

Rethinking resettlement and family reunion in Australia

Sahar Okhovat, Asher Hirsch, Khanh Hoang and Rebecca Dowd

Refugee Council of Australia and Australian Lawyers for Human Rights

Cite as: Sahar Okhovat, Asher Hirsch, Khanh Hoang & Rebecca Dowd, 'Rethinking Resettlement and Family Reunion in Australia', (2017) 42(4) *Alternative Law Journal* 273

Available online: <http://journals.sagepub.com/doi/full/10.1177/1037969X17732705>

Abstract

Family reunion remains a significant issue for refugee communities in Australia. Family separation causes significant psychological, social and economic harm to displaced communities. Instead of supporting the reunion of refugee families, the current law and policies make it increasingly difficult, if not impossible, for refugees to bring their family members to Australia. This article outlines the barriers to family reunion for refugees under Australian law and policy and addresses how such policies could be reformed to better facilitate reunification.

Keywords

Family reunion, Australian migration and refugee law, refugee and humanitarian programme

It is well recognised that families often become separated during the course of displacement. Resettlement – the transfer of refugees from a country of asylum to another State that has agreed to admit and grant them permanent protection¹ – ought to address, rather than perpetuate this problem. Consistent with the right to family life set out in both the *Universal Declaration of Human Rights*² and the *International Covenant on Civil and Political Rights*,³ the United Nations High Commissioner for Refugees (UNHCR) has long encouraged States to 'preserve the integrity of family groups in the course of resettlement operations.'⁴ Facilitating family reunion through resettlement typically means reuniting nuclear family members or dependent relatives of a refugee⁵ in the State where they have been granted permanent protection. Resettled family members should, in principle, obtain the same legal

¹ See United Nations High Commissioner for Refugees, *Resettlement* (24 March 2017), <<http://www.unhcr.org/en-au/res'ettlement.html>>.

² *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 12.

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17. The International Covenant on Economic, Social and Cultural Rights also affords protection and assistance to the family. See *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 10.

⁴ United Nations High Commissioner for Refugees, 'UNHCR Guidelines on Reunion of Refugee Families' (1983) 3.

⁵ Though this article often refers simply to refugees, the material usually applies to both refugees and other humanitarian entrants.

status and have access to the same support services as the principal family member.

In the Australian context, consistent feedback provided to the Refugee Council of Australia (RCOA) during its annual national consultations suggests that barriers to family reunion have negative consequences for both refugees and Australia more broadly.⁶ For example, uncertainty about the safety and wellbeing of family members left in precarious situations leads to psychological stress. Separation from family members deprives refugees of social and emotional support critical to positive settlement outcomes, and has led to significant mental health issues for separated family members. There are also financial costs, as refugees may feel compelled to forgo study in favour of paid work in order to send income overseas to support their families, income which would otherwise have been injected into the Australian economy. Separation from family may also lead to the loss of social cohesion or family break up, as family members feel they have been 'abandoned', failing to understand the barriers in Australia that lead to prolonged delays in family reunion.

In this article, we outline the barriers to family reunion for refugees under Australian law and policy and address how such policies could be reformed to better facilitate reunification. This article is timely, since much attention has been placed on Australia's laws and policies in relation to spontaneous arrivals, mandatory immigration detention and offshore processing, but relatively little attention has been paid to resettlement.

The background and history of refugee family reunion in Australia

The entry and permanent stay of non-citizens in Australia is highly regulated. Permanent visas are issued under two streams: the Migration Programme (consisting of skilled, business and family visas) and the Refugee and Humanitarian Programme (consisting of refugee and humanitarian visas). The number of permanent places available each year is determined by the Australian government.⁷

One of the stated aims of the Refugee and Humanitarian Programme is to 'reunite refugees and people in refugee-like situations overseas with their family in Australia'.⁸ Within the Refugee and Humanitarian Programme, there are offshore and onshore components. The offshore component consists of refugee category visas and Special Humanitarian Programme (SHP) visas. The refugee category visas facilitate resettlement of refugees, the majority of whom are referred to Australia by UNHCR. On the other hand, the SHP visa facilitates resettlement of persons who are outside their country of origin, have been subject to substantial discrimination amounting to gross violations of human rights in their home country, and are sponsored by a 'proposer'.⁹

⁶ Refugee Council of Australia, *Australia's Response to a World in Crisis: Community Views on Planning for the 2016-17 Refugee and Humanitarian Program* (29 March 2016), <<http://www.refugeecouncil.org.au/wp-content/uploads/2016/04/2016-17-Intake-submission-FINAL.pdf>>.

⁷ See Department of Immigration and Border Protection, *Historical Migration Statistics* (24 March 2017), <<https://www.border.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/historical-migration-statistics>>. The linked spreadsheet shows that planning levels for the Migration Programme have been at 190,000 since 2012-2013. Under the Refugee and Humanitarian Programme, the numbers have remained steady since 2005 at around 13,000. At the time of writing, the Humanitarian Programme was set at 13,750 places. The 2017-18 Humanitarian Program will provide 16,250 places.

⁸ Department of Immigration and Border Protection, 'Australia's Humanitarian Programme 2016-17' (Discussion Paper, Department of Immigration and Border Protection, 2016) 3.

⁹ A proposer must be one of the following: an Australian citizen, an Australian permanent resident, an Australian organisation, or an eligible New Zealand citizen. A proposer cannot be a person who entered Australia as an illegal maritime arrival on or after 13 August 2012, unless they obtain Australian citizenship.

The SHP was established in 1981, providing a resettlement option to 'members of minority groups fleeing substantial discrimination or avoiding significant violation of human rights in their homelands.'¹⁰ Thus, the SHP includes those who may not meet the definition of a refugee but are still in need of protection. Those eligible for the programme were required to 'demonstrate a personal claim on Australia by virtue of having close relatives settled here, close former ties with Australia or, for a small number, a strong and well established community which [was] well-organised and able and willing to provide all necessary settlement support'.¹¹ This requirement was introduced so that 'it [would] not represent a significant burden to the taxpayer.'¹² Generally, proposers were required to provide all settlement support, an expectation which still exists today, with some exception.

In July 1997, the Australian government under John Howard introduced new regulations creating the 'split family' provision of the SHP (discussed below). This policy shift coincided with greater emphasis being placed on the skilled stream of the Migration Programme and more stringent criteria being introduced within the family stream. Refugees and humanitarian entrants applying through the 'split family' provision were able to avoid the costs associated with family stream visas as well as the two-year wait to access social security. Initially, this change also provided faster processing leading to families being reunited more quickly. While RCOA at the time welcomed the move to make family reunion less costly, concern was expressed that family reunion places would be counted against the Refugee and Humanitarian Programme,¹³ rather than increasing the overall number of places available. This concern remains valid today.¹⁴

Barriers to family reunion under the Special Humanitarian Programme

The SHP is the primary avenue through which people from refugee backgrounds seek to reunite with family members. However, the number of places is limited. In 2017–18, there will be 16,250 places made available under the Refugee and Humanitarian Programme, but only 5000 places will be allocated to the SHP component: 2.6 per cent of the overall 2017–18 permanent migration programme.

It is not surprising that the demand for SHP visas far outstrips the number of places available. RCOA estimates that, based on available government data, demand exceeds supply at a rate of seven to one.¹⁵ This backlog often means that refugees have to wait many years to reunite with their families. One reason for this backlog is that the government has historically linked the SHP visa numbers to the number of onshore visas granted to refugees who arrive by boat. For every refugee who arrived by boat before 13 August 2012 and was granted a permanent visa, one visa place was taken away from the SHP. This meant that, due to an increased number of boat arrivals in 2012, the SHP was reduced to just 503

¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 November 1981, 3072 (Ian Macphree, Minister for Immigration and Ethnic Affairs).

¹¹ Department of Immigration and Ethnic Affairs, 'Review' (Research Paper, Parliamentary Library, Parliament of Australia, 1982) 58.

¹² Commonwealth, above n 10.

¹³ Refugee Council of Australia, *Australia's Refugee and Humanitarian Program: Community views on current challenges and future directions* (February 2008) 13

¹⁴ For more details about SHP visa requirements, see Department of Immigration and Border Protection, Special Humanitarian Program, <[https://www.border.gov.au/Trav/Refu/Offs/The-Special-Humanitarian-Programme-\(SHP\)>](https://www.border.gov.au/Trav/Refu/Offs/The-Special-Humanitarian-Programme-(SHP)>).

¹⁵ Refugee Council of Australia, *Addressing the Pain of Separation for Refugee Families* (21 November 2016), <<http://www.refugeecouncil.org.au/publications/reports/family-separation/>>.

visas.¹⁶ Australia is the only country to link its onshore refugee system with its resettlement quota.

However, even if more places are set aside under the SHP to facilitate family reunion, there are other legal and administrative barriers that prevent or restrict access to the programme. SHP applications are prioritised in the following order which is based on the visa the proposer holds, whether the proposer is an Australian citizen, and the closeness of the relationship between the applicant and the proposer:

1. 'split family' of a person who holds an SHP visa
2. other family proposed by a close family member who does not hold a Protection or Resolution of Status visa (partners, children, parents and siblings who do not otherwise meet the 'split family' definition)
3. other family proposed by an extended family member who does not hold a Protection or Resolution of Status visa (grandparents, grandchildren, cousins, aunts, uncles, nieces and nephews)
4. applicants proposed by a friend or distant relative who does not hold a Protection or Resolution of Status visa or by a community organisation
5. any person proposed by or on behalf of a person granted a Protection or Resolution of Status visa.¹⁷

Given the demand for the SHP programme, those further down the priority list can expect extensive delays, or may in fact never receive a visa, as any new application that is a higher priority will be placed before them. The prioritisation of 'split family' applications also impacts those who are proposing extended family or community members.

The definition of 'immediate family' and prohibitive costs

One of the main hurdles is that applicants for an SHP visa require sponsorship from an Australian citizen or permanent resident, an approved organisation or an eligible New Zealand citizen.¹⁸

Those who are in Australia and were previously granted a protection visa onshore or were granted one of the offshore visas under the Refugee and Humanitarian programme can propose 'immediate family members' for resettlement to Australia, known as the 'split family' provisions. An 'immediate family member' is defined in the *Migration Regulations* to include only a spouse or de facto partner, a 'dependent child', or a parent if the applicant is under 18 years of age.¹⁹

The definition of 'immediate family member' rules out all other family members, including those with whom the proposer has close family-like bonds. Further, the definition of a 'dependent child' requires that a child be under 18 years of age, or, if over 18, to have been wholly or substantially reliant on the proposer for financial, psychological or physical support for a substantial period before the visa application is made.²⁰ The definition places significant

¹⁶ Department of Immigration and Citizenship, 'Annual Report 2012-2013' (2013) 122.

¹⁷ Department of Immigration and Border Protection, 'Procedures Advice Manual 3: Refugee and Humanitarian Offshore Humanitarian Program Visa Application and Related Procedures' (2015) 16.

¹⁸ The criteria for the grant of a SHP visa is found in the *Migration Regulations 1994* (Cth) sch 2. In particular, paras 202.211 and 202.212 set out the sponsorship requirements that must be met at time of application.

¹⁹ *Ibid* reg 1.12AA.

²⁰ *Ibid* reg 1.03 for the definition of dependent child, referring to the definition of 'dependent' in reg 1.05A. A

burden on refugee families to evidence 'dependency' before an application for family reunion is made. Importantly, this narrow definition of family is at odds with UNHCR's Resettlement Handbook, which promotes broad and flexible criteria for family reunion. UNHCR suggests that family reunion should extend beyond the nuclear family to encompass other dependent family members and relatives.

Another barrier to sponsorship under the SHP is the prohibitive cost of resettlement borne by the proposer. This includes the cost of airfares, migration agents, legal fees and settlement support. For example, in RCOA's recent consultations, a service provider in Adelaide provided an example of a refugee who had to pay \$22,000 to bring his wife and children to Australia: 'He is a pensioner. What kind of pensioner can afford that? He's got mental and physical disabilities [but has to] find \$22,000 to bring over his wife and kids?'.²¹

Denial of access to family reunion for those who arrive by boat

There are a number of additional restrictions that seriously limit the ability of refugees who arrived in Australia by boat to sponsor their families for resettlement in Australia. People who arrived in Australia by boat without a valid visa on or after 13 August 2012 are not eligible to propose any family members for resettlement in Australia.²²

For those who arrived by boat in Australia prior to 13 August 2012, and who hold a permanent protection visa, their applications for any family visas (under the Migration or Refugee and Humanitarian Programmes) are given the lowest priority processing under a Ministerial Direction.²³ As outlined above, a key factor in determining priority for processing under the SHP is the relationship between the applicant and their family member. Yet those who came by boat and seek to sponsor their family are placed at the lowest level (level 5) regardless of this relationship.

An exception to depart from the processing priorities for family visas is provided under the Direction if the application involves special circumstances of a compassionate nature and there are compelling reasons to do so. Circumstances that are 'compassionate' or 'compelling' are not defined by the legislation. In practice, decision-makers retain considerable discretion as to whether to depart from the processing priority. This policy effectively means that people who arrived by boat prior to 13 August 2012 will not have their applications for family reunion under the SHP or family visas considered until they are granted citizenship (which takes at least 4 years). A further hurdle is the significant delays of over one year that former refugees are experiencing when applying for citizenship, as recently exemplified in a report by RCOA and a case in the Federal Court.²⁴

Further, as of 22 March 2014, minors who arrive in Australia by boat are also barred from proposing their family for resettlement to Australia. While the Australian government

'substantial' period is not defined by the legislation but in policy is taken to be at least 12 months. See Department of Immigration and Border Protection, 'Procedures Advice Manual 3: Relationships and Family Members - Dependent Family Members' (2016) [37.2].

²¹ Refugee Council of Australia, above n 15, 4.

²² For example, in relation to the Subclass 202 visa, paragraph 202.211(2)(d) of the *Migration Regulations* requires that the proposer not be a person mentioned in subparagraph 2.07AM(5), which includes all unauthorised maritime arrivals who arrived in Australia after 13 August 2012.

²³ Department of Immigration and Border Protection (Peter Dutton MP), *Ministerial Direction No 72 - Order for Considering and Disposing of Family Visa Applications* (13 September 2016).

²⁴ Refugee Council of Australia, 'Delays in Citizenship Applications for Permanent Refugee Visa Holders' (October 2015); *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 (16 December 2016).

recognises that family reunion would be in the best interest of minors, it considers that this is outweighed by the need to maintain the 'integrity of Australia's migration system' by deterring minors from taking boat journeys to achieve resettlement in Australia. This is inconsistent with Australia's obligations under international human rights law.

Restricting access to family reunion as a means of deterring boat arrivals is perplexing, given that it retrospectively affects those refugees who are already in Australia. Participants in RCOA's consultation process commented that these changes are unnecessarily punitive and have serious consequences, such as a profound negative impact on mental health, both for people settling in Australia and their family members overseas. It is difficult to see how such a policy position is a necessary or proportionate response to the issue of spontaneous boat arrivals.

Resettlement via alternative migration pathways

The Australian government's preferred position is that resettlement of family members should occur through other migration visas available under Australia's Migration Programme such as partner, child, parent and aged dependent relative visas. The person applying for such visas is known as a 'sponsor,' which gives rise to certain obligations depending on the visa type.

However, for many refugees, sponsoring family members through these pathways is not an option due to the prolonged waiting period or the extraordinary high costs that are incurred to expedite an application. For example, it costs \$7000 to make an application for an offshore partner visa, excluding other associated costs such as health assessments, police certificates and airfares.²⁵ Under what is known as the 'balance of family test', parents can only be sponsored for a parent visa if at least half of their children live permanently in Australia, or more of their children live in Australia permanently than in any other country.²⁶ Sponsoring an aged parent on a 'non-contributory parent visa' meets a 30-year waiting period.²⁷ A 'contributory aged parent' has a shorter waiting period, but may cost up to \$100,000 for both parents. These visas are also capped by the Australian government. In the year 2015–16, only 1500 places were allocated to non-contributory parent visas and 7175 places were offered to contributory parent visas.²⁸ There is no specific allocation for refugees and humanitarian entrants.

²⁵ *Migration Regulations* sch 1, item 1129.

²⁶ Department of Immigration and Border Protection, *Balance of Family Test* (24 March 2017), <<https://www.border.gov.au/Trav/Brin/Pare/balance-of-family-test>>.

²⁷ Department of Immigration and Border Protection, *Parent Visa Queue* (24 March 2017), <<https://www.border.gov.au/Trav/Brin/Fami/Capping-and-queuing/Parent-visa-queue#>>.

²⁸ *Ibid.*

Community Pilot Proposal: Resettlement via private sponsorship

Between June 2013 and June 2017, up to 500 places per year were available within the Refugee and Humanitarian Programme for people sponsored under the Community Proposal Pilot (CPP).²⁹ Under this programme, individuals and community groups wishing to propose a person for resettlement in Australia could lodge an application through one of five Approved Proposing Organisations.³⁰ Proposers were required to pay substantial visa application charges to the Department of Immigration and Border Protection totalling \$19,124 for the first applicant and \$2680 for each additional family member.³¹ Additional processing fees included a non-refundable fee of \$11,000 to the Approved Processing Organisation and a separate \$5000 bond refundable only when the proposer had completed the designated role in the settlement of the new arrival.³² In addition, the costs of medical checks for people being processed; airfares to Australia; initial accommodation, and household goods, food and utilities also had to be covered. To bring just one relative to Australia under this scheme, the proposing family member needs to spend around \$40,000 with a further \$5000 for each additional relative. Those who applied through the CPP had their applications prioritised for processing, meaning that they were processed more quickly than applications lodged under the SHP.

Feedback received from participants in RCOA's annual consultations suggested that the CPP has been seen and used as a more expensive version of the SHP, rather than an attempt to increase the involvement of the community in the settlement process, thereby taking the programme away from its original intention. Many commented that it has created a perception that '*if you are rich, you come quicker, if you are poor, it's years.*' For some proposers, CPP has expedited family reunion but led to destitution.

As part of the 2017–18 federal budget, the Australian government announced that 1000 places within the Refugee and Humanitarian Program will be set aside for privately sponsored refugees through what has been re-termed the Community Support Programme (CSP). The CSP will expand upon the CPP, in particular to allow businesses to sponsor humanitarian entrants to Australia. Sponsors will be required to support humanitarian entrants during their first year in Australia, including by funding their visa application, airfares and settlement services, and refunding any working age payments made to the humanitarian entrant. Further, an additional \$20,000 assurance of support will be required for each person of working age, which will be returned after a year if the sponsored entrants do not access social security or other government support. Priority for places within the CSP will be given to applicants who are 'between 18 and 50 years of age' and have 'an offer of employment (or a pathway that leads to employment) and/or personal attributes that would enable them to become financially self-sufficient within 12 months of arrival.'³³ The Refugee Council of Australia has expressed concern that these new proposal will further privatise Australia's humanitarian programme and prioritise those who are skilled over the most vulnerable.³⁴

²⁹ See Community Proposal Pilot, <<https://cpp-apo.net/>>.

³⁰ These are: Australian Migrant Resource Centre; AMES Australia; Brotherhood of St Laurence; Liverpool Migrant Resource Centre; and Illawarra Multicultural Services.

³¹ Community Proposal Pilot, *What are the Costs? About the Pilot* (2016) <<https://cpp-apo.net/about/>>.

³² Ibid.

³³ Department of Immigration and Border Protection, *The Community Support Programme*, <<https://www.border.gov.au/Trav/Refu/Offs/community-support-programme>>.

³⁴ Refugee Council of Australia, *The Community Support Program: Providing complementary pathways to protection or privatising the Humanitarian Program?* (July 4, 2017), <<https://www.refugeecouncil.org.au/ourwork/16445/>>.

The way forward

There are clearly multiple barriers to family reunion within the Migration Programme, the SHP and the CSP/PPP. We suggest that the Australian government could take steps to modify existing policies to improve access to family reunion for refugees and other humanitarian entrants.

This could be achieved by making the CSP and family stream visas through the Migration Programme genuinely accessible to refugees and humanitarian entrants. We suggest, at a minimum, reform would include:

- Allocating at least 5000 visas annually under the family stream of the Migration Programme specifically to refugee and humanitarian entrants;
- Providing concessions to refugees and humanitarian entrants applying for visas under the Migration Programme. Such concessions could include: a visa application fee reduction or waivers; prioritised processing for family members at immediate risk; and quick access to settlement services. Consultations should be undertaken with the refugee sector to develop a process for assessing eligibility for such concessions; and
- Expanding the CSP nationally to include both metropolitan and regional areas of Australia. Processing priorities of the expanded programme should emphasise humanitarian need and include 'safety net' mechanisms to protect those sponsored in cases of emergency or family breakdown.

Any expansion of the CSP or family migration pathways should be consistent with the principle of additionality. With respect to the CSP, the number of places available for private sponsorship must be in addition to those available under the Refugee and Humanitarian Programme. This is not presently the case, even following the recent expansion of this programme to 1000 places. Similarly, opening up more family visa places specifically for refugees and humanitarian entrants under the Migration Programme should not detract from the places available under the Refugee and Humanitarian Programme.

In addition, the SHP would itself benefit from reform that includes:

- Expanding the definition of 'family' used to assess and prioritise family reunion applications to be consistent with UNHCR's Resettlement Handbook;
- Reducing processing times for family reunion applications; and
- Removing the restrictions on family reunion for those who arrived by boat and, in particular, unaccompanied minors.

Conclusion

Current avenues for family reunion are failing to meet the needs and uphold the rights of refugees and humanitarian entrants in Australia. The prolonged separation of families has serious psychological, economic and social consequences for individuals, in addition to negative repercussions for the wider community.

This article has provided various suggestions for reform that aim to increase the accessibility of family reunion in Australia for refugees and other humanitarian entrants, without distorting the original goals of the Refugee and Humanitarian Programme or the Migration Programme.

Sahar Okhovat is a Senior Policy Officer, Refugee Council of Australia.

Asher Hirsch is a Senior Policy Officer, Refugee Council of Australia and PhD Candidate, Monash University.

Khanh Hoang is an Associate Lecturer, ANU Migration Law Program (Australian National University), PhD Candidate at the Andrew and Renata Kaldor Centre for International Refugee Law, University of New South Wales, and co-chair of the Refugee Rights Subcommittee, Australian Lawyers for Human Rights.

Rebecca Dowd is a refugee law research consultant and (former) co-chair, Refugee Rights Subcommittee, Australian Lawyers for Human Rights.