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## RCOA DISCUSSION PAPER

### ON FAMILY UNITY AND FAMILY REUNIFICATION OBLIGATIONS IN RELATION TO FAMILY UNITY

International human rights law provides guidance as to the binding and non-binding obligations on States with respect to the issues of family unity and family reunification. The Universal Declaration of Human Rights proclaims that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State" (Article 15(3)). Further:

- the UN Covenant on Economic, Social and Cultural Rights requires that "the widest possible protection and assistance be accorded to the family, which is the natural and fundamental unity of society, particularly for its establishment and while it is responsible for the care and education of dependent children" (Article 10.1); and
- the Convention on the Rights of the Child requires that "applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with by State parties in a positive, humane and expeditious manner" (Article 10.1).

When considering this issue in relation to refugees, the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (1951) sets out at Article iv.B:

CONSIDERING that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unit is constantly threatened, and NOTING with satisfaction that ... the rights granted to a refugee are extended to members of his family,  
RECOMMENDS Governments to take the necessary measures for the protection of the refugee's family especially with a view to:

- (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.
- (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.

Further, Conclusion No. 24 (XXXII) of the United Nations High Commissioner for Refugees Executive Committee sets out:

1. In application of the principle of unity of the family and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families...

5. It is hoped that countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.

6. When deciding on family reunification, the absence of documentary proof of the formal validity of a marriage or of the filiation of children should not per se be considered as an impediment ...

8. In order to promote the rapid integration of refugee families in the country of settlement, joining close family members should be granted the same legal status and facilities as the head of the family who has been formally recognised as a refugee.

#### THE IMPORTANCE OF FAMILY REUNIFICATION

The refugee experience is such that it is common for family members to be separated from each other before or during flight. It is also common for refugees to be unaware, often for long periods, whether a family member is alive or dead. The commonality of the experience does not, however, detract from the pain and anxiety felt by those who are separated from close family members. Finding lost relatives and finding a way to be reunited with them can easily assume paramount importance in a refugee's life.

A further complication can also be added when a refugee is selected for resettlement. While resettlement is undeniably an important durable solution for refugees, it has to be recognised that it takes them further away from relatives from whom they have been separated.

The importance of family reunification for resettled refugees is clearly acknowledged and was emphasised repeatedly at the first international conference on refugee settlement, the International Conference on the Reception and Integration of Resettled Refugees held in Sweden in April 2001.

Resettled refugees who are separated from family members are unable to devote their full energies to learning the new language, seeking employment and establishing themselves in the new community. Depending on their circumstances, they will be:

- preoccupied with locating lost family members, desperately trying to find out whether they are dead or alive;
- deeply concerned for the well-being of relatives who are in precarious situations in the country of origin or the country of first asylum;
- devoting a large part of their income to supporting family members overseas;
- unable to make any long-term plans, believing they must not do so until the family can make them together.

On the other hand, intact families are more likely to be able to devote their full energies to rebuilding their lives and the host country will, in turn, benefit from the economic and social contributions the family can make to their new country.

Many of the same issues apply in cases where a refugee has sought and been granted asylum in a country distant from the country of origin. As the journey to an asylum country can often be perilous, it is not uncommon for one or two members of the family to make the voyage, leaving women and young children behind in the hope that they can follow by safer routes.

Recognition of the importance of family reunification is thus very important in the government policies and programs of a country such as Australia which provides both resettlement places (through the offshore program) and asylum (through the onshore program) to refugees. Every

effort should be made to ensure that refugees are assisted to trace, contact and be reunited with significant family members from whom they have been separated.

Expedition of family reunion is very important. The longer family members are separated, the greater the gulf between spouses and between parents and children can become. Rebuilding the family after prolonged separation can be a painful process and one that is not always successful.

## CURRENT CONCERN

Australia has a long and proud tradition of resettling refugees. In addition, a significant proportion of the refugee program is currently devoted to refugees whose status has been conferred in Australia.<sup>1</sup> While not seeking to diminish the contribution that is being made in this regard, the Refugee Council is concerned that a number of current policies and practices are inconsistent with the protection of family unity and the promotion of family reunification. These are:

### (1) Refusal of family reunification on health grounds:

The case of the Pakistani refugee who set himself alight outside Parliament House in Canberra and then died of his injuries drew stark attention to the issue of medical testing and family reunion. For many years this man had been trying to bring his wife and children to Australia and on each occasion, the application was rejected because one of his children was mentally impaired. His desperate act potently demonstrated the anguish many refugees feel at being separated from their families.

While it is acknowledged that countries have responsibilities to tax-payers in relation to the potential health costs a migrant might incur, it can be validly argued that the standards applied to migrants should not apply to refugees. People migrating to come to Australia have a choice as to whether they come or remain in their home country. Refugees do not. Migrants residing in Australia are (if finances permit) in a position to visit relatives barred from entering Australia on health grounds in the country in which they are living. Refugees are, by definition, unable to return to their country of origin.

For refugees, the decision to exclude a close family member on health grounds can mean a lifetime of separation for that family. This creates an intense sense of guilt and anguish for the refugee in Australia and will undoubtedly impact on his/her settlement prospects.

### (2) Narrow interpretation of "family"

When considering the concept of family, it is important to note that in the refugee context there are certain definitional issues that must be considered:

- the notion of "family" as defined by the refugee's culture - the concept of the nuclear family (mother, father and children) as the significant family unit is a very western construct. In many parts of the world, people have close meaningful relationships with other family members such as grandparents, aunts, uncles and cousins. Sometimes these relationships are culturally prescribed, sometimes they come about as a result of cohabitation. Further, it is important to note that in many cultures, "dependency" does not cease when a son or daughter reaches the age of 18; rather, it is common for a young person to be seen as an integral part of the nuclear family until they marry;

CASE STUDY: Southern Sudanese couple who "adopted" and raised the daughter of the husband's younger brother because of the rejection of the young man's union by the family patriarch. The couple are the only parents the child has known. For complex reasons she did not travel to Australia with the couple. The child, now aged 14, has been sent by the grandparents to Cairo to await resettlement in Australia. The application to bring her to

Australia has been rejected on the grounds that her mother (with whom she has no relationship) is still alive. The couple are extremely distressed by this and find it very difficult to understand why the Australian authorities do not understand the nature of the family relationship.

- the notion of "family" as defined by the refugee experience - some refugees have lost all family members in the conflict or unrest that precipitated their flight. In these cases, it is not uncommon for the refugee to make new links with "significant others" who, although not blood relatives, assume a special importance for the refugee.

CASE STUDY: Ethiopian man who was resettled in Australia in the early 1990s. On his application, he only made reference to the children of his current wife, omitting two daughters from a previous union. His former wife then died and the man sought to bring his daughters to Australia. Because of his original omission, his paternity was challenged. DNA testing established that one of the girls was his but not the other. He was given the option of bringing one of the girls to Australia and not the other. He chose this course of action but it has caused a great deal of distress. The daughter who came to Australia grieves for her sibling. The daughter left behind is unable to understand why she was "rejected" by the man who she believes to be her father. The father waited some time before informing the daughter of the reasons, fearing that being without a father would bring shame to her in their culture and this significantly affected the relationships between all family members. The matter is currently before the Migration Review Tribunal.

For the purpose of family reunion, Australia's humanitarian program defines "family" as spouse and dependent children (ie under 18). None of the factors outlined above are taken into consideration. The Refugee Council argues that to have such a narrow notion of what constitutes a family member does not necessarily meet a refugee's deep psychological need for family reunification.

### (3) Proof of relationship:

While it is conceded that fraud does occur and that some refugees will fake relationships in order to be reunited with significant others, it is argued that, in many instances, the level of proof required is unrealistic. It is not reasonable to expect all refugees to have evidence of relationships either because they come from countries where birth and marriage certificates are not routinely issued or because such documents that do exist could well have been left behind during flight and are unobtainable by a person targeted by the very authorities who issue them. Failure to give proposer recognition to these constraints has variously lead to:

- refugees feeling it necessary to resort to using the services of forgers to obtain documents that they have been told are essential for their application to be considered. This then makes them vulnerable to having their visas cancelled at a later date if the "fraud" is detected;
- refugees being required to undertake very expensive DNA testing to establish the legitimacy of relationships. Given that most refugees in these circumstances are newly arrived and impecunious, this testing requirement can either send them heavily into debt or cause severe guilt when the test is not done because of lack of funds. In those cases where it is done, it is common for the process to be exceptionally drawn out, with family reunification being delayed for many years;
- refugees having to endure long periods of separation while proof of relationship is argued.

CASE STUDY: Chinese national who was granted a permanent protection visa and later reunited with his wife and "white" child. The couple also had a second child who, because of China's One Child Policy, had been "hidden" with relatives in a rural area but whom the wife visited on a regular basis. When the wife came to Australia, she missed her second child terribly and this began to affect her health. When an attempt was made to sponsor the child,

Department of Immigration officials were sceptical that the child was actually theirs. After an extremely lengthy process of applications to the Migration Review Tribunal and DNA testing, it was established that the child was in fact the progeny of both parents. The child finally arrived in Australia after 5 years separation from her mother. 4. Need for flexibility to deal with changed circumstances:

Refugees, by definition, are people coming from precarious situations and in many instances, the risk is not significantly diminished after flight. This can be complicated by changes in the refugees' circumstances which can exacerbate the risk.

CASE STUDY: Somali woman, kidnapped when she was 19 and held as a sex slave for 7 years. During this time she gave birth to a daughter. She escaped from her captors, made her way to her home with her child. Not long later, she was recaptured and taken back into slavery. The child was left behind with the grandmother. The woman managed to escape again and this time made her way to Australia where she was granted refugee status. An application was made to bring the child to Australia and the grandmother took the child to Kenya to wait for the visa (planning that she would return to Somalia once the child had left to join her mother). While waiting in the camp, the grandmother died. DIMA were notified of the changed circumstances but took no action. Meanwhile, the child's relatives came to the camp and took the child, then aged 6, back to Mogadishu. DIMA were notified of the changed circumstances and the urgency of the situation. Before the visa could be issued, the Mogadishu home was raided by bandits. One person was killed and a teenage girl was kidnapped. The family fled, taking the now 7 year old with them. They are in hiding and the mother has no contact. She is distraught about the separation and the lack of contact.

Had the authorities acted immediately when they were notified that the grandmother had died and the 6 year old was alone in the refugee camp, the child would now be with her mother rather than lost somewhere in Somalia.

The lack of flexibility in the program also affects refugees when their circumstances have changed between the time of application and the time the visa is issued.

CASE STUDY: Sudanese family with 4 children who were granted visas to come to Australia. Four days before the family left, the woman gave birth to a fifth child. Because there was no visa, the infant was left behind with family in the camp. The parents believed that they would be able to bring the infant soon after their arrival in Australia. At the time of writing, four months have passed and there is still no visa, despite the interventions of caseworkers supporting the family. As in the above case, the separation from her infant child is having a profound impact on the mother.

In this case, had there been the potential for the infant to travel with the family and have the visa problems resolved after arrival, much heartache would have been saved.

#### (4) Need for family support in times of crisis:

Many refugees find themselves alone or with only a small number of family members in the country in which they are resettled. For many this might not be a problem during good times but when something happens, such as a serious illness, separation from family can be very distressing.

CASE STUDY: 42 year old Iranian woman who has resided in Australia for some years. She has no family in Australia. She has recently been diagnosed with terminal cancer and given 6 months to 2 years left to live. She is very fearful about her future and wants to have a member of her family with her as she approaches death.

Having provision for extended temporary or permanent entry in such cases would alleviate much suffering.

#### (5) Inclusion of family reunion cases in the humanitarian program:

Provisions introduced in the last few years have enabled immediate family members (spouse and children) to be visaed and to travel to Australia more expeditiously than was previously the case. Whereas previously they had had to apply under the family reunion program, if family members were included on the original application, they now come under the humanitarian program. There are some benefits but also some drawbacks to this approach.

On the plus side:

- processing times have been reduced and the families are reunited in a much more systematic fashion than was previously the case;
- expensive family reunion application costs do not apply;
- immediate family members are not affected by the two year waiting time for income support<sup>2</sup> and they are able to access relevant support programs.

On the down side:

- the policy of bringing immediate family members under the same program as the entrant, and counting their numbers in this program, reduces the number of places available for others seeking access to the humanitarian program;
- this in turn means that family members who may not be in immediate danger take places away from others who may be. This debases the fundamental principle behind Australia's program - the protection of people in greatest need - and turns it into a defacto family reunion program.
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This issue has been further complicated, however, by the current policy which sees the numerical linkage of the onshore and offshore humanitarian programs. The high number of onshore visa grants have meant that there are very few humanitarian places currently available. Refugees seeking to be reunited with immediate family members overseas are being told that they can wait for several years for a humanitarian place or pay the application fee for a family reunion application.

**CASE STUDY:** Palestinian couple with two children granted refugee status in Australia. The 3 minor sons of the man's first marriage, for who the couple has had sole care for the last 8 years, were left with the husband's relatives. When an application was made to DIMA to bring the sons to Australia, the family were told that they could either go through the humanitarian program, but would have to wait for 2 years, or pay in excess of \$3,000 in filing fees for family reunion visas and have the boys come more quickly. Because of their desire not to prolong the separation, and because the eldest boy will turn 18 within the next two years and thus would become ineligible for family reunion, the family has gone into debt.

#### (6) Restrictions on family reunion for holders of temporary protection visas:

Prior to October 1999 all refugees, irrespective of their mode of arrival, had family reunion rights. The introduction of the Temporary Protection Visa (TPV) regime changed this. People determined to be refugees after having arrived in Australia in an unauthorised fashion are now granted TPVs which have attached to them a number of restrictions, including a bar on family reunion. The Government's rationale for this is that it makes Australia a less attractive destination for would-be asylum seekers. The Refugee Council, on the other hand:

- questions whether the TPV regime has achieved its objectives, given that we have seen an increase in the arrival rate since the end of 1999;
- is deeply concerned at the impact this restriction is having on the TPV holders, many of whom are men who have left their wives and children behind in precarious situations, believing that they would be able to bring them via a safer route. There is ample evidence

from people working with the TPV holders that they are deeply distressed by the separation and send most of their income overseas. This in turn impacts on their chances of becoming productive members of the community;

CASE STUDY: Refugee woman client of one of the torture and trauma counselling services begins each session with her counsellor by noting the number of days before she can apply to be reunited with her family.

- notes that there is as yet no certainty about whether the TPV holders will be able to be reunited with immediate family members if they are successful in their second claim for refugee status and sees the anxiety this lack of clarity is causing;
- notes too that the period of family separation will be much greater than 3 years once time in detention and the time it takes to process family reunion applications is included. It is possible that families could be looking at a period closer to 5 years before they can be together again;
- is concerned that the longer family members are separated, the greater the likelihood that other attachments will be formed, thereby undermining the prospects for the family being able to once again form a cohesive unit. This has very obvious implications for the children;
- recognises that there could well be many cases where the extended delay in being able to submit family reunion applications could mean that the child of a TPV holder will reach the age of majority and thus will no longer qualify as a dependent child, thus making separation permanent;
- argues that the policy is in fact forcing women and children into the hands of smugglers and exposing them to the dangers of clandestine travel. Since the introduction of the TPV regime there has been an increase in the number of family groups arriving as well as arrivals of women and children whose husbands have arrived previously.

CASE STUDY: Iraqi man now resident in Victoria. He was a high profile military engineer who, because of his opposition to the Hussein regime, was forced to flee and eventually made his way to Australia where he was granted protection. His wife and children are in Jordan. They have had to be constantly on the move because they are being pursued and threatened by Iraqi government agents. UNHCR and the Red Cross have identified an immediate resettlement need. Because the man is on a temporary protection visa, he is ineligible to sponsor his family. Efforts by community workers to get the family considered under other programs have thus far produced no results. Because of this, and the immediate danger the family is in, consideration is now having to be given to seeking resettlement for them in the USA or Canada. This would mean long term and possibly permanent separation

(8) The trial release of women and children from detention centres:

In response to criticisms about the detention of women and children, the Minister for Immigration has announced his intention to trial releasing a small number of women and children from the detention centre in Woomera. This would involve separating the family members as release of the male head of household is not being considered, neither is release of female headed households. As such, it indicates a lack of respect for the principle of family unity and potentially presents families with a Hobson's choice: either the family remains together and the children are kept in the unnatural detention environment or the children are in a better physical environment but separated from their father.

(9) Interception measures:

The view of the Australian Government that it is not appropriate for refugees to select the country to which they will appeal for protection ("to achieve a migration outcome") and the apparent disregard for the factors<sup>3</sup> that have led to an upswing of secondary refugee movement from countries in the Middle East have led the Government to devise interception measures designed to prevent would-be asylum seekers from reaching Australia.

The Australian Government has brokered an agreement with the Government of Indonesia, the office of the United Nations High Commissioner for Refugees (UNHCR) and the International Organisation for Migration which sees asylum seekers on route to Australia intercepted and detained in Indonesia, then have their claims examined by UNHCR and, if they are determined to be refugees, resettled anywhere other than Australia. While this might satisfy the refugees' protection needs in the narrowest of senses, it fails to take into account the reasons why the refugee elected to flee towards Australia (and not Europe or North America as is the case for the majority of those leaving the Middle East). It is acknowledged that for some it might have been the cost or the fact that this was the only option that prompted them to come to Australia, however in many other cases, the decision was underpinned by the fact that they have family members already resident in this country. Refusal to allow them to come to this country sentences the family to ongoing separation and affects the settlement prospects of both those already here and the refugee(s) compelled to go to another resettlement country.

#### (10) Unaccompanied Minors:

While Australia has not experienced the number of unaccompanied minors (under 18 year olds with no links) seeking asylum as European states, such arrivals do occur. As at 1st June 2001 there were 39 unaccompanied minors in detention. Unaccompanied minors present many challenges to authorities including, but not limited to:

- determining whether the minor has Convention-related protection needs (this can be especially difficult if the child is young and/or unable to articulate their circumstances);
- establishing what family, if any, the minor has in the country of origin or elsewhere;
- deciding what course of action is in the best interests of the minor;
- ensuring that, until he/she reaches the age of 18, the minor is appropriately cared for and protected.

If the minor is determined to be a refugee, or if it is determined that it is not in the best interests of the child to be returned to his/her country of origin, it is of paramount importance that reunion with remaining family be expedited, especially in cases of young refugees.<sup>5</sup> The current TPV regime, however, makes this impossible.

Should the argument be made that allowing family reunion for minors would encourage families to send anchor children, it should be countered by arguing the importance of protecting the rights of children already in this country and by stressing that, if the Government is so concerned about stopping irregular movement, far greater emphasis should be placed on addressing push factors.

## RECOMMENDATIONS

In order to remedy the perceived deficiencies in the way that Australia's policies impact on refugees' rights to be reunited with their families, the Refugee Council recommends the following:

- (i) That family members of refugees not be excluded from entry solely on health grounds if no other option is available for the family to be reunited.
- (ii) That in cases where a refugee has no immediate family members, consideration be given to facilitating reunion with members of the extended family and/or a person or persons who, through shared experiences, has taken on a special meaning to the refugee.
- (iii) That it be acknowledged that for many refugees it is impossible to obtain documentary proof of relationships and that lesser measures (such as statutory declarations with a clear explanation of the implications of misrepresentation) be adopted.

- (iv) That measures be put in place to allow for visas to be expedited in emergency circumstances or when there is a change in family composition due to the birth of a child.
- (v) That provision be made for refugees to be reunited with family members on compassionate grounds such as serious illness or family tragedy.
- (vi) That there be a designated component of the family reunion program for the family members of humanitarian entrants, allowing these family members access to essential settlement services but not resulting in their entry taking places away from unlinked humanitarian entrants.
- (vii) That the restrictions on family reunion be removed from the Temporary Protection Visas.
- (viii) That alternatives to the current policy of mandatory detention that do not involve disruption of the family unit be explored.
- (ix) That, for so long as extra-territorial interception measures are engaged in, refugees with family ties in Australia be eligible for resettlement in Australia.
- (x) That, for so long as the Temporary Protection Visa regime is in place, the barriers to family reunion not apply to unaccompanied minors.

ENDNOTE: Each of the case studies contained in this position paper relates to current or immediately past clients of RCOA Member Organisations.

1 It should be noted that the Refugee Council opposes the numerical linkage of the offshore and onshore refugee programs which has seen a marked reduction in the number of places available to refugees requiring resettlement in recent years.

2 As applies to people who enter under the Family Reunion program.

3 Breakdown of protection in countries of first asylum, threats of forced return, limitations of access to basic services and complicity with the persecutory regime.

4 Without the benefit of legal representation, interpreters or independent review as they would have in Australia.

5 There have been cases of unaccompanied minors of 11 and 12 years of age and a recent arrival who is believed to be 8 years of age.