



SUBMISSION ON FAMILY UNITY AND REFUGEE PROTECTION

1. Introduction

The applicability of the principle of family unity under the Refugee Convention is a complicated and contested area, partly because the Refugee Convention itself provides minimal guidance on the issue. State legislation and practice is diverse and inconsistent.

We support the call for State Parties to adopt humane and consistent procedures and practices towards refugees to ensure that the principle of family unity is given practical effect through family re-unification.

As our direct experience in the refugee jurisdiction is limited to Australia, this submission is focused primarily on a number of problem areas with the application of the principle of family unity in the Australian context. We note that the Refugee Council of Australia has submitted a position paper entitled, "Position on Family Unity and Family Reunification" and endorse that position.

In this submission we have limited our comments to our concerns about the increased use of temporary protection mechanisms for refugees who arrive in Australia in an unauthorised manner (primary by boat). Conditions on temporary refugee visas (Temporary Protection Visas and Offshore Entry Visas) absolutely prohibit family re-union for the duration the visa.

We agree with many of the conclusions reached by Jastram and Newland in their discussion paper. Our submissions are:

- a) States should be urged to acknowledge the right to family re-unification in specified circumstances as a basic principle of international humanitarian and refugee law.¹ As a minimum the family unit (ie spouses and underage and dependent children) should be entitled to re-unification in circumstances in which a family member has found durable protection in a country.
- b) States should be encouraged to implement this right through domestic legislation. Persons who have sought and obtained asylum in a country should be entitled to sponsor members of their family unit to that country.
- c) In situations where members of the same family have reached different countries of temporary asylum², States should facilitate re-unification to the State that is best placed to offer protection.

¹ See Jastram and Newland p 10

² see UNHCR Guidelines on Reunification of Refugee Families, para 9(d)

- d) States should be prevented from penalising refugees who have reached a country of asylum in an irregular manner by prohibiting family re-unification absolutely or for an unreasonable period of time. This attempts to link two unrelated issues – namely irregular movement and the fundamental right to family unity. States should be consider more appropriate and humane strategies to address concerns about irregular movement.
- e) States should be encouraged to see the benefits of family re-unification from a national perspective in addition to the obvious humanitarian benefits to the emotional well being of a refugee in being reunited with her or his family. Family re-unification is a critical aid to integration in a foreign country and often reduces reliance upon other forms of state sponsored social support (including counselling services).
- f) States should be prevented from prohibiting family re-unification where a family member has a medical condition. Such restrictions discriminate on health grounds and impose impermissible caveats on the right to family unity.
- g) States should be prevented from detaining asylum seeking families. Such practices have a direct and damaging impact on the integrity and stability of the family unit.
- h) States should set reasonable time limits for the re-unification of the family unit. We support the Jastram and Newland proposal that temporary permission to enter the country of asylum should be provided if an application cannot be resolved within a reasonable time period (including on account of limited places available under re-settlement programs). The re-unification of refugee families should be seen through a protection, not migration perspective.

2. **The Australian context**

Increasing numbers of unauthorised asylum seeker boat arrivals in Australia since 1999 has resulted in the imposition of a visa regime which discriminates against asylum seekers who have arrived without authorisation. A summary of recent legislative developments are contained in our submission on Article 31.

In Australia, refugees who have arrived in an authorised manner and those selected under the offshore resettlement program are granted permanent protection and the right to immediate family re-union.³ Refugees who arrive in an unauthorised manner or in certain ‘excised’ parts of Australia are provided with only temporary visas and no rights to family re-union for the duration of those visas.

³ Asylum seekers who are accepted as refugees in Australia are granted a Permanent Protection Visa (subclass 866). Refugees and special humanitarian entrants under the offshore program receive one of a category of permanent Refugee or Special Humanitarian visas (subclasses 200-204)

The Australian Government maintains that all asylum seekers who arrive in Australia are treated in accordance with the minimal standards required under the Refugee Convention. They point out that there is no requirement for a signatory State to the Convention to provide permanent residence to a refugee. They contend that it is permissible for State Parties to provide different and preferential treatment to certain types of refugees.

The current visa regime contrasts dramatically with the situation prior to October 1999 in which all refugees in Australia (whether onshore arrivals or refugees accepted under the offshore resettlement program) were granted permanent residence and immediate family re-union rights. Since October 1999 the Australian government has introduced a punitive visa regime for refugees arriving in an unauthorised manner. This regime is based upon mode of arrival and an assessment as to whether a person has bypassed or forsaken protection.⁴

2. Temporary Protection Visas – a practical perspective on the imperative of family re-unification.

Refugees who have arrived in an unauthorised manner outside of an ‘excised zone’⁵ are eligible for three year Temporary Protection Visas. This visa is valid for three years after which time an applicant’s claims to refugee status are re-assessed. If the applicant is still found to be a refugee, they are eligible for a Permanent Protection Visa and family re-union. However there is no right to family re-union for the three years in which they hold temporary visas. On the other hand, an unauthorised arrival who arrived in an ‘excised zone’ is limited to successive temporary visas and is permanently prohibited from family re-unification.

RILC, as a community legal centre that deals with all manner of asylum seekers and refugees is confronted with the daily misery of the government’s current family re-union policy on Temporary Protection Visa holders. Since October 1999 we have assisted hundreds of Temporary Protection Visas and explained to them that they are unable to be re-united with their spouses and dependent children for a period of at least three years.⁶

We endorse the comments made by Jastram and Newland in their discussion paper with respect to the problems with these visas. We add some further concerns from our practical perspective

- We believe that the restrictions on family re-union will lead inevitably to a high rate of mental illness and psychological breakdown amongst TPV holders. The importance of the family unit as an aid to assist integration or settlement in the host country is canvassed in the discussion paper. We submit that the Australian

⁴ see submission on Article 31

⁵ ‘excised zones’ include Christmas Island and Ashmore Reef where the majority of asylum seekers have landed by boat in recent years.

⁶ Recent legislation extends the ‘successive temporary visa regime’ to existing holders of Temporary Protection Visa holders who did not apply for Permanent Protection Visas prior to 27 September 2001. If these persons are assessed as being ‘secondary movers’ they will never be eligible for permanent residence in Australia. This will affect many thousands of TPV holders in Australia.

government's policy will create an underclass of disillusioned and psychologically fragile refugees in Australia. Whilst this might serve the government's short term campaign against unauthorised arrivals, it is likely that many TPVs will remain in Australia for long periods of time, either as permanent residents or on successive temporary visas. The short-sightedness of this policy will become apparent in years to come with increased costs and strain placed on the social system, including health care and counselling services. The quality of protection offered is thus seriously reduced.

- It is likely that many family relationships will break down over the course of a three year separation. The Australian government contends that refugees who place a high value on the maintenance of the family unit will not leave their family behind. We consider this argument to be unworthy of any serious comment. It takes no account of the motivations of many spouses (invariably husbands) who take action to try and secure a non-persecutory future for their family. Again this issue is dealt with in the paper by Jastram and Newland.⁷

A three year separation may well prove fatal for a spousal relationship. There may be pressures on the remaining spouse to re-marry or find a male partner who is able to provide physical support. A three year separation from minor children will be distressing for all parties and will inevitably cause some breakdown in the parental relationship. The separation will result in feelings of guilt from the refugee in Australia, feelings of anger from the spouse left behind and feelings of alienation by children whose father has left them for an extended period. The Government may argue that these stresses and strains are part and parcel of many refugee situations. Whilst this may be so, this is generally the result of factors that cannot be controlled, not deliberate government policy.

- As foreshadowed in the discussion paper, the bar on family re-union has resulted in a 'pull factor' of family members travelling to Australia by boat in an unauthorised manner. A greater number of refugee women and children have begun to arrive by boat in Australia as the only way of being re-united with their spouse.

The UNHCR Guidelines on Reunification of Refugee Families consider the situation where members of the same family have reached different countries of temporary asylum. This must now be (unfortunately) considered to be the case when unauthorised arrivals are accepted as refugees in Australia and receive variants of temporary refugee visas. UNHCR advise that if reunification to the same country of permanent asylum

⁷ It has also been contended by Immigration representatives at meetings in which RILC has participated that the departure of some TPV holders from Australia indicates they were not actually in need of protection in the first place. (Although clearly refugee status will only be conferred when a person has been assessed as not having prior protection overseas). We were not advised that these refugees had returned to their countries of origin/persecution (ie Afghanistan and Iraq), merely that they had left Australia. It seems likely to us that these departees have made arrangements to enter their countries in which their families are remaining in order to support them. Generally TPV holders had left these countries in the first place on account of the lack of adequate protection.

cannot be facilitated, “Field Officers should where possible promote the reunification of family members in one of the countries of temporary asylum while awaiting a durable solution.”

Most refugees who receive Temporary Protection Visas in Australia have family members in overburdened and underdeveloped host countries of first asylum (primarily Pakistan and Iran). In these situations (and consistently with UNHCR Guidelines) it must be recognised that Australia is the most suitable country for family reunification whilst family members await a durable solution. UNHCR Guidelines advise that when the ‘settlement’ country imposes long waiting periods or refuse altogether to authorise certain types of family re-unification, such difficulties should be reported to Headquarters.⁸ Current Australian practice actively impedes the UNHCR mandate on refugee family re-unification.⁹

Conditions on Temporary Protection Visas should be amended to permit family re-unification and to adhere to UNHCR guidelines and principles of international law.

3. Successive Temporary Visas – no prospect of family re-union

The most unfortunate category of refugees that arrive in Australia are those who arrive in an unauthorised manner at an ‘excised place. They are not eligible to apply for asylum in Australia, are transferred to either Nauru or Papua New Guinea and are eligible only for Offshore Entry Visas (subclass 447).

Offshore Entry Visas contain criteria additional to the question of whether or not the applicant is a refugee. There is no guarantee that a refugee who has arrived in Australia and been transferred to Nauru or Papua New Guinea will ever be accepted as a refugee in Australia. Instead they may be granted an Offshore Entry Visa if they meet additional requirements¹⁰ and depending upon the number of places Australia makes available for these visas. Offshore Entry Visas are three year temporary visas which can be successively ‘rolled over’ for additional periods of three years. An Offshore Entry Visa holder has no right to permanent residence or family re-union whatsoever.

This regime dooms a refugee to be permanently denied of their right to family re-union if they wish to remain in Australia.

4. Denial of family re-union as punishment for minor criminal infringements

Punitive provisions have been recently introduced for holders of Temporary Protection Visa holders who are convicted of minor crimes. In case of conviction, Temporary

⁸ UNHCR Guidelines on the Reunification of Refugee Families, 1983, ‘exit visas’, 10.(i), & (v)

⁹ See EXCOM Conclusion No 9(xxviii) on Family Reunion, 1977, also EXCOM Conclusion No 24 (xxxii), on Family Reunification, 1981

¹⁰ including links or connections to Australia, public interest criteria and health criteria. See our submission on Article 31

Protection Visas will be rolled over for an additional period of four years from the date of conviction, thus postponing the prospect of family re-union by that period of time.

The Department of Immigration advise that:

Migration Regulations have been amended to ensure that a person is not granted a Permanent Protection Visa for four years from the date of a conviction in Australia, whether during detention or while in the community, for a criminal offence carrying a maximum penalty of imprisonment of twelve months or more.

We understand that a 'maximum penalty of imprisonment of twelve months or more' covers the most minimal criminal offences in Australia from abusive language to theft of a bicycle.

These provisions result in the double punishment of a person who has already been convicted through the judicial system by depriving them of family re-union for a subsequent four years period. There is no possible justification for such a penalty under the Refugee Convention. Such penalties are entirely disproportionate to the minor offence committed. These provisions may have the consequence of sending a TPV holder into a cycle of despair and perhaps subsequent further criminality.

5. Detention of family members

Jastram and Newland comment on the recent 'trial release' proposal by Australian immigration authorities to allow women and children from the Woomera detention centre in Australia into the local community during the refugee determination process provided the male spouses remain in detention as a form of 'surety'. Participation in the program is voluntary.

Aside from proposals which encourage the physical separation of refugee family units, it is clear that the confinement of family members within a detention centre places extreme strain on a family relationship and can do lasting damage. We have acted for a great number of asylum seekers in detention over the years where the detention environment has damaged the family relationship and thus the integrity of the family. The following are three relevant case studies:

(1) In 1998 we acted for an single female Afghan asylum seeker with three children who was detained in the Maribyrnong Detention Centre for over eight months. We witnessed the slow deterioration of the relationship between mother and children over the months as our client proceeded through the refugee determination process. We watched as the children became progressively more morose, withdrawn and uncontrollable. The strains on our client were extreme. Her children were told by other schoolchildren outside the centre that they must have a 'bad mother' as they were living in a jail.

(2) We were involved with an Iranian family of mother, father and two young daughters who were held in the Maribyrnong Detention Centre for over 18 months until August 2001. During that period the marital relationship between mother and father deteriorated, the father's hair turned white, the mother was diagnosed with extreme depression, both parents were on doses of anti-depressant medication and both children began to exhibit signs of extreme distress.

(3) We currently act for an Iraqi father who was detained for many months with his 12 year old daughter in the Woomera detention centre. During the riots in Woomera in 1999, the father was arbitrarily detained in the 'secure' section of the detention centre with his daughter and 22 other male adults and 1 young boy. There were no other female asylum seekers in the section. Our client's daughter began to exhibit signs of post traumatic stress disorder, began to have nightmares and developed a bed wetting habit which was documented by detention centre medical staff. Our client says he can never forgive himself for bringing his daughter to a detention centre in Australia. His daughter currently attends regular trauma counselling sessions.

The current Australian temporary visa regime for genuine refugees makes no attempt to adhere to the principle of family unity within the Refugee Convention. Australian practice in fact punishes refugees for their mode of arrival by withholding from them what is most critical to their well-being – namely their immediate family.