



**UNHCR**

United Nations High Commissioner for Refugees  
Haut Commissariat des Nations Unies pour les réfugiés

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UNHCR Brief relating to Bill C-11, An Act to Amend the Immigration and Refugee Protection Act and the Federal Courts Act

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***Chairman Tilson, Honourable Committee Members, Ladies and Gentlemen,***

UNHCR appreciates the opportunity to provide comments relating to Bill C-11, An Act to Amend the Immigration and Refugee Protection Act and the Federal Courts Act.

The Canadian refugee status determination procedure is one of the very few which UNHCR holds up as an example to other countries. In fact, there is no other system, as a whole, which we point to as being exemplary. It has a lot going for it. While the Canadian refugee status determination system does have a number of challenges, including the significant backlog of claims pending determination that need to be addressed, let me say that the core remains solid and an excellent example for other countries to emulate. UNHCR hopes to be able to continue to refer to Canada as a bastion of refugee protection, including with regard to your refugee status determination system.

In view of the nature of the risks involved and the grave consequences of an erroneous determination, it is essential that asylum-seekers be afforded full procedural safeguards and guarantees at all stages of the refugee status determination procedures. The necessity to provide fair and efficient refugee status determination procedures in the context of individual asylum systems stems from the right to seek and enjoy asylum, as guaranteed under Article 14 of the *Universal Declaration of Human Rights*, and the responsibilities derived from the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol*, international and regional human rights instruments, as well as relevant Executive Committee Conclusions.

Currently made up of 78 members, UNHCR's governing Executive Committee in which Canada plays a significant role, meets in Geneva annually to advise UNHCR on international protection and discuss a wide range of other issues. The Programme of Action for the implementation of the Agenda for Protection adopted by UNHCR's Executive Committee in 2002 affirms that States are to grant access to asylum procedures and to ensure that their asylum systems provide for effective and fair decision-making. Numerous Conclusions of the UNHCR Executive Committee, including the 1977 Conclusion on the Determination of Refugee Status, the 2002 Conclusion on Reception of Asylum-Seekers in the Context of Individual Asylum Systems, the 1983 Conclusion on Manifestly Unfounded Applications for Refugee Status, and the 1989 Conclusion on the Problem of Refugees and Asylum-Seekers who move in an irregular manner from a country in which they had already found protection examine topics relevant to this Bill. Canada, as an active contributor

informing the work of the Executive Committee, has been closely engaged in the development and review of international norms and best practice with regard to refugee status determination. My statement today echo positions taken internationally by Canada, as reflected in UNHCR Executive Committee Conclusions supported by Canada, and promoted by Canada internationally.

UNHCR has been closely co-operating with Canada for six decades. For three of these we have directly supported your authorities in their implementation of the Refugee Convention through our office presence here. UNHCR looks forward to continuing to work closely with the Canadian authorities on the reforms planned for Canada's asylum system, including with regard to development of Regulations and other areas of engagement.

I would like to take the next few minutes to review the various proposed changes to the Immigration and Refugee Protection Act.

***With regard to time limits:***

The first amendment I wish to discuss provides for expedited time frames including the referral of a refugee claimant to an interview with an Immigration and Refugee Board official, who is to collect information and schedule a hearing in a quicker process than has previously been in place. While not specified in the Bill, we are informed that the planned change is intended to include a data gathering period of eight (8) days that replaces the Personal Information Form (PIF) process, schedules a hearing date, and completes first instance refugee status determination before a civil servant within sixty (60) days.

UNHCR advocates for fair and efficient refugee status determination procedures, including timely processing of asylum claims. Rapid processing should not, however, compromise fairness. Despite time limits, it is important that a substantive written report is made of every personal interview, containing at least the essential information regarding the application, as presented by the asylum-seeker. Based on best State practice, the asylum-seeker should have access to the report of the personal interview and his or her approval should be sought regarding the contents of the report of the personal interview. Verifying the contents of the report of a personal interview is useful not only to avoid misunderstandings but also to facilitate the clarification of contradictions.

Per the Refugee Convention and Protocol, a State's responsibility is engaged from the moment an asylum-seeker declares his or her intention to seek protection against persecution to authorities of the asylum country, be it at the border, including land, airport, seaport or within the territory. As has been underlined repeatedly by the General Assembly and UNHCR's Executive Committee, physical access of asylum-seekers to the territory of the State where they are seeking admission as refugees and, further, access to procedures where the validity of their refugee claim can be assessed, are essential preconditions of international refugee protection. Imposition of visas is clearly a sovereign prerogative. UNHCR understands the need to find effective methods of addressing unfounded claims while UNHCR supports Canada's attempts to assure access to protection for those who

genuinely need it through processes that provide alternative tools to the use of visas for persons fleeing persecution. If an asylum application is filed at an airport or seaport, the same conditions as in-country applications must be met to ensure that persons in need of international refugee protection have access to fair and effective procedures. In particular, procedural guarantees for applicants, including access to information about the procedure and assistance of interpreters, should be accessible as a right.

UNHCR advocates for efficient asylum systems, including timely processing and decision-making. Attempts to assure this must be balanced against the need for adequate time to fairly process asylum claims. Time limits should not unduly impact negatively on asylum-seekers' right to counsel and ability to review information collected prior to hearings, in turn raising concerns regarding fairness of procedures and natural justice. Formal requirements should not pose an obstacle to the exercise of the right to seek asylum. Excessively short and tight deadlines can impinge on fairness.

To illustrate concerns relating to the impact of overly ambitious processing time limitations, considering the example of credibility concerns with regard to identity of asylum-seekers and the elements of their claims is useful. This is a regular area of inquiry for decision makers, both as to admissibility to procedures and the substance of asylum claims. In the context of current procedures in Canada credibility concerns frequently have led to decision-makers seeking documentary evidence concerning asylum-seekers claims, including, for example, birth certificates or other documents which could support assertions. UNHCR regularly receives requests relating to camp registrations, asylum-seeker certificates or other documents issued by UNHCR to individuals prior to their arrival in Canada. Verifying documents takes time. Obtaining documents from abroad takes time. Development of source materials to assist with decision making in a claim takes time. It is generally recognized that country of origin information should be obtained from various sources, as to the general situation prevailing in the countries of origin of applicants. In UNHCR's view, information used as a basis for decisions should be similarly available to the asylum-seeker and his or her legal adviser or counselor, and should further be subject to the scrutiny of reviewing bodies. Noting the amended time limits proposed, it is important to assure that adequate time is provided to the asylum-seeker and his or her legal advisor to gather and submit country information as well as to review information from other sources to be used by decision-makers in assessing claims. Decision-makers should have adequate time to collect, consult and assess country of origin information meaningfully. Furthermore, while we understand the concerns over lengthy processing times and the proposals for strict and tight deadlines, we believe that for the overall process to maintain its credibility, these should not be at the expense of quality decisions.

Time constraints can be problematic where the Bill limits access to the Refugee Appeals Division for asylum-seekers from source countries listed as "safe countries of origin", and for which review through the Refugee Appeals Division is therefore not available, including with regard to review of country of origin information used in decision making. Asylum-seekers are often unable to articulate the elements relevant to an asylum claim without the assistance of a qualified legal representative or counselor because they are not familiar with the precise grounds for the recognition of refugee status and the legal system

of a foreign country. Their circumstances, vulnerabilities and special needs may also make such representation fundamental to a fair assessment of their claims for asylum. Quality legal assistance and representation is, moreover, in the interest of States, as it can help to ensure that international protection needs are properly identified. Good legal representatives can help to ensure the efficiency of procedures, highlighting key areas of claims requiring focus and narrowing the need for extensive inquiry. The efficiency of refugee status determination procedures is thus often improved.

Identifying counsel and assuring that they have a necessary period to prepare a case is important. In UNHCR's view, the right to legal assistance and representation is an essential safeguard, especially in complex asylum procedures. It is important to guarantee legal assistance and representation in procedures. Adequate provision of time should additionally be made for asylum-seekers with special needs including women, unaccompanied children, victims of torture and other traumatic experiences, and those with special needs resulting from mental or physical impairments, or detainees. Such persons generally require additional legal, as well as other, assistance. State practice usually recognizes the need for free legal assistance and/or representation in the event of an appeal of a negative decision, in some cases under certain explicit conditions specified in law. UNHCR monitoring of current procedures in Canada has identified significant constraints with regard to the availability of legal aid to asylum-seekers.

Best State practice ensures that the reasons for not granting refugee status are, in fact and in law, stated in the decision. This also takes time. Such information should be shared with the applicant as soon as necessary for allowing time to decide whether to appeal, as well as time to prepare and lodge an appeal within limits imposed by law. Time limits may result in hasty and poorly motivated decisions, given the pressure on decision makers to complete cases. In UNHCR's view, it is important that decisions are properly substantiated so that the applicant can appeal meaningfully from a negative decision.

***With regard to Governor in Council (GIC) appointees use in first instance decision-making:***

Refugee status determination undertaken by independent decision makers is fundamental to fair assessment of asylum claims. Legislation that ensures independence is an important guarantee of fairness. One of the reasons that Canada's system is exemplary now is that there is a quality first instance decision, made by independent, trained and qualified decision-makers. We believe that this focus on quality first instance decision making should continue.

UNHCR has consistently noted domestically and internationally the high quality of decision making by the IRB's Refugee Protection Division Members. While proposed amendments to legislation which replace the current appointments process with civil servants as refugee status determination authorities do not contravene any obligation of Canada internationally, UNHCR monitoring of RPD Members has noted consistent high quality decision making and found that a significant reason for this has been the independence of individual

decision-makers. In UNHCR's view this independence should be maintained. UNHCR hopes to be able to continue to promote the Canadian system as a best practice model, including with regard to the quality of decisions and decision-makers at first instance. Given the fact that asylum applications raise issues which require specialized knowledge and expertise, best State practice provides for a clearly identified authority with responsibility for examining requests for refugee status and taking a decision in the first instance. Wherever possible, this should be a single central authority. Refugee status determination should be carried out by well trained staff with specialized skills and knowledge of refugee and asylum matters, who are familiar with the use of interpreters and appropriate cross-cultural interviewing techniques. The central refugee authority should also include decision-makers with training in the treatment of applications by individuals with differentiated needs, including women, children, applicants who are victims of sexual abuse, torture or other traumatizing events, or individuals with mental or physical impairments which may negatively impact their ability to articulate a claim for asylum. The Canadian system has been commended by UNHCR, where it is sensitive to and addresses the concerns of asylum-seekers with special needs and particular vulnerabilities.

***With regard to implementation of the Refugee Appeals Division:***

UNHCR warmly welcomes the implementation of the Refugee Appeals Division. In most countries which institute individualized refugee status determination procedures, claimants have the right to an appeal before an independent and impartial tribunal or body. This supports the right to an effective remedy in law. Such an appeal instance should have the jurisdiction to review questions both of fact and law. It should be able to accept and assess new evidence, and to recognize refugees independently. In practice, the combination of specialist expertise with quasi-judicial independence has proven particularly beneficial for the quality of decision-making. Since the introduction of IRPA, UNHCR has called for an appeal on the merits, made available to all asylum-seekers whose claims are rejected at first instance. Instituting an appeal available to all persons irrespective of their country of origin represents best practice. It will further enhance Canada as a model.

UNHCR recommends that the Refugee Appeals Division should be available to all claimants, including those from "designated" or "safe" countries of origin. At the core of the Refugee Convention lies the principle of *non-refoulement*, whereby those with protection needs cannot be returned to a place where they will be at risk of human rights violations, persecution or even possible loss of lives. The purpose of a second review through an appeals mechanism is to ensure that errors of fact or law in first instance decision making can be corrected, to avoid injustice and to ensure respect for the principle of *non-refoulement*. Lack of access to the Refugee Appeals Division for asylum-seekers from source countries contained in the safe country of origin list may result in protection gaps, absent incorporation of alternative safeguards.

***With regard to a list of designated countries, the so called “safe country of origin” list:***

UNHCR does not oppose the introduction of a “designated” or “safe country of origin” list as long as this is used as a procedural tool to prioritize or accelerate examination of applications in carefully circumscribed situations, and not as an absolute bar. An accelerated procedure permits the examination of the substantive claim, in a simplified and shortened manner, i.e. normally the time taken for examination is shorter than for complex cases. If major substantive issues arise, best State practice is to transfer the claim to the regular procedure.

The safe country of origin concept is a presumption that certain countries can be designated as generally safe for their nationals insofar as it can be shown that there is generally and consistently no persecution, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict. Given the absence of significant levels of persecution in such countries, it is possible that an application for international protection by an asylum-seeker from a country of origin which is considered to be generally safe is likely to be unfounded.

However, in such situations it is critical that:

- each application involves a personal interview and is examined fully and individually on its merits in accordance with certain procedural safeguards;
- each applicant is given an effective opportunity to rebut the presumption of safety of the country of origin in his or her individual circumstances;
- the burden of proof on the applicant is not increased, and applicants have the right to an effective remedy in the case of a negative decision.

UNHCR recognizes the inherent difficulties in making an assessment of general safety. Displacement situations, and general conditions, can be volatile in many countries. Moreover, any assessment by States is susceptible to political, economic and foreign policy considerations. Therefore, if the safe country of origin concept is to be employed, there must be clear and objective benchmarks for the assessment of general safety and mechanisms for the regular review of assessments. The process must be flexible enough to take account of changes, both gradual and sudden, in any given country.

Country conditions can and do change rapidly. Constraints on appeal, including those that may relate to time or access to multiple levels of appeal, are of particular concern if they proscribe assessment in situations of changed circumstances in the country of origin. Such changes may result in valid protection needs for individuals, as refugees sur place. Ultimately, whatever procedures a State may enact, the principle of non-refoulement prohibits the return of an individual to persecution. A limitation in law or practice that results in refoulement breaches international obligations. Thus, if access to appeal review is restricted, other mechanisms become necessary to review protection needs in situations of changed circumstances after a negative first instance decision.

Separated and unaccompanied children require special procedural safeguards, including the application of the principle of the “best interest of the child” throughout the whole asylum procedure in accordance with the 1989 Convention on the Rights of the Child. A guardian ad litem or similar mechanism should be incorporated in all such situations, with an appointee who has specialized skills, preferably being the same individual or body from the time of admission to territory and procedures through assessment of claims and where appropriate, beyond.

The designation of a country as a safe country of origin cannot establish an absolute guarantee of safety for nationals of that country; it can only take into account the general civil, legal and political circumstances in a country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned. As such, an application by an asylum-seeker from a designated safe country of origin must nevertheless be subject to an individual and thorough examination in which the presumption of safety can be rebutted. Therefore, designation of a country as a safe country of origin cannot be a ground for inadmissibility to process. Where it may be a ground for the prioritization and/or acceleration of the examination of the application, the examination must comply with the basic principles and guarantees of law.

It may be that despite general conditions of safety, for some groups or relating to some forms of persecution, the country may remain unsafe. For example, despite the best efforts of a democratic government, harmful traditional practices such as female genital mutilation may prevail. Similarly, a country with democratic institutions and legislative protections relating to gender concerns may none the less in practice be unable or unwilling to protect individuals from biases and prejudices against homosexuality that result in persecution. In such circumstances it is UNHCR’s view that legislation should assure greater access to assessment mechanisms for those with heightened risk profiles.

A designated safe country of origin can only be considered to be safe for a particular applicant if, after an individual examination of the application, it is found that the applicant is a national of that country, and has not submitted any serious grounds for considering the country not to be a safe country of origin in their particular circumstances. In such circumstances examination of concerns relating to statelessness are an important aspect of assessment. Modalities for the application of the safe country of origin concept should ensure that applicants have an effective opportunity to rebut presumptions of safety with regard to their own individual circumstances.

With regard to the designation of a part of a country as safe, UNHCR considers this problematic. A country cannot be considered safe if it is so only for part of its geographic territory. Further, UNHCR emphasizes that the designation of a safe part of a country does not necessarily represent a relevant or reasonable internal flight alternative. The existence of a safe part of a country is but one element in an examination of whether a particular applicant has such an alternative. Complex questions which arise in the application of the

internal protection alternative require a careful examination of an individual case in the regular procedure and should not be dealt with in an accelerated procedure.

UNHCR recommends that States inform all applicants at the outset of the asylum procedure when their country of origin has been designated as, or is considered to be, a safe country of origin; and explain the implications for the examination of the application. Applicants should be given an effective opportunity to consult a legal adviser in this regard. States should offer all applicants from designated safe countries of origin the opportunity of a personal interview, in which they are explicitly asked whether there are any grounds for considering that the country is not safe in their particular circumstances, thereby giving an effective opportunity to rebut the presumption of safety.

The concept of safe country of origin also has an evidentiary impact as it requires the applicant to rebut the presumption that the country of origin is safe with regard to his or her particular circumstances. This should not result in an increased burden of proof on the applicant. The shared duty between the applicant and the determining authority to ascertain the facts still remains.

In view of the need to take account of both gradual and sudden changes in a particular country, States should have in place appropriate mechanisms for the review of safe country of origin lists, as well as benchmarks and criteria that would trigger and inform such a review. Mechanisms providing for both periodic and urgent review of country situations to assure the appropriateness of ongoing designation are therefore fundamental.

***With regard to removal and to the one year bar on access to PRRA and H&C review subsequent to a negative final determination by the IRB:***

UNHCR guidance is that an asylum-seeker should have access to a first instance decision, followed by an appeal in case of a negative decision. As a good practice, there should be a mechanism in place for addressing any gaps and to provide a catch basket for failure of the system to identify protection needs, and to address needs that may arise subsequent to IRB decision-making, for example with regard to refugees sur place. It is important to ensure a discretionary mechanism whereby individuals in need of and deserving of recognition as refugees, who are none the less not recognized through regular processing, can be protected.

Circumstances that force people to flee their country are frequently complex and often of a composite nature. Information obtained during an examination of a claim under the Refugee Convention could also be relevant for the examination of complementary or subsidiary protection needs. Basic procedural guarantees should apply equally to any request for international protection. Therefore, it is advisable that all forms of international protection which are available in a national legal system be decided upon by the same competent authority in one single procedure with the same minimum guarantees. Thus, each case should be considered in its entirety with regard to both Refugee Convention grounds and complementary or subsidiary protection needs. Such an approach should increase efficiency and possibly reduce the costs of decision-making in asylum matters.

UNHCR notes that effective return policies and practices are essential to maintain the integrity of refugee status determination procedures and “asylum space”, and that it is appropriate for States to remove those determined not to be in need of protection where they have had access to full and fair procedures, and where there is a finding that they are not in need of or deserving of protection. This should include access to an appeal that includes assessment of the merits of their claim. Lodging an appeal should have a suspensive effect on removal processes, until such time as there is a final outcome.

In the 2003 Executive Committee Conclusion on the Return of Persons found not to be in need of International Protection, the following is noted:

- the efficient and expeditious return of persons found not to be in need of international protection is key to the international protection system as a whole, as well as to the control of irregular migration and prevention of smuggling and trafficking of such persons;
- the credibility of individual asylum systems is seriously affected by the lack of prompt return of those who are found not to be in need of international protection;
- removal procedures should be in accordance with human rights norms and should not infringe the dignity of the returnee. Treatment in accordance with human rights principles in general (as enshrined in the Universal Declaration on Human Rights) and the standards set forth in the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture (CAT) is necessary;
- in all actions concerning children, the best interests of the child shall be a primary consideration;
- that States parties to the 1951 Convention and/or its 1967 Protocol facilitate the return of persons found not to be in need of international protection by providing facilities for the transit of such persons taking into account, where applicable, agreements concerning the mutual recognition of asylum determination decisions;
- the importance of ensuring the sustainability of returns and of avoiding further displacements in countries emerging from conflict;
- that phasing returns of persons found not to be in need of international protection can contribute to avoiding further displacement;
- that once a person found not to be in need of international protection has made an informed decision to return voluntarily, this should take place promptly;
- any discussion of the removal of failed asylum-seekers best practice is predicated on the existence of a fair, efficient, timely process of refugee determination involving a full and inclusive application of the Geneva Convention definition that specifically maintains the principle of *non-refoulement* contained in Article 33, which provides: ‘No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

***With regard to Assisted Voluntary Return:***

The Assisted Voluntary Return (AVR) programme is an important mechanism to support return of failed claimants in a manner which helps them to re-integrate effectively. UNHCR supports the Assisted Voluntary Return programme which has been introduced through the Bill. UNHCR considers that sensitive counseling at all stages of the asylum process is necessary, including for those subject to removal procedures. This includes counseling and other incentives to promote the voluntary return of persons not in need of international protection, the value of which should not be underestimated. In this regard, NGOs may have an important role to play that is particularly worthy of support.

***Chairman Tilson, Honourable Committee Members,***

I thank you again for providing UNHCR with the opportunity to address our comments regarding the contents of Bill C-11 to you today.

*End of brief*