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Title: “Gendered impact of State Enacted Family Reunification Policies under South African Refugees Act”

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ABSTRACT

South Africa continues to host the largest number of refugees and asylum seekers in Southern Africa. An urban refugee policy coupled with the right to work; a stable political climate and strong economy continue to make South Africa a preferable asylum seeking destination. Faced with an increase in migratory pressures, from both asylum seekers and non-nationals seeking employment, the South African government has in response, begun to tighten its migration and refugee protection framework, often in violation of South Africa's domestic and international obligations towards refugee protection. Additionally, these changes have impacted and continue to impact family unity and family reunification procedures. The restrictive refugee policies adopted by South Africa force many refugee families and in particular women to remain separated or to live undocumented in South Africa. This often has unintended and nuanced gendered implications. In this paper we seek to analyse how South Africa gives effect to the right to family unity through its family joining procedure. We argue that the manner in which South Africa implements its family unity and family reunification procedure produces gendered outcomes which significantly alter women's roles and positions within relationships. We further argue that it shapes gender norms and engenders power dynamics within families, this affects women in particular ways. We reason that it creates the conditions for power imbalances in relationships and consequently, we place a critical lens on the ways in which these power dynamics affect women and what strategies women use to cope with them. The analysis in this paper is expanded to include the broader socio-economic impact of the gendered outcomes produced by the family joining procedure.

1. Introduction

In June 2016 the United Nations High Commissioner for Refugees (the “UNHCR”) estimated that there was an unprecedented 65.3 million people around the world that have been forced to flee their homes or countries of origin¹. This included asylum seekers and refugees and those who have been internally displaced. Of the estimated 65.3 million people around the world who have been forced to flee from their homes, 21.3 million of them are refugees and over half of them are women (UNHCR, 2016)².

Even though women make up a large proportion of those fleeing their homes, the study of human mobility, even within the context of forced migration, has predominantly been approached from a male centric orientation. Policies and laws adopted by states seldom take into account the gendered nature of migration and in some instances this has had unintended gendered impacts which often negatively impact women. This blind spot in policy making has been particularly acute in asylum and refugee protection legislation and policies. Often states that receive and host asylum seekers and refugees are not cognisant of the challenges and experiences of women as they cross borders in search of asylum, their barriers to asylum and how they navigate through the asylum process³.

In order to illustrate how a lack of understanding and recognition of the gendered impact of the asylum seeking processes, this paper will focus on South Africa as a case study and will critic the manner in which it attempts to give effect to family reunification in terms of section 3(c) of South Africa’s Refugees Act⁴ (the “Act”) which provides that a dependent or spouse of a recognised refugee may also be granted refugee status. This is South Africa’s interpretation of family reunification which is intended to ensure family unity.

Due to the unpredictable and volatile nature of war and other forms of armed conflict, men and women often flee their countries without their spouses or children which

¹ UNHCR. (18 June 2015). Worldwide displacement hits all-time high as war and persecution increase <http://www.unhcr.org/558193896.html> accessed 03 November 2016.

² Ibid.

³ Doreen, T. 2008. Engendering Forced Migration: Theory and Practice. Berghahn Books.

⁴ Refugees Act, No 130 of 1998.

causes many families to be separated⁵. In response to fragmented family units, a number of states, with the assistance of the UNHCR and other organisations such as the International Organization for Migration (the “IOM”), have implemented various policies and programmes to help reunite families who have been separated due to displacement in order to ensure the preservation of family units.

We will therefore, critically examine how the South African Department of Home Affairs⁶ (the “DHA”) approaches family reunification and the manner in which section 3(c) of the Act is implemented. The process is referred to by the DHA as “family joining”. Family joining allows a spouse or dependent of a recognised refugee to be granted derivative refugee status by virtue of his/her dependent relationship to a recognised refugee. The spouse needs only to establish that he/she is a spouse, which once established, is granted refugee status. However, the continued renewal of this refugee status is dependent on the continued existence of the spousal relationship. Once the spousal relationship ceases to exist, refugee status is withdrawn. We will submit that it creates power imbalances within relationships amongst refugee couples. This critic of South Africa’s approach to family reunification will take place within the context of South Africa’s increasingly restrictive immigration and refugee protection legislation. It is within this highly political context that this policy should be examined and understood. Ultimately, the gendered impact of South Africa’s family reunification policy is a symptom of a broader issue of the securitization of national borders. A worrying trend not isolated to South Africa or Africa but one prevailing throughout the rest of the world.

It is within this migration climate that this paper will therefore analyse, through the lived experiences of refugee women living in South Africa; how South Africa’s new family joining policy adopted by the DHA impacts the lives of women, and how women in these relationships negotiate the power imbalances created by this policy. In instances where women are the primary applicants or holders of refugee status, the family joining process can aid them in balancing the power relations as it renders the male spouse legally dependent on the female spouse. This paper will explore how documented

⁵ Rohan, M. 2014. Refugee Family Reunification Rights: A Basis in the European Court of Human Rights’ Family Reunification Jurisprudence. *Chicago Journal of International Law*.

⁶ The Department of Home Affairs is an administrative arm of South Africa’s national government tasked with the implementation of the Refugees Act.

refugee women use their refugee status to negotiate power imbalances in their relationships in order to obtain greater autonomy. However, where the woman is the one without legal documents, gender roles are often exacerbated and reinforced as these women are often rendered vulnerable to emotional, physical and economic abuse. Moreover, family joining procedures can contribute to the feminisation of poverty in that the manner in which they are enforced prevents the documentation of female spouses, thereby forcing them to live undocumented, unable to work and, without access to socio-economic rights. Consequently, the paper will also examine how family joining affects women's capacity to access their rights in South Africa.

2. Methodology

This section is devoted to the methodology that will guide the study and how data was gathered and analysed. Given that the study is concerned with women's experiences, the most suitable research method is qualitative. The empirical data for this paper was collected through in-depth semi-structured interviews with asylum seekers, recognized refugee women currently living in Cape Town, South Africa. The participants interviewed are a representative sample and provide a suitable cross-section of asylum seekers and refugees who have engaged in one way or another with the DHA's family joining policy. The participants vary in age and religious following, marital status and country of origin. Many have also lived in various parts of South Africa before settling in Cape Town.

In-depth semi-structured interviews were most suited for the type of experiential data and information that was sought. Guiding questions were used, but during the interviews participants were allowed a large amount of freedom and latitude to introduce topics and emphasize or expand on issues, memories and experiences, which they felt, were important to communicate.

2.1. Target population and sample

The participants were drawn from African female refugees or asylum seekers living in Cape Town, South Africa. We interviewed five (5) Somali women, six (6) women from The Democratic Republic of Congo, three (3) Burundi, three (3) Rwandese women,

two Ethiopian women, two Kenyan women, three (3) Zimbabwean women and three Ugandan women. Most of the participants are part of an ongoing legal challenge of DHA's new family joining policy. This legal challenge launched by the University of Cape Town's Refugee Rights Clinic is currently before the Cape Town High Court: in the matter of *Scalabrini v The Minister and Others* (case no: 5242/2016). The case seeks to challenge the manner in which the DHA gives effect to the right to family unity. Twenty (20) participants were interviewed. Initially the respondents were identified purposively based on their known lived experience; these lived experiences were drawn from previous consultations at the University of Cape Town's Refugee Rights Clinic. Afterwards a combination of snowball and theoretical sampling was used to approach participants that were recommended by the initial set of respondents.

2.2. Sources, method of data collection and data analyses

The study used both primary and secondary materials. The primary materials consisted of one on one interviews and focus group interviews. We conducted twenty (20) interviews in order to cover the diversity of the target population. This is to fulfil the Grounded Theory⁷ (GT) requirement of generality - which requires that a GT derived theory should be significantly variable in such a way as to apply to diverse situations of the same phenomena. The data was analysed using the GT method in order to inductively generate theories from the assembled data. In selecting this method, it was our hope that GT would allow the data to "speak for itself" without us imposing a certain theoretical framework⁸. We therefore analyzed the data by coding and using the thematic approach. Each interview was transcribed and carefully analyzed to identify emerging themes. These were coded in different colors. Once themes were identified the data was again analyzed to locate subthemes. This was followed by theoretical coding where the relationships between categories was identified using the central or core category as the "mast" that holds the emerging theory together. The emerging theory and the memo alongside the theoretical guides

⁷ Glaser, B. G. & Strauss, A. L., 1967. *The Discovery of Grounded Theory: Strategies for Qualitative Research*, Chicago, Aldine Publishing Company.

⁸ Ibid.

and other applicable theories was contrasted with each other. Gender was used as an analytical tool.

2.3. Interview structure:

At the beginning of each interview, respondents were reminded of what the study is about and their right to withdraw their consent at any point. A semi structured interview guide was either given or read to the respondent to enable them to familiarize themselves with the questions. After which questions were discussed and answers elicited. We were well aware of the likely power relations and attempting to minimize them by creating a two-way engagement where respondents can ask questions and clarifications. Questions were phrased in a clear, audible friendly and empathetic manner. Notes were taken in the form of memos for purposes of identifying spontaneous categories and themes. Respondents were also debriefed at the end of each interview with the purpose of the research further clarified and their questions and concerns discussed. The interviews were analysed using the grounded theory method.

2.4. On Gender:

Our analysis and critic of South Africa's family joining policy is done through the prism of gender and as such it is important to clearly outline what the authors' notion and theoretical understanding of gender entails.

Gender is a socio-cultural construct of female and male identity that shapes how individuals live and interpret the world around them. Gender is a social construct; it is socially acquired through direct and indirect means⁹. Even though gender has become synonymous with women, gender applies equally to conceptions about females and males. "*Gender thus refers to the social attributes, opportunities, and relationships that*

⁹ Women, Men, and the Changing Role of Gender in Immigration (2009). Institute for Latino Studies University of Notre Dame Student Research Series.

*are associated with being feminine and masculine*¹⁰. It also determines what behaviours are valued, expected, and allowed of men and women in a given context. Similarly, gender roles are perceived behavioural norms associated with males and females within a given social group, culture or system. Gender affects and is affected by social, political, economic, and religious forces¹¹. Forced migration represents a drastic life change and gender roles and relations often shift in this process. At the same time, gender permeates many of the practices, identities, and institutions involved in the processes of immigration and assimilation¹². It is therefore crucial to keep in mind that, while we argue that family joining has had a profound impact on gender roles in refugee families, the process of migration has also significantly affected gender norms and gender roles in refugee and asylum seeking families.

3. Brief overview of South Africa's domestic refugee protection legislation and international obligations in relation to family reunification/unity.

While the 1951 United Nations Convention and the subsequent Protocol of 1967 Relating to the Status of Refugees (the "1951 UN Convention") or the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the "1969 OAU Refugee Convention") do not confer a specific right to family reunification or family unity on refugees, the issue has nevertheless been considered important. The right to family is drawn from other international instruments. For example, Article 16(3) of the Universal Declaration of Human Rights of 1948 provides that:

"family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

Article 23(1) of the International Covenant on Civil and Political Rights of 16 December 1966 also has the exact same provision as above. A number of other universal and regional, binding instruments similarly uphold this same principle of protecting family

¹⁰ Women, Men, and the Changing Role of Gender in Immigration (2009). Institute for Latino Studies University of Notre Dame Student Research Series.

¹¹ Ibid.

¹² Ibid.

unity. Article 10(1) of the International Covenant on Social, Economic and Cultural Rights of 16 December 1966 provides that:

“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children”.

The preamble of the Convention on the Rights of the Child of November 1989 notes that:

“Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”.

Article 18(1) and (2) of the African Charter on Human and Peoples’ Rights of 26 June 1981 states that:

“The family shall be the natural unit and basis of society. It shall be protected by the State.

The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community”.

South Africa is a signatory to all of the above international instruments. In the absence of a binding legal instrument on the manner in which family reunification should be approached or performed, states have adopted various policies and laws to give effect to family reunification. South Africa has no specific legislation that confers the right to family reunification or family unity, however the courts¹³ have identified family unity as

¹³ In *Dawood v Minister of Home Affairs* s 2000 (1) SA 997 (C) the Cape High Court held that the right to dignity must be interpreted to afford protection to the institutions of marriage and family life. The Constitutional Court of South Africa confirmed the approach and held that the Constitution indeed protected the rights of persons to freely marry and raise a family:

“Further, that s 25(9)(b) of the [Immigration] Act also fell foul of the right to human dignity protected in s 10 of the Constitution, both of South African permanent residents who were married to alien non-resident spouses, as also of such alien spouses. The practical effect of s 25(9)(b) was that, although an alien spouse married to a South African permanent resident was in fact living in South Africa with her or his spouse, the alien spouse could be compelled to leave South Africa and to remain outside the

forming part of the right to dignity which is protected in terms of section 10 of the Constitution¹⁴ of South Africa.

The DHA gives effect to family reunification through section 3(c) of the Refugees Act. For completeness, section 3 of the Refugees Act provides:

“Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person -

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
- (c) is a dependant of a person contemplated in paragraph (a) or (b)”.

South Africa affords derivative status to the dependants of refugees which includes immediate family of the recognised refugee. This Act recognizes that not all members of a family necessarily have refugee claims.

It must be noted however that “family joining” involves no active effort by the South African government to trace, locate or provide any assistance to a refugee or his family to reunite them with their family. It is only after a refugee has located their family and

country while her or his application for an immigration permit was being submitted to and considered by the relevant regional committee. This would result in a violation of the core element of the alien spouse's right to family life and thus a violation of her or his right to human dignity. Accordingly, s 25(9)(b) also constituted an infringement or a threatened infringement of the South African permanent resident spouse's right to human dignity”.

¹⁴ South African Constitution: Act 108 of 1996

found a way to bring them to South Africa will they be able to invoke section 3(c) of the Refugees Act.

In our experience, the application of section 3(c) has in practice, been fraught with difficulty and it appears that the DHA continually creates new administrative requirements or interprets section 3(c) in a manner that aims to hinder or frustrate efforts by refugees to have their spouses or dependents documented in terms of section 3(c).

In theory, a recognised refugee can invoke section 3(c) and add her spouse and children and any other family dependents that she may have. The South African government can thus go from affording protection to one person for example, to affording protection to almost the entire family. To make section 3(c) less inclusive, the DHA has adopted a new policy where the DHA will only document a spouse of a refugee if they were married in their country of origin prior to fleeing their country and if the spouse who fled first and applied for asylum declared that they were married and listed their spouse in their application form. Those who marry and established families in South Africa, experience difficulties with obtaining family joining. This is because their marriages are often not treated as valid and are therefore perceived as marriages of convenience. The DHA therefore requires them to undergo extensive investigation procedures in order to prove the existence of their marriages. It is not yet clear what these investigative procedures are and they are currently being challenged at the Cape High Court¹⁵.

The logic behind this approach can be extrapolated from South Africa's increasing hostile and restrictive approach to migration more generally. After the Refugees Act came into effect in 2000 it appears that South Africa was not prepared for the ever growing volume of asylum applications and refugees that would seek asylum. As one of the top refugee receiving countries in Southern Africa and arguably has some of the most progressive and liberal refugee protection legislations in the world. As old conflicts continue to rage on and new political tensions force many more people to flee their countries of origin, South Africa continues to become a favourable asylum destination. It is this migratory pressure that the South African government seeks to curb by interpreting section 3(c) of the Act in a restrictive and narrow manner and as we will

¹⁵ *Scalabrini v The Minister and Others* 5242/2016

demonstrate later, often with some unintended gendered outcomes which particularly affect women.

4. The gendered impact of South Africa's family joining policy

4.1. Women's experiences and challenges with family joining:

In our effort to understand the manner in which the family joining policy has shaped gendered family life for different categories of asylum seeking women and refugee women, we interviewed women who had acquired derivative refugee status in terms of the family joining policy. These women were still in possession of a valid derivative status and were thus using it when we interviewed them – this group of women was our Category A. It was felt that women who had attained refugee status would give a more balanced view in terms of the advantages and disadvantages of the family joining process. These women would also provide us with rich experiences of how being in possession of a derivative status has affected their lives. We also interviewed women who were initially in possession of derivative refugee status which were subsequently withdrawn pursuant to section 36 of the Refugees Act read with regulation 16(6) of the Regulations¹⁶ of the Refugees Act. The withdrawal of refugee status usually occurs when the husband, as the principal file holder or principal refugee, has his status withdrawn, or after the dissolution of the marriage or spousal relationship, or in instances where the principal file holder is deceased or has abandoned his refugee status - this was our Category B. Category C consisted of women who were the primary holders of the refugee status and had assisted their husbands in acquiring a derivative refugee status. The last category of women consisted of those who were married to refugees and were currently seeking family joining and were experiencing hurdles with the process - this was our Category D.

The rationale behind the sample group was to provide multiple experiences of the family joining process in South Africa's refugee law system. It was intended that

¹⁶ Regulation enacted in terms of section 38 of the Refugees Act.

acquiring data from women who were at different stages of the family joining system would provide us with multiple perspectives of understanding how the process affects women, their access to rights, and how it shifts or entrenches power dynamics in their relationship. We interviewed twenty women and only five had their own independent refugee permits, seven were in possession of expired or withdrawn derivative refugee status. For ease of reference we thus classify these women who had their status withdrawn as undocumented. Four women were in possession of a valid derivative status, and the last four were asylum seekers, who were in the process of being joined to their husband's permit, they therefore sought derivative status.

As stated above, family joining is used to ensure family reunification and family unity in South Africa. This is particularly so in cases when one spouse has a refugee claim and the other does not have a refugee claim and has arrived in South Africa solely for the purpose of being with their refugee spouse. The applicant, who may not have a refugee claim can obtain derivative status. Thus, family joining allows the couple to remain in South Africa together by issuing the partner who has no refugee claim with a derivative status. The refugee status is therefore derived from the existence of the spousal relationship and it can be withdrawn once the spousal relationship ceases to exist.

The data collected, revealed that 70% of the women who had acquired derivative refugee status, either had a *prima facie* refugee claim which was independent of their spouses, at the time of arriving in South Africa. However, they were not informed of the right to make independent claims or applications for asylum or they were advised by members of the refugee community that acquiring a derivative status was a quicker and easier route of obtaining a refugee status in South Africa¹⁷. Some of the women were not given any information about refugee law in South Africa, their rights, and their possible legal options. This lack of information was largely the fault of officials employed by the DHA who failed to provide the women with the necessarily legal information when they attended Refugee Reception Offices. This was exacerbated by the fact that some of the women arrived in South Africa after their husbands.

¹⁷ This is true given that some asylum claims can take up to fifteen years to be adjudicated by the Department of Home Affairs.

Therefore, they relied heavily on their husbands to provide them with guidance and counsel.

During the interviews, seven women revealed that their husbands were the first to come to South Africa. They were left behind when their husbands faced imminent danger of persecution. Two of the women stated that their husbands were involved in politics and therefore fled because of fear of persecution. Another woman reported that her husband was a journalist who reported on human rights violations. The government was not happy about what he was reporting and they sought to arrest him, and as a result, he had to flee the country. The other four women stated that their husbands fled due to general war and it was easier for them as men to flee first. They also stated that the men fled because in times of violent attacks men are sometimes forcefully recruited into the army or forced to join rebel forces. The women later joined their husbands because they too faced persecution often due to imputed political opinion or gendered persecution in the form of sexual violence. In some of the cases, the family was forced to flee because of violent attacks and they were subsequently separated in the process of fleeing from the violence. Some women stated that, they agreed that the husband should migrate first and once he has established himself the wife and children would join him. In other instances, each party fled for safety separately and was not even aware that the other party was alive, let alone in South Africa. An example of this is Janny¹⁸ and her husband who were separated when the rebels attacked her village in South Kivu, she fled with two of their children, while her husband fled with their son. *“I did not know if they made it, I thought they died and one day I was walking in Pick ‘n Pay¹⁹ and I met one of my friends from Congo and he told me that my husband is here! I could not believe it! That is how I found him”*. It is well documented that, in times of forced migration, families are often forced to separate in order to survive.

What emerged from the data was that the women often joined their husbands later because women frequently flee with children, and are therefore, not as mobile as men. Consequently, the males are at an advantage in that they have more time to adapt and learn about the host country, and its asylum laws. Once the women arrive in

¹⁸ Pseudo names are used in order to protect the true identity of the participant. Janny was interview no.18.

¹⁹ A family supermarket in South Africa.

South Africa they rely on this acquired knowledge to strategically place themselves in positions of power. The women thus approach the DHA with their husbands and if their husbands have already been granted refugee status, the DHA simply joins them to the husbands file, without making an enquiry as to whether they have an independent refugee claim or not. The decision to join them to the spouse's refugee status is often made in consultation with the husband, in this process the woman is ordinarily excluded from this conversation due to language barriers and the lack of legal knowledge. This approach reveals the gendered nature of the South African asylum process where women are only seen as spouses of refugees and not as themselves refugees. It reinforces the male centric notions of "refugeeism" and the masculine understanding of persecution. It further reveals how gender norms are reinforced where women's agency is ignored or presumed not to exist. It demonstrates that patriarchal norms permeate even government structures where men are given dominion over their wives.

The women stated that when they approached the DHA to apply for asylum, the husbands accompanied them and represented them, which resulted in the DHA officials only speaking to their husbands. The women felt that they were not given any information about the process, they did not understand what was happening, and they were not consulted but rather instructed on what to do. This was done both by the DHA officials and the spouse. When asked why they did not ask more questions, the women responded by saying that they were scared and that it was not culturally permitted to question a man, particularly in public spaces. As a result, even though some of the women have been in possession of the derivative refugee status for more than three years, they still did not fully understand the rights and obligations flowing from the derived refugee status. They were not aware of the conditions relating to how the status can be withdrawn by the Standing Committee for Refugees Affairs²⁰. They did not know the nature of a derivative status nor was it explained to them that they have a legal right to apply for asylum independently. They were never interviewed in order to ascertain whether they have independent refugee claims. They were simply joined to their husbands' files and thus treated, not as autonomous individuals, but as

²⁰ The Standing Committee for Refugee Affairs is a quasi- independent tribunal established in terms of section 9 – 11 of the Refugees Act which reviews decisions by Refugee Status Determination Officers and also has the power to withdraw refugee status.

wives. It is the gendered nature of the South Africa asylum process which enables women to be seen as only wives of refugees instead of refugees in their own right. Furthermore, this infantilization of women reinforces the gender norms which view women as perpetual minors who are incapable of making decisions. It creates a dependency relationship where women cannot be independent of their husbands. By treating refugee women in this way, the DHA is complicit in the creation of gender inequality. This is due to fact that most of our participants had *prima facie* refugee reasons for fleeing their home country, however, because they were never afforded the opportunity to apply under their names, their individual claims were never accessed.

4.2. The Production of Gendered Outcomes and the Alteration of Gender Norms:

This paper sought to argue that the family joining process produces gendered outcomes which altered women's roles and positions within the family structure and within their relationships. We began by objecting to the infantilization of women and to the manner women are made legally dependent on their male spouses. The data gathered from our interviews revealed a complex web of power relations, the dynamics present in each relationship, but also it showed that power in everywhere. Therefore, it was difficult for us to locate where power in centrally located within these relationships. We confirm, however, that being joined to a spouse's refugee permit created power relations within the relationship as both parties knew that one of the spouses' legal status was dependent on the other. The dependency was further entrenched by the fact that those who acquired derivative refugee status cannot renew the refugee status in the absence of the principal file holder. When their refugee permit expires, the holder of a derivative status must be physically accompanied by the principal file holder or he or she will not be assisted. Therefore, without the principal file holder, a dependent spouse is unable to regularise his or her stay. Women therefore reported that they adjusted their behaviour and avoided conflicts whenever their permits were about to expire. This was out of fear that the male partner might refuse to accompany them to the DHA in order to extend the permit. Some of the women who were joined to their husband's permit reported feeling powerless because

they could not renew the permit without the husband, *“I cannot even extend this permit if he is not with me, I only exist at Home Affairs because of him. He knows it but he does not say anything. We don’t talk about it; it is normal for a man to have all the power”*²¹. In this way, some women felt trapped by the derivative status, the creation of this legal dependency meant that they became vulnerable to being illegal should their relationships be unsuccessful. Accordingly, women felt that they were under pressure to maintain these relationships in order to remain legally documented. Where they felt abused or mistreated, they had to be strategic in how and when they resisted their husband’s domination. The power imbalances thus, had to be negotiated in covert ways and could not be resisted in overt ways. What was needed was a skilful manipulation and rebalancing of the power relations within the relationship. Sometimes a balance was achieved and in other times women had to remain in that situation until an opportunity to balance the power relations presented itself. Therefore, women are placed in a precarious position of having to choose between a stable legal status or a happy relationship, *“In the end you must survive and we do our best to survive. You must be clever and find ways to take power back”*²².

In other instances, women were forced to remain in abusive relationships because they lacked independent legal status. They felt that they could not challenge their husbands due to fear of getting divorced, *“My sister, if your husband beat you, you cannot call the police. If you call the police and the police take him how are you going to renew your permit? You must pray that you don’t have a wicked husband. It is hard without papers in South Africa, if you find a man with papers you must be good to him”*²³. Consequently, some women are opting for security in terms of legal status as opposed to romantic happiness. They assert their agency in choosing which path to walk, which is often the path of least resistance.

Though the family joining process produces gendered outcomes which render some women at the mercy of male power, some women use the derivative status acquired through family joining to better negotiate their positions in the relationships, *“I did not worry about the joining because it allowed me to work and to move around freely*

²¹ Interview no.5.

²² Interview no. 20.

²³ Interview no. 9

*without fear. It gives me freedom and ability to work and support myself. When am able to earn money, nothing matters.*²⁴

Once they obtained the derivative status, the women found it easier to enter the informal labour force to increase family income. In doing so, gender roles and power structures were often transformed. By entering the workforce, women gain leverage in their families because of their increased economic influence. Economic productivity allowed women to be much more financially independent. Having a refugee status increased the women's ability to work and when they were earning an income they were able to negotiate their positions in the family structure and the romantic relationship. The South African economic structure created the necessity for women to work in order to alleviate the financial burden on the family. The ability to work brings a sense of freedom in not only an economic sense but it also provides the women with legitimate reasons to be outside the household and to transgress masculine spaces. The women were no longer confined to their homes, in fact, work is generally used as a means of escaping gendered duties such as household tasks and child care. The women used work as an excuse to return home late, thereby compelling the husbands to step into the domestic spaces to assist in maintaining the home. This resulted in gender norms and responsibilities being altered, what was once traditionally seen as women's work became communal work that the husband must perform in the absence of the woman. The husband is also assisted in fulfilling his gendered role, in that he is no longer the only one with a source of income. The key role that women play in maintaining their families financially fluid is thus reciprocated when they are granted more decision-making power in the family.

The workload begins to be distributed in a more equitable manner as the husband's duties also increased to include household tasks, he begins to perform tasks that were ordinarily viewed as women's work. *"my husband washes the children because he comes home early, he does the pressing. In Uganda, he would not do that"*²⁵. Furthermore, those with derivative status developed covert ways of negotiating power dynamics within their relationships and manipulating the power relations. Some women reported that they were not always honest about the amount of money they

²⁴ Interview no. 2.

²⁵ Interview no.20.

earned, they used the money to buy things that they would not ordinarily buy. Others stated that they intentionally return home late in order to socialise with friends and form women's supportive networks which assisted them in times of need. It is through these daily practices that the women attempt to take back power from their husbands. Through these everyday practices, they use their derivative refugee status to alter gender norms and practices.

It is also through these small practices that women experience disenfranchisement, by not allowing women to obtain their own refugee status they are often subjugated to dependency. The threat of the possibility of losing one's document keeps them obedient. Furthermore, we observed that gender norms are learned and internalised through everyday life. Gender can therefore permeate one's life to such an extent that individuals begin to perform gender roles through seemingly inconsequential practices. Therefore, gender roles can be altered in seemingly inconsequential ways such as when a man begins to assist his wife around the house. Most women did not recognise this as a shift in gender roles but it is indicative of a paradigm shift in the men's conduct as the men occupied certain spaces and the household was not one of them. Seeing them taking up more responsibility in the household indicates a positive shift in gender roles and responsibility.

All five women who were primary holders of refugee status felt positively about the shifts in gender and power roles that have occurred in South Africa, indicating that they preferred their role in South Africa. This however cannot be attributed to the impact of being a principle file holder, it was clear that the process of migration itself, had a positive impact on gender norms and gender roles. Having their own refugee status, however, provided the women with greater leverage in appeals for male assistance in household tasks, spatial mobility and their access to valuable social and economic resources beyond the domestic sphere also expanded.²⁶ This consequently, supports our hypothesis that; where women are the primary holders of refugee status, the family joining process can aid them in balancing the power relations as it renders the male spouse legally dependent on the female spouse. We will study how

²⁶ Pessar, Patricia R. 2003. *"Engendering Migration Studies: The Case of New Immigrants in the United States."* Gender and U.S. Immigration Contemporary Trends. New York: University of California at page 27.

documented refugee women use their refugee status to negotiate power imbalances in their relationships in order to obtain greater autonomy.

The family joining process has changed the gender norms and dynamics in Tatenda's relationship in a way that she is not conscious of. It has altered the traditional, cultural, and religious gender norms. In her culture and religion, a man is the bread winner, it is his responsibility to provide for the family and he makes all the decisions in the family. However, when her husband was undocumented, he could not work, which meant that she became the bread winner and took over the role of the 'man' in providing for the family and for him. She assisted him in supporting his family back home, in Cameroon, through the money that she makes. This made her husband feel uncomfortable as he felt emasculated. She attempted to reassure him and to safeguard his fragile masculinity by allowing him to make the decisions as to how they spend the money in the house. She admits however, that it has changed their relationship, she is allowed greater latitude in terms of decision-making and he respects her more for what she has done for the family. She concedes that having him legally dependent on her, does create an extra security measure for her. It allows her to be bold and more authoritative in the relationship.

Once the rights, duties, and consequences which stem from a derivative refugee status were explained to the women, they were asked whether, if they were in possession of this information before approaching the DHA, would they have elected to obtain a derivative status as opposed to making an independent refugee claim. 90 % of the women stated that they would willingly choose family joining because of the disadvantages linked with being in possession of the section 22 asylum seeker permit. The women stated that the section 22 asylum seeker permit is undesirable because it expires every three to six months whereas the refugee status expires once in every four years. This means that those who are in possession of the section 22 asylum seeker permit must travel to the DHA every three or six months in order to renew their permit. This was found to be difficult because of the appalling services that refugees and asylum seekers receive at the DHA. The women narrated that obtaining a permit extension was not easy at the DHA because of long queues and poor services from the officials. The women stated that in order to be assisted one has to wake up as early as 4:00am in order to be first on the queue. They stated that sometimes even if you wake up at 4:00am and are amongst the first on the queue, you can be turned

away because the system is down or because they only take certain nationalities on certain days or they have reached the number of people that they can serve on that day which is usually twenty a day. This means that it often takes several days to renew a permit. This has huge financial implications as most refugees and asylum seekers are either precariously employed or are small scale entrepreneurs. Entrepreneurs lose out on income as they must temporarily close business during these days, while those who are precariously employed face wage deductions or far worse, dismissal. Mrs Kalonda who works as a shopkeeper stated that she once lost her employment because she was absent from work for five days, she had attempted to renew her permit and each day she was either told the system was down or that the DHA was too full and instructed to return the following day. When she was finally assisted, her employer had grown weary of her absenteeism and had unilaterally terminated her employment. The financial burden is exacerbated for women who have children because the women must travel with the children to the DHA in order to renew the children's statuses as well, *"you see when I was using asylum [section 22 permit] the children were in my file, all three of them. Home Affairs [DHA] refused to join them to my husband's status. They say you are the mother. So every time I go to home affairs, I have to take them with me. I don't have a car, I take train. My children stand in the train when it is full. It is not safe. Sometimes it is raining, we standing outside home affairs early in the morning and my children get sick. Am scared we get robbed or raped. My husband cannot come with us because he has work and his permit expires on a different date. Now that we do family enjoying [Family joining], my husband comes with us because we are all in one file, his file. He helps me with the kids and I feel safe. So yes I like family enjoying."*²⁷

Some of the women stated that they prefer being on the derivative status because it allows them to open bank accounts, access social grants, access hospitals and clinics, and it allows them to work. This, they argued was difficult with the section 22 asylum seeker permit, because it expired frequently, banks were reluctant to open bank accounts for them, and employers were also unwilling to employ them. Though they depended on the husband for legal documentation, the financial opportunities offered

²⁷ Refugees often refer to the family joining process as family enjoying. This is partly due to linguistic limitations and to the fact that family joining allows families to enjoy certain rights such as family unity. Interview no. 13.

by the derivative status allowed them to contribute to the financial wellbeing of the family which gave them more power to negotiate gender roles in the household. Most women stated that because they too bring in an income, they are able to have a say in how the money is spent.

The women who were either undocumented because the DHA had withdrawn their refugee statuses pursuant to section 36 of the Refugees Act, or they were in possession of an expired derivative refugee status because they were unable to produce the principal file holder, narrated poignant stories of how they ended up undocumented after years of being in South Africa.

When they arrived in South Africa, they relied on their husbands who had arrived in South Africa before them. The DHA had failed to ascertain whether they had independent claims and they were simply documented as spouses. They were not informed of the consequences of family joining and only learned of them when they divorced or could not produce the husband when they were due to extend their permits. Nunu is an example of this, she came to South Africa with her aunt, she is from the Democratic Republic of Congo (“DRC”). She fled the country due to political instability in Eastern DRC. She travelled to South Africa with her husband and was documented with him. The DHA did not open a separate file for her, they merely joined her to her husband’s file. When his application for asylum was granted, she obtained a derivative status by virtue of being his wife. They lived happily for three years until their marriage broke down and they divorced. Her ex-husband immediately removed her from his file without notifying her and remarried and added his new wife to his file,

“sister, I was shocked when they told me my permit had been cancelled. I ask by who? Why? They say that husband of yours. He took you out and put his new wife. They told me to travel to Pretoria or Musina to go make new application. After three years!?! How? My bank account is closed, I cannot get my money, Pretoria is too far, I need a train ticket and accommodation, where am I going to sleep in that town? I know no one. It’s not fair…… what about my work? I will lose my job if I don’t go to work.”

These women revealed the struggles that women face once their derivative statuses are withdrawn. They are left undocumented, often in precarious financial positions as their bank accounts are frozen, and are denied access to them. They are unable to work because of the lack of documentation and are also denied access to social and

health services such as hospitals and schools. Consequently, the manner in which family joining is conducted contributes to the feminisation of poverty in these cases. It renders women illegal, when they ought to have been documented independently and acquired independent refugee statuses. This is exacerbated by the fact that in majority of the cases when couples present themselves at the DHA to apply for asylum it is the woman who is treated as a dependent and not given an opportunity to apply independently for status. This is regardless of whether she has an independent *prima facie* refugee claim or not. As argued before, this stems from the fact that the asylum process in South Africa is generally male centric, persecution is understood from a masculine perspective and feminine experiences are often excluded from the definition of persecution.²⁸

We therefore see how a seemingly gender neutral policy can have gendered outcomes. In general, family joining is a noble policy which seeks to ensure family reunification and family unity. However, given the gendered nature of the asylum process in South Africa it has resulted in the denial of many married women with refugee claim's rights to apply independently for asylum in South Africa. It has meant that married women can only engage with the asylum process as married women who seek to join their husbands and not as women who are fleeing persecution. This has had different unintended gendered outcomes for refugee families. In some instances, it enabled women to escape the incompetent and clogged refugee application process by fast tracking their application, thereby granting them access to the rights contained in the refugee status in a shorter period of time. In some cases, it has altered gender roles and changed power dynamics in the relationship. In some cases, the derivative refugee status has enabled women to access certain socio-economic rights that were inaccessible on the section 22 permit. By increasing women's capacity to claim and substantiate their rights, it provided them with greater economic power which enabled them to properly negotiate their space within the family. In some cases, family joining has had devastating consequences for women and their ability to claim and substantiate their rights. It has denied them the right to asylum, thereby affecting their ability to work, which resulted in the feminization of poverty and in the lack of access to social grants and hospital.

²⁸ Aberman, T. 2014. Gendered Perspectives on Refugee Determination in Canada. York University.

5. Conclusion

Consequently, family joining is an essential protective component of South Africa's refugee law, however, the manner in which it is implemented reveals the gloomy realities of a deeply gendered refugee law system. It further denotes how gendered the institutions, values shaping family joining in South Africa are. It reveals the gendered notions of dependency are crucial in the construction of marriage; in that married women's legal status becomes dependent on the spouse. Henceforth, with the disillusion of marriage, refugee women on derivative statuses lost their legal status in South Africa and protection from deportation and social rights attached to the status such as social grants. "In this way, legal status is directly linked to the social and economic positioning of individuals and thus produces distinct forms of civic stratification²⁹". We have therefore attempted to demonstrate how gender neutral policies can produce, alter and reconfigure gender roles within relationships. In doing so we uncovered the complexities of power relations and we traced how women negotiate power dynamics within relationship. What emerged was an understanding that these gender neutral policies have far reaching consequences for women's access to socio-economic rights.

²⁹ Morris, L. (2003), Managing Contradiction: Civic Stratification and Migrants' Rights. *International Migration Review*, 37: 74–100. and Katie Bales, Universal Credit: not so universal? Deconstructing the impact of the asylum support system, *Journal of Social Welfare and Family Law*, 2013, 35, 4, 427.

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