

The Law Proposal

The proposed changes in the Aliens Act (*Utlendingsforskriften*), § 23 a, entail that a foreigner who wants to seek a residence permit based on connection to his or her spouse residing in Norway, will have to present a document showing that the spouses have the equal right, concerning the civil and religious marriage, to get a divorce in the country of origin of the applicant. The proposal suggests further that a foreigner who has been married in a third country will have to submit a document which shows that he or she has got a divorce in accordance with the domestic law of the country where he or she got married, in order to be able to get married to an other person residing in Norway.

Introduction

According to the *International Covenant on Civil and Political Rights (ICCPR)*¹ States Parties to the Covenant shall take appropriate steps to ensure equality of rights and responsibility of spouses as to marriage, during marriage and at its dissolution, *Art. 23 (4) ICCPR*. This obligation of the States Parties must although be seen in relation to the outcome of the stipulations laid down in accordance with *Art. 23 (4) ICCPR*. It is also important to keep in mind that there are no rules in public international law that regulate the question of legal separation as a basic human right.²

The right to freedom of religion

According to the ICCPR everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching, *Art. 18 (1) ICCPR*. The freedom to manifest one's religion or beliefs may be subject to limitations if they are such as are prescribed by law and are necessary in order to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, *Art. 18 (3) ICCPR*.

The right to family life - The family as the fundamental group unit - The right to marry and to found a family

The right to a family, not only to be a family but also to in reality share family life is protected by *Art. 12 of the Universal Declaration of Human Rights (UDHR)*³ (soft law) and *Art. 17 ICCPR* (hard law). These articles stipulate that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Art. 23 (1) ICCPR stipulates that the family is the fundamental group unit of society and is entitled to protection by society and the State. *Art. 16 (3) UDHR* states that the family is the natural and fundamental group of society and is entitled to protection by the society and the State.

¹ International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, entered into force 23 March 1976, G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966).

² Maja Kirilova Eriksson, *The Right to Marry and to Found a Family – A World-Wide Human Right*, Iustus Förlag Juridiska Föreningen I Uppsala, p. 106f.

³ Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), UN Doc. A/810.

According to *Art. 16 (1) UDHR* men and women who have reached the age of majority have the right to marry and to found a family without any limitation due to race, nationality or religion. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

The right to marry and to found a family includes the right to maintain a family and live as such together.⁴

UNHCR promotes family reunification and is in this endeavour supported by the UDHR and the ICCPR, as shown above. Family reunification should apply in any case to the so-called “nuclear family”. In order to make family life possible it is essential to support family reunification. The European Court of Human Rights has in its jurisprudence stressed that if an individual has been recognised as a refugee by a State, he or she has the right to be reunited with his or her family members in that State under the condition that there is no other country where the family can reunite and live together as a family.⁵ As the refugee family can not safely return to its country of origin, the right to reunite with one’s family also includes the right to do so in a country of asylum.

A refugee family often faces the unintended risk of being separated from each other. The separation of a refugee family is rarely intended to be permanent. The ones left behind are often women, children and elderly who can become extremely vulnerable, especially women and children who are in a great risk of exploitation and sexual abuse.

The praxis to conclude and dissolve marriages is not uniform in all the nationalities. Women from e.g. Muslim countries do not have the right to get a divorce and will as a result of this in combination to the proposed changes not have the possibility to get married to a Norwegian, either in Norway or in an other country, with the intention to reside in Norway.

The Rights of the Child

According to *Art. 9 of the Convention on the Rights of the Child*⁶ States Parties shall ensure that children are not separated from their parents against their will. Although authorities - subject to judicial review - may determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

Conclusions

It is universally recognised that the refugee family shall be protected and kept as a unit in order to make family life possible. It is also recognised that the right to marry and found a family includes the right to live together as a family. As has been noted above, refugee families who have been separated will face a greater risk to be subjected to exploitation and sexual abuse. Experience has shown that families who could stay together are also these who integrate most successfully.⁷

⁴Kate Jastram and Kathleen Newland, Family unity and refugee protection in Refugee Protection in International Law p.556f.

⁵ Family Protection Issues, EC/49/SC/CRP.14 p.3.

⁶ Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly, Resolution 44/25 of 20 November 1989.

⁷ Family Protection Issues, EC/49/SC/CRP.14 p.4.

UNHCR is concerned that the Norwegian Law proposal may have unintended discriminatory effects. Refugees from certain countries may not be in a position to fulfil the suggested criteria.

UNHCR would recommend that an exception in relation to refugees be included in the proposal regarding the obligation to submit a marriage certificate according to which the spouses have the equal right to get a divorce.

UNHCR furthermore hopes that the concerns raised in the above will be considered in the re-view of the proposal.

It is in the spirit of on-going, close co-operation with the Norwegian Government that the UNHCR Regional Office for the Baltic and Nordic Countries has offered the foregoing observations and suggestions. UNHCR trusts that they will be duly taken into consideration.

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