Bill C-43 – Reducing fairness for refugees and permanent residents
A Submission to
the House of Commons Standing Committee on Citizenship and Immigration
by the
Canadian Council for Refugees

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Introduction

The Canadian Council for Refugees (CCR) is a non-profit umbrella organization committed to the rights and protection of refugees in Canada and around the world and to the settlement of refugees and immigrants in Canada.

The CCR wants refugees and immigrants to be treated fairly and honourably, in a process that is independent and affordable. We believe that these are Canadian values and that treating newcomers fairly is good for Canada and good for newcomers.

Bill C-43 contains a number of provisions of concern to the CCR because they will lead to less fairness, do not honour Canada's legal obligations and deny some people the right to appear before an independent decision-maker.

No access to humanitarian and compassionate (H&C) considerations (s. 9 and 10)

Change: People who are inadmissible on grounds of security (s. 34), human or international rights violations (s. 35) or organized criminality (s. 37) cannot apply for humanitarian and compassionate considerations (or be granted H&C by the Minister on his own initiative).

Concern: These inadmissibility sections (34, 35 and 37) are extremely broad and catch people who have neither been charged with, nor convicted of, any crime, and who represent no security threat or danger to the public. While the current Act causes considerable hardship and injustice because of the breadth of these provisions, it does at least contain mechanisms by which individuals' particular circumstances can be taken into account – by grants of Ministerial relief or, in appropriate circumstances, a waiver of inadmissibility on humanitarian and compassionate grounds. This bill would eliminate both remedies. Section 18 of the bill would make Ministerial relief meaningless in most cases (see below). By also eliminating access to H&C relief (sections 9 and 10), the bill will leave no mechanism to respond to compelling humanitarian circumstances or to ensure that those who are innocent or who present no danger to Canada are not unjustly targeted.

The elimination of access to H&C will prevent consideration of the best interests of any affected child, contrary to Canada's obligations under the Convention on the Rights of the Child.[1]

Examples
Those caught by the broad inadmissibility provisions include:

- Someone who is or was a member (even at a very low level, and without any involvement with violence) of a national liberation movement such as the ANC, or a member of an organization opposed to repressive dictators such as Gaddafi or Pinochet (s. 34 – security inadmissibility).
- An employee in a government that committed human rights abuses who courageously opposed those abuses. (s. 35 – human or international rights violations)
- A child living in a refugee camp in Ethiopia, who cannot be reunited with his father who is a refugee in Canada, because the father is inadmissible on the basis that he participated in a non-violent way in the Eritrean liberation struggle. (s. 34 – security inadmissibility).[2]

> As a teenager, an Iranian girl was involved with an opposition group. She attended meetings, went to demonstrations and handed out flyers. Because of her political activities, she was arrested and imprisoned for five years in Evin Prison, where she was tortured.
>
> She later fled to Canada. She has been found inadmissible on security grounds because of her association, between the ages of 14 and 16, with the banned group.

Recommendation: Strike the amendment.

Ministerial relief (section 18)

Change: The bill brings together in one section the provisions for the Minister (of Public Safety) to exempt people from inadmissibility on grounds of security (s. 34), human or international rights violations (s. 35(1)(b) and (c)) or organized criminality (s. 37(1)). The bill also legislates a version of the decision of the Federal Court of Appeal in Agraira[3], stating that: "the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada."

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[1] Article 3 (1) of the Convention on the Rights of the Child states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." In its recent examination of this country, the UN Committee on the Rights of the Child urged Canada to "Ensure that legislation and procedures use the best interests of the child as the primary consideration in all immigration and asylum processes". CRC/C/CAN/CO/3-4, 5 October 2012, http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-CAN-CO-3-4_en.pdf

[2] For more examples, see *From Liberation to Limbo*, http://ccrweb.ca/files/from_liberation_to_limbo.pdf.

[3] Canada (Public Safety and Emergency Preparedness) v. Agraira, 2011 FCA 103, http://www.canlii.org/en/ca/fca/doc/2011/2011fca103/2011fca103.html.

Concerns:

- The wording is difficult to understand but appears designed to allow the Minister to refuse relief despite the absence of any hint that a person presents any actual danger to Canada.
- The Agraira decision of the Federal Court of Appeal is currently before the Supreme Court of Canada (decision reserved).
- The narrowing of the Ministerial relief provision completely misses the point that the inadmissibility provisions are extremely broad, and include many people who should not be considered inadmissible. Parliament's decision in creating these provisions was to cast a wide net with the definition of inadmissibility, knowing that many innocent people would be included, and then provide for Ministerial relief to exempt such people.
- It is important to recognize that people who are inadmissible on grounds of security, human or international rights violations or organized criminality are ineligible to make a refugee claim.[4] Even though they may be entitled to a Pre-Removal Risk Assessment, that assessment cannot consider whether they are a refugee under the UN Refugee Convention.[5] It is therefore essential that Ministerial relief be broad enough, and be applied appropriately, so that no refugee is wrongly caught in these inadmissibility provisions. Failure to do so makes it likely that Canada will return refugees to face persecution, in violation of our international legal obligations under the Refugee Convention.
- Narrowing Ministerial relief is not consistent with the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada has said that the broad definition of security inadmissibility was only compatible with the Charter because of the Ministerial relief provision.[6] In the view of the Court, the Minister must consider whether Charter rights would be violated if a person was denied Ministerial relief. The proposed amendment would prevent the Minister from considering Charter rights.

Recommendation:
Take the opportunity to fix the overly broad inadmissibility provisions, by providing precise definitions and full due process rights, so that people don't have to depend on Ministerial relief.[7]

Short of that, strike this amendment, or alternatively amend the Ministerial relief provisions to spell out that Ministerial relief must be provided if its denial would breach the applicant's international human rights or Charter rights, and to offer full due process rights.

> Sugunanayake Joseph, a 74 year-old widow from Sri Lanka has been found inadmissible as a member of a terrorist organization, the Liberation Tigers of Tamil Eelam. Ms Joseph was not in fact a member of the Tigers, but she supported the activities of her husband, an MP who was assassinated. Ms Joseph's husband was not actually a member of the Tigers either, but participated in an alliance that pressed for negotiations between the government and the Tigers. "Membership in a terrorist organization" is a very broad and loose category.

[4] IRPA 101(1)(f).
[5] IRPA 113(d).
[6] *Suresh v. Canada (M.C.I.)*, [2002] 1 SCR 3, paras 109-110.
[7] The Ministerial relief provision currently does not function as it should. See *From Liberation to Limbo*, pp 22-23, http://ccrweb.ca/files/from_liberation_to_limbo.pdf.

Serious criminality – loss of right of appeal to the Immigration and Refugee Board (section 24)

Change: Currently, permanent residents lose the right of appeal to the Immigration and Refugee Board (IRB) if they are sentenced to imprisonment for two years or more. The bill reduces this to a sentence of six months. The right of appeal is also lost for permanent residents who have been convicted of, or have committed, a crime outside Canada that is punishable in Canada by a maximum of 10 years or more (no matter what the length of the sentence imposed).

Concerns:

- We need a fair and transparent process, before an independent tribunal, to review removal, taking into consideration the individual circumstances.
- Crimes committed outside Canada could be minor offences, for which the person received no prison sentence or only a very short sentence. (Crimes punishable by a maximum of 10 years or more include possession of firearm knowing possession is unauthorized (92), using a false document (368) and obstruction of justice (139(2)).)
- The loss of appeal rights essentially guts the Immigration Appeal Division of jurisdiction to hear cases of permanent residents appealing loss of status on grounds of criminality. It will only have jurisdiction to hear cases of permanent residents who are sentenced to less than 6 months, for crimes for which the maximum sentence is 10 years or more.

Examples
Full appeal rights are needed in order to take into consideration all the relevant circumstances of the case, which might include:

- A person who came to Canada as a child and has lived effectively all their life in this country. They may have no family or connections in the country of their birth, and not even speak the language.
- A person who is suffering from mental health problems, which contributed to the commission of the crime.
- A person who faces excessive hardship if returned to their country of origin, because of the situation in the country, e.g. war, massive human rights abuses.
- In the case of a crime committed outside Canada, the person may have been convicted in an unfair process in another country.

Recommendation: Amend the law instead to give all permanent residents the right of appeal to the IRB.

Public policy refusals (s. 8)

Change: The Minister of Citizenship and Immigration can prohibit a specific individual from entering Canada as a visitor (or student, or otherwise as temporary resident).[8]

[8] 22.1 (1) The Minister may, on the Minister's own initiative, declare that a foreign national, other than a foreign national referred to in section 19, may not become a temporary resident if the Minister is of the opinion that it is justified by public policy considerations.
(2) A declaration has effect for the period specified by the Minister, which is not to exceed 36 months.

Concern: This provision gives too much power to one person to refuse entry to visitors. No appeal is possible. Decisions may be arbitrary and politicized. Having such broad power to refuse a person undermines the rule of law: the rules of who can enter Canada should be clear and transparent, and applied through a fair process.

We note that this amendment continues a worrying trend to place more and more power into the hands of the Minister to decide, on a purely discretionary basis, who's in and who's out.

Recommendation: Strike the amendment.

Period of inadmissibility for misrepresentation (s. 16)

Change: The period of inadmissibility is extended from two years to five years. In addition, people will be barred from even applying for permanent residence during the five year period. This means it will be even longer than five years before they can hope to obtain permanent residence.

Concern: Misrepresentation can be for a very wide range of acts or omissions. Five year inadmissibility is excessively harsh in cases of minor infractions or when the person was acting under some form of duress.

Examples

- A woman who didn't declare a husband or a child because of social and family pressures.
- An applicant who was not personally responsible for the misrepresentation, because an unscrupulous agent or even a family member filled out the forms for them.

It is worth mentioning here the related problem of R. 117(9)(d), the "excluded family member" provision. This rule prohibits a family member – even a child – from being sponsored if they were not examined by an immigration officer when the sponsor immigrated to Canada. In many of these cases, the family member was not declared and there may be an issue of misrepresentation. For excluded family members, the punishment is not two years or even five years, but perpetual.[9]

When a would-be sponsor applies for a family member who is excluded under R. 117(9)(d), the sponsor may face charges of misrepresentation. Under the proposed amendment the penalty will be far more severe. Refugees are frequently among those affected by R. 117(9)(d).

Recommendations:

- Strike the amendment.
- Eliminate R. 117(9)(d).

[9] See CCR, *Families Never to be United: Excluded family members*, http://ccrweb.ca/files/famexcluprofilsen.pdf

Inadmissibility based on inadmissible family member (section 17)

Change: This is a new provision to make people inadmissible to Canada as a temporary resident (visitor, student etc) if they have a family member who is inadmissible on grounds of security (s. 34), human or international rights violations (s. 35) or organized criminality (s. 37).

Concerns: Again, this will affect family members of people who have committed no crime.

Also practically speaking how is this going to work? If someone applies to visit Canada, is their spouse going to have to undergo security screening? How long would that take? Many people would surely be unable to visit Canada simply because the screening will take too long.

Recommendation: Strike the amendment.

Mandatory conditions - inadmissibility on grounds of security (sections 22 and 23)

Change: The bill introduces a new rule saying that a person released from detention who is subject to inadmissibility on grounds of security (report or removal) must be released under conditions. The specific conditions to be imposed will be set out in regulations.

Concerns: This is again very unfair, especially because a person can be inadmissible on security grounds for a whole range of reasons. In many cases, the person is in no way a security threat or danger to the public. Mandatory conditions don't allow the individual circumstances to be taken into account.

There is no need to impose mandatory conditions because the Immigration Division already has the authority, when releasing anyone from detention, to order terms and conditions individually tailored to mitigate any potential risk to the public.

Recommendation: Strike the amendment.

Mandatory conditions - Security certificate cases – (section 25 and 26)

Change: The bill also introduces mandatory conditions (to be defined by regulations) for persons under a security certificate who are not detained.

Concerns: As above, mandatory conditions are unfair because they don't allow the individual circumstances to be taken into account.

Recommendation: Strike the amendment.

Interview with CSIS

Change: If CIC asks, applicants must attend an interview with CSIS and answer all questions put to them.[10]

Concern: People applying for status in Canada are in a vulnerable position. All an officer needs is "reasonable grounds to believe" that the person is inadmissible on security grounds – in these circumstances, refusal to be interviewed and to answer all questions is likely to be enough to condemn the person. In some cases where the applicant is not represented by counsel, CSIS officers exploit the person's situation.

Recommendation: Amend the provision to include a statement of right to counsel within the mandatory CSIS meetings and to require that the interviews be recorded.

Security inadmissibility (s. 13)

Change:
Current inadmissibility for:

(*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;

Is changed to:

(*a*) engaging in an act of espionage <u>that is</u> against <u>Canada or that is contrary to Canada's interests</u>;

Concern: "Canada's interests" is too vague. The current definition is also vague and very broad – it is interpreted to include, for example, people who worked to overthrow a government guilty of massive human rights abuses. No one should be considered inadmissible on security grounds simply because they worked against undemocratic or brutal regimes.

[10] (2) Section 16 of the Act is amended by adding the following after subsection (2): (2.1) A foreign national who makes an application must, on request of an officer, appear for an interview for the purpose of an investigation conducted by the Canadian Security Intelligence Service under section 15 of the Canadian Security Intelligence Service Act for the purpose of providing advice or information to the Minister under section 14 of that Act and must answer truthfully all questions put to them during the interview.