
**PROTECTING THE REFUGEE'S FAMILY
(THE FINAL ACT OF THE 1951 UNITED NATIONS CONFERENCE OF
PLENIPOTENTIARIES):**

AN AUSTRALIAN PERSPECTIVE

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1. INTRODUCTION

This paper considers the interpretation and application of the recommendation to protect the refugee's family contained in the Final Act of the 1951 United Nations Conference of Plenipotentiaries, which adopted the 1951 Convention relating to the Status of Refugees.

The paper begins by briefly considering the nature and intent of the recommendation to protect the refugee's family in the Final Act of the Conference. Then, drawing from relevant provisions in international law, discussion centers on various issues relating to family unity and family reunification, including the assistance given to unaccompanied minors in this context. Australian policy and case law is then examined. Finally, a summary of the main themes and conclusions is provided.

2. THE NATURE AND INTENT OF THE RECOMMENDATION TO PROTECT THE REFUGEE'S FAMILY

The Refugees Convention does not incorporate provisions relating to family unity or family reunification.¹ Instead issues relating to the protection of the refugee's family are included in the form of a recommendation in the non-binding Final Act of the 1951 Conference of Plenipotentiaries.

The 1951 Conference of Plenipotentiaries that adopted the final text of the Refugees Convention approved unanimously a recommendation that States take necessary measures for the protection of the refugee's family. Recommendation B of the Final Act of the Conference states that:

Considering that the unity of the family, the natural and fundamental group of society, is an essential right of the refugee, and that such unity is constantly threatened, and

Noting with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems 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.²

2.1 THE INTENTIONS OF THE CONVENTION'S FOUNDERS

Recommendation B was proposed by the representative of the Holy See. According to the representative,

¹ Indirect reference to the refugee's family is found in the following provisions: Article 4 refers to refugees' 'freedom as regards the religious education of their children'; Article 12(2) provides that '... rights attaching to marriage, shall be respected'; Article 22 concerns the public education of children; para 2 of the annexed schedule concerning travel documents notes that children may be included in the travel document of a parent or, in exceptional circumstances, of another adult refugee.

² Recommendation B of the Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, United Nations Treaty Series, vol 189, p 37, cited in UNHCR's Handbook, Annex 1, pp 55-56.

... assistance to refugees automatically implied assistance to their families, but, although that proposition was an obvious one, it would be wise to include specific reference to the families.³

The representative noted that the recommendation was not of a contractual nature, but considered that it could be a directive to States with a view to ensuring that the maximum possible assistance was extended to refugees.⁴

The absence of any provisions relating to family unity or family reunification in the Convention suggests that the founders were not prepared to accept unconditional obligations relating to the families of refugees. The Convention's founders regarded these issues as ultimately a matter for the judgement of the country of refuge, to be determined mainly by national asylum and immigration law and policies and related admission criteria within the framework of international law.⁵

Such an approach is consistent with an intention on the part of the founding States to retain their sovereign rights to determine who may enter, remain and be removed from their territory.⁶

3. PROTECTING THE REFUGEE'S FAMILY

3.1 PROTECTION OF THE FAMILY IN INTERNATIONAL LAW

Various international instruments recognise the family as the basic unit upon which society is organised and its right to protection by society and by the State.⁷ For example, the Universal Declaration of Human Rights (UDHR)⁸ and the International Covenant on Civil and Political Rights (ICCPR)⁹ provide in identical terms that

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.¹⁰

³ Weis 1995 p 380

⁴ Weis 1995 p 380. Weis also details that, in debating the recommendation, the representative from the United Kingdom was keen to maintain the 'categorical view' of the Ad Hoc Committee that 'governments were under an obligation to take such action in respect of the refugee's family': p 381.

⁵ According to the Committee that drafted the Convention, 'The fact that the Draft Convention is silent on a subject means that in this matter the Committee believed that a special provision is not necessary and that Governments would be free to decide it at their discretion in accordance with international law'; Report of the Ad Hoc Committee on Refugees and Stateless Persons on its first session, E/1618, pp 36–37, cited in Weis 1995 p 378.

⁶ As the title of the Convention suggests, it is concerned essentially with the status and civil rights to be afforded to refugees within the territories of State Parties. As noted by Gummow J of the Australian High Court in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225, 'The predominant view (including that of the Supreme Court of the United States in *Sale v Haitian Centers Council* [(1993) 125 L Ed 2d 128] and the House of Lords in *T v Home Secretary* [(1996) AC 742] is that decisions to admit persons as refugees to the territory of member states are left to those states. In the preparation of the Convention only a limited consensus was reached and expressed in Recommendation D in the Final Act, namely that [citing Krenz, 1996] "Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement". Hence the recent statement by Lord Mustill [in *T v Home Secretary* at 754]: "[A]lthough it is easy to assume that the appellant invokes a 'right of asylum', no such right exists. Neither under international nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. Subject only to qualifications created by statute this country is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries." The position in international customary law is succinctly stated in the current (4th) edition of Halsbury's Laws, reissued in 2000, paragraph 984 and 985 of volume 18(2): 'In customary international law a state is free to refuse the admission of aliens to its territory or to annex whatever conditions it pleases to their entry ... a state may expel an alien from its territory at its discretion'. See also *MIMA v Ibrahim* [2000] HCA 55 at 137–38.

⁷ Regional instruments that recognise the principle of family unity include the African Charter on Human and People's Rights (Article 18), the American Convention on Human Rights (Article 17(1)), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 8 and 12).

⁸ Article 16(3), UDHR. The UDHR is not binding on States.

⁹ Article 23(1), ICCPR

¹⁰ This formulation was deliberately broad to allow for variation in the legal protection or other measures a society or State would afford the family depending on different social, economic, political and cultural conditions and traditions; see Communication No 35/1978, *Aumeeruddy-Cziffra et al v Mauritius*, UN Human Rights Committee 1981 Report, Annex XIII, para 9.2(b) 1–4. However, according to M K Erikson, there was a consensus during the drafting of Article 23 of the ICCPR on safeguarding family unity as one aspect of protection (Article 16 in Eide et al 1992 p 253). The UN Human Rights Committee was

Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) 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. ...¹¹

The concept that the family unit is entitled to protection is reinforced by other provisions that prohibit arbitrary interference with the family, and which reaffirm the right to marry and to found a family. For example, Article 12 and Article 16(1) of the UDHR respectively state that:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. Everyone has the right to the protection of the law against such interference or attacks.¹²

and

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.¹³

Similar provisions are found in the ICCPR. Article 17(1) prohibits arbitrary interference with the family,¹⁴ while Article 23(2) reaffirms the right to marry and found a family.¹⁵ The right to found a family has been interpreted by the UN Human Rights Committee as including both the possibility to procreate and live together.¹⁶

Provisions relating to the protection of the family in the context of children's rights are contained in the Convention on the Rights of the Child (CROC).¹⁷ For example, CROC provides that no child shall be subject to arbitrary interference with, among other things, his or her family;¹⁸ for the right, as far as possible, for a child to know and be cared for by his or her parents;¹⁹ and that a

established to monitor the implementation of the International Covenant on Civil and Political Rights and the Protocols to the Covenant in the territory and within the jurisdiction of States parties.

¹¹ Article 10(1) ICESCR. The ICESCR does not impose absolute and immediately binding standards of attainment, but rather requires States to take steps to the maximum of their available resources to progressively realise rights (Article 2(1)) in a non-discriminatory way (Article 2(2)).

¹² Article 12, UDHR

¹³ Article 16(1), UDHR

¹⁴ Article 17(1) of the ICCPR provides that, 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...'. According to the UN Human Rights Committee, 'the term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.' (Human Rights Committee, General Comment 16, (Twenty-third session, 1988) para 3. In the Committee's view, 'the expression "arbitrary interference" is also relevant to the protection of the right provided for in article 17. ...[T]he expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.' (para 4). In a recent non-refugee case, the Committee was divided over whether Australia's proposed removal of unlawfully resident parents of a minor who is an Australian national would constitute a violation, inter alia, of Article 17(1) of the ICCPR: *Hendrik Winata, Ms So Lan Li and Barry Winata v Australia*, Communication No. 930/2000. For a discussion of this decision, see footnote 108 below

¹⁵ Article 23(2), ICCPR states that, 'The right of men and women of marriageable age to marry and to found a family shall be recognized.' Consistent with Article 23(2), no restrictions are placed on asylum applicants or refugees in regard to marriage or founding a family in Australia, other than those which may be generally applicable.

¹⁶ See General Comment 19, Article 23 (Thirty-ninth session, 1990) para 5.

¹⁷ Domestic case law has recognised Australia's international legal obligation to give proper consideration to the interests of children in the field of immigration. According to the High Court in *Teoh*, certain immigration decisions which impact on a child may be an 'action concerning children' under CROC, and in such actions 'the best interests' of the children must be 'a primary consideration'. In addition, the High Court held that ratification of a treaty by Australia (for example, CROC) creates a legitimate expectation that decision-makers will act in accordance with the treaty provisions, and that if in the exercise of a discretion the decision-maker proposes to make a decision that is inconsistent with that expectation, the person affected should be given notice and an opportunity to reply. However, the Government has made Ministerial statements to displace the legitimate expectation in administrative law which would otherwise arise out of the entry into treaties. Importantly, the judgement in *Teoh* also creates a rule of interpretation that the legislation will be construed in accordance with relevant international obligations to the extent the legislation permits. See *MIEA v Teoh* (1995) 128 ALR 353. Relevant CROC provisions relating to family reunification are discussed in Section 4.2 below.

¹⁸ Article 16(1), CROC

¹⁹ Article 7(1), CROC

child shall not be separated from his or her parents against their will, except when such separation is necessary for the best interests of the child.²⁰

Provisions have also been developed to address the protection of the family unit in specific situations, for example, during situations of armed conflict,²¹ and in relation to migrant workers.²²

3.2 DEFINING THE FAMILY GROUP

International law does not provide a definition of family. Nor is there a universally accepted concept of the family group. However, many would agree that it consists at least of the 'nuclear family' of husband, wife, and their dependent children.²³

According to the UNHCR Handbook,

... the minimum requirement is inclusion of the spouse and minor children. In practice, other dependents, such as aged parents of refugees, are normally considered if they are living in the same household.²⁴

Elsewhere, UNHCR has emphasised the flexibility in defining the concept of family, stating that it:

... has always held that pragmatism and flexibility, in addition to cultural sensitivity, be brought to bear in the process of identifying the members of the refugee family.²⁵ The nuclear family is clearly the core, but the element of dependency among family members, both physical and financial, as well as psychological and emotional, should find its appropriate weight in the final determination.²⁶

A flexible definition of the term family, which takes into account the element of dependency among family members, should be used. The situation of the elderly in this context should receive special attention.²⁷

Among measures it has recommended to protect the unity of the refugee family, the Executive Committee of the High Commissioner's Programme (ExCom) has included:

(b)(ii) the consideration of liberal criteria in identifying those family members who can be admitted, with a view to promoting a comprehensive reunification of the family;²⁸

According to the UN Human Rights Committee, the term 'family' must be given a broad interpretation so as 'to include all those comprising the family as understood in the society of the State party concerned'.²⁹

²⁰ Article 9(1), CROC

²¹ See Articles 25, 26, 49(3), and 82(2) of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 1949; Articles 74 and 75(5) of the Additional Protocol I, 1977; and Article 4(3)(b) of the Additional Protocol II. Further discussion of these provisions in relation to family reunification is found in Section 4.2 below.

²² See Article 44(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990. Further discussion of these provisions in relation to family reunification is found in Section 4.2 below.

²³ UNHCR Guidelines on Reunification of Refugee Families, para 5(a)

²⁴ UNHCR Handbook, para 185

²⁵ According to UNHCR, this approach is in line with that adopted in CROC, which uses differing concepts of family for different rights: UNHCR, 'Family Protection Issues', p 156, para 4, fn 4.

²⁶ UNHCR, 'Family Protection Issues', p 156, para 4. More recently, at the June 2001 Annual Tripartite Consultations on Resettlement, UNHCR's background note for the family reunification agenda item provided guiding principles that sustain UNHCR efforts to protect family unity. One of these guiding principles included 'flexible and expansive' definitions of the family that are 'culturally sensitive and situation specific'.

²⁷ UNHCR, 'Family Protection Issues', June 1999, para 27

²⁸ ExCom Conclusion No 88 (L) 1999 on Protection of the Refugee's Family

²⁹ UN General Assembly Official Record (GAOR), Human Rights Committee, 32nd Session, 791st meeting, at 2, UN Doc. CCPR/C/21/Add.6 (1988), quoted in Van Beuren 1995. According to Cynthia S. Anderfuhren-Wayne (1996 pp 357-8), the European Court of Human Rights has held that the existence of a family for the purposes of Article 8 [of the European Convention on Human Rights] depends upon proof of certain ties, which in turn depends upon the nature of a

The approach in Australia

The criteria for defining the family group, including the refugee family, are set out in the Migration Regulations.³⁰ Applicants for a refugee or humanitarian visa offshore are also entitled to include members of the family unit in their application.³¹

For the purposes of applying for a refugee or humanitarian visa (granted in Australia or offshore), a member of a family unit is:

- (a) a spouse of the family head; or
- (b) a dependent child of the family head or of a spouse of the family head; or
- (c) a dependent child of a dependent child of the family head or of a spouse of the family head; or
- (d) a relative of the family head or of a spouse of the family head who:
 - (i) does not have a surviving spouse or any other relative (other than the family head) able to care for that relative in the relevant country; and
 - (ii) is usually resident in the family head's household; and
 - (iii) is dependent on the family head; or
- (e) a relative of the family head or of a spouse of the family head who:
 - (i) has never married or is widowed, divorced or separated; and
 - (ii) is usually resident in the family head's household; and
 - (iii) is dependent on the family head.

3.3 DERIVATIVE STATUS

There is no mention of the members of a refugee's family in the definition of a refugee in the Refugees Convention.³² However, the status of refugee family members was considered by the Ad Hoc Committee that drafted the Convention. In the report of its first session, the Committee said that:

given relationship. While these ties are generally assumed for close family relations—that is, nuclear family members—unless proven otherwise, 'genuineness' in other relationships depend upon a variety of factual circumstances, ranging from whether or not the concerned persons shared the same household to a consideration of economic dependency (*X v Fed Republic of Germany* and *X v United Kingdom*). The fact of birth (that is biological ties between mother and child) creates family life, thus protection is given to illegitimate children. Adopted children and parents are also considered to be family (*X v France*). In addition, the Court has held that ties between near relatives such as grandparents and grandchildren can comprise family life, since such relatives may play a considerable part in family life (*Marvck v Belgium*).

³⁰ Migration Regulations, Regulation 1.12(1)

³¹ For example, in relation to the Subclass 200 offshore humanitarian visa (as in all offshore humanitarian visa categories), provision is made for combined applications. See Regulation 200.31 of the Migration Regulations 1994:

200.31 Criteria to be satisfied at time of application

200.311 The applicant:

- (a) is a member of the family unit of, and made a combined application with a person who meets, or has met the requirements of paragraph 200.211(1)(a); ...

(Paragraph 200.211(1)(a) provides that 'The applicant is subject to persecution in the applicant's home country and is living in a country other than the applicant's home country.')

³² Under Article 1A(2) of the Convention, a refugee is a person who '... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence, is unable or, owing to such fear is unwilling to return to it.'

Members of the immediate family of a refugee should, in general, be considered as refugees if the head of the family is a refugee as here defined. Also, such members are to be regarded as refugees if the conditions set forth in paragraph A (of Article 1) apply to them even if the head of the family is not a refugee.³³

In view of this statement and the recommendation on family protection of the Conference of Plenipotentiaries,³⁴ it may be argued that the Convention's founders supported the concept of a 'derivative status', at least in respect of those family members who had accompanied the refugee to the country of refuge; that is, that members of the refugee's family in the country of refuge should be given the same protection as the refugee in the interests of family unity, even if they individually did not meet the refugee definition criteria.

ExCom has indicated its support for this concept. Measures it has recommended to protect the unity of the refugee's family include:

(b)(iii) provisions and/or practice allowing that when the principal applicant is recognized as a refugee, other members of the family unit should normally also be recognized as refugees, and by providing each family member with the possibility of separately submitting any refugee claims that he or she may have.³⁵

ExCom has also recommended that all children who are accompanied by their parents should be treated as refugees if either of the parents is determined to be a refugee.³⁶

According to the UNHCR Handbook, and subject to the qualifications outlined below, 'if the head of a family meets the criteria of the definition, his [or her] dependents are normally granted refugee status according to the principle of family unity'.³⁷ If the head of the family is not a refugee,

... there is nothing to prevent any one of his [or her] dependents, if they can invoke reasons on their own account, from applying for recognition as refugees under the 1951 Convention or the 1967 Protocol. In other words, the principle of family unity operates in favour of dependents, and not against them.³⁸

Among commentators, Grahl-Madsen has suggested a presumption of equal status, based on the view that if people are persecuted for one of at least the first four Convention grounds—race, religion, nationality, or membership of a particular social group—not only the head of the family, but all his or her closest relatives will, as a rule, be in the same danger. Such 'persecution by association' is not suggesting a derivative status, but that the close relatives would most likely qualify for protection in their own right.³⁹

³³ UN Doc E/EAC.32/5 (E/1618), 40, cited in Grahl-Madsen 1966 Vol 1 p 413. According to Grahl-Madsen at p 418, the concept of 'head of the family' appears in recent times to have lost its significance, with the emphasis shifting to the factual unity of a family group and the dependence of certain persons on one or more others.

³⁴ The preamble to Recommendation B of the Conference includes the statement: 'Noting with satisfaction that, according to the official commentary of the Ad Hoc Committee on Statelessness and Related Problems the rights granted to a refugee are extended to members of his family'.

³⁵ ExCom Conclusion No 88 (L) 1999 on Protection of the Refugee's Family. See also ExCom Conclusion No 24 (XXXII) 1981 on Family Reunification, para 8, which recommended that 'in order to promote the rapid integration of refugee families in the country of settlement, joining close family members should in principle be granted the same legal status and facilities as the head of the family who has been formally recognized as a refugee'.

³⁶ ExCom Conclusion No. 47 (XXXVIII) 1987 on Refugee Children, para h

³⁷ UNHCR Handbook, para 184. According to the Handbook at para 183, Recommendation B in the Final Act of the 1951 Conference is observed by the majority of States, whether or not they are parties to the 1951 Convention or to the 1967 Protocol.

³⁸ UNHCR Handbook, para 185

³⁹ Grahl-Madsen 1966 Vol. 1 p 421

That said, the insertion of the words 'in general' in the first sentence of the Ad Hoc Committee's statement above, suggests the Committee envisaged that it may be justified in certain circumstances to depart from the principle of family unity and the concept of derivative status.⁴⁰

These circumstances are likely at the least to have included situations described by UNHCR in its Handbook, according to which:

It is obvious, however, that formal refugee status should not be granted to a dependent if this is incompatible with his personal legal status. Thus, a dependent member of a refugee family may be a national of the country of asylum or of another country, and may enjoy that country's protection. To grant him refugee status in such circumstances would not be called for.⁴¹

[In addition], if the dependent of a refugee falls within the terms of one of the exclusion clauses, refugee status should be denied to him.⁴²

Grahl-Madsen, agrees that there may be circumstances where it may be justified to depart from the principle of family unity.⁴³

The derivative status concept has been rejected in Canadian law. Specifically, the Courts have found that the principle of family unity has not been incorporated in the definition of Convention refugee,⁴⁴ that a person is not automatically a refugee because a family member is persecuted,⁴⁵ and a family connection is not an attribute requiring Convention protection in the absence of an underlying Convention ground for the claimed persecution.⁴⁶

Grahl-Madsen has suggested that family members who have been recognised as refugees merely by application of the principle of family unity are not refugees as defined in the Convention, and the provisions of the Convention are therefore not directly applicable in their case.⁴⁷ Instead, their status is simply based 'on the practice of States'.⁴⁸ In his view the principle of family unity does not imply conferment of refugee status on the members of families who do not have a well-founded fear of being persecuted for a Convention ground.⁴⁹

The approach in Australia

Members of a principal applicant's family unit who arrive together in Australia may be included in the application for a protection visa, that is, the legal procedure to both claim asylum and make an application to regularise migration status.⁵⁰ Where the principal applicant is granted the visa,

⁴⁰ Grahl-Madsen 1966 Vol. 1 p 425.

⁴¹ UNHCR Handbook, para 184. According to the Handbook, 'Where the unity of a refugee's family is destroyed by divorce, separation or death, dependents who have been granted refugee status on the basis of family unity will retain such refugee status unless they fall within the terms of a cessation clause; or if they do not have reasons other than those of personal convenience for wishing to retain refugee status; or if they themselves no longer wish to be considered as refugees (para 187).

⁴² UNHCR Handbook, para 188

⁴³ See Grahl-Madsen 1966 Vol. 1 p 425.

⁴⁴ *Shalkh, Sarwar v. M.C.I.* (F.C. T.D., no. IMM-2489-98), Tremblay-Lamer, March 5, 1999 cited in Immigration and Refugee Board of Canada 1999, Chapter 9 ADDENDA. Included in the addenda is a note to flag that there are other means within the Act to ensure that dependents of Convention refugees are granted permanent residence.

⁴⁵ *Jeyarajah, Vijayamallnt v. M.C.I.* (F.C. T.D., no. IMM-2473-98) Denault March 17 1999, cited in IRB 1999. Noting however that claims may still be family related, leading for example to recognition of refugee status on the basis of membership of a particular social group, namely family.

⁴⁶ *Serrano, Roberto Fores et al v. M.C.I.* (F.C. T.D., no. IMM-2787-98) Sharlow, April 27, 1999 cited in IRB (1999).

⁴⁷ Grahl-Madsen 1966 Vol. 1 p 431

⁴⁸ Grahl-Madsen 1966 Vol. 1 p 431

⁴⁹ Grahl-Madsen 1966 Vol. 1 p 431. For Goodwin-Gill it appears sufficient that, at least in the case of unaccompanied minors, 'social realities' and 'practical reasons and procedural convenience' lead to the subordination of individual claims to the principle of family unity. See Goodwin-Gill 1996 p 357.

⁵⁰ Section 36(2) of the *Migration Act 1958* provides that:

A criterion for a protection visa is that the applicant for the visa is:

there has been a long-standing practice, supported by recent legislation,⁵¹ of granting all members of the family unit included in the person's application at the time of decision the same legal migration status without having to individually demonstrate a well-founded fear of persecution.⁵² Significantly, however, the family membership ground for grant of a protection visa is an alternative to being owed protection obligations. Australian processes and law provide the practical effect of supporting family unity without providing derivative refugee status to family members.

In regard to repeat applications, recent legislation has also clarified that such applications cannot be made by the spouse or dependent of a person whose asylum application has been rejected, when the spouse or dependent was included as a family member on the original application and had an opportunity to lodge claims in their own right at that time.⁵³

This change was necessary to prevent misuse of the asylum system by family groups wishing to prolong their stay in Australia by lodging protection applications serially, each member taking turns to advance claims for protection while the others apply as family members. However, the Minister for Immigration and Multicultural and Indigenous Affairs may intervene to allow the application to proceed where he thinks it is in the public interest to do so,⁵⁴ for example where credible additional information has emerged which enhances the applicant's chances of making a successful claim.

When an asylum applicant is found after a full merits review of their case not to engage Australia's protection obligations, the opportunity exists⁵⁵ for the Minister to intervene and provide an alternative means of stay. This may occur, for example, where special humanitarian considerations are involved, including considerations relating to family,⁵⁶ or where other international obligations are engaged.⁵⁷

-
- (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
 - (b) a non-citizen in Australia who is the spouse or a dependent of a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa.

See also Regulations 866.21 and 866.22 of the Migration Regulations 1994:

866.21 Criteria to be satisfied at time of application

- 866.211 The applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and:
- (a) makes specific claims under the Refugees Convention; or
 - (b) claims to be a member of the same family unit as a person (the claimant) who:
 - (i) has made specific claims under the Refugees Convention; and
 - (ii) is an applicant for a Protection (Class XA) visa.

866.22 Criteria to be satisfied at time of decision

- 866.221 The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention
- 866.222 In the case of an applicant referred to in paragraph 866.211 (b):
- (a) the Minister is satisfied that the applicant is a member of the same family unit as a claimant referred to in that paragraph; and
 - (b) that claimant has been granted a Protection (Class XA) visa.

⁵¹ *Migration Legislation Amendment Act (No 6) 2001*, s36(2)(b)

⁵² Family members of the principal applicant, including minors, have the right to lodge their own applications or to present their claims in a combined application with the principal applicant. If a member of the family unit other than the 'family head' is a person to whom Australia has protection obligations under the Convention, then all members of the family unit, including the family head, who have a valid application may be granted a Protection visa.

⁵³ Amendments to s48A(2)(aa) and (ab) of the *Migration Act 1958*, in the *Migration Legislation Amendment Act (No 6) 2001*

⁵⁴ See s48B of the *Migration Act 1958*

⁵⁵ Under s417 and s501J of the *Migration Act 1958*

⁵⁶ For example, under CROC.

⁵⁷ Such as those under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

Finally, Australian courts have for some time accepted the possibility that a family may constitute a particular social group for the purposes of the definition of a refugee under Article 1A(2) of the Convention.⁵⁸

Where the members of the family unit do not arrive in Australia with the applicant, they must demonstrate that they are owed protection in their own right. In Australia's view, the concept of 'derivative status' is without solid legal foundation. The application of this concept in order to effect family reunification downgrades refugee status itself and subverts a State's sovereign right to determine the conditions under which any family reunification will be provided.

3.4 PROMOTING SELF-SUFFICIENCY OF ADULT FAMILY MEMBERS

Self-sufficiency among adult family members is an important element in the protection and well-being of a family. Measures for the protection of the refugee's family can therefore extend beyond asylum procedures to arrangements that serve to facilitate their economic and social self-sufficiency. As UNHCR has noted,

The provision of economic opportunities for refugees and returnee families to enable them to become self-sufficient is a pragmatic way to assist families to meet their responsibility vis-à-vis their individual members.⁵⁹

Among measures it has recommended to protect the unity of the refugee's family, ExCom has included:

(b)(v) ... programmes to promote the self-sufficiency of adult family members so as to enhance their capacity to support dependent family members.⁶⁰

UNHCR too has encouraged States to adopt:

(e) ... national policies, procedures and programmes [that] enhance the unity of the family...[by] strengthening the capacity of individuals to function in their new countries, facilitating their integration process and promoting social and economic self-sufficiency.⁶¹

The approach in Australia

Holders of Permanent Protection visas granted in Australia, and holders of permanent humanitarian Visas granted offshore, are immediately eligible for the same services available to other members of the Australian community, including social security payments, health benefits, and a range of government assistance programmes which provide financial support to eligible people.⁶²

⁵⁸ *Chan v MIEA* (1989) 169 CLR 379; *Applicant A v MIEA* (1997) 190 CLR 225; *Sarrazola v MIMA* [1999] FCA 101; *C and S v MIMA* [1999] FCA 1430. See also the discussion of family in Chapter 4, Particular Social Group. The Australian Parliament has recently passed legislation whereby certain matters must be disregarded in determining whether an applicant has a well-founded fear for reasons of their membership of a particular social group that consists of the applicant's family; see *Migration Legislation Amendment Act (No 6) 2001*, s91S. The new legislative provisions do not prevent a family *per se* being a particular social group for the purpose of establishing a Convention reason for persecution. However, they prevent the family being used as a vehicle to bring within the scope of the Convention, persecution motivated for non-Convention reasons (such as a criminal act of retribution for failure to repay a debt).

⁵⁹ UNHCR, Family Protection Issues, para 22

⁶⁰ ExCom Conclusion on Protection of the Refugee's Family No. 88 (L) 1999

⁶¹ UNHCR, Annual Tripartite Consultations on Resettlement 2001

⁶² Other permanent entrants generally must wait two years before accessing these benefits.

In addition, holders of these permanent visas with English skills below functional level are entitled to up to 510 hours of free English tuition through the Adult Migrant English Program.⁶³ Free interpreting is available to those who require language assistance in dealing with certain service bodies and other organisations,⁶⁴ and DIMIA provides free summary translations of certain settlement-related documents, such as employment references and birth certificates, during their first two years in Australia.

Furthermore, permanent refugee and humanitarian entrants also have access to special settlement support designed to meet their particular needs and assist in their smooth integration into the Australian community. This support is provided through the framework of the Integrated Humanitarian Settlement Strategy (IHSS). Established in 1997–98, the IHSS provides support to those in most need and delivers services in an integrated manner, including through needs assessment, information provision, material assistance and referrals to other settlement services.⁶⁵

General settlement help after the initial arrival period is provided in the first instance through more than 30 Migrant Resource Centres (MRCs) located in major cities and towns around Australia. Culturally-based individual assistance and referral advice is available through a range of other community-based services funded under the Government's community grants program. Permanent refugee and humanitarian entrants also have access to many general services that are provided to some other migrants and Australian residents.

Certain entrants to Australia are eligible only for temporary refugee or humanitarian visas in the first instance. These include refugees who have entered Australia unauthorised, who have been immigration cleared on fraudulent documents, or who have been granted a humanitarian visa offshore but have undertaken secondary movement.⁶⁶

⁶³ Those permanent entrants whose learning has been affected by experiences of torture and trauma can also access up to 100 hours of English tuition through a Special Preparatory Program in addition to the 510 hours entitlement. Special Preparatory Programs are designed to meet the particular needs of this group. They are less than full-time and are delivered to small groups in settings where the participant feels comfortable. Participants are offered first-language support where possible and may choose to be supported by a trained volunteer tutor.

⁶⁴ Under the Charter for Public Service in a Culturally Diverse Society (DIMA 1998), Commonwealth and State Governments have a commitment to provide free interpreting for people who need help with English in dealing with government agencies. DIMIA provides complementary fee-free interpreting through the all-hours Translating and Interpreting Service (TIS) for permanent refugee and humanitarian entrants dealing with agencies such as local councils, non-profit community-based organisations, emergency services, unions and private practice doctors.

⁶⁵ IHSS services include the following:

- *Initial Information and Orientation Assistance:* This service assists permanent refugee and humanitarian entrants to access the services they need in the initial stage of settlement, including other IHSS services.
- *Community Support for Refugees:* Through this service, community-based volunteers provide social and friendship support, including introduction of the family to local ethnic, religious and other community support organisations and information, guidance and practical assistance on adjusting to life in Australia.
- *Accommodation Support:* Permanent refugee and humanitarian entrants are provided with initial accommodation and are supported to secure longer-term accommodation at an early stage in their settlement. This service integrates with other IHSS services such as Household Formation Support.
- *Early Health Assessment and Intervention:* The service provides entrants with information on health services and a physical and psychological screening with referral to appropriate health services, as well as torture and trauma counselling that will assist the entrant to manage their recovery from serious traumatic and psychological difficulties.
- *Torture and Trauma Counselling:* Australia funds a nation-wide network of torture and trauma support agencies referred to as the National Forum of Services for Survivors of Torture and Trauma. These organisations provide treatment and rehabilitation services for those who have survived torture and trauma experiences. Refugee and humanitarian entrants who have experienced physical or mental torture and/or trauma can benefit from private and confidential counselling and other treatment provided by specially trained staff of these agencies, using professional interpreters.
- *Household Formation Support:* Through a needs-assessment, this service ensures that permanent humanitarian entrants have the basic material requirements to establish a household in Australia. Assistance may include clothing, household goods and basic furnishings.
- *IHSS Provider Support:* The Strategy also includes assistance to IHSS service providers themselves through the Service Providers' Support service. The service provides training and other information resources to service providers on issues such as cross-cultural awareness, communication and torture and trauma awareness.

⁶⁶ 'Immigration cleared' is defined by subsection 172(1) of the *Migration Act 1958*. More detail on Australia's temporary protection regime is provided in section 4.3.2 below.

Refugee and humanitarian entrants with temporary visas have work rights and access to Medicare, Special Benefits, Rent Assistance, Maternity and Family Allowances and Family Tax Payment.⁶⁷ They are also eligible for referral to the early health assessment and intervention and torture and trauma counselling elements of the IHSS.

The obligations of States relating to the treatment of refugees staying temporarily or permanently in their territories, as covered by Articles 2–34 of the Convention,⁶⁸ are focused mainly on according refugees treatment in respect of certain matters comparable to other non-citizens or nationals in the same circumstances. It is open for States to be more generous in their treatment of refugees than required by the Convention, as in the case of Australia in its comprehensive settlement arrangements for permanent refugee and humanitarian entrants— those provided a durable solution in the form of local integration or resettlement.

4. FAMILY REUNIFICATION

4.1 A COMPLEX ISSUE

Issues relating to family unity and reunification are by their very nature sensitive and emotive, socially, politically and individually.

The circumstances in which refugees are forced to flee persecution in their countries of origin often involve the separation of families. However, the separation of refugee families may also be the result of a voluntarily chosen strategy. Many asylum-seekers have had, or have bypassed the opportunity to seek and enjoy, effective protection in a country of first asylum. Rather, they have engaged a people smuggler to take them to a more desirable destination, in pursuit of a preferred migration outcome. That is, they are undertaking secondary movement to their country of choice, often in the process voluntarily separating from family members in the country of first asylum in the expectation that they will later be able to reunite in the country of choice. It is important to note in this context that, while refugees have a right to protection, they do not have the right to choose the country that provides the protection.⁶⁹ Nor do they have the right to abandon protection in one country to seek it in another.⁷⁰

There would be few States who do not recognise the importance of the principle of maintaining or restoring the unity of refugee families for humanitarian as well as practical reasons.⁷¹ However,

⁶⁷ This is the same basic taxpayer-funded package of services which is available to unemployed members of the Australian community.

⁶⁸ Apart from its definition of a refugee in Article 1, the Convention is divided broadly into provisions that define the legal status of refugees and their rights and duties in the country of refuge (Articles 2–34) and provisions dealing with the implementation of the Convention from the administrative and diplomatic standpoint (Articles 35–46).

⁶⁹ Article 14(1) of the UDHR states that, 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'. However, as noted by Gummow J in *MIMA v Ibrahim* [2000] HCA 55 at 137–38, '[I]t has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national ... [The] right "to seek" asylum [in the UDHR] was not accompanied by any assurance that the quest would be successful. A deliberate choice was made not to make a significant innovation in international law which would have amounted to a limitation upon the absolute right of member States to regulate immigration by conferring privileges upon individuals. Over the last 50 years, other provisions of the Declaration have [citing Brownlie] come to "constitute general principles of law or [to] represent elementary considerations of humanity" and have been invoked by the European Court of Human Rights and the International Court of Justice. But it is not suggested that Art 14 goes beyond its calculated limitation. Nor was the matter taken any further by the International Covenant on Civil and Political Rights ... Article 12 of the ICCPR stipulates freedom to leave any country and forbids arbitrary deprivation of the right to enter one's own country; but the ICCPR does not provide for any right of entry to seek asylum and the omission was deliberate'. See also comments by Gummow et al in *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225.

⁷⁰ *Thiyagarajah v MIMA* (1997) 80 FCR 543. This issue is discussed in more detail in the paper titled 'Article 31—Refugees unlawfully in the country of refuge: An Australian Perspective'. On a related matter, see the paper 'The Internal Flight Alternative: An Australian Perspective'.

⁷¹ Some of the practical reasons for maintaining or restoring the unity of refugee families are described in UNHCR, 'Family Protection Issues', pp 155–63, especially pp 158–60. See also papers from the International Conference on the Reception and Integration of Resettled Refugees, Sweden, April 2001.

from a State's perspective and notwithstanding the special situation of refugees,⁷² measures to facilitate refugee family reunification must be considered in the broader context of State efforts to address the rapid growth of people smuggling, irregular migration and the secondary and tertiary movement of refugees.

The challenge for States is therefore to balance the need for measures which protect refugee families with measures which permit national refugee and humanitarian programs that are orderly, protect those most in need, minimise abuse, and are sustainable in terms of resources and community support.

4.2 FAMILY REUNIFICATION IN INTERNATIONAL LAW

International law does not recognise a substantive right to family reunification. However, there is wide and proper support in the international community for measures aimed at facilitating family reunification, where appropriate.⁷³

The most detailed provisions relating to family reunification issues are found in international instruments dealing with armed conflict, children's rights, and non-national residents.⁷⁴

Families dispersed by armed conflict

The 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Times of War addresses the problems of 'families dispersed during war'.⁷⁵ It provides for mechanisms such as family messages,⁷⁶ tracing of family members,⁷⁷ and the registration of children,⁷⁸ in order to enable family communication and 'if possible' family reunification.⁷⁹

Notably, in relation to families separated as a result of armed conflict, States are required, *inter alia*, to facilitate family reunification in 'every possible way'.⁸⁰

Children

The CROC mandates that States Parties shall respect and ensure the rights set forth in the CROC to each child within the State's jurisdiction without discrimination,⁸¹ and that the best interests of

⁷² Unlike normal migrants, a dispersed refugee family cannot normally be expected to reunite in the country of nationality in view of at least one of the family members having a well-founded fear of persecution in that country.

⁷³ According to Plender, while international instruments do not provide an express right to family reunification, they do nevertheless establish a widespread acceptance that States should facilitate admission to their territories of family members of citizens or residents: see Plender 1988 pp 365–72.

⁷⁴ Jastram and Newland 2001 pp 8–12. These instruments include the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Times of War, and the 1977 Additional Protocols I and II; CROC; and the ILO Convention on Migrant Workers, and the 1990 (not yet in force) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Part IV). Regional instruments which recognise the right to family reunification in certain circumstances include the European Social Charter (article 19), and the European Convention on the Legal Status of Migrant Workers (Article 12). The Final Act of the Conference on Security and Co-operation in Europe, (Helsinki 1975) asks States to deal 'in a positive and humanitarian spirit' with applications of persons who wish to be reunited with members of their family. See also the amended European Commission Proposal for a Council Directive on the right to family reunification, COM(2002) 225 final, Brussels, 2 May 2002. The purpose of the proposed directive is to determine the conditions in which the right to family reunification (limited to the nuclear family, that is spouse and minor children) may be exercised by third-country nationals residing lawfully in the territory of Member States of the European Union. The proposed directive does not apply to asylum-seekers or those persons benefiting from temporary or subsidiary forms of protection.

⁷⁵ Article 26 of the 1949 Fourth Geneva Convention

⁷⁶ Article 25 of the 1949 Fourth Geneva Convention

⁷⁷ Article 140 of the 1949 Fourth Geneva Convention

⁷⁸ Article 50 of the 1949 Fourth Geneva Convention

⁷⁹ Cited in Jastram and Newland 2001 pp 9–10.

⁸⁰ Additional Protocol I, 1977, Article 74. Cited in Jastram and Newland 2001 pp 9–10.

⁸¹ Article 2, CROC

the child are to be a primary consideration for all actions concerning children.⁸² Under CROC, a child shall not be separated from his or her parents against their will, except where necessary for the best interests of the child.⁸³

States are required to take appropriate measures to ensure that a child who is seeking refugee status or is determined a refugee receives appropriate protection and humanitarian assistance.⁸⁴ They must deal with applications by a child or his or her parents to enter or leave a country for the purpose of family reunification in a 'positive, humane and expeditious manner'.⁸⁵ However, CROC does not grant a substantive right of entry for family members, or impose a positive obligation on States to facilitate reunification in its territory. Importantly, it does not preclude reunification in a third country where the child's parents and other family members continue to reside and which provides them with effective protection.

A child whose parents reside in different States has the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents.⁸⁶ States are also required to cooperate as they consider appropriate in any efforts by the United Nations or organisations cooperating with the United Nations in obtaining information necessary for the child's reunification with his or her family.⁸⁷ The requirement to provide such assistance applies to any refugee child whether that child is within a State's territory or not; however, it is not intended that it ground a right of reunification.

Non-national Residents

The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families requires States Parties to facilitate as far as possible the reunification of family members with the migrant worker.⁸⁸

⁸² Article 3, CROC

⁸³ Article 9(1) CROC provides that, 'States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.'

⁸⁴ Article 22(1) CROC states that, 'States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.'

⁸⁵ Article 10(1) CROC provides that, 'In accordance with the obligations of States Parties under article 9, paragraph 1, 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 States Parties in a positive, humane and expeditious manner...'

⁸⁶ Article 10(2) CROC provides that 'A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under Article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention'.

⁸⁷ Article 22(2) CROC provides that 'States Parties shall provide, as they consider appropriate, cooperation in any efforts ... to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family'. With regard to separated children, UNHCR, in collaborative efforts with the United Nations Children's Fund (UNICEF), the International Committee of the Red Cross (ICRC), and specialised NGOs such as the International Rescue Committee (IRC) and the International Save the Children Alliance, aims to prevent separations, to identify children who have become separated from their families, to ensure that such children receive the protection and assistance they need, and to reunite them with their families in a timely manner. See Report of the Secretary-General to the UN General Assembly on Protection and assistance to unaccompanied and separated refugee children, para 9.

⁸⁸ Article 44(2) of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families provides that 'State Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to the applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children. (3) States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers'. Australia is not a State party to this Convention, which is not yet in force.

According to a 1985 UN General Assembly Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live,

Subject to national legislation and due authorisation, the spouse and minor or dependent children of an alien lawfully residing in the territory of a State shall be admitted to accompany, join and stay with the alien.⁸⁹

While the UN Human Rights Committee, which provides general comments on the rights and provisions contained in the ICCPR, has not considered the specific issue of family reunification of refugees, in a general comment on the rights of non-citizens it expressed the view that:

The [ICCPR] does not recognise the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.⁹⁰

The circumstances in which family reunification may, in the view of the Committee, fall within obligations under the ICCPR are not specified. However, in a view expressed in 1981, the Committee held that the denial of entry for a family of a resident non-national might constitute a breach of international law if it were of an arbitrary nature or contrary to the ICCPR.⁹¹

Additionally, in considering the right to marry and to found a family in Article 23(2) of the ICCPR, the Committee has taken the view that:

The right to found a family implies, in principle, the possibility to procreate and live together. ... [T]he possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.⁹²

4.3 REUNIFICATION OF REFUGEE FAMILIES

Family unity and family reunification are not obligations imposed by the Refugees Convention on State Parties, but are rather matters for States to decide at their discretion in accordance with international law. In this context, the so-called 'right' to family unity is in fact a principle which, while important, permits careful and flexible interpretation by States in accordance with their overall sovereign responsibilities.⁹³

⁸⁹ Article 5(4) of the non-binding Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by General Assembly resolution 40/144 of 13 December 1985

⁹⁰ Human Rights Committee, General Comment 15 (Twenty-seventh session, 1986). According to Klug, commenting on rulings by the Human Rights Committee (on the ICCPR) and the European Court of Human Rights (on the 1950 European Convention on Human Rights), 'Although a right to family reunification cannot be drawn from these rulings, both treaty bodies declare that the denial of family reunification could result in a violation of the respective treaty' (Klug 1999 p 2)

⁹¹ View of the Human Rights Committee, 9 April 1981, *Human Rights Law Journal* 1981, Vol. 2, p 139, cited in Klug 1999 p 3.

⁹² UN Human Rights Committee, General Comment 19, Article 23 (Thirty-ninth session, 1990)

⁹³ States have the sovereign right to control their borders and to determine who will enter their territory. As the High Court of Australia said in the case of *Lim*, 'The power to exclude or expel even a friendly alien is recognised by international law as an incident of sovereignty over territory. As Lord Atkinson, speaking for a Judicial Committee of the Privy Council, said in *Attorney-General for Canada v Cain* ((53) (1906) AC 542 at p 546), "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter the state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social and material interests".': Brennan, Deane and Dawson JJ, in *Lim v MILGEO* (1992) 176 CLR 1 FC 92/051 at 27. More recently, in *Ruddock v Vardalis* [2001] FCA 1329 at 193, French J (in the majority) stated that 'The power to determine who may come into Australia is so central to its

Recognising the particular vulnerabilities faced by families separated during refugee flight, the United Nations General Assembly has called upon States,

... to take measures to ensure that the refugee's family is protected, including through measures aimed at reuniting family members separated as a result of refugee flight.⁹⁴

In a conclusion on protection of the refugee's family, ExCom similarly recommended, *inter alia*, measures '...to reunify family members separated as a result of refugee flight' in order to protect the unity of the refugee's family.⁹⁵

UNHCR promotes family reunification of families of persons who are refugees within its mandate. This includes not only those recognised by States as Convention refugees, but those who come within UNHCR's mandate and who have been granted a permit to stay under a humanitarian protection scheme.⁹⁶ According to UNHCR,

(c) Respecting the unity of the family is one of the principal means of protecting the refugee's family. This requires not only taking measures, including national legislative measures, to maintain the unity of the family, but also to reunite families that have been separated.⁹⁷

According to the UNHCR Handbook,

The principle of the unity of the family does not only operate where all family members become refugees at the same time. It applies equally to cases where a family unit has been temporarily disrupted through the flight of one or more of its members.⁹⁸

Both ExCom and UNHCR have called for the expeditious facilitation of reunification for separated refugee families. For example, in 1981 ExCom adopted the following conclusion:

1. In application of the principle of the unity of the family and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families.
2. For this purpose it is desirable that countries of asylum and countries of origin support the efforts of the High Commissioner to ensure that the reunification of separated refugee families takes place with the least possible delay.⁹⁹

In 1998, ExCom further

(w) Exhort[ed] States, in accordance with the relevant principles and standards, to implement measures to facilitate family reunification of refugees on their territory, especially through the consideration of all related requests in a positive and humanitarian spirit, and without delay;¹⁰⁰

sovereignty that it is not supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australian community, from entering'.

⁹⁴ UN General Assembly Resolution 55/74 (4 December 2000)

⁹⁵ ExCom Conclusion No 88 (L) 1999 on Protection of the Refugee's Family, para b, i

⁹⁶ ExCom Conclusion No 88 (L) 1999 on Protection of the Refugee's Family, para 21. See also UNHCR Guidelines on Reunification of Refugee Families.

⁹⁷ UNHCR, 'Family Protection Issues', para 27

⁹⁸ UNHCR Handbook, para 186

⁹⁹ ExCom Conclusion No 24 (XXXII) 1981 on Family Reunification. In Conclusion No 9 (XXVIII) 1977 on Family Reunion, ExCom reiterated the fundamental importance of the principle of family unity and reaffirmed the coordinating role of UNHCR with a view to promoting the reunification of separated refugee families through appropriate interventions with Governments and with inter-governmental and non-governmental organisations.

¹⁰⁰ ExCom Conclusion No 85 (XLIX) 1998 on International Protection

According to UNHCR, 'Governments are encouraged to deal with applications for family reunification of refugees in an expeditious and humane manner'.¹⁰¹

4.3.1 Where should reunification occur?

Many countries with developed asylum systems, including Australia, provide avenues to effect family reunification for categories of refugees—some immediately, some after a qualifying period, some through special measures and some through normal migration family reunification provisions.¹⁰² Much of the support for family reunification comes from consideration of the plight of refugee families unwillingly separated during flight from their country of origin. However, little support is likely to be extended where separation is due to purposeful acts of the refugee's own volition represented by smuggled secondary movement, leaving the family behind in a country of first asylum where their needs for protection were and continue to be met.

While States are urged to facilitate the reunification of separated refugee families, there is no obligation for that reunification to be effected in their own territory, in particular if the family can be reunited elsewhere.

There is a strong argument that, in order to effect family reunification, it is open to the refugee to return to the country of first asylum and continue to enjoy effective protection there as a reunified family. However, abandonment of effective protection should not be able to be used to pressure the country of choice into agreeing to entry of the family and so further encouraging the use of people smugglers.

The European Court of Human Rights has held that respect for family life under Article 8 [of the ECHR] may, in some cases, obligate States to allow the family members of a lawful resident of that State to reside in that State,¹⁰³ provided that the family cannot live together elsewhere.¹⁰⁴

According to UNHCR, applying this reasoning to a refugee family, if an individual has been recognised as a refugee by a State, it follows that he or she is entitled to be reunited with his or her family in that State, provided that there is no other country where the family can live together.¹⁰⁵ UNHCR has also stated that,

(f) Separated families can only enjoy family life through the reunion of family members in a country where they can live a normal life together. Therefore, refugees and other persons in need of international protection who have no country other than the country of asylum [in which] to lead a normal life together, should be entitled to family reunion in the country of asylum.¹⁰⁶

The Committee of Ministers of the Council of Europe has expressed a similar view:

Member states hosting refugees and other persons in need of international protection [including persons benefiting from temporary protection], who have no other country than the country of asylum or protection in order to lead a normal family life together,

¹⁰¹ ExCom Conclusion No 85 (XLIX) 1998 on International Protection, para (e)

¹⁰² Issues relating to family reunification are discussed in detail in Section 5 below.

¹⁰³ The Court has stated that 'expulsion of or a refusal to admit a person to a State's territory resulting in an arbitrary separation of family members is a violation of Article 8 [of the ECHR]': *X v Sweden*, App. No. 434/50; see *Anderfuhren-Wayne* 1996 p 352 and fn 22.

¹⁰⁴ See, for example, *Gul v Switzerland*, 19 February 1996, No. 53/1995/559/645, and *Ahmut v Netherlands*, 28 November 1996, No. 73/1995/579/665.

¹⁰⁵ UNHCR, 'Family Protection Issues', para 13

¹⁰⁶ UNHCR, 'Family Protection Issues', para 27

should promote through appropriate measures family reunion, taking into account the relevant case-law of the European Court of Human Rights.¹⁰⁷

The obligation to respect family life under Article 8 of the ECHR proscribes unreasonable or arbitrary interference with family life. Interference may be justified on the grounds that it is in accordance with law, pursues a legitimate aim and is necessary in a democratic society.¹⁰⁸ In addition, respect for family life under Article 8 of the ECHR is a qualified right, and the European Court applies a balancing formula between elements concerning respect for family life and, among other things, considerations relating to the proper enforcement of immigration controls.¹⁰⁹ The question that the European Court asks is whether there are insurmountable obstacles for the family to conduct their family life elsewhere.¹¹⁰ The UK Supreme Court recently noted that:

In the field of immigration, the [European Court] gives considerable weight to the right of States to control immigration. It has, however, on occasion held that this right is subordinated to the right to family life. It is possible that the approach of the Court to the position of asylum applicants has changed over the years as more States have agreed to recognise the right to asylum and the volume of asylum seekers has grown. So far as general principles of international law are concerned the position has not changed. The current (4th) edition of Halsbury's Laws, reissued in 2000, states in paragraph 984 and 985 of volume 18(2): 'In customary international law a state is free to refuse the admission of aliens to its territory or to annex whatever conditions it pleases to their entry ... a state may expel an alien from its territory at its discretion'.¹¹¹

¹⁰⁷ Committee of Ministers of the Council of Europe, Recommendation No R (99) 23 of 15 December 1999 and Recommendation No R (2000) 9 of 3 May 2000.

¹⁰⁸ See Plender 1995 p 60. In a recent non-refugee case, the UN Human Rights Committee was divided over whether Australia's proposed removal of unlawfully resident parents of a minor who is an Australian national would constitute a violation, inter alia, of Article 17(1) of the ICCPR: *Hendrik Winata, Ms So Lan Li and Barry Winata v Australia*, Communication No. 930/2000. According to a majority of the Committee, on the facts of the case, the decision to remove both parents was an 'interference' with the family on the grounds that it would result in substantial changes to long settled family life. In the majority's view, a State party's discretion to require the removal of unlawful non-citizens is not unlimited and in certain circumstances may be exercised arbitrarily in breach of Article 17. The majority held that while aliens do not have a right to reside in the territory of a State party, States parties are obliged to respect and ensure all their rights under the Covenant. Importantly, however, in a dissenting opinion, a minority of the Committee concluded that there was 'no basis' for viewing Australia's decision as arbitrary. The minority applied a test of proportionality to determine whether Australia's decision to require the parents to leave its territory was disproportionate to its legitimate interest in enforcing its immigration laws. In their view, on the facts of the case, Australia's decision to remove was not disproportionate. They took account of the fact that Australia's decision would not force separation of the family members. They also considered that the difficulties encountered by the son in adjusting if he were to return to his parents' country of origin were not so great as to render Australia's decision disproportionate.

¹⁰⁹ *Anderfuhren-Wayne* 1996 p 362. In a recent case that involved balancing respect for family life with the proper enforcement of immigration controls, the Irish High Court ruled that non-national parents of Irish-born children are not entitled to remain in the State by virtue of having an Irish citizen within the family: *Osayande, Lobe and others v Minister for Justice (joined cases)*, High Court (Mr Justice Smyth), 8 April 2002 (2001 659 & 658 JR [FL5235]). The focus of the cases was whether a child born in the State to non-national parents is entitled to have, within the State, 'the care, company and parentage [sic] of its parents'. (Children born in Ireland automatically become citizens, and as a result of a 1990 Irish Supreme Court ruling, their non-national parents have been allowed to remain: *Fajjonu v The Minister for Justice* [1990] 2IR151. In that case, illegal immigrants from Nigeria and Morocco who had lived in Ireland for seven years were allowed to remain on the basis that their Irish child had the right to the 'care, company and parentage [sic]' of its parents within the family unit. The Court held that only the interests of the 'common good' and the 'protection of the State and society' justified any interference with the child's constitutional rights.) In a judgement that involved consideration of the rights of an Irish-born child as an individual and member of a family unit, of families containing Irish citizens and non-nationals and of the duties and responsibility of the government in relation to the common good and preserving the integrity of the asylum and immigration systems, the High Court found that it was satisfied that the reasons for making the deportation orders were grave and substantial reasons associated with the common good. While the High Court agreed that a child has the right to the company of its parents, it said that it did not follow from this that a child has the right to the society of its family in Ireland. The cases also raised issues relating to the Dublin Convention, a treaty between the governments of the EU States under which applications for asylum are required to be considered by the first country the applicant enters (the Irish authorities were seeking to deport the applicants to the United Kingdom, where their asylum claims had already been refused).

¹¹⁰ *Anderfuhren-Wayne* 1996 p 361. *Anderfuhren-Wayne*, however, notes that in some more recent cases the European Court has emphasised one's connections to a given territory and ignored the issue of obstacles to resuming family life elsewhere.

¹¹¹ *Saadi, Dilshad, Osman & Mohammed v Secretary of State* (2001) WL 1171795, para 42-43.

4.3.2 Temporary protection

Clearly, refugees do not have an express right to family reunification in the country of refuge, regardless of whether they have become permanent residents of that country or are only temporary residents.¹¹² Nevertheless, ExCom has expressed the view that beneficiaries of both temporary and permanent protection should have access to family reunification:

In the interests of family reunification and for humanitarian reasons, States should facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted.¹¹³

Similarly, according to UNHCR,

The principle of family unity should be respected and no undue restrictions should be imposed to limit the admission of close family members to rejoin beneficiaries of temporary protection. Particular attention should be given to vulnerable beneficiaries of temporary protection who, due to their personal circumstances, require the support of close family members.¹¹⁴

Where members of the same family have reached different countries of temporary asylum, UNHCR has expressed the view that:

... reunification must be effected by coordinating resettlement to the same country of permanent asylum. If resettlement cannot be expected in the near future, ... reunification of the family members [should be promoted] in one of the countries of temporary asylum while awaiting a durable solution.¹¹⁵

According to UNHCR, while there has been a tendency for a growing number of States to authorise family reunification for at least spouses and minor children as part of temporary protection arrangements, State practice varies widely.¹¹⁶

¹¹² The fundamental obligation of States Parties under the Refugees Convention is to not return a refugee to his or her country of origin or any other country in which he or she would be at risk of persecution for a Convention ground. There is no obligation upon States to provide permanent residence to a refugee to meet this obligation, although they may choose to do so. The absence in the Convention of a right to be granted asylum or permanent residence, and the inclusion of provisions that place express limits on the people who are owed protection and provide for the cessation of refugee status, indicate an intention by the founders to maintain the right of States to decide who should be admitted to their territory and for how long. Many States, including Australia, have at various times and in response to differing circumstances therefore adopted a mix of temporary and permanent residence options for refugees in their territory. Temporary residence options used in Australia include the safe haven visa arrangements that were used for Kosovar and East Timorese evacuees (see s37A and s91 subdivision AJ of the *Migration Act 1958*), as well as the temporary protection arrangements developed since 1999, which are described later in this section. See also Migration Regulations 786 and 449 covering Temporary (Humanitarian Concern) and Humanitarian Stay (Temporary) visas respectively.

¹¹³ ExCom Conclusion on Refugees without an Asylum Country No 15 (XXX) 1979, para (e).

¹¹⁴ Executive Committee of the High Commissioner's Programme, Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It, UN Doc. EC/47/SC/CRP.27,30 May 1997, para 4(m). UNHCR has historically viewed temporary protection as a humanitarian strategy tied to mass influx. However, as noted above, the concept of temporary protection is consistent with the Convention.

¹¹⁵ UNHCR Guidelines on Reunification of Refugee Families, para 9(d).

¹¹⁶ UNHCR Observations on the revised proposal of the European Commission for a Joint Action on Temporary Protection of Displaced Persons, para 7. While access to family reunification is granted automatically to people recognised as Convention refugees in most European countries, those granted complementary or other forms of protection often have to meet a number of preconditions before being able to reunite, which may include a minimum length of stay in the country of asylum, access to appropriate housing, and minimum levels of income: Information from ECRE 'Position on Refugee Family Reunification' pp 5-6. Persons granted temporary protection are eligible for family reunification in some European countries (for example, Austria, Belgium, Sweden, Switzerland), but not in others (for example, France, Netherlands, Hungary and Bulgaria): Information from Council of Europe, 'The Right to Family Life for Migrants and Refugees, 200, para 37. According to a recently concluded European Union directive on temporary protection, Member States are required to reunite from within the European Union core family members as well as unmarried partners if the State has similar treatment for them in its aliens law and allows them to reunite close dependent family members. Family members who are not in the European Union but wish to be reunited with a sponsoring relative will be able to do so on a showing that they are in need of protection: European Union *Council Directive* 2001/55/EC of 20 July 2001, article 15. It should be noted that 'temporary protection' in this context means 'a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection': European Union *Council Directive* 2001/55/EC of 20 July 2001 article 2(a).

The approach in Australia

Under 'split family' provisions in the Migration Regulations relating to Australia's Humanitarian Program,¹¹⁷ a person granted a permanent refugee or humanitarian visa is provided access to family reunification in Australia. That is, they may propose immediate family members for entry to Australia under the Humanitarian Program. Immediate family members are spouses, dependent children, or parents where the child proposing the parent's entry has not yet turned 18.¹¹⁸

The size and composition of the Humanitarian Program is decided each year by the Australian Government after the Minister for Immigration and Multicultural and Indigenous Affairs conducts community consultations and considers the global resettlement needs identified by UNHCR.¹¹⁹ However, the ability to resettle in Australia has been under increasing pressure as a result of a surge in unauthorised arrivals since 1999, many of whom are making secondary movements from countries of first asylum. Consequently, in order to give places available offshore to those who have a compelling need for resettlement, persons who are the immediate family of permanent Humanitarian Program visa holders, who may not qualify for a Humanitarian Program visa on the basis of their own claims, are increasingly being encouraged to apply for entry to Australia under the family stream of the Migration Program.¹²⁰

Family reunification policies have been an enduring commitment within the Migration Program, and by world standards Australia's family immigration rules are generous. For example, Australian

¹¹⁷ The split family provisions were introduced in 1997. Prior to 1997, refugees wishing to sponsor family members to Australia were required to be 'settled' in Australia before being eligible to sponsor a family member under the general Migration Program (see description below). In this context, 'settled' meant lawfully resident in Australia for a reasonable period, generally two years.

¹¹⁸ To be eligible, the immediate family relationship must have been declared to DIMIA by the proposers before they were granted their visas, and a time limit applies to applications. All persons entering Australia under the Migration Act, including family members being sponsored to Australia, also need to meet health criteria, unless a decision is made in individual cases to waive this requirement. This is irrespective of whether they are being sponsored under the family stream of the Migration Program (see below) or proposed under the 'split family' provisions of the Humanitarian Program. The health criteria are designed to protect the Australian community from public health risks and from significant drains on health and welfare services in terms of costs or use of health resources in scarce supply. However, there is a mechanism whereby individual cases may be considered by the Minister to see if all the circumstances of the case justify putting aside the health requirement.

¹¹⁹ The number of humanitarian visas Australia can grant in any one year is limited by Australia's social and financial capacity to resettle the people successfully. Each year the Government sets the number of new visa places for the coming year and these places are notionally divided between the offshore resettlement component and the onshore protection component on the basis of need and demand. Australia's protection obligations under the Refugees Convention require the onshore component to take priority over the offshore component when it comes to the use of these places. Accordingly, any increase in the number of people who arrive in Australia and engage Australia's protection obligations translates to a decrease in the number of resettlement places that Australia can offer to people waiting overseas. For the 2001–02 program year, a total of 12,349 places were available for Australia's Humanitarian Program, comprising 12,000 new places and a carry-over of unused places from 2000–01. Of that total, 3,885 were used onshore, 8,458 were used offshore and 6 of the places were used for Temporary Humanitarian Concern Visas. There are a further 12,000 new places allocated for the 2002–03 program year, 10,000 of which are notionally allocated for the offshore caseload and 2,000 for the onshore caseload. For the past several years, the Humanitarian Program has been set at 12,000 new places each year.

¹²⁰ Australia's Humanitarian Program is managed separately from its general Migration Program to provide a better balance between Australia's international humanitarian objectives and the domestic, social and economic goals primarily guiding the Migration Program. The Migration Program comprises two main components—the skilled stream and the family stream. Family stream migrants are selected on the basis of their family relationship with their sponsor or nominator in Australia: there is no test for skills or language ability as is the case for skilled stream migrants. The family stream consists of four main categories: *partner*: comprising spouse (husband, wife, or de facto partner) or interdependent partner (a person in an interdependent relationship with an Australian partner involving a mutual commitment to a shared life together) or fiancé(e); *child*: comprising dependent child (the natural, adopted or stepchild) or adopted child (a child adopted overseas) or orphan relative (an unmarried child under 18 at the time of application who cannot be cared for by either parent); *parent*: comprising working age parent (a person outside Australia who is not old enough to be granted an Australian age pension and who meets the balance of family test) or aged parent (a person, either in or outside Australia, who is old enough to be granted an Australian age pension and who meets the balance of family test[see Regulation 1.05 of the Australian Migration Regulations for details of the balance of family test]); and *other family*: comprising aged dependent relative (single, widowed, divorced or formally separated person who is dependent on an Australian relative) or remaining relative (brother, sister, child or step equivalent with no close family ties outside Australia) or carer (a person willing and able to give substantial, continuing assistance to an Australian relative or member of their family who has a medical condition that impairs their ability to attend to the practical aspects of daily life, with the need for assistance likely to continue for at least two years). In 2001–02, 93,078 migrants were selected in the Migration Program, of which 33,085 (35.5 per cent) were in the family stream—comprising 28,875 spouse visas, 3,864 fiancé(s) visas, 604 interdependency visas, 1,622 child visas (including adoption), 508 parent visas and 2,021 other family visas (including orphan relatives). In 2002–03 a total estimate of 100,000 to 110,000 places will be available in the Migration Program, of which 43,200 are allocated to the family stream comprising 32,000 spouse visas, 4,800 fiancé(s) visas, 700 interdependency visas, 2,700 child visas (including adoption), 500 parent and 2,500 other family visas. Further details can be found at www.immi.gov.au.

immigration law allows legal and defacto spouses as well as same sex partners to migrate or secure residence in Australia in order to settle with their Australian citizen or resident partners.

In addition, Australia has implemented a series of measures designed to address problems associated with people smuggling, secondary movement and fraud in its asylum caseload. It continues to grant immediate permanent residence and access to family reunification to those persons who have entered lawfully and subsequently applied and been found to be refugees. Immediate permanent residence and access to family reunification is also granted to those resettled in Australia from countries of first asylum through the offshore program. However, only a temporary visa (and hence no access to family reunification) is available to a person who has undertaken secondary movement. A person who has arrived in an unauthorised manner or on fraudulent documents may only be issued with a temporary visa in the first instance.¹²¹

There is provision for the Minister for Immigration and Multicultural and Indigenous Affairs to exercise a non-compellable discretion, where he or she considers it to be in the public interest, to allow a holder of any temporary protection or humanitarian visa to access at any time the permanent visa regime and associated entitlements to family reunification.¹²²

In Australia's view, provided core Convention obligations are met, developing this type of 'mix' of reception and protection benefits, in which there is differential treatment of refugees on the basis of factors such as secondary movement, is a reasonable and responsible approach to some of the asylum/migration challenges facing States and the international protection framework.

Some critics claim that facilitating family reunification in countries of asylum may reduce unauthorised flows of refugees to those countries. However, logic and Australia's experience

¹²¹ Before 1999, all refugees who engaged Australia's protection obligations under the Refugees Convention were granted immediate permanent residence and access to family reunification in Australia. In 1999, temporary protection arrangements were introduced as part of a series of initiatives to address illegal migration and people smuggling, which had resulted in a substantial increase in the number of people arriving in Australia without authority and then seeking Australia's protection. The generous settlement services traditionally provided by Australia, including immediate permanent residence and access to family reunification, was undoubtedly one of the factors encouraging this phenomenon. Under the 1999 arrangements, a person who is determined to be a refugee and owed protection by Australia, but who has arrived illegally or was immigration cleared on fraudulent documents, is eligible for only a Temporary Protection Visa in the first instance. This Temporary Protection Visa continues ordinarily for 36 months. After 30 months that person may be granted a Permanent Protection Visa (that is, formal local integration) if Australia still owes protection obligations and other criteria are met.

In September 2001, further visa changes were introduced; see the *Migration Amendment (Exclusion from Migration Zone) Act 2001* and the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions Act) 2001*. Under the new arrangements, persons who stay in the first country of refuge and are resettled to Australia from there will continue to receive immediate permanent residence and full settlement services, including access to family reunification. However, persons who move beyond that country to a third country, and are resettled from there, will generally need to wait 54 months before being eligible for permanent residence and family reunification in Australia. Persons who reach Australia and enter unauthorised at an 'excised offshore place' (places excised from Australia's Migration Zone for particular purposes, principally the Ashmore and Cartier Islands in the Timor Sea, Christmas Island and the Cocos Islands in the Indian Ocean, and offshore resource and sea installations) and who are able to apply for a visa (such arrivals cannot make a valid visa application unless permitted by the Minister), or those who enter Australia unauthorised and have spent at least seven days in a country en route where they could have sought and obtained effective protection, will generally be eligible for only successive temporary visas of 36 months duration should protection continue to be needed, with no entitlement to permanent residence or family reunification in Australia.

Where a refugee has made a direct unauthorised flight to Australia as the country of first asylum, Australia can provide a period, either through its safe haven visa arrangements or a temporary visa, during which immediate protection needs are met. The Safe Haven visa was introduced in 1999 in response to a global appeal by the UNHCR for temporary evacuation following the expulsion of persons from Kosovo. The visa class was later amended to allow a fast and positive response to the humanitarian crisis in East Timor. The visa provides for temporary stay in Australia while conditions in the visa-holder's home country are unstable. In the case of those undertaking direct unauthorised flight who arrive at an excised offshore place or are taken to a declared country, access to a temporary visa to Australia can be considered in the context of Ministerial powers enabling the refugee to apply for an appropriate visa. Longer-term, where repatriation is not feasible and protection is still owed by Australia, there is provision through Ministerial intervention powers for the person to access permanent residence.

Consistent with Article 2 of the Convention in regard to a refugee's duty to conform to the laws and regulations in the country of refuge, measures were also introduced to encourage protection visa applicants and holders to comply with Australian laws. Temporary Protection visa holders are now prevented from being granted a Permanent Protection visa and therefore access to family reunification for four years from the date of any 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. In addition, a former Temporary Protection visa holder whose visa was cancelled, and who reapplies for a Protection visa, will be eligible only for the grant of another temporary protection visa in the first instance.

¹²² See for example Regulations 866.214, 866.215, and 866.228A of the Australian Migration Regulations.

suggests that, while providing ready access to family reunification might reduce the numbers of unaccompanied women and children travelling unauthorised, it will greatly increase the overall number of refugees engaged in secondary movement because of the surety that they will later be able to sponsor their families to join them.

In Australia's view, in the context of millions of refugees worldwide and the need for hard choices as to who and how many Australia can help, unauthorised secondary flows disadvantage the resettlement prospects of many other refugees who may be in greater relative need of assistance, including those in refugee camps and those who do not have the financial resources to pay people smugglers.¹²³

5 PROTECTION AND REUNIFICATION OF UNACCOMPANIED MINORS¹²⁴

The 1951 Conference of Plenipotentiaries recommended that States

... take the necessary measures for the protection of the refugee's family, especially with a view to ... [t]he protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.¹²⁵

In recent years, the international community has become increasingly concerned over the large numbers of unaccompanied minors seeking asylum, their presence in destination countries largely attributed to organised trafficking networks.¹²⁶ According to UNHCR, unaccompanied minors may be seeking asylum because of fear of persecution or the lack of protection due to human rights violations, armed conflict or disturbances in their own country.¹²⁷ Others may have been sent, willingly or otherwise, to secure a better future in what their caregivers have perceived to be more developed countries.¹²⁸ Yet others may have been sent as so-called 'anchor children' in the hope that the rest of the family will be granted family reunification with them. A worrying feature of the increase in people smuggling and secondary movements is an increase in the number of unaccompanied minors who appear to be sent by their families to make long and potentially hazardous journeys in order to enter destination countries illegally, in an attempt to establish a foothold for their families.

There is widespread recognition in the international community of the particular vulnerability of unaccompanied minors.¹²⁹ As noted by the UN General Assembly:

¹²³ Any increase in the number of people who arrive in Australia and engage its protection obligations translates to a decrease in the number of resettlement places that Australia can offer to people waiting overseas.

¹²⁴ According to UNHCR, 'unaccompanied minors' are children under 18 years of age who have been separated from both parents and are not being cared for by an adult who by law or custom is responsible to do so: UNHCR, *Refugee Children: Guidelines on Protection and Care*, UNHCR Geneva, 1994; *Guidelines on policies and procedures in dealing with unaccompanied children seeking asylum*, 1997. More recently, the term has been used to also encompass 'separated children', that is, children under 18 years of age who are separated from both parents or from their previous legal or customary primary caregiver: Report of the Secretary-General to the UN General Assembly on Protection and assistance to unaccompanied and separated refugee children. According to UNHCR, the wider definition seeks to highlight that while not all children are found to be unaccompanied (as according to this first definition), many have been separated from their previous legal or customary caregiver and, although living with extended family members, may face risks similar to those encountered by children arriving completely alone: UNHCR, *Trends in Unaccompanied and Separated Children Seeking Asylum in Europe*, para 1.

¹²⁵ Recommendation B of the Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.

¹²⁶ During 2000, some 16,100 unaccompanied minors applied for asylum in Europe. The Netherlands received the largest number of asylum claims lodged by unaccompanied minors (6,705), followed by the United Kingdom (2,733) and Hungary (1,170): UNHCR, *Trends in Unaccompanied and Separated Children Seeking Asylum in Europe*, para 6. According to the International Organization for Migration (IOM), the movement in unaccompanied minors is believed to be organised by trafficking networks: IOM, *Trafficking in Migrants*, p 1.

¹²⁷ UNHCR, *Trends in Unaccompanied and Separated Children Seeking Asylum in Europe*, para 2

¹²⁸ UNHCR: *Guidelines on policies and procedures in dealing with unaccompanied children seeking asylum*, para 1.1

¹²⁹ In a report on the trafficking of unaccompanied minors for sexual exploitation in the European Union, the IOM cites the causes of the increase in unaccompanied minors migrating to the EU to include the growing demand for young people to work in the commercial sex industry, and the high incidence of minors falling victim to traffickers when they try to flee poverty, war, family conflicts, or other crises, drawn by false promises and hopes for a better life, and

Unaccompanied refugee minors are among the most vulnerable refugees and the most at risk of neglect, violence, forced military recruitment, sexual assault and other abuses and therefore require special assistance and care.¹³⁰

There is general consensus that the principles of the best interests of the child and family unity dictate that family reunification should be the primary aim for unaccompanied minors. However a key problem for unaccompanied refugee minors is the search for a durable solution—voluntary repatriation, local integration, or resettlement.

In a recent resolution on assistance to unaccompanied refugee minors, the UN General Assembly asserted that ‘the ultimate solution of unaccompanied refugee minors is their return to and reunification with their families’,¹³¹ and called upon governments (among others) to ‘exert the maximum effort’ to expedite such return.¹³²

Supporting the idea of return, Goodwin-Gill has suggested that unaccompanied minors should not necessarily be channeled into refugee status procedures because ‘social realities’ and ‘practical reasons and procedural convenience’ lead to the subordination of individual claims to the principle of family unity.¹³³ According to Goodwin-Gill,

So far as such a child may apply for asylum, the rules require priority treatment, close attention to welfare needs, and care in interviewing. Nevertheless, the child’s best interests are a primary concern. The likelihood of risk of harm in his or her country of origin must be factored in, but in many cases the most appropriate solution may still be reunion with family members who have remained behind.¹³⁴

ExCom has stressed that all action taken on behalf of refugee children must be guided by the principles of the best interests of the child and family unity.¹³⁵ According to ExCom,

... while the best durable solution for an unaccompanied refugee child will depend on the particular circumstances of the case, the possibility of voluntary repatriation should at all times be kept under review, keeping in mind the best interests of the child and the possible difficulties of determining the voluntary character of repatriation.¹³⁶

According to UNHCR,

... in seeking [an appropriate durable] solution, regard should be given to the principles of family unity and the best interests of the child. The latter requires that decisions on durable solutions for unaccompanied refugee children be taken by competent expert bodies. Cases must be thoroughly assessed on an individual basis. The procedure should permit the effective participation of the refugee child and, as with status

encouraged by the relative ease of remaining in the country of destination compared to other groups of migrants, only to end up in the sex trade, as labourers in sweatshops, or as beggars: IOM, *Trafficking in Migrants*, pp 1–2.

¹³⁰ UN General Assembly Resolution on Assistance to unaccompanied refugee minors, A/RES/54/145, 22 February 2000

¹³¹ UN General Assembly Resolution on Assistance to unaccompanied refugee minors, A/RES/54/145, 22 February 2000

¹³² UN General Assembly Resolution on Assistance to unaccompanied refugee minors, A/RES/54/145, 22 February 2000, para 6: ‘The General Assembly...calls upon all Governments, the Secretary-General, the office of the High Commissioner, all United Nations organisations, other international organisations and non-governmental organisations concerned to exert the maximum effort to assist and protect refugee minors and to expedite the return to and reunification with their families of unaccompanied refugee minors’.

¹³³ Among the reasons that he cites for this conclusion is that the best interests of the child prevail over the narrower concerns of refugee status: Goodwin-Gill 1996 p 357.

¹³⁴ Goodwin-Gill 1996 p 358

¹³⁵ ExCom Conclusion No. 47 (XXXVIII) 1987 on Refugee Children, reaffirmed by ExCom Conclusion No. 59 (XL) 1989 on Refugee Children. ExCom has also called upon States and relevant parties to respect and observe rights and principles that are in accordance with international human rights and humanitarian law, and that are of particular relevance to international refugee protection, especially to safeguarding child and adolescent refugees, including ‘the principle of the best interests of the child and the role of the family as the fundamental group of society concerned with the protection and well being of children and adolescents’: ExCom Conclusion No. 84 (XLVIII) 1997 on Refugee Children and Adolescents, para i.

¹³⁶ ExCom Conclusion on Refugee Children No 47 (XXXVIII) 1987, para j

determination, arrangements may be made for him or her to be represented. Where possible, the views of the parents or other in loco parentis should be obtained.¹³⁷

UNHCR takes the view that while family reunification is the primary aim for unaccompanied refugee children,¹³⁸ adoption can be considered under limited circumstances, namely where reunification either would not be in the best interests of the child, or is not likely to be realised within a reasonable time, normally at least two years.¹³⁹

This view has been affirmed by ExCom, which has stated that,

... adoption of refugee children should only be considered when all feasible steps for family tracing and reunification have been exhausted, and then only in the best interests of the child and in conformity with international standards.¹⁴⁰

Emphasising the primary aim of family reunification for unaccompanied minors, ExCom has stressed that,

... Every effort should be made to trace the parents or other close relatives of unaccompanied minors before their resettlement. Efforts to clarify their family situation with sufficient certainty should also be continued after resettlement. Such efforts are of particular importance before an adoption—involving a severance of links with the natural family—is decided upon.¹⁴¹

According to UNHCR, unaccompanied minors, where possible, should be released into the care of family members who already have residence within the asylum country.¹⁴² Where this is not possible, alternative care arrangements should be made by the competent child welfare authorities for them to receive adequate accommodation and appropriate supervision. Residential homes or foster care placements may provide the necessary facilities for their proper development.

National practice within the European Union appears to vary with respect to reunification of family members with a minor who has been granted refugee status. The United Kingdom, for example, considers that if the parents of an unaccompanied minor are in another receiving country the minor should be sent there.¹⁴³

The approach in Australia

Australia endorses the position that the primary aim for unaccompanied minors should be family reunification, and the importance of seeking durable solutions for these children. Importantly, formal refugee determination should not be an automatic starting point when dealing with unaccompanied minors. Contact with parents or family members, where possible, provides an

¹³⁷ UNHCR, Note on Refugee Children

¹³⁸ In 1988 UNHCR issued the first edition of its Guidelines on Refugee Children. Revised in 1994, these guidelines recognise the centrality of the CROC as a normative frame of reference for UNHCR's actions, laying down legally required standards and legally established goals. According to the guidelines, all work with children must be founded on detail and verification, and action should begin as soon as possible to trace relatives and to promote family reunification. See UNHCR, Refugee Children: Guidelines on Protection and Care. See also the UNHCR Handbook, paras 213–19, which provides guidance in relation to refugee determination processes where especially young and unaccompanied children are involved, particularly in relation to how a subjective fear of persecution might be established.

¹³⁹ UNHCR, Refugee Children: Guidelines on Protection and Care, p 131: Adoption is also not to be carried out if it is against the expressed wishes of the child or the parent, or if 'voluntary repatriation in conditions of safety and dignity appears feasible in the near future and options in the child's country of origin would provide better for the psychological and cultural needs of the child than adoption in the country of asylum or a third country'.

¹⁴⁰ ExCom Conclusion on Protection of the Refugee's Family No 88 (L) 1999, para c

¹⁴¹ ExCom Conclusion on Family Reunification No 24 (XXXII) 1981, para 7

¹⁴² UNHCR, Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers

¹⁴³ Council of Europe, Parliamentary Assembly, 'The right to family life for migrants and refugees' para 44

avenue to obtain their wishes on the best outcome for the child and may provide a more reliable indication of any protection needs for the child. Accordingly, in Australia's view, the application of the principles of best interests of the child and family unity may in many cases lead to facilitating an unaccompanied minor's quick return to his or her family in the country of origin or first asylum. Such an approach also serves as a deterrent to the exploitation of children as smuggled anchors. Australia considers that the desirability of an option to return should be explored on a case by case basis, in close consultation with UNHCR, UNICEF and the IOM..

Australia cooperates with UNHCR and other competent international organisations to trace the parents of an unaccompanied minor for the purpose of reunification. In particular, DIMIA and the Australian Red Cross work in a cooperative and collaborative manner to provide these services to unaccompanied minors. Where the location of a parent is unknown, tracing of parents or other relatives by the Australian Red Cross is requested as soon as practicable. The unaccompanied minor is kept informed by the Australian Red Cross of the process on a regular basis.

Australia seeks to ensure that any child who is seeking asylum receives appropriate assistance. Unaccompanied minors are among those whose asylum claims receive processing priority.¹⁴⁴

As with other holders of a Permanent Protection Visa granted in Australia or a Permanent Humanitarian Visa granted offshore, unaccompanied minors holding these visas are able to propose eligible family members for reunification in Australia under either the split family provisions of the Humanitarian Program, or the family reunification component of the Migration Program. Unaccompanied minors who hold Temporary Protection or Humanitarian Visas do not have access to family reunification in Australia. However, there is provision for holders of such visas to access the permanent visa regime and associated entitlement where the Minister considers it to be in the public interest.

6. FAMILY UNITY AND DETENTION

ExCom has expressed the opinion that:

If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.¹⁴⁵

In regard to children, provisions in the CROC,¹⁴⁶ which are reflected in UNHCR guidelines,¹⁴⁷ seek to ensure that no child is deprived of his or her liberty unlawfully or arbitrarily. The CROC also

¹⁴⁴ A minor (a person under 18 years of age) is able to make a protection visa application in his or her own right. The Migration Act makes no distinction between minors and adults insofar as making protection visa applications. Claims from minors, as for other applicants, are assessed on a case by case basis. In assessing claims, the decision maker will consider the age, degree of maturity and cultural background of the child, and the capacity of the child to recall past events and to communicate his or her experiences. Where the child is not able to articulate a subjective fear of persecution, the decision maker will consider objective factors, such as the circumstances of the child's departure from his or her country of origin and information about his or her country. Interviews are conducted in a non-adversarial and sensitive manner, appropriate to the age of the child. DIMIA decision makers are trained to be culturally sensitive and interpreters are used when necessary. Particular care is taken where there is evidence, or it is suspected, that a minor has been subjected to torture and/or trauma or otherwise subjected to harm. The interview allows a child to discuss freely the elements and details of his or her claim, and the decision-maker aims to ascertain the objective evidence to evaluate the child's claim. All unaccompanied minors who prima facie may engage Australia's protection obligations are provided with an adviser under the Immigration Advice and Application Assistance Scheme (IAAAS). Under IAAAS, eligible applicants (including unaccompanied minors) are provided with assistance and advice by lawyers or other suitably qualified people in preparing, lodging and presenting applications for protection visas at primary and merits review stages.

¹⁴⁵ ExCom Conclusion No 44 (XXXVII) 1986 on Detention of Refugees and Asylum Seekers, para (b)

¹⁴⁶ Article 37, CROC

provides that children shall be detained only as a 'measure of last resort' and for the 'shortest appropriate time',¹⁴⁸ and that in such circumstances they shall have 'prompt access to legal and other appropriate assistance', as well as the 'right to challenge the legality of the deprivation' and to a prompt decision on any such action.¹⁴⁹ In all but a limited number of cases, however, it is likely to be in the best interests of children to remain with their parents in detention.¹⁵⁰

According to UNHCR, in the case of children accompanying their parents, all appropriate alternatives to detention should be considered. Children and their primary caregivers should not be detained unless this is the only means of maintaining family unity.¹⁵¹ Where detention occurs, UNHCR considers that family unity and privacy are essential, even for a short stay, and families should have the possibility to stay together in the same premises.¹⁵²

The approach in Australia

In each immigration detention facility every effort is made to ensure that family groups are accommodated in separate family areas, and to ensure that asylum applications of persons in immigration detention are processed as quickly and efficiently as possible, while maintaining the integrity and robustness of the asylum procedure. Asylum applications from family units and children in their own right receive processing priority.¹⁵³

The Australian Government accepts that the best interests of the child are a paramount consideration. In certain circumstances, children in immigration detention may be released into the community on a bridging visa.¹⁵⁴ Criteria for release depend on whether a child welfare authority has certified that release from detention is in the best interests of the child,¹⁵⁵ and the Minister is satisfied that appropriate arrangements are in place for the care and welfare of the child.

¹⁴⁷ UNHCR, Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers

¹⁴⁸ Article 37(b), CROC provides that, 'States Parties shall ensure that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'.

¹⁴⁹ Article 37(d), CROC provides that 'Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action'.

¹⁵⁰ Provisions in CROC emphasise that in all actions concerning children, the best interests of the child shall be a primary consideration (Article 3), and underline the importance of keeping families together.

¹⁵¹ UNHCR, Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, p 7

¹⁵² UNHCR, Reception Standards for Asylum Seekers in the European Union, p 11. See also Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons.

¹⁵³ Processing data at different points during 2001 shows that about 80% of protection visa applications lodged by detainees were decided at primary level within 14–18 weeks of an application being made, and that some straightforward cases were advised of primary decisions within three to six weeks after lodgment. Data on processing times for family units and unaccompanied children is not separately held. A number of factors can contribute to extended detention periods, including difficulty in establishing identity and completing character and security checks, litigation, and obtaining travel documentation.

¹⁵⁴ The Migration Act and Regulations make provision for the granting of a bridging visa in certain circumstances. Subregulation 2.20(7), after specifying the range of detainees it applies to, prescribes eligible minors as those:

- (d) *in respect of whom a child welfare authority of a State or Territory has certified that release from detention is in the best interests of the non-citizen; and*
- (e) *in respect of whom the Minister is satisfied that:*
 - (i) *arrangements have been made between the non-citizen and an Australian citizen, Australian permanent resident or eligible New Zealand citizen for the care and welfare of the non-citizen; and*
 - (ii) *those arrangements are in the best interests of the non-citizen; and*
 - (iii) *the grant of a visa to the non-citizen would not prejudice the rights and interests of any person who has, or may reasonably be expected to have, custody or guardianship of, or access to, the non-citizen.*

Those persons who have exhausted all avenues of review associated with their protection visa application do not fall within the prescribed classes. In other words, those detainees who are due to be removed are not eligible for release on a bridging visa.

¹⁵⁵ The child's best interests are assessed on the particular circumstances of the individual case.

While the Minister has the power to grant a bridging visa to a child, no such power exists in relation to the child's parents where they are also in immigration detention and do not personally meet the other criteria for such a visa. A child released from detention in these circumstances would therefore be denied the protection and assistance of his or her parents.¹⁵⁶ On balance, it is generally in the best interests of children, and consistent with the principle of family unity, if they remain with their parents, family or carers where these persons are also in immigration detention, with every effort being made to ensure they are detained for the shortest possible time.¹⁵⁷

A permanent working party of senior officers of DIMIA meets regularly to undertake an administrative review of all detention cases and particularly cases of concern such as those who have been in detention for long periods, including family groups and children. DIMIA also conducts a fortnightly Unaccompanied Minors and Children's Teleconference, chaired by a senior departmental official, which deals with any issues relating to unaccompanied minors, and any special needs matters relating to children in detention including specific case management

DIMIA recently concluded a successful six-month trial of alternative detention arrangements for women and children. The Woomera Residential Housing Project (RHP) consists of a cluster of four houses within a community setting and was under the supervision of female detention staff. The Project is based on voluntary participation and provides for the needs of women and children asylum seekers from the Woomera centre who meet the criteria for participation.¹⁵⁸ To maintain the integrity of family units throughout the trial, the participants were able to regularly visit family members remaining in the detention facility. These visits were made once or twice a week, although arrangements can be made if families wished to visit more often. DIMIA has also begun to trial visits by fathers to the Project site.

Following the success of the trial, existing arrangements under the Project are being extended beyond its initial six months, and consideration is being given to expanding the number of residents able to be accommodated within the Woomera township under similar arrangements.¹⁵⁹ Consideration is also being given to an expansion of the criteria for eligibility for women and children to participate in alternative detention arrangements and for the development of further alternative detention models in other locations.

7. CONCLUDING COMMENTS

- The Refugees Convention does not contain provisions relating to family unity or family reunification. Instead, the 1951 Conference of Plenipotentiaries, which adopted the Refugees Convention, adopted a non-binding recommendation that States take necessary measures for the protection of the refugee's family.

¹⁵⁶ Article 9(1) of the CROC states *inter alia* that, 'States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.'

¹⁵⁷ According to DIMIA's Migration Series Instruction (MSI) 131, para 7.4.2, 'Where a child is in detention with his or her parents, it can be assumed that the child's best interests are served by being with their parents, except in cases of neglect or abuse ... Where there exists any evidence of neglect or abuse, the relevant Child Welfare Authority should be contacted immediately.'

¹⁵⁸ To be eligible to participate in the Project, the participants were required, as a minimum, to have made a valid application for a visa, completed health and character assessments and be waiting for a primary decision. Male family members over 12 years of age were not eligible to participate.

¹⁵⁹ Woomera RHP currently has a total capacity of 25. The total number of detainees at the RHP as at 12 August 2002 was 19, comprising 8 adult women and 11 children.

Family unity and family reunification are matters over which States enjoy discretion within the framework of their international law obligations and national asylum and immigration law and policies.

In this context, the so-called 'right' to family unity is in fact a principle which, while important, permits careful and flexible interpretation by States in accordance with their overall sovereign responsibilities, including their right to determine who may enter and remain within their territory.

- Various international instruments, including the UDHR, the ICCPR and the ICESCR, recognise the family as the basic unit upon which society is organised and its right to protection by society and by the State.

The collective right of the family to protection in international human rights instruments is deliberately expressed in broad terms to allow for national variation. However, international law does not prescribe what those measures of protection should encompass.

- International law does not provide a definition of family. At a minimum, it consists of the 'nuclear family' of husband, wife, and their dependent children.

Australia adopts generous criteria as regards the definition of the family group for the purposes of persons applying for a refugee or humanitarian visa (in Australia or offshore).

- It has been a long-standing practice in Australia, recently reinforced in legislation, to generally provide family members who accompany a refugee the same migration status as the refugee, even if they do not individually meet the refugee definition criteria.

Australia does not support the concept of presumptive derivative refugee status for the purposes of family reunification.

- Self-sufficiency among adult family members is an important element in the protection and general well-being of a refugee family.

Australia has a comprehensive and generous settlement program for permanent refugee and humanitarian entrants. Temporary refugee and humanitarian entrants are provided the core benefits and services required by the Convention.

- All action taken on behalf of a refugee child must be guided by the principle of the best interests of the child, and be consistent with the principle of family unity.

In Australia's view, it is generally in the best interests of the children to stay with their parents, family or carers, even where these persons are also in immigration detention. Children, particularly unaccompanied minors, may in certain circumstances be released into the community.

Australia supports the position that the primary aim for unaccompanied minors should be family reunification, and the importance of seeking durable solutions for these children. In Australia's view, the application of the principles of the best interests of the child and family unity may lead to facilitating an unaccompanied minor's quick return to his or her family in the country of origin or first asylum.

- International law does not recognise a substantive right to family reunification.

Refugees do not have an express right to family reunification in the country of refuge, regardless of whether they have become permanent residents of that country or only temporary residents.

While States are urged to facilitate the reunification of separated refugee families, there is no requirement for that reunification to be effected in their own territory, in particular if the refugee family can be reunited elsewhere.

- From Australia's perspective, measures to facilitate refugee family reunification must be considered in the broader context of migration policy generally, and efforts to address the rapid growth of people smuggling, unauthorised arrivals and the secondary movement of refugees.

Australia seeks to balance measures to restore the unity of refugee families with the proper enforcement of immigration controls that support national refugee and humanitarian programs that are orderly, protect those most in need, minimise abuse, and are sustainable in terms of resources and community support.

In Australia's view, provided core Convention obligations are met, developing a 'mix' of reception and protection benefits, in which there is differential treatment of refugees on the basis of factors such as secondary movement, is a reasonable and responsible approach to some of the asylum-migration challenges facing States and the international protection framework. Consistent with this view, Australia provides holders of permanent protection or humanitarian visas with access to family reunification in Australia, but not those who hold only temporary visas.