, but they need to prove they are related and one way to do so is by providing DNA samples. DNA testing can be done only by accredited organizations and results must be sent to the applicant or their mother/guardian if under 16 of age. When officials receive the results, they must handle them carefully by recording them only on the applicant's personal file and must also show sensitivity when delivering their decision, as disproving a claimed biological relationship (e.g. father/son) may have devastating consequences on the family member who did not know of the true relationship and repercussions for the mother and the son[147]. Theoretically, where applicants choose not to volunteer DNA testing, this should not have a negative impact on their application; however, since then, refusal rates have been doubling, as in the case of Somali and Eritrean applicants, and "it is reasonable to assume that the change to DNA testing has been a major cause"[148]. Two examples with a positive outcome can be found in the case law. In *Khaled Yousuf Abdu Mohamed Sharif v. Secretary of State for the Home Department*, based on Article 8 of the ECHR and the principle of the best interest of the child, the Tribunal ruled that the lack of a marriage certificate proving the relationship between the two Somali applicants should not preclude the possibility to reunite the family, and that the previous judge had failed to consider the situation in which the two got married (in a refugee camp) and had imposed too high evidential standards. Indeed, the DNA test run on the child proving the father-son relationship, the money transfers and the Skype calls records, and the visits to the father in Ethiopia were evidence substantial enough to establish the existence of a genuine and subsisting relationship[149]. In *R. (on the application of Al-Anizy) v. Secretary of State for the Home Department*, on the same legal grounds, the Court found that because the applicants are part of the Kuwati Bidoons ethnic group they are not recognized as citizens in their country of origin and thus do not have travel or identity documents. This situation

[147] Home Office, *DNA Policy Guidance*, 2020, pp. 16-17.
[148] UK Independent Chief Inspector of Borders and Immigration, *An Inspection of Family Reunion Applications*, 2016, pp. 5 and 26.
[149] *Khaled Yousuf Abdu Mohamed Sharif v. Secretary of State for the Home Department*, Appeal no. OA/08826/2014, United Kingdom: Upper Tribunal, 10 November 2015, paras. 16-25.

had prevented the wife of the applicant and their two younger children from being able to apply for family reunification, notwithstanding the fact that the applicant and two of the children were already recognized refugees living in the UK, and this had severe consequences on the psychological wellbeing of the children. The judge ruled that caseworkers had to consider the other substantial proofs of identity provided by the applicant and his family, such as the biometric residence permits, the marriage contract, the asylum interviews and the Country Information Guidance report illustrating the difficult situation of Kuwati Bidoons and explaining the absence of documents[150].

With regards to documentary proofs, all three countries allow for a wide range of evidence to be submitted. While the most important documents to substantiate the claim remain official certificates, States are also willing to accept family photos, phone calls and money transfers records, etc. as proof of the family link, which is a policy that tries to meet the family members' different possibilities. Similarly, caseworkers are also invited to take account of the difficulties refugees face in providing documentary evidence due to their precarious situation. When all evidence has been exhausted, but officers still have doubts about the truthfulness of the relationship, they can decide to interview the applicants in order to verify the consistency of their stories and clarify possible discrepancies. In general, officers must respect the privacy of the applicant and treat the information collected with confidentiality, considering the personal, social, and cultural situation as well as the vulnerability of the applicant. In addition, since conducting interviews is not prescribed by law, Canada allows for a waiver on such procedure in specific cases. Instead, the Australian government offers the possibility to conduct the interview on the phone, thus meeting the needs of those applicants who cannot travel to the interview location due to the costs of the journey or the security risks. However, only in the UK applicants can automatically obtain a copy of the transcript right after the end of the interview. If caseworkers are still not satisfied with the family relationship claim, then they can ask the applicant to voluntary undergo DNA testing. In all three States regulations on DNA testing are strict and they explicitly state that DNA testing is to be used as a "last resort" option, because the results can have disrupting

[150] *R. (on the application of Al-Anizy) v. Secretary of State for the Home Department*, [2017] UKUT 197, United Kingdom: Upper Tribunal, 25 April 2017.

consequences on the lives of the refugees and their family members. However, practice shows that this procedure is being requested by officers on a regular basis, sometimes even before having considered the other documentary evidence. Additionally, the cost of the test is charged on the applicant, who often cannot afford to pay such high prices and wait long times for the results. This demonstrates how, despite applicants have guarantees and reassurance on paper, in reality the standards of proof are rigorous and difficult to meet.

2.2.2. Income, accommodation and other requirements

In **Canada**, as previously mentioned, refugee sponsors and their family members, who decide to apply for family reunification after one year since the refugee received permanent residence, must meet income and accommodation requirements under the Family Class. In particular, the sponsor must not be on social assistance for reasons other than disability, must not have debts with the government (e.g. be in default with respect to repayments for transportation loans), and must be able to give financial support for the basic needs of the sponsored family members. Basic needs are food, clothing, shelter, utilities, fuel, other needs for everyday living, and health needs that are not covered by the public health service (eye and dental care). The sponsor needs also to make sure that the people who are sponsored will not need to ask for the government financial help. For spouses and partners, the sponsorship undertaking is three years after arrival; for dependent children (both of the sponsor or of the spouse/partner), the commitment is either ten years or until the child turns 22 years old, whichever comes first. The undertaking is a binding promise of support and will stay in effect for its entire length, even if the situation changes (e.g. the sponsor has financial problems or divorces from the spouse)[151]. Concerning other relatives, such as parents and grandparents and their dependants, the length of undertaking is twenty years. In this case, the sponsor's spouse or common-law partner can co-sign the sponsorship application to combine the incomes

[151] https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5289-sponsor-your-spouse-common-law-partner-conjugal-partner-dependent-child-complete-guide.html#eligibility.

and meet the financial requirements[152]. If during the undertaking, the sponsored parent or grandparent turns to social assistance, the sponsor is responsible for reimbursing any sum of money received. As shown in the table below, sponsors need to meet income requirements for each of the three consecutive taxation years immediately preceding the date of the application. The amount required varies depending on the number of people to sponsor; in most cases, there is no minimum necessary income for spouse, partner, or dependent children sponsorship, but only for parents and grandparents. However, if either a spouse or partner has as dependent child who has dependent children of their own, or a sponsored dependent child has a dependent child of their own, the sponsor must meet the income requirement[153]. Between 2018 and 2019 the amount required was increased by around $1,000, instead, since many sponsors may have been affected financially by the COVID-19 pandemic, the income requirement for 2020 has been reduced. Also, family class sponsors will be able to count COVID-19 related benefits in their income calculations for the 2020 tax year[154].

Income required for the 3 tax years right before the day you apply (sponsors applying in 2021)

Total number of people you'll be responsible for	2020 [1]	2019 [1]	2018 [1]
2 people	$32,270	$41,007	$40,379
3 people	$39,672	$50,414	$49,641
4 people	$48,167	$61,209	$60,271
5 people	$54,630	$69,423	68,358
6 people	$61,613	$78,296	$77,095
7 people	$68,598	$87,172	$85,835
If more than 7 people, for each additional person, add:	$6,985	$8,876	$8,740

Table 6. Sponsorship income requirements for 2021 in Canada.

[152] https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5772-application-sponsor-parents-grandparents.html
[153] Ibid. fn. 151.
[154] Ibid. fn. 152.

Normally any foreign national admitted to Canada as a permanent resident must go through a medical examination, including a physical and mental exam and a review of past medial history, and meet the requirements of not being a danger to Canadian health or safety. However, the Regulations allow for exceptions, which include "a family member of a protected person, if the family member is not included in the protected person's application to remain in Canada as a permanent resident; and a non-accompanying family member of a foreign national who has applied for refugee protection"[155].

Finally, applicants and dependent children who are 18 years of age or over must provide police certificates, clearances, or records of no information for every country they have lived in for six months or more during the 10 years prior to their application for permanent residence. If they were under the age of 18 when they lived in these countries, this information is not necessary. In case a family member is inadmissible on the grounds cited in IRPA sections 34 to 37, this does not prevent the protected person from being granted permanent residence. However, the inadmissible family member must be informed by the visa officer and must have the chance to respond whether in person at an interview or in writing[156].

In **Australia**, if the family member is not a refugee in its own right, there are different financial requirements depending on the type of visa the family member wishes to apply for. Under the Partner (provisional) visa, reserved for de facto partners and spouses, and the Child visa, the sponsor must provide support, accommodation, and financial assistance (including English language courses, if needed) for the first two years of the applicant being in Australia. If the sponsor does not comply with the sponsorship obligations, the government may cancel the visa[157]. For the Aged Dependant Relative visa, meaning a single older person, who has been relying on a relative living in Australia for financial support for at least three years, the undertaking is two years, but the sponsor

[155] Ibid. fn 39, section 30(1)(e) and (f). See also https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements/medical-requirements/exam/who-must-submit-immigration-medical-examination.html

[156] Citizenship and Immigration Canada, *OP 24 - Overseas Processing of Family Members of In-Canada Applicants for Permanent Residence*, 2006, paras. 7.9 and 10.7.

[157] For more details on the complete process for Partner visa check: https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/partner-offshore/provisional-309#About and for Child visa: https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/child-101#About

may be asked to sign an assurance of support. An assurance of support is a legal commitment to repay any welfare payments made by the government to a visa holder. The sponsor will need to show that he/she has a job or an ongoing income, by providing either two consecutive payslips for the current year or a letter from the employer or a Taxation Notice of Assessment for one of the past two years[158]. On the other hand, parents who wish to join their children must meet the so-called balance-of-family test, which determines the extent of the parent's links to their children or stepchildren in Australia. To meet this requirement the parent must have at least half of his/her eligible children in Australia or more eligible children living in Australia than in any other single country. Children are not counted in the test of they are deceased or they no longer under the parents' exclusive legal custody or they are registered with the UNHCR as refugees and live in a camp or in a country where they suffer persecution. Even in compelling or exceptional circumstances there is no waiver to this test[159]. The table below provides useful examples on the application of the balance-of-family test.

Total number of children	Children living permanently in Australia	Children in country A	Children in country B	Children in country C	Children in country D	Passes test?
1	1	0	0	0	0	Yes
2	1	1	0	0	0	Yes
3	1	2	0	0	0	No
3	1	1	1	0	0	No

Table 7. Calculations for the balance-of-family test in Australia.

[158]For more details on the complete process for Aged Dependent Relative visa check: https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/aged-dependent-relative-114#aboutVisa-index-4 and https://www.servicesaustralia.gov.au/individuals/services/centrelink/assurance-support/how-apply/documents-you-need-provide

[159]https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/contributory-aged-parent-864/balance-of-family-test

Moreover, family members must meet health requirements, even if they are not accompanying the refugee sponsor. The aim is to protect the Australian community from public health and safety risks, especially regarding active tuberculosis, polio, or Ebola, and controlling the costs and availability of the national health services. Applicants may also need to undergo a medical examination to prove to meet the requirements. The results of the examination will be assessed by a Medical Officer, who will advise the applicant on the health status and the kind of services the person may need. The kind of test required depends on the age of the applicant and the country specific health risks, but generally it comprises a medical examination, a TB screening test, a chest x-ray, and a HIV test. The results of the health assessment are usually valid for 12 months. If the applicant has a significant health condition, he/she may be asked to sign a health undertaking that helps ensure that he/she follows up any significant health conditions with an onshore health provider, if needed. There is also the possibility to exercise a health waiver if the applicant does not satisfy the health requirements, but this is considered by the government on a case-by-case basis[160]. According to the RCOA, consideration should be given to the situation of people who fail the pre-departure health check. Indeed, if one member of the family fails the test, they have to wait for treatment to occur and for every family member to undergo another pre-departure medical check. In the meantime, the family might not have anywhere to live, having left their property in the refugee camp, and the children, having left the school for their departure to Australia. The period before being cleared for departure to Australia can take some time; for example, the RCOA reported of a family in a Thai-Burma border camp who had to wait more than 20 months before moving to Australia, after a family member failed the health check. Families may have to choose between leaving a member behind, increasing the vulnerability of the person, or waiting long periods of time with a detrimental effect on the settlement process of the family[161].

Australia also requires all visa applicants be of good character in order to live in the country, meaning that they must pass the character test, and remain of good character. A person fails the character test if he/she has a substantial criminal record; he/she has been convicted while in immigration detention; he/she has been or is a member of a criminal group; he/she has been or is involved in human trafficking, genocide, a crime

[160] https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/health
[161] Refugee Council of Australia, *Family reunion and Australia's Refugee and Humanitarian Program: A discussion paper*, p. 10.

against humanity, a war crime etc.; he/she may engage in a criminal conduct in Australia if admitted; or he/she has been convicted of one or more sexually based offences involving a child. Applicants are invited to declare all criminal conduct and answer truthfully all the questions, as officers consider all circumstances of the case and, even if they do not meet the requirements, the Minister of Home Affairs can still choose to grant the visa[162].

In the **United Kingdom**, refugees seeking to bring nuclear family members do not have to show an adequate level of income and accommodation and the family members do not have to demonstrate any proficiency in English before arriving in the UK. Instead, extended family members are subject to the same rules that apply to other migrants. Since 2012, for adult dependent relatives, the applicant must provide evidence that they can be adequately maintained, accommodated, and cared for in the UK by the sponsor without recourse to public funds. The sponsor must sign an undertaking, confirming that the applicant will have not resort to social assistance, and that he/she will be responsible for them for a period of five years from the date the applicant enters in the UK[163]. Maintenance can be provided by the sponsor or by a combination of the funds of the sponsor and the applicant; however, promises of support by third parties are not accepted as they are vulnerable to changes in the other's personal situation and in their relationship with the applicant. The application must also establish that the dependent relative has no access to the required level of care in the country where they are living, even with the financial help of the sponsor. The "required level of care" is a matter to be objectively established, according to the needs of the applicant, by evidence provided by a doctor or other health professionals. In considering whether such care is available in the country where the applicant is living, officers must consider both what type of care is available and if it is realistically accessible considering the geographical location and the costs. Finally, evidence that the applicant's physical or mental condition requires long-term personal care must be established by a doctor, and the officers have the power to refer the applicant for a medical examination in an approved centre[164].

[162] Ibid. fn. 38, section 501(6). See also https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/character
[163] Ibid. fn. 87, Rule E-ECDR.3.1 and 3.2.
[164] Ibid. fn. 91, pp. 12-16.

Refugees in post-flight relationships must show a minimum level of income of at least £18,600 annually, an additional £3,800 for the first child and an additional £2,400 for each added child. The requirement can be met by gross annual salary alone or, if it is below the threshold, in combination with savings; it is also possible to rely on savings alone. However, only the sponsor's earnings are considered, while the prospective earnings of the partner or any third-party support are ignored. The type of income sources and its different combinations admissible are specified in Appendix FM-SE of the Immigration Rules. For example, bank statements must be originals or accompanied by a cover letter from the institution. The bank account must belong to the sponsor or jointly to the sponsor and the applicant. Payslips must be originals or accompanied by a letter of the employer, which must contain certain information about the employment, such as level of income, type of employment and length of employment. Savings must be in cash and easy to withdraw. Moreover, the applicant must also provide evidence of adequate accommodation, meaning a flat, a house or a room owned or occupied exclusively by the family, that is not overcrowded or breaking public health regulations[165].

In the government's view the financial requirement supports integration and prevents excessive burdens to be placed on the taxpayers. However, many consider the minimum income requirement to be unfair and disproportionate, as it is an obstacle to family reunification, especially for some groups who are more affected than others due to differences in earnings[166]. In 2017 changes were brought to the Immigration Rules following a Supreme Court sentence. The case in question is that of *MM (Lebanon) & Others v. the Secretary for the Home Department*, which concerned applications for partners and a child which failed to meet the financial requirement. The Supreme Court upheld in principle the minimum income rule; however, it required the government to revise the regulations to take proper account of the duty to protect and promote the welfare of children and of other possible reliable sources of income other than those listed in Appendix FM. One of the appellants was a refugee from the DRC, who had naturalized as a British citizen and thus had to meet the income threshold, and who wanted to reunite

[165] Ibid. fn. 87, Rule E-ECP.3.1. and 3.4. For further guidance on the assessment of adequate maintenance and accommodation see Home Office, *Immigration Directorate Instructions, Family Migration: Appendix FM – Adequate maintenance and accommodation*, 2021.
[166] Gower, M. and McGuinness, T., *The financial ('minimum income') requirement for partner visas*, Commons Library Briefing no. 6724, 2017, p. 3.

with his post-flight spouse who also was from the DRC. The Court recognized that in this case there were insurmountable obstacles for them to carry out their family life in the DCR, and thus it "follow[ed] that there [were] exceptional circumstances which would mean that refusal of the application results in unjustifiably harsh consequences for the sponsor and the claimant"[167]. Since then, if an applicant cannot meet the financial requirement through the sources specified in the Immigration Rules, decision makers are required to consider whether there are "exceptional circumstances" which would render a refusal decision a breach of Article 8 of the ECHR and other credible and reliable sources of income, as set in paragraph 21A of Appendix FM-SE[168].

Since 2010, the UK also demands post-flight spouses and partners to meet certain English language requirements. In particular, the applicant satisfies this requirement if he/she is a national of a majority English speaking country; has an English language certificate in speaking and listening at a minimum of level A1 and issued by an approved test provider, or has a high academic qualification awarded in the UK or taught in English in another country. The applicant is exempted from the English language requirement if, at the date of application, he/she is 65 or over; has a disability, or there are exceptional circumstances which prevent the applicant from being able to meet the requirement[169]. In the latter case, applicants need to provide clear evidence of the impact of the exceptional circumstance, such as examples of previous efforts to access learning materials or to travel abroad to take an approved test and the obstacles to doing so. This must include evidence provided by an independent source or verifiable by the decision maker[170].

Moreover, under current Immigration Rules, all people applying for a visa to stay in the UK for more than six months, thus including family reunification applicants, and who come from certain "high risk" countries, must undertake a TB test to include in the application. The TB test must be done by a Home Office approved clinic, of which there is usually only one per country. since it is practically impossible to both do the test and attend the appointment at the Visa Application Centre (VAC) in the same day, family

[167] *R (on the application of MM (Lebanon)) (Appellant) and others v. Secretary of State for the Home Department (Respondent)*, [2017] UKSC 10, United Kingdom: Supreme Court, 22 February 2017, paras. 80-87, 91-92, 100-101 and 102.
[168] Ibid. fn. 87, Rule GEN.3.1. and Home Office, *Immigration Directorate Instructions, Family Migration: Appendix FM - Financial Requirement*, 2021, p. 17.
[169] Ibid. fn. 87, Rule E-LTRP.4.1. and E-LTRP.4.2.
[170] Home Office, *Immigration Directorate Instructions, English language requirement: family members under Part 8, Appendix FM, and Appendix Armed Forces*, 2021, p. 22.

members are forced to arrange accommodation overnight or to make multiple journeys. If the family do not take the test, then the application is refused even if they meet all the other requirements. If the applicant tests positive, they must undergo treatment and then retake the test[171].

Finally, according to R352A and R334(iii)(iv) family members must satisfy the same security checks as asylum applicants, meaning that they are not a danger to the security of the UK and have not been convicted by a final judgment of a particularly serious crime.

In terms of financial requisites, the three States act rather differently from one another. Both Canada and the UK require sponsors and applicants not to rely on public funds or social assistance benefits to meet their income requirements, Australia does not. On the other hand, in all countries, sponsors have to sign an undertaking in which they ensure their support to the applicant for a period that varies depending on the relationship between the two parties. In Canada the sponsorship for spouse and children is shorter than for parents and grandparents; in Australia it has the same length. Canada and the UK also offer the possibility to combine different sources of income to meet the minimum income requirement. In the latter case, to sponsor an ADR, the sponsor and the applicant can join their incomes, but the same is not true for post-flight family members; in the former case, to sponsor an ADR, the sponsor can have the spouse co-sign the undertaking. As to the income, Canada has a significantly high threshold for relatives, starting with an income around 40.000$ for the past two years. Fortunately, the requirement has been lowered for 2020 because of the economic instability during the COVID-19 pandemic. Australia does not have a specified minimum income, they only require sponsors to be able to financially support the applicants. The UK, instead, distinguished between requirements for ADR, for which the sponsor has to maintain them, and those for post-flight family members, for which the sponsor has to provide a minimum income depending on the number of applicants. In this case, however, it is possible to have a waiver if exceptional circumstances apply. These requirements are put in place mostly so that newly arrived family members can already count on a basic network of economic support, without having to rely on the whole community for assistance. Concerning country-specific

[171] British Red Cross, *The long road to reunion: making refugee family reunion safer*, 2020, p. 25.

requirements, the "balance of family" test, which consists in a balance between the parents and the number of children living in different countries, is peculiar to Australia and makes sure that only those parents with the strongest family ties to the country are eligible. In Australia, health requirements are highly demanding, as they must be meet also by non-accompanying family members, with the aim of protecting the country from public health risks. The UK is the only State demanding applicants to have at least a basic understanding of the English language before entering; however, this requirement only applies to post-flight family members.

2.2.3. Application process and limited timeframe to apply

In **Canada**, the IRCC website provides a complete guide on how to apply for family reunification under the OYW provisions. Both the sponsor and the family member abroad have to complete and submit a series of forms in a particular order. The sponsors must submit the request for processing family members under the OYW, containing personal details, address and email of the sponsor and the biographic details, current country of residence and degree of relationship of the family members, and proof of their permanent resident status. If the sponsor wants to reunite with more than one family member at the same time, there are two possible scenarios: if their trying to bring the spouse/partner and children, the former is the principal applicant and the latter are accompanying dependants; if their trying to bring two or more children, each child is a principal applicant and must submit separate applications. The family members must submit: a generic application form for Canada, indicating a personal email address (only the principal applicant); a form containing additional family information (both the principal applicant and each family member who is 18 years old or over); another form about the background situation of the family (both the principal applicant and each family member who is 18 years old or over); one photo for the principal applicant and one for each family members, with names and dates of birth. All forms must be completed in French or English, must be dated, and signed and validated electronically with a barcode. Family members of refugees who are over 14 years old and overseas are also required to pay and submit their biometric data to a Visa Application Centre (VAC). Due to the complexities and difficulties that applicants may face when biometrics collection

facilities are not nearby and applicants have to travel, it is possible to ask officers to waive the requirement according to Regulation 12(8). The request should include the reasons for the waiver, such lack of accompaniment for minor children, lack of financial resources to travel, unsafe travel conditions or visa issues. Once all the documents have been filled in, family members must send their forms to the sponsor, who will assemble them and submit the application within one year from the arrival in Canada. The application can be mailed to the IRCC address in Ottawa or emailed by scanning all the documents; the IRCC also advises sponsors to use only one of the two options, as duplicates can delay the processing. The next step is for officers to review the application; if it is incomplete, the sponsor has the opportunity to rectify the situation within 30 days. Then the officers decide if the application meets the OYW criteria and inform the sponsor and the principal applicant about the decision[172]. To sponsor relatives under the Family Class most of the forms to fill in are the same, with the only differences regarding the submission of a financial and income sources evaluation document for parents and grandparents and proof of payments of correct fees[173]. In a survey carried out between 2012 and 2013 which evaluated the Family Reunification Program, the IRCC found that information services provided to clients (e.g. application forms, guidance documents, etc.) were clear and helpful and, as a result, sponsors and applicants overall had a good understanding of the sponsorship requirements and of the application process. However, clients also described the process as complex, as they found the forms to be excessively detailed, and identified a need for more updated information on the ongoing status of their application[174].

Recognized refugees in Canada can benefit from facilitated family reunification procedures enabling them to be joined by their non-accompanying family members. Indeed, when they apply for permanent resident status, they can include any family member in the application. Under section 175(1) of IRPR, a refugee must apply for permanent residence within 180 days of receiving protected person status. The latter have one year to apply to join their sponsor under the OYW provisions. This is an opportunity

[172] https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5578-request-process-following-family-members-year-window-opportunity-provisions.html and Canadian Council for Refugees, *Refugee Family reunification: Practical Guide*, 2019, p. 7.
[173] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/non-economic-classes/family-class-process.html
[174] Immigration, Refugees and Citizenship Canada, *Evaluation of the Family Reunification Program*, 2014, pp. xi and 35.

for refugee in Canada to avoid delays in having to wait for permanent residence before applying for family reunification. Refugees who first obtained permanent residence for themselves can still subsequently apply for their family members and have up to one year from the date they received permanent resident status to do so without having to satisfy the requirements of the Family Class. However, as Bradley noted, despite these admirative measures that are meant to facilitate family reunification for refugees, many of them are separated from their family members abroad for extended periods of time. Indeed, both the 180-day and the one-year provisions represent a significant limitation, as refugees do not always have the capacity to access all resources need within the specified timeframe[175]. The UNHCR has criticized the OYW as an "arbitrary restriction", as there is no compelling reason why family members should be subject to a different regime after one year[176].

In **Australia**, applications for family reunification by family members abroad can be submitted online or on paper, depending on the type of visa they wish to obtain. "Split family" members can apply for an Offshore Humanitarian visa if, within the last five years, a member of their "immediate family" was granted a refugee or other permanent protection visa. In this case, the main applicant, meaning the family member, has to complete Form 842 – "Application for an Offshore Humanitarian visa" and Form 80 "Personal particulars for assessment including character assessment", while the proposer has to complete Form 681 – "Refugee and special humanitarian proposal" and Form 956A "Appointment or withdrawal of an authorised recipient" and attach them to the application. Applicants who wish to be considered under the refugee category must lodge their form on paper at an Australian overseas mission (e.g. embassy or consulate). Form 842 contains personal information about the main applicant and their dependants, such as contact details, family background history, links to Australia (e.g. other relatives in the country), ID and travel documents information, details about the humanitarian claim, employment and education history, health and character information. Applicants are also required to sign an "Australian values statement", in which they undertake to conduct

[175] Bradley, A., "Beyond Borders: Cosmopolitanism and Family Reunification for Refugees in Canada", 2010, pp. 392-396.
[176] UNHCR Ottawa, *UNHCR Comments on CIC Paper Entitled "Refugee Family Reunion: Implementation of Policy"*, 2000, para. 6.

their behaviour in accordance with Australian values, like democracy, tolerance, respect of other individuals, and a "Biometric declaration of consent", in which the accept to give fingerprints and photos. All applicants over 18 must sign. Then they need to attach all the required documents to support their claim, but, if they are not able to provide a specific document, it is possible to make a written statement explaining why it is not available. If the form is incomplete, this can lead to a delay in the decision or a refusal of the application. Moreover, since it is not compulsory to interview all applicants, they are advised to include all the details possible about their personal situation. Form 80 contains the history of where all applicants 16 or over lived, their education, employment, military service, and family relationships. Form 681 is to be signed by the sponsor. The role of the proposer is that of assisting their family members in the settlement in Australia, including meeting them at the airport, providing accommodation, and introducing them to the relevant services. The form includes the details about the sponsored person and their dependents, the proposer's details, and information about previous proposals and their outcome. Form 956A is for correspondence from the Department of Home Affairs to be sent to the proposer and must be signed by the proposer and all applicants 16 or over[177]. For online applications, after having created an account and completed the application form with the personal details, the applicant must attach all the supporting documents before finalizing the application. Photos of the documents are accepted if they are clear and show all information. To attach a document, the applicants need to specify to which applicant it belongs, the reason for its attachment (e.g. "residential evidence") and the type of document (e.g. drivers licence). There is a limit to the number of documents that can be attached, depending on the visa; usually the limit for each person is 60 documents. In case of a mistake or changes in the situation, for example changes in their family composition as a result of birth, death or change in relationship status, it is possible to update the details on the application before finalising it. Once the family member has completed their application, through the reference number, the sponsor can continue the process by uploading their remaining documents. The procedure for on paper applications is similar, except for the fact that applicants must provide certified copies of the documents and must send their application by post or courier to the relevant address[178].

[177] Ibid. fn 51, pp. 12 and 21-23. Refugee and Immigration Legal Service (RAILS), *Refugee Family Reunion*, 2020, p. 1. Forms are available to download on the Department of Home Affairs website.
[178] https://immi.homeaffairs.gov.au/help-support/applying-online-or-on-paper/overview

As said, "split family" applications must be made within five years of the grant of the proposer's refugee visa to be granted the same degree of protection as the sponsor and to be exempted from dependency requirements.

In the **United Kingdom**, family reunification applications for people outside the UK must be submitted online. Applicants must complete an application form with all the family members personal details (one form for each family member), provide the supporting documents by uploading them electronically or by booking an assisted scanning appointment, and have photographs and fingerprints taken at a Visa Application Centre or at a British embassy/consulate. During the process, applicants will be asked to estimate the date of travel, for this they have to make sure they check how long the embassy will need on average to issue a decision (reasonably 3 months)[179]. If there is no embassy, consulate or visa application centre in the country, the family members must travel to the nearest office in another country[180]. Reaching an embassy or an application centre poses serious challenges, including protection risks, especially in cases where travel through conflict zones or travel of minors is necessary. In the inspection carried out in 2016, the Independent Chief Inspector found that of Borders and Immigration found that "in 69 (36%) of the 181 applications sampled had to cross an international border to travel to the VAC. Of these 69 cases, 28 were reapplications, mostly from Syrian and Iranian nationals"[181]. Similarly, in its study the British Red Cross found that in 20% of 91 cases examined applicants did not have access to a British embassy within their country of residence, the majority of whom were women and children. But serious risks emerge also for those who have already began their journey and find themselves residing illegally in third countries. In addition, they reported cases where applicants were refused access to embassies, despite having pre-arranged appointments, or had difficulties using online tools to book the appointment because the default location assigned was in a dangerous location or impossible to get to[182]. The Red Cross has also highlighted the fact that applicants must hand in their passport when they attend the VAC to have their

[179] British Red Cross, *Applying for refugee family reunion: a guide to the family reunion process*, 2020, p. 34.
[180] https://www.gov.uk/settlement-refugee-or-humanitarian-protection/family-reunion
[181] Ibid. fn. 148, p. 51.
[182] Ibid. fn. 146, pp. 53-60.

biometrics taken. This can cause many problems for those who come from third countries and need to have an ID to return home. In these circumstances, embassy officers can easily make copies, but this compromise should be arranged in advance. Once the decision is taken, the family member will have to return to the same embassy to have the visa fixed on the passport[183]. Moreover, successful applicants should be aware that entry clearance visa are only valid for 30 days, so they must travel to the UK within this period and before the visa expires. Applicants should give themselves enough time to make travel preparations, however, if applicants need more time to prepare to travel, they should make clear on the application the earliest date they intend to travel so that the visa can be issued to start on that day. Family reunion applications should normally be made online; however, the Immigration Rules also allow for in-country applications. Such applications should be made by writing to the UKVI a letter containing the following information: the sponsor's full name, date of birth, nationality and Home Office reference number, two passport sized photographs of each family member, valid passport for each applicant (where possible), a statement from the sponsor, setting out who is in their family, giving names and dates of birth, how they came to leave their family behind, what contact they have had with their family whilst separated, what contact they have with their family currently and what circumstances their family is living in, any supporting documentary evidence available, contact details in the UK of the sponsor and any representative[184].

Besides the limited period imposed on family members within which they have to travel to the UK, there are no specific deadlines for refugees to lodge the application for family reunification in order to be exempted from accommodation, income and health requirements.

The application processes for refugee family reunification consists of similar stages in all three countries. Both the sponsor and the applicants need to fill in and submit several forms, which are very detailed and require several specific information about their personal situation and family background. Such details might not be available or known to applicants or they may find confusing completing the documents by themselves. Each

[183] Ibid. fn. 169, p. 28 and fn. 170, p. 31.
[184] Ibid. fn. 58, pp. 10-11.

country allows for online applications, but only partially since family members still need to complete some of the steps in person. Indeed, in Australia and the UK, applicants must submit biometric information at the nearest embassy or application centre, often forcing them to travel long distances and face protection risks to cross international borders in conflict areas. At the same time, the UK is the only state which provides for the possibility for the sponsor to lodge the application in the country on behalf of the family members. Furthermore, Canada and Australia give the chance to correct the application forms in case of mistakes or to update them in case of changes to the family situation, although in Canada the timeframe to do this is limited.

More in general, limited timeframes may create major problems for refugees and their family members. Canada has adopted a significantly strict policy, which, on one hand, is supposed to facilitate and speed up the procedure by combining the permanent residence and the family reunion application and submitting them within one year. On the other, it may become an obstacle for refugees who do not have the resources and find it difficult to meet the deadlines and it also unreasonably discriminates against family members who would meet the definition, but that for various reasons do not finalise the application on time. Australia provides for a more feasible timeframe, which allows applications for "split family" reunion to be made within 5 years of the grant of refugee status to the proposer and consequently gives them time to settle in the new country and then sponsor their family members to join. Finally, although the UK is free of time restrictions to lodge an application, it requires family members to travel to the UK within one month of receiving entry clearance. The date of the travel can be estimated on the application to have some margin, but they may still need more time to arrange the journey and prepare to start their new life.

2.2.4. Dissemination of information and legal advice, fees and other expenses

In **Canada**, those who wish to get help filling out family reunification forms may ask for a representative. A representative is someone who provides advice, consultation, or guidance to the applicant at any stage of the application process, or in a proceeding and, if appointed, has the permission to conduct business on the applicant's behalf with the IRCC, the IRB and the Canada Border Services Agency. The appointment of a

representative is not compulsory and there can be only one for each application. Representatives can be uncompensated, thus will not charge fees or receive compensation for their work, including friends, family members, and third parties; or compensated, meaning that they will charge a fee or ask for remuneration, including consultants, lawyers and notaries who authorized or have some kind of agreement with the government[185]. The frequency of use of a representative may be an important indicator of the perceived complexity of the application process. In the evaluation of the family reunification program carried out by the government in 2014 it was found that overall 27% of the 1753 surveyed sponsors hired a representative, 36% reported doing so because the process was too difficult, 32% because the forms were too detailed and complicated and 20% because they were unable to fill out the form in English nor French. In fact, the reason most often given for hiring a representative was the belief that having professional help would improve the chances of a positive decision on the application (said by 52% of those who reported hiring a representative)[186].

The IRPR establish the amount of fees to be paid when applying for permanent residence. According to Regulation 295(2), refugees and their family members included in the permanent residence application are exempted from paying the fees, as well as not being charged under the OYW provisions. On the contrary, those who apply under the Family Class have to pay a significant amount. To be sponsored as spouse or common-law partner, applicants have to pay $1050, comprising a sponsorship fee of $75, a processing fee of $475 and right of permanent residence fee of $500; to be sponsored as dependent child, applicants have to pay $150 for each of them, which includes a sponsorship fee of $75 and a processing fee of $75, while they are exempted from the permanent residence fee. The same charges apply also for sponsoring parents, grandparents, and their dependents. In addition, applicants are charged with a biometrics fee of $85 per person or a maximum of $170 if a family of two or more people apply at the same time and place[187]. Moreover, the CCR advises refugees to think in advance about travel arrangements as they most probably will have to be paid by the sponsor. Indeed, although refugees can apply to IRCC for a travel loan, this procedure lengthens the

[185] https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5561-instructions-use-representative.html
[186] Ibid. fn. 173, p. 37.
[187] Ibid. fn. 150 and 151.

waiting time because they can only apply once the visa is issued and there is no guarantee it will be granted. Also, if the family member arriving in Canada is a young child travelling alone, then sponsor have to arrange for someone to accompany them, either a family member or friend or they have to pay the airline for an escort[188].

In **Australia**, applicants who need assistance in the application process can appoint a migration agent or legal practitioner who is registered with the Home Affairs Department. A migration agent or a lawyer is someone who can: advise applicants on the visa that may best suit them; inform them on the documents they need to submit with the application; help fill in the application and submit it; communicate with the Department on their behalf; and represent in, or prepare for, proceedings before a court or review authority in relation to a visa matter[189]. In the past years, the RCOA reported growing difficulties in accessing free migration advice and assistance for humanitarian visa applications. This was due to a decrease in government's funding despite the increase in demand, until 2013 when funding ceased definitively. Application forms are complex and difficult to complete, especially for people who are not familiar with the bureaucratic system in place. Thus, the recourse to migration advice can be crucial for the success of an application, however, non-fee charging agents are very difficult to find and there are long waiting lists, while private agents can be very costly for refugees, who often incur in high debts to access this service. Alternatively, they attempt at completing the forms themselves, which results in poor quality applications with essential information missing and subsequent high refusal rates. Moreover, people who had lodged an application expressed great concern for the lack of specific feedback about unsuccessful application, as they did not receive information about why their application was refused nor they got advice on how to lodge a future application. This practice caused distress and frustration for applicants and divisions within families, with the sponsors in Australia unable to explain to their family members abroad why the application failed[190].

Applicants under the Offshore Humanitarian Programme are exempted from having to pay visa application or processing charges, as well as travel costs. On the contrary, a significant obstacle to family reunification is the excessively high visa fees

[188] Ibid. fn. 171, p. 9.
[189] https://immi.homeaffairs.gov.au/help-support/who-can-help-with-your-application/overview
[190] Ibid. fn. 160, pp. 5-6.

imposed on people who seek to sponsor their family members through the Family Stream of the Migration Program, maybe because the five years deadline for humanitarian visa has passed. Visa charges for a Partner visa start from AUD 7,850. Sponsoring parents can cost between AUD 47,825 for a Contributory Parent visa and AUD 6,490 for a Parent visa, which has waiting times of up to 30 years. Finally, for an Aged Dependent Relative visa the cost is from AUD 6,490, with waiting times of up to 50 years. To these prices applicants must add other associated costs, such as health assessment, police certificates for the character test and biometrics, plus additional costs for any dependents[191]. As a result, such high visa charges make family reunion possible only for the well-off. Regarding this issue, the RCOA found that the Australian policy requiring proposers under certain categories (e.g. Special Humanitarian) to pay the cost of travels to Australia to their family members has had major financial and psychological impacts on the sponsors. Indeed, the majority resort to loans taken form informal sources, with excessively high interest rates and short-term repayments periods, which end up causing more hardship for those who do not manage to repay on time. Moreover, difficulties in paying for air tickets caused delays in the arrival of families, which remained separated for additional periods, also making the proposers more vulnerable to "exploitative payment arrangements" to find the necessary funds. In cases where the family members are not part of the nuclear family, the proposer would transfer the debt accumulated to the new entrants, which as a result were not able to afford their own accommodation and were forced to live with the proposer often in overcrowded conditions[192].

In the **United Kingdom**, the government stopped funding legal aid for refugee family reunification applications in 2013, following the passing of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)[193]. In the government's view, such applications were straightforward and were an immigration rather than an asylum matter, thus applicants did not need to be assisted in the process[194]. However, the impact of the Act on refugees and their family members has been significant. The British

[191] It is possible to explore the different visa options here: https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-finder/join-family and to get an estimate of visa charges for both the principal applicant and any dependent here: https://immi.homeaffairs.gov.au/visas/visa-pricing-estimator?visa=143
[192] Ibid. pp. 8-9.
[193] Ibid. fn 18, p. 116. See also United Kingdom, *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, United Kingdom: Parliament, House of Commons Library, 1 May 2012, Part 1.
[194] Ministry of Justice, *Reform of Legal Aid in England and Wales: the Government Response*, 2011, paras. 89-90.

Red Cross demonstrated that a number of complexities normally arise throughout the application process, in particular when compiling documentation and in preparing and submitting an application, and which would require qualified legal support. Refugees are often unable to hire legal advisers on their own due to financial insecurity, leaving family members in dangerous situations and affecting the possibilities of the sponsors to integrate[195]. The Public Accounts Committee Chair has also commented on the implementation of such reform describing the overall approach as "deeply disturbing" and criticizing the lack of evidence in favour of "cutting costs as quickly as possible"[196]. Those categories which are no longer in scope for legal aid and cannot afford to appoint a lawyer may be eligible for legal aid on an exceptional basis under the "Exceptional Case Funding" (ECF) system, as set out in section 10 of the Act[197]. However, at the end of last year, an important report revealed the ongoing challenges of the ECF and the overall impacts of the cuts to legal aid and the human cost on refugee family reunions suffered since the implementation of the LASPO. In particular, the ECF has been criticised "for failing to offer a meaningful safety net to vulnerable refugees in the family reunion context". On one hand, this is due to the complexity of applying for ECF, on the other, to the fact that advisers find it time-consuming and, if the application is unsuccessful, they are not paid for their work[198]. In a 2014 judgment concerning several decisions to deny legal aid through the ECF, the UK Court of Appeal dismissed the government's appeal against a High Court ruling holding that the Director of Legal Casework had been mistaken in denying legal assistance. One of the decisions concerned an Iranian refugee woman seeking to bring her husband and 16-year-old son to the UK. The first question raised was whether an application for family reunion could be in scope for legal aid under para 30 of Part 1 of Schedule 1 of the LASPO, as a right "arising from" the Refugee Convention. The High Court judge had accepted the argument made on behalf of the women, according to which "rights "arising from" the Refugee Convention […] include not only those that are contained in the Refugee Convention but also those that are

[195] Ibid. fn. 146, pp. 69-70.
[196] https://old.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news/report-implementing-reforms-to-civil-legal-aid/
[197] For guidance on the ECF see UK Legal Aid Agency, *Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)*, last updated in 2021, paras. 27-29 and 61-63.
[198] British Red Cross, *Cuts that Cost: The Impact of Legal Aid Cuts on Refugee Family Reunion*, 2020, pp. 46-47.

contingent on the recognition of refugee status under the Refugee Convention". The appellants, on the contrary, contended that the expression "arising from", as intended by the Parliament, had a narrow meaning and that rights arise from the Convention only if they are contained in the instrument. The Refugee Convention does not include a right to family reunification, thus the Court of Appeal accepted the view of the government. Secondly, the Court considered whether denying legal aid under the ECF system had amounted to a breach of the applicant's rights under Article 8 of the ECHR. Various testimonies contended that without legal advice the woman had no idea how to secure her family's entry in the UK, as she did not speak English and needed practical and emotional assistance in submitting the application. Moreover, because of the particular circumstances of the case, it was envisaged that there could be grounds for refusal if additional evidence was not provided along with legal submissions by a legal adviser explain the situation. The Director of Legal Casework, however, refused her application for ECF on the grounds that withholding legal aid "would not make her claim practically impossible or lead to an obvious unfairness or breach her Article's 8 rights". On the contrary, the Court of Appeal concluded that "family reunion is generally a matter of vital importance for refugees […] The particular circumstances of B, her husband and her son gave rise to issues of particular complexity. […] Without legal advice and assistance, it was impossible for her to have any effective involvement in the decision-making process. The Director ought therefore to have concluded that failure to provide legal aid would amount to a breach of her Convention rights" and, thus, dismissed the appeal[199]. In another judgement, the High Court judge found that during its first year of implementation, only around 1,300 ECF applications were made, and the success rate had "a very worrying figure" of just over 1%, thus leaving those unable pay for legal assistance "suffering in a way that Parliament cannot have intended"[200]. Because of legal challenges, the ECF system has undergone some improvements, including a shortening of the application form and the introduction of a procedure for urgent applications[201].

[199] *Gudanaviciene & Ors, R (on the application of) v The Director of Legal Aid Casework & Ors*, [2014] EWCA Civ 1622, United Kingdom: Court of Appeal (England and Wales), 15 December 2014, paras. 136-173.
[200] *IS (By the Official Solicitor as Litigation Friend) v The Director of Legal Aid Casework & the Lord Chancellor*, [2015] EWHC 1965 (Admin), United Kingdom: High Court (England and Wales), 15 July 2015, paras. 29 and 80.
[201] Ibid. fn 197, p. 47.

However, despite these improvements, the number of applications under the ECF scheme and the number of successful requests remains well below the government's predictions. Indeed, during the debate prior to the adoption of the LAPSO, the government estimated there would be around 5,000-,7000 applications a year, of which 53-74% would be granted[202]. The most recent legal aid statistics available shows that 745 applications were received, with a success rate of 92%[203]. While every year more applications are being made, in reality the application volumes are far lower than predicted, confirming that ECF applications are overly complex and time consuming both for advisers and for refugees who lack legal knowledge. Finally, while in England and Wales even *pro bono* lawyers and NGOs are struggling to meet the sharp increase in demand due to the funding cuts, it is interesting to note that legal aid is still available in refugee family reunion cases in Scotland, including the cost for advice, interpretation, translation, key reports, or evidence as well as representation in tribunal. This means that where refugees are accommodated after they arrive in the UK may determine whether they have access to legal aid for family reunification[204]. In order to meet as much as possible the needs of refugees and their family members in dealing with the application process, the British Red Cross has developed an up-to-date practical guide with a step-by-step explanation of how to apply for family reunification in the UK, including where to find all the relevant forms and which supporting documents to attach to the application. It has also put together a team of five qualified immigration advisors working across the country to provide counselling and information on family reunification, with the aim to help people understand who is eligible, gather the necessary evidence, complete statements to explain any missing documentation, fill in and submit application (including booking appointments at the application centre for the family members), and refer refused applications for further advice[205].

Family reunification applications for refugees reuniting with immediate family members are free of charge both for application and for biometric enrolment. However, applicants may have to pay for translations, DNA test, TB test, document postage if

[202] The Law Society, *Access Denied? LAPSO four years on: a Law Society review*, 2017, pp. 21-22.
[203] UK Ministry of Justice and Legal Aid Agency, *Legal Aid Statistics quarterly, England and Wales. July to September 2018*, 2018, p. 9.
[204] Ibid. fn. 136, pp. 26 and 50.
[205] Ibid. fn. 130 pp. 53-54 and 58.

documents are not uploaded online, travel to the embassy, and the VAC appointment fee (even if the application is free, some VAC charge applicants for using their services). Applicants are advised to start saving for these costs from the beginning of the application process, to avoid last minute stress and delays. Those who apply as other family members are charged with an application fee, which varies depending on the category and the country from which the applicant is applying. For example, an adult dependent relative applying from Afghanistan has to pay $388, while a post-flight family member $1523; an adult dependent relative applying from Nigeria has to pay $559, while a post-flight family member $2192[206].

Getting legal advice for family reunification is a costly and difficult procedure both in Canada, Australia and the UK. In Canada the government does not provide free legal aid; the only options are to either pay for an authorized and in good standing legal adviser or to rely on a friend or family member who may lack competences or attempt to fraud the applicant. In 2013 both Australia and the UK stopped funding their legal aid programs, so that claimants need to pay to receive assistance to lodge their application or have to resort to much complicated procedures like the ECF in the UK. Nevertheless, refugees are already financially strained by the overwhelming amount of money they need even before even considering applying for family reunification, with many sponsors having to pay for housing, food, and other essentials, while also supporting their families abroad. Indeed, many refugees who are trying to settle in the new country feel an enormous pressure to send money their relatives in refugee situations overseas, money that could be injected in the national economies. When adding to these expenses also the costs of getting legal help, they end up incurring in large debts with high interest rates and becoming more vulnerable to exploitation. Alternatively, they may feel compelled to rely on the advice of people in their community, which can be helpful, but not entirely comprehensive or relevant to the case. So, on one hand there is the willingness of governments to cut costs, on the other, however, when wrong information is used and applications are rejected, then it can take a lot of legal expertise and time, with additional costs for the refugee family, to remedy the problems caused[207]. Unfortunately, it was not

[206] Ibid. fn 179, p. 32 and 35-36. Fees calculator (trial service) https://visa-fees.homeoffice.gov.uk/y/afghanistan/gbp/settlement/family-reunion-for-asylum-seekers/all
[207] Ibid. fn. 198, pp. 22-23 and fn. 79, p. 2.

possible to find further information on if and at what stage refugees are informed of the possibility to bring members of their families to the host country. One positive aspect, however, is that all the information found in this study, including those on how to lodge the application, are public and easily accessible online. This can be helpful for refugees and family members to get an idea of what they will need to apply and to understand how to do it.

Immediate family members are charged with application fees, even though other costs arise from having to pay for DNA tests, health examinations, biometrics, travel arrangements, appointments, and documentation. Other family members, instead, are charged with considerably high application fees. In Canada fees are much lower than those in the UK and especially in Australia where sponsors have to pay astronomical prices of thousands of dollars. However, they may still be financially unsustainable for the sponsors, forcing them to make debts or choose between which family members to propose to manage all the expenses associated with the procedure.

2.3. Does State practice comply with international and regional standards?

Procedure-wise, States seem to be following international and regional standards depending on the matter, making the overall accessibility to the family reunion process for refugees difficult and inconsistent and the outcome of applications unpredictable.

Being able to prove family relationship claims is a central aspect of the family reunification procedure; such relationships can however be hard to demonstrate. The UNHCR encourages States to be realistic in type of documentary evidence they require, as refugees fleeing from conflict and dangerous situations face major obstacles in gathering official certificates, either because for customary reasons in their country of origin such documents are not issued or because administrative institutions are not working properly anymore, or they may risk their lives contacting local authorities. In this regard, Canada, Australia and the UK all adopt a flexible approach, allowing applicants to submit a variety of evidence other than marriage, birth or adoption certificates, such as family photos, money transfers, phone calls and correspondence records, testimonies from friends, etc. In the UK it is also possible to submit any proof of attempts to collect the documentation proving the family link. At the same time, however,

civil society actors have repeatedly criticized the high standard of proof imposed by the British authorities, which leads to a high refusal rate of applications due to the impossibility for refugees to meet such benchmark[208]. Similarly, as international standards require the respect for the right of confidentiality when conducting interviews, as well as the adoption of special measures for cases involving children, all three countries examined provide suitable arrangements. Australia allows for interviews to be conducted on the phone in cases where it is impossible for applicants to reach the interview location, while caseworkers are duly instructed on the ethnic, cultural, religious, gender and age limit that can prevent applicants from answering all the questions. On the contrary, the use, or better the misuse, of the DNA testing procedure poses some issues. We know that according to authoritative guidance, DNA should be used as a measure of "last resort", only when all other evidence has been exhausted, but caseworkers still have doubts about the truthfulness of the family claim and fear applicants might have a fraudulent intent. Indeed, theoretically States' policy establishes that the documentation available has to be examined first and that interviews have to be conducted to clarify discrepancies, while only at a later stage it is possible to ask applicants to voluntarily undergo DNA testing. However, the reality of state practice is quite different. Reports and case law from the different countries show that DNA testing is not always used properly, and States are not securing compliance with international and regional standards. In Canada, for example, people coming from Africa, Asia and the Caribbean are being asked to undergo DNA testing more frequently than other groups[209]. Moreover, officers seem to be asking applicants to undergo DNA testing on a regular basis without considering other alternatives, regardless of the quality or quantity of documentation provided and increasing the risk of disclosing personal information and the potential of disrupting family relationships. Finally, while international standards call for States to be responsible for the costs of DNA testing, by either paying for it or reimbursing the cost, none of the countries examined has implemented this policy, except for the UK which has now withdrawn the funding.

Regarding income, accommodation and other requirements, there is little guidance given at the international level, other than the fact that States need to adopt measures of

[208] See above 2.2.1.
[209] Ibid. fn. 135, p. 1.

social and economic assistance to help sponsors meet the requirements. States, however, do not allow for sponsors nor applicants to ask for social assistance or government financial help in order not to weigh on the taxpayer. Canada is the only country where there is the possibility to have a co-signer, usually the spouse, to join the financial resources and fulfil the condition when sponsoring parents or grandparents. Instead, in the UK, the sponsor and the family members can combine funds to prove maintenance. On a more general note, if international standards require the procedure to "human", given the personal and financial situation of refugees, imposing such high thresholds does not seem to be in line with the recommendations of the international governmental bodies. In the same way, discriminating between immediate and extended family members by imposing higher income requirements and lengthier undertakings to sponsor the latter, precludes the possibility for many refugees to reunite with their families, especially in those cases where members are considered related only by custom and not genetically.

Concerning the application process, refugees and their family members have to overcome a number of obstacles, both in terms of having to understand how to fill in the required forms and of actually being able to submit their application. It is well known how difficult it can be for refugees' family members, especially women and children, who are left behind in their country of origin, to reach embassies/consulates and visa application centres which often are located far away or are not present in the country at all. We have seen that several concerns arise both in terms of lack of personal safety and of additional expenses. For this, States have been urged to avoid asking applicants to travel to their embassies or, at least, reduce the number of appointments they have to take to lodge the application. In the case of Canada, Australia and the UK, although two out of three have implemented online procedures or, as in the case of Canada, sponsors can submit the application on behalf of their family members, States still require them to reach the nearest embassy to submit biometric information or to collect their visa. Various country-specific issues have also been identified. In Canada, the CCR**,** while considering applications made by one of the parents as the principal applicant and the children as dependents, it has highlighted that "it can become a problem if there should ever be a barrier to the spouse coming to Canada, because the children's applications are dependent on this parent", thus they will be delayed or rejected all together, preventing the dependent

child to be reunited with the other parent[210]. In Australia, the RCOA found that, when several family members are part of a single application, the visa document is issued to the primary visa holder, leaving the other members of the family without a copy. Concerns have been expressed about the difficulties associated with obtaining additional copies of the identity document, which leads to further issues if the family splits after being settled in the country[211]. During its most recent community consultations, the Council has also spoken in favour of developing a humanitarian family reunion program outside the current Refugee and Humanitarian Program, to make the process more accessible and flexible to the needs of refugee families and to meet the high demand of places. Indeed, such improvement would fulfil Australia's commitment in the New York Declaration to consider the expansion of flexible arrangements to assist family reunification[212]. In the UK, a report from the Scottish Refugee Council found that professionals and caseworkers respondents felt that current guidelines were "unclear and lacked transparency". Some stated that "there was a specific need for guidelines to clarify what documentation was acceptable in a family reunion application". Respondents also felt that documentation required under current guideline was "unrealistic and unreasonable". A lack of clarity in family reunion guidelines was also referred to by caseworkers in terms of languages barriers faced by some refugees in interpreting and understanding the guidelines that where available only in English, thus calling for the need to have information available in multiple languages. As well as lacking clarity, numerous agency respondents also felt that failed to provide adequate support for minor children overseas during the family reunion application process[213]. Put together all these difficulties made the application process extremely complicated even for trained professionals, presumably even more for refugees and their families, highlighting the overall gap between the right to family unity and the ability to exercise that right.

Another important issue that emerged from state practice is the imposition of limited timeframes to apply to be exempted from several requirements, normally compulsory for other categories. However, refugees' ability to meet deadlines depends

[210] Ibid. fn. 172, p. 6.
[211] Ibid. fn. 161, p. 9.
[212] Refugee Council of Australia, *Rebuilding a responsive and strategic Refugee Program*, 2021, p. 11.
[213] Scottish Refugee Council, *'One Day We Will Be Reunited'. Experiences of Refugee Family Reunion in the UK,* 2010, p. 19.

on a range of factors, such as tracing family members, accessing accurate information and support, reaching the embassy, collecting necessary documents and financial resources, all factors that are often beyond their control. As a result, it often happens that deadlines lapse and refugees are then subject to the same requirements as other migrants, even though their personal situation and needs are different. According to international standards, the system should be more flexible and should take into account possible and justifiable delays that may occur when lodging an application. States, however, keep implementing this type of policy, applying more or less restrictive deadlines, with the exception of the UK.

As we have seen procedure are complex and often unclear, if to this we had the lack of available, timely and clear information as well as the difficulty for applicants to access free legal advice, then there is a high chance that applications will be negatively affected, and family members will not be able to exercise their family reunion rights. States have a positive obligation to enable respect for the right of refugees to family life and family unity, hence the authorities in the country of asylum have the duty to inform beneficiaries, as soon as they are granted protection and, in a language and manner that they can understand, of the conditions under which they can apply for family reunification, the procedures to be followed and any deadline that may apply. Caseworkers from the UK referred to the general lack of accurate information available to refugees on the family reunion application process and the lack of information available in multiple languages. They also reported a general failure to fully promote awareness and greater knowledge among refugees, causing misunderstandings and unrealistic expectations for many, who believed that they could quickly and easily be reunited with their families without having to go through a long and detailed process"[214].

Receiving support during the application for family reunification is of vital importance for refugees and their family members. Legal support may be required for various reasons. During the documentation stage it is useful to identify complex cases that may need additional support; to gather and produce evidence capable of supporting the application; to clarify and explain the language and terms used in family reunion documents and to clarify the rules and regulations that had to be adhered to; to review and resolve discrepancies that may came up during interviews. Legal support may also

[214] Ibid. p. 28.

be required during the submission stage to allow sponsors and applicants to have representation on their behalf and develop a good strategy to present the case; to understand policy and guidance on refugee family reunion; to contact other relevant professionals and organisations to create a network of support. In its Concluding Observations from 2015, the HRC expressed concerns about the impact of reforms to the UK legal aid system on access to justice, including the shortcomings in the exceptional funding scheme, and urged the State to address the weaknesses in the ECF scheme and review the need for restrictions on legal aid[215]. The RCOA has also called for the restoration of funding for professional migration advice services to support refugees in lodging family reunion applications[216].

Refugees also face particular difficulties paying the high fees imposed and all the other associated costs. They may not have had access to the labour market while waiting for a decision on their status and can face difficulties accessing both banking systems and private loans. In addition, their family members may themselves face with restrictions on their rights to work and limited resources in the country where they live. When all the costs for family reunification are combined, this may put family members of refugees in precarious and exploitative situations and even lead families to have to choose which family member to reunite with first, leaving others behind until they can gather sufficient resources. The UNHCR, through the voice of some of the most prominent experts in the field, demands States to apply lower fees for refugees in order not to make reunification impossible; however, States, including those investigated, keep imposing high fees which may significantly delay or even prevent family reunification altogether. As recommended by the RCOA, fees should be waivered or at least some type of concession should be introduced for refugees sponsoring family members under the mainstream migration programs, and an increased number of no-interest loans should be made available to assist sponsors in meeting the costs of travels and application fees[217]. Similarly, the Parliamentary Assembly of the Council of Europe (PACE) has encouraged States to establish a revolving fund through bilateral agreements, national or European schemes,

[215] UN Human Rights Committee, *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/7, 17 August 2015, para. 22.
[216] Ibid. fn. 212, p. 12.
[217] Ibid. p. 11.

in order to cover the costs of the process for beneficiaries of international protection who cannot afford it[218].

[218] PACE, *Family reunification of refugees and migrants in the Council of Europe member States*, Resolution 2243, 2018, para. 5.

	CANADA	AUSTRALIA	UK
	DOCUMENTATION, INTERVIEWS, DNA TESTING		
Admissibility of informal evidence (e.g. photos, phone records, etc.)	✓	✓	✓
Guarantee of interviews	✓	✓	✓
Optional DNA test (on paper)	✓ (the cost is on the applicant)	✓ (the cost is on the applicant)	✓ (the cost is on the applicant)
	INCOME, ACCOMMODATION, OTHER REQUIREMENTS		
Income*	✓	✓	✓
Accommodation*	✓	✓	✓
Commitment to adequate level of care	✗	✗	✓
Language	✗	✗	✓
Health check	✓	✓	✓
Balance-of-family test	✗	✓	✗
Security check	✓	✓	✓
	APPLICATION PROCESS AND LIMITED TIMEFRAME		
Online	✗	✓	✓
On paper	✓	✓	✗
Embassy or VAC appointment	✓ (possibility of waiver)	✓	✓
Limited timeframe	1 year	5 years	✗

	INFORMATION, LEGAL ADVICE, FEES AND EXPENSES		
Information	-	✗	✗
Free legal advice	✗	✗	✗
Fees*	$150-$1050	$6,490 – $47,825	Depends on the category and the country the applicant is applying from
Expenses	Born by the sponsor	Born by the sponsor	Born by the sponsor

*If within required timeframe, nuclear family is exempted.
Note: a tick means yes, a cross means no, a dash means not mentioned.

Table 8. Comparison of governmental provisions regarding access to the procedure for family reunification.

CONCLUSION

The overall aim of this research was to consider the current level of protection granted to refugees' family members in relation to the right to family unity and family life. We have done so through the study of three countries in three different regions of the world. The study was useful to highlight the main gaps and/or attainments in the fulfilment of States obligations towards refugee rights. Having tried to be as consistent as possible with the analysis despite the different cases, what emerged is that none of the three countries fully complies with international and regional standards. We have considered a wide range of categories and steps in the family reunification process, and the result is that States are inconsistent with their outcomes, conforming with certain standards and failing to meet others. Unfortunately, the lack of a specific right for refugees to family reunification and the non-binding nature of many instruments adopted at the international level represent cumbersome obstacles, and it is often left it to tribunals to give effect to this right depending on the personal circumstances of the applicant. However, very few of these cases are successful, while the majority of applicants are left on their own to grasp a procedure that requires considerable expertise, as a lack of attention to details can have highly negative consequences. Additional efforts shall be taken by the governments in cooperation with civil society organizations, which are already working closely with refugees and their family members, to better understand and respond to their needs and difficulties. Political and public awareness regarding restrictions to family reunion for refugees has increased in recent years, as it is shown by the numerous reports by third-sector organizations. However, limited disaggregate data on the amount of successful applications are available and a number of restrictive policies are still in place.

In particular, the system used to select the "family" does not always acknowledge the meaning of family for refugee entrants. Indeed, the definition of family adopted by States is still very much attached to the Western idea of spouses and children as being the core part of the family, excluding other relatives or people who may have become familiar and who, due to the circumstances, are *de facto* dependent on one another, but are not necessarily blood related. In line with current guidance, a broader approach should be adopted in order to incorporate a wider network of relationships which are recognised as

an integral part of the family in non-Western countries (e.g. the African idea of family can count on members of the tribe or region) and to support the already existing structure of refugee families. Similarly, those States which do not recognise post-flight relationships should take the necessary steps to allow for family reunification for them too, as refugees often spend years on the move before reaching a safe country and it is very much possible that they establish a family life during this time. Moreover, it should not be acceptable that some States policies prevent refugee minor children from sponsoring their parents or any other relative. They have often experienced serious traumas in the past and having a supportive family can be an important resource for their well-being and growth. On the other hand, Canada's policy which considers children up to 22 years-old eligible or Australia's one which allows reunification for parents of minor children seem to be going in the right direction to make the right to family reunification more accessible. Finally, States should consider reviewing policies that do not allow the family members who were not declared in the original application to be reunited, rather permanently excluding them from the reunion process. We have seen that there are a number of reasons for not listing a family member, mainly due to fear or misinformation.

Another aim of this work was to consider how accessible is the procedure in the States examined. Prolonged family separation can have adverse social and psychological consequences on refugees, especially depression, anxiety and a sense of helplessness that prevents them from planning for the future. We have said that families are providers of material and emotional care for the well-being of their members and thus, after a new arrival, can make settlement less traumatic. It was suggested that "the longer the period of separation, the poorer the outcomes when the family reunites and the harder it is to regain its balance"[219], as after years spent apart relationships may have changed or families may have felt abandoned. Moreover, many applicants are vulnerable individuals, women, and children, who as family members of refugees are escaping similar situations themselves. Family reunification is thus a priority for many refugees; however, States policies seem to lack such "human" perspective in their policies, focusing instead on the mere compliance with their requirements. To complete the process, applicants are required to be physically present at an embassy, often located very far away or in another

[219] Marsden, R., and Harris, C., *"We started life again": integration experiences of refugee families reuniting in Glasgow*, Research Report British Red Cross, 2015, p. 40, with reference to previous studies.

country; they are asked to provide documents that are often impossible to request or got lost during the flight; they are more and more frequently invited to undergo DNA testing, with additional financial, emotional, and psychological costs. Moreover, the recent trend in governmental policies to cut the amount of funds to support family reunification processes made costs for refugees prohibitive or unaffordable, if not after years of savings. Indeed, recently arrived refugees may struggle to find a secure job with a high salary, plus they send considerable sums to their families, leaving themselves struggling to cover even the basic needs. However, we also gathered examples of more proactive policies to the needs of refugee families, such as the possibility of wavering the interview in Canada, or that for sponsors to be on social assistance in Australia, or the absence of a limited timeframe to apply in the UK. Certainly, the practices discussed in this research are not intended to be an exhaustive list, but rather a starting point for further studies. Moreover, the number of countries considered here is relatively narrow, and thus it is possible to expect several different positive and negative positions emerge in a broader context. Nonetheless, the research will hopefully stimulate some reflection in the reader and will inspire future questions and analysis on this topic.

In conclusion, family reunification should become a high-priority human rights issue for governments. Indeed, in the context of irregular migration and dangerous journey to reach a safe country, a greater use of family reunification channels would allow more people to travel legally, contributing to the better management of border-crossing movements, reducing reliance on smugglers and, at the same time, providing safe pathways to protection and successful integration. In this respect, states have already expressed a first commitment through the Global Compact for Migration, but the there is still a long way to go before refugees can have an equal access to the right to family reunification.

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