**Protecting rights in a fair and efficient refugee determination system**
**Submission on Bill C-11**

5 May 2010

## INTRODUCTION

*The need for reform?*
All those committed to refugee protection in Canada agree that the current system is in need of improvement. The Canadian Council for Refugees has been calling for an appeal on the merits for over twenty years. We therefore welcome the inclusion in Bill C-11 of access to the Refugee Appeal Division. We are also painfully conscious of the very long delays currently faced by refugee claimants waiting for determination and we support the goal of speeding up access to a hearing.

Bill C-11 however has been presented not just as an improvement to the system, but as a response to an alleged crisis in the refugee system. We reject the notion that the system has been "broken" by abusive claims. The rhetoric about "abuse" and "bogus clams" is inaccurate and tarnishes Canada's reputation as a defender of refugees.

Refugees are among the most vulnerable people in society and are easy targets for attack, as non-citizens in a foreign country. Disparaging labels, especially coming from government, profoundly damage public perception of refugees, and non-citizens in general.

We call on the Minister of Citizenship and Immigration to live up to his responsibility to promote Canada's compliance with its obligations towards refugees.

Insofar as the refugee system has become intolerably backlogged, a large part of the responsibility lies with the government, which controls appointments and reappointments of decision-makers. As the Auditor General documented in her March 2009 report, the high turnover and the failure to appoint sufficient members to the Immigration and Refugee Board "had a significant impact on the Board's capacity to process cases on a timely basis."[1]

We note that the announcement of the proposed refugee reform is accompanied by a welcome commitment to increase funding for the system. The benefits of faster processing could also be achieved if the increased funding were applied to the current system.

Not everyone who makes a claim needs protection but that does not make them "abusers". Refugee claimants may have compelling reasons for leaving their country, even if they do not meet the narrow refugee definition. People are often forced to leave due to violence or a desperate economic situation, perhaps with some Canadian complicity, for example due to unfair

[1] 2009 March Status Report of the Auditor General of Canada, Chapter 2—The Governor in Council Appointment Process, 2.102, http://www.oag-bvg.gc.ca/internet/English/parl_oag_200903_02_e_32289.html

trade arrangements. Many claimants face overwhelming hardship or danger at home even if that hardship or danger doesn't fall within the restricted legal definition of persecution or risk under Canadian and international law.

We also challenge the assertions that claimants are taking advantage of Canada's generosity or necessarily costing taxpayers huge sums of money. Many claimants find work quickly, often accepting difficult, low-wage jobs, which Canadian employers have trouble filling. Claimants who work pay taxes that go towards services and benefits enjoyed by Canadians, but for which the claimants themselves are often ineligible.

*The goal of reform*

There is general agreement that a good refugee determination system is one that fairly and quickly determines who needs refugee protection.

Do the proposals presented by the government meet that goal? Bill C-11 contains some positive elements, but also several serious flaws that would put refugees, particularly the most vulnerable, at risk of being deported to persecution.

Some provisions would also make the system more inefficient. A number of provisions would likely lead to a great deal of litigation.

The primary concern, however, must be the need to respect refugee claimants' human rights. People's lives are at stake. We must ensure that all refugees are protected.

As we will detail fully below, key proposed changes in the system unfortunately combine to greatly increase the chances of vulnerable refugees being denied protection. Take the case of a woman who was the victim of sexual violence in a "designated country". She is interviewed and then rushed to a hearing before she is ready to testify frankly about her experiences and before adequate documentation about the situation of abused women in that country can be collected. Her case is decided by a civil servant who is aware that the government considers claims from this country to be unfounded. Once rejected, no appeal is available to review whether an error was made or to hear new evidence, received after the hearing, that confirms her fears of persecution. She is also barred from applying for humanitarian and compassionate consideration for 12 months and is, in fact, removed within those 12 months.

**Checklist for good refugee determination**

- Accept that refugee determination is difficult: it is rarely obvious who is a refugee.
- Assess each case on its individual merits.
- Invest in high quality initial decisions: get it right the first time.
- Keep it non-political: have an independent body make all decisions.
- Keep things simple: avoid unnecessary rules.
- Put the necessary resources in place: avoid backlogs.
- Remember that human lives are at stake: adhere to human rights standards.

*Refugees overseas*
We welcome the government's announced intention of increasing the numbers of refugees resettled from overseas. However, we reject the proposed trade off of refugees in Canada against those overseas. Wherever they are in the world, refugees have the same needs: protection and a durable solution. Canada has specific legal obligations towards refugees who are in Canada, so it is wrong to suggest that protections in Canada can be sacrificed in favour of refugees abroad. We have a moral responsibility towards refugees elsewhere in the world. We could and should do more to resettle refugees, without reference to changes in the in-Canada system.

We also note that there are serious problems in how Canada is treating refugees overseas – problems that are largely being ignored in public discussion of Canada's refugee system. Refugees seeking resettlement and family members of refugees abroad face intolerable delays in some regions. The CCR highlighted this problem in its recent report, *Nairobi: Protection delayed, protection denied*. There are furthermore longstanding concerns over the low quality of decision-making on refugee cases at some visa posts. This issue was examined by the CCR in its report, *Concerns with refugee decision-making at Cairo*.

## COMMENTS ON PROVISIONS IN BILL C-11

### 1) Interview at Immigration and Refugee Board (IRB)

S. 11(2), replacing IRPA 100(4). Also S. 20, amending IRPA 161(1) re. issuance of rules.
According to the CIC backgrounder: "individuals who are determined to be eligible to make an asylum claim would meet with a public servant at the IRB within eight days of being referred to the IRB. During this information-gathering interview, information on the claim would be collected, forms properly completed and a hearing scheduled before another public servant at the IRB within 60 days."

The proposed legislative amendment does not specify the 8-day timeline for the interview, nor the purpose or limits of the interview: these points would appear in the Rules.

**Concerns**
The proposed 8-day interview raises serious concerns on grounds both of fairness and efficiency.

Experience teaches us that many refugee claimants are not ready for a detailed interview on the basis of their claim after 8 days. This is particularly the case for some of the most vulnerable refugees.

It is well-established that people suffering from post-traumatic stress disorder often have difficulty providing coherent and consistent responses to questions about their experiences. Survivors of torture and of other traumatic events need time to prepare themselves properly for these types of questions. For these refugees, the 8-day interview will likely result in misleading and incomplete responses, and may also cause retraumatization.

The Immigration and Refugee Board's Guideline on Procedures with Respect to Vulnerable Persons (Guidelines 8) calls for procedural accommodations for vulnerable people, including survivors of torture. However, the Guideline depends upon claimants being identified as vulnerable – something that could not happen within 8 days.

Some women will have particular difficulty with the 8-day interview. Some women claimants arrive in Canada with limited experience talking to authority figures and are too intimidated to speak freely. Women also may have feelings of shame that make them reluctant to disclose important experiences, such as rape or domestic violence.

**Impact of trauma**
Marie[2] arrived in Canada with little formal education, unable to speak English or French. At her refugee hearing, she was confused by the questions and gave unsatisfactory answers. She was found not credible and her claim was denied.

Marie's full story only came out after the hearing. She had been gang-raped for three days in police detention in the Democratic Republic of Congo. Marie's experience left her traumatized and terrified of people in authority. Her feelings of shame made her reluctant to discuss her experience of sexual violence.

Marie was able to talk freely only after her lawyer had spent many hours gaining her trust. She had also by then begun counselling and had the support of a close friend.

Claimants who have fled persecution on the basis of their sexual orientation or gender identity or expression similarly often can't talk openly about their experiences shortly after their arrival.

Refugees may have a well founded fear of government officials based on their past experiences of persecution. That fear may be too deep-seated to be set aside immediately simply because the officials in front of them are Canadian.

Most claimants would not have time to engage a lawyer before the 8-day interview, forcing them to attend the interview unrepresented. Many will desperately turn to whoever is at hand for advice about the interview, and may well get bad advice. There is also a strong danger that unscrupulous persons may prey on claimants' vulnerability, charging them large sums for incompetent services. CCR members are regularly dealing with problems caused by claimants having been given bad advice: these problems are only likely to multiply with the 8-day interview.

Competent lawyers play a vital role in making the refugee determination system work fairly and efficiently. They spend many hours talking to their clients in order to develop a relationship of trust and to find out what among all the many things that have happened to them are relevant to the refugee definition. Most refugees, like most Canadians, have only a vague idea about the

[2] Names throughout have been changed to protect identities.

refugee definition. They have not analyzed their experiences to understand which aspects are the most important for their refugee claim.

It therefore seems likely that the 8-day interview, if implemented, will prove expensive and ineffective. If the interviews are short, little useable information will be collected. On the other hand, if the intention is to be comprehensive, interviews will last many hours (and still often fail to gather the most relevant information for a refugee determination).

The 8-day interview will also create significant practical problems. Availability of interpreters is likely to be a challenge, as it will be difficult to find interpreters at such short notice for fluctuating language needs.

It will also be difficult for the IRB to deal fairly with claimants outside the major centres. The Board has offices in only a limited number of cities, but claims are made in many different places. It is unreasonable to expect either claimants to travel to a major centre (perhaps even in a different province) or the Board to fly in an official to conduct an interview within 8 days of every claim made. In addition, the challenge of quickly finding interpreters is even more severe in smaller centres. The use of videoconferencing or telephone for the interpretation would disadvantage the claimants.

Based on previous experience, the CCR is sceptical of ambitious timelines advertised in plans for a new system. Practical realities relating to case management usually thwart such plans. For example, the government in 1989 launched a new refugee determination system with optimistic expectations that claimants would within days of arrival pass through the "credible basis" screening test. Delays immediately started to accumulate, and claimants were soon waiting weeks and even months for a decision. (In 1992, Parliament abolished the "credible basis" step, recognizing that it was expensive and ineffective.)

Similarly, in 2002 the *Immigration and Refugee Protection Act* legislated automatic referrals to the Immigration and Refugee Board after three days if an eligibility decision had not been made. The goal was to avoid claimants having to wait weeks or months for referral when immigration officials got backed up. However, Citizenship and Immigration Canada quickly found a way around this: they sent claimants away with a date for an interview weeks later, and started the legislated 3-day clock only when the claimant returned for the appointment.

Furthermore, we foresee the potential for the interview to engender substantial litigation. The courts may be asked to clarify what may or may not happen at the interview, and how the record of the interview may or may not be used in the refugee determination. All this adds needless complexity, cost and delay.

Finally, we underline the danger of having a legislated interview with no defined purpose or parameters. Parliament is being asked to legislate a step in the process, without any control over what it might be used for in the future.

**RECOMMENDATION**

1. Delete the reference to an interview in the law.

We note it is still possible to hold interviews without including this in the law. For example, in Montreal the Immigration and Refugee Board has for several years called claimants in for a scheduling interview. This is used to make sure claimants are aware of what is required of them in the process.

**2) Fixing of date of hearing**

**Concerns**
Refugees need to get faster hearings than at present: it is intolerable that many claimants are being forced to wait years for a decision on their refugee claim. However, the proposal to have hearings scheduled 60 days after the interview is neither realistic nor fair for many refugees. It will be particularly problematic for refugees who have experienced serious trauma such as torture, and refugees who need to build trust in order to be able to testify freely, such as women who have experienced sexual assault. Lesbian, gay, bisexual, transgender or transsexual (LGBT) persons also often hesitate initially to talk about their experiences, because of a lifetime of fear of the consequences. Many of the same concerns raised in the context of the 8-day interview apply also to 60 day hearings.

For survivors of torture, an expert report may be extremely helpful in the refugee determination process. This is recognized in the Immigration and Refugee Board's Guideline on Procedures with Respect to Vulnerable Persons (Guideline 8), which states:

> A medical, psychiatric, psychological, or other expert report regarding the vulnerable person is an important piece of evidence that must be considered. Expert evidence can be of great assistance to the IRB in applying this Guideline if it addresses the person's particular difficulty in coping with the hearing process, including the person's ability to give coherent testimony. (8.1)

It is unrealistic to expect that such experts' reports can be available within 60 days. Someone would need to identify the claimant's vulnerability and refer them to an appropriate expert. The expert would need to schedule one or more meetings with the claimant, and then prepare the report. If the refugee hearing is held before there has been time for the report to be prepared, decision-makers will be without an important piece of evidence that can help them make the right determination, and survivors of torture and other trauma are more likely to be retraumatized by the hearing process.

It is also important to take into account the time needed to find and engage a lawyer, especially in cases when claimants are dependent on legal aid. Procedures and timelines vary by province, but in many cases the provincial legal aid authorities take several weeks to approve a claimant's eligibility.

Refugees need to gather documentation, both on their individual case and on country conditions. This often takes time to do properly. This is particularly true for claimants from countries, or regions within countries, from which it is more difficult to get documentation promptly, for example a rural area with limited communication or a region where communication has been disrupted by conflict or disaster.

The length of time necessary to collect documentation also depends greatly on the type of case. Claimants fleeing a situation that is well-documented in the human rights reports and frequently seen before the Immigration and Refugee Board may be able to present documentation relatively quickly. On the other hand, women fleeing gender-based persecution in a country where little attention is paid to women's rights will likely need more time. Similarly, there is only limited documentation on the situation of LGBT persons in some parts of the world. The same difficulties in collecting documentation apply for claimants fleeing emerging patterns of human rights violations, or from a small and neglected ethnic minority.

**Gathering evidence**

Flora fled to Canada from Peru to escape brutal violence at the hands of her husband. To be accepted as a refugee, she needed evidence to show that she was still at risk. It took her lawyer several months to obtain an expert report from a Peruvian women's rights lawyer, affidavits from Flora's family members detailing ongoing threats, and proof that her husband would be able to track her down anywhere in the country. Research needed to be done, affidavits prepared, documents translated.

Flora won her refugee claim. She likely would not have been accepted if she had not had enough time to gather the evidence that showed she was at risk throughout Peru.

Rushing to conduct a hearing before the claimant is ready or evidence is collected will lead to more bad decisions, which will need to be corrected on appeal. It is better to take the time needed to get the decision right the first time.

Alternatively, Immigration and Refugee Board members will be forced to adjourn the 60-day hearing on the basis that it would be unfair to have the claim go ahead when the evidence is reasonably accessible, but more time is needed. This would result in significant waste of precious hearing room time.

The CCR is also sceptical about the feasibility of a 60-day rule, from the perspective of the IRB. As with the 8-day interview, there will be serious practical challenges in guaranteeing the availability of a decision-maker, an interpreter and a hearing room 60 days after each interview, given fluctuations in the numbers of claims made.

It is more efficient, as well as fairer, to schedule hearings based on an assessment of the needs of the individual case – some are ready to proceed very quickly, others require more time. It is wasteful to schedule a hearing and then have to postpone.

**RECOMMENDATION**

2. Schedule hearings taking into account when they will be ready to proceed.

**3) First instance decision makers**

S. 26, adding IRPA s. 169.1

According to Bill C-11, first instance decision-makers would be civil servants, rather than Governor-in-Council (GIC) appointees. Members of the Refugee Appeal Division (RAD) would be appointed by Cabinet (i.e. GIC appointees).

**Concerns**

The CCR welcomes the move away from problematic political appointments. The IRB has repeatedly been hampered by government failure to make timely appointments. The Auditor General in her 2009 March Status Report summarized this concern as follows:

> At the Immigration and Refugee Board of Canada, turnover and vacancy rates for GIC-appointed positions are higher now than in 1997, when we first raised them as serious concerns. They have significantly contributed to increased delays in rendering decisions and an exceptionally high inventory of unprocessed refugee claims and immigration appeals.[3]

In addition to the delays in appointments, the current process is tainted by partisan and political considerations, and does not necessarily result in the appointment of the best candidates.

However, assigning refugee determination to civil servants is fundamentally problematic because they lack the necessary independence. Canada has become a model for countries around the world with its current system of initial refugee decisions made by a fully independent board – this important asset would be lost under the government's proposal.

Refugee determination systems using civil servants in other countries have proven unsuccessful, with a large number of initial decisions overturned on appeal. For example, 28% of asylum decisions in the UK were overturned on appeal in 2009.[4]

Appointments under the *Public Service Employment Act* may bias the Board because applicants will come from the civil service and bring with them the perspective of their previous department.[5]

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[3] 2009 March Status Report of the Auditor General of Canada, Chapter 2—The Governor in Council Appointment Process, http://www.oag-bvg.gc.ca/internet/English/parl_oag_200903_02_e_32289.html

[4] http://www.homeoffice.gov.uk/rds/pdfs09/immiq309suppa.xls

[5] We already see how that works in the Immigration Division (ID), which is made up of public servants. Several ID members were prior to their appointment lawyers appearing before the IRB on behalf of the government, where they argued against persons appearing before the Board, On the other hand, very few members previously appeared before the IRB on behalf of those persons. This is because those representing the Minister against the applicants are within the civil service and therefore have access to these appointments.

The IRB has benefitted from the expertise of members with impressive CVs, who come from a range of fields, such as academia, human rights or social service. Limiting appointments to civil servants will exclude some of the most highly qualified potential decision-makers.

The question of appointments to the RAD remains unresolved. Under this bill, they would remain problematic political appointments.

**RECOMMENDATION**

3. Amend the Act so that RPD and RAD members are appointed for a fixed term by the Chairperson of the IRB. The Chairperson would be required to appoint only the most highly qualified candidates recommended by a selection committee, according to clear criteria established in law. Candidates could be from the civil service or from outside the civil service.

**4) Designated countries of origin**
S. 12, adding new IRPA 109.1.

Bill C-11 would empower the Minister to designate countries whose nationals would not have access to the refugee appeal. Although Citizenship and Immigration Canada's backgrounder refers to "safe countries of origin", neither the word "safe" nor any criteria are included in Bill C-11. The bill also allows the Minister to designate one part of a country or a class of nationals from a country.

**Concerns**
A two-tier system, which denies some claimants access to the appeal based on nationality, will be unfair.

Treating claimants differently based on country of origin or membership in a class is discriminatory. Refugee determination requires individual assessment of each case, not group judgments. Claimants from designated countries will face a bias against them even at the first level, since Board members will be aware of the government's judgement on the country. Denial of fair process to these claimants may lead to their forced return to persecution, in violation of human rights law.

Introducing discriminatory measures into the refugee determination system runs directly counter to the principle of non-discrimination which lies at the heart of refugee protection. The very first paragraph of the preamble in the Refugee Convention states:

> Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

Consistent with that principle, article 3 of the Convention (to which Canada is party) states:

> The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Claimants that will be particularly hurt include women making gender-based claims, and persons claiming on the basis of sexual orientation. In many countries that otherwise seem fairly peaceful and "safe", there can be serious problems of persecution on these grounds. For example, years after Ecuador adopted constitutional protections against discrimination on grounds of sexual orientation (1998), international human rights organizations were documenting cases of State agents torturing and extrajudicially executing LGBT people.[6]

Claims from countries that generally seem not to be refugee-producing are among those that most need an appeal, due to difficult issues of fact and law, such as the availability of state protection. This is the case, for example, with claims from Mexico, where the Federal Court has repeatedly overturned decisions of the Immigration and Refugee Board because of a failure to apply appropriately the test on state protection. The question of the availability of state protection in Mexico remains very confused and cries out for a decision at the Refugee Appeal Division that could set a precedent and clarify matters for the Refugee Protection Division.

Having a list of "safe countries of origin" politicizes the refugee system: there will be new diplomatic pressures from countries unhappy about not being considered "safe". It is a mistake to politicize the refugee system.

There may also be litigation about whether a country is correctly deemed safe, or whether safe country of origin provisions are discriminatory.

As currently drafted, the amendment basically gives the Minister a blank cheque to designate any country, part of a country or group within a country, based on political considerations or whim. No criteria are established, the word "safe" is never mentioned and there is no required process (the designation is explicitly exempted from the *Statutory Instruments Act*). No effective judicial oversight is possible. Parliament would be irresponsible to pass this amendment, since it would allow future Ministers to use the provision in ways intended neither by the current Minister nor by Parliament.

It should be noted, however, that the addition of criteria into the legislation would not make the safe country of origin provisions acceptable. Experience with the application of the safe third country criteria has shown that the courts consider the government to be authorized to interpret the criteria as it chooses. The criteria therefore do not meaningfully constrain the ability of the government to designate a country.[7]

It is possible that excluding claimants from the appeal may in fact be more expensive and time-consuming than granting them access to the appeal. It can be fairly assumed that the Federal Court will rarely intervene in cases where claimants have had a chance at a refugee appeal. On

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[6] Amnesty International, 2000 – 2004.

[7] *The Queen v. Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe*, 2008 FCA 229, 2008-06-27

the other hand, the Court may well feel that they must scrutinize more closely the cases of claimants denied an appeal, since judicial review represents the only recourse. Federal Court proceedings are costly (involving not just the expense of the Court, but also significant legal expenses for the government as the process is formally adversarial). Court proceedings are also quite time-consuming, especially if leave is granted. The Refugee Appeal Division represents a more efficient forum for ensuring review of a rejected claimant's case.

The CCR is aware that, from time to time, there are problems with patterns of unfounded claims being made. In fact, the CCR has in the past repeatedly raised this issue with the government and called for appropriate action. Often the claimants themselves are victims of unscrupulous agents who charge large sums of money and give them false information about Canada (for example, telling them that Canada is seeking workers and that the agent will manage the process).

However, the proposed amendment is, in the view of the CCR, neither a fair nor an effective way to address the issue. The principal problem in addressing these claims lies not with the refugee determination system, but rather with the lack of coherent enforcement action (and inadequate efforts to provide accurate information in the originating communities). CCR members regularly see such claimants quickly refused in the refugee determination system, but thereafter the claimants wait months or even years to be called in for removal proceedings.

**RECOMMENDATION**

4. Delete provisions relating to designated countries of origin.

5. To address concerns about manifestly unfounded claims, amend the Act to give authority to the Minister of Public Safety (CBSA) to identify a limited number of claims (say 5%) that the IRB would be required to hear on a priority basis.

In practice, the IRB has been prioritizing some claims, which is improper for an independent tribunal, as it puts it into the position of pre-judging claims that it should hear in an unbiased way. It is more appropriate that this prioritization be done by CBSA, which is the agency responsible for enforcement. It may also help CBSA to be more coherent in its analysis of which cases should be a priority for enforcement action. CBSA should designate the claims on a case-by-case basis, to avoid the conceptual and practical problems of designating countries (or parts of countries, or classes of individuals).

**Safe country of origin in Europe**

In announcing Bill C-11, the Minister of Citizenship and Immigration noted that many European states "use a safe country of origin policy to accelerate asylum procedures for the nationals of certain countries."[8]

[8] The following countries were specifically mentioned: United Kingdom, Ireland, France, Germany, Greece, the Netherlands, Norway, Switzerland, Denmark and Finland. CIC, Backgrounder, Safe countries of origin, 30 May 2010, http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010-03-30b.asp

The application of the safe country of origin principle in European Union states has been controversial and vigorously criticized by various domestic and international organizations.

Based on their country of origin, claimants are placed in an accelerated procedure with reduced safeguards. They are often detained and deprived of social benefits. Their right to appeal is compromised because they are removed before the appeal is heard.

**Safe country of origin is discriminatory**
Many groups have criticized the provision on the basis that it is discriminatory.

In France, for example, the Commission national consultative des droits de l'Homme has consistently and firmly opposed the notion of "safe country of origin" and finds the principle "contrary to the provisions of the Geneva Convention with respect to non discrimination of claimants according to the country of origin."[9]

**Unclear standards for assessing the country of origin**
In a recently released report UNHCR found "significant divergence" in the criteria applied by EU states when assessing third states as safe countries of origin. [10] Some criteria do not meet the minimum standards contained in the EU Asylum Procedure Directive[11] and fall short of meeting the country's obligations under international refugee and human right law.[12]

In the UK, the designation of some countries as safe is contradicted by the Home Office's own assessment recording a high degree of human rights violations by the police and the internal security forces.[13]

In 2008, in response to a legal challenge by a refugee rights group, the Conseil d'État in France ordered the removal of Albania and Nigeria from the safe country of origin list, on the basis that those countries could not be considered safe given the unstable political and social context in those countries.[14]

**Lack of transparent mechanism to regulate the designation process**
The UNHCR finds "an absence of clear provisions for reviewing the safety of countries, including which criteria would trigger a decision to add or remove a country from the list."[15]

[9] Commission nationale consultative des droits de l'Homme, *Avis sur les conditions d'exercice du droit d'asile en France*, 29 June 2006, para 15, http://www.cncdh.fr/IMG/pdf/06.06.29_Avis_Droit_d_Asile.pdf
[10] UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, March 2010, para 68, http://www.unhcr.org/4ba9d99d9.pdf
[11] Council Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status.
[12] UNHCR, supra note 10, para 68
[13] Justice**,** *Inquiry into Asylum and Immigration Appeals, Committee on the Lord Chancellor's Department,* April 2003, para 10, http://www.justice.org.uk/images/pdfs/appeals.pdf
[14] Conseil d'État, Decision N° 295443, 16 January 2008, p.3, http://www.ofpra.gouv.fr/documents/CE295443Forum.pdf
[15] Ibid.

With respect to procedures to assess designated states, the UNHCR further concludes that there is "an apparent lack of regulation, transparency, and accountability in the process."[16]

Amnesty International France has complained about the lack of any mechanism in France to conduct a rapid review of the list in case of change in circumstances.[17]

**Lack of safeguards for claimants from safe countries of origin**
Reviewing compliance with the Covenant on Civil and Political Rights, the UN Human Rights Committee has stated that "in order to afford effective protection under articles 6 and 7 of the Covenant, applications for refugee status should always be assessed on an individual basis and that a decision declaring an application inadmissible should not have restrictive procedural effects such as the denial of suspensive effect of appeal (articles 6, 7 and 13 of the Covenant)."[18]

### 5) Refugee Appeal Division
S. 13-14, amending IRPA 110

The Refugee Appeal Division (RAD) would (finally) be implemented and would be able to hear new evidence, taking on the role of the Pre-Removal Risk Assessment (PRRA). The RAD would also be able to hold a hearing.

**Concerns**
An appeal on the merits is necessary to correct the inevitable errors at first instance: the implementation of the RAD created by Parliament in 2001 is long overdue.

**The fatal cost of denying an appeal**
Grise, a young Mexican woman, sought refuge in Canada from drug traffickers, who were persecuting her family. She was refused refugee status. After her return to Mexico, she was kidnapped by the people she had originally fled. In June 2009, she was found dead, with a bullet in her head. She was 24 years old.

Grise might be alive today if she had had access to a refugee appeal.[19]

It is an excellent idea to allow new evidence at the RAD, using this to replace the ineffective and inefficient PRRA. It makes much better sense to look at new evidence in the context of what is already before the IRB. For example, a claimant may have new information that a family

[16] UNHCR, supra note 10, para 69
[17] Amnesty International France, *Révision de la liste des pays d'origine ''sûrs'' : Une procédure transparente et protectrice des réfugiés est plus que jamais indispensable*, November 2009, http://www.amnesty.fr/var/amnesty/storage/fckeditor/File/sf09f81_nov09_listepayssurs.pdf
[18] Concluding observations of the Human Rights Committee: Estonia. 15/04/2003, CCPR/CO/77/EST, para 13, http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CCPR.CO.77.EST.En?Opendocument
[19] Toronto Star, Mexican woman deported to her death, Nicholas Keung, 23 October 2009, http://www.thestar.com/news/gta/article/714781--deported-to-her-death

member was arrested or the government may have taken new persecutory measures against the organization of which the claimant is a member: this new evidence should be reviewed in the context of the evidence that has already been submitted, rather than having a PRRA decision-maker open a completely new file.

However, experience has shown that there are problems with the current definition of "new evidence" ("evidence that arose after the rejection of their claim or that was not reasonably available"). The proposed amendment simply transfers, to the RAD, the wording for "new evidence" currently used for the PRRA. This wording has led to legalistic bars on presenting evidence that may be crucial to show that a claimant is in fact at risk.

Often there is important evidence that could theoretically have been produced at first hearing, but practically speaking it is impossible to produce everything, given constraints of time and money. Sometimes claimants are unrepresented or not well represented, and therefore fail to produce important evidence that competent counsel would have helped them submit. Yet, PRRA decision makers are rejecting evidence based on the theoretical notion that the evidence was "reasonably available", without regard to practical realities. This leads to important pieces of evidence being excluded from consideration, simply because the claimant had poor counsel or lacked the financial means to have all possible evidence sent from the home country.

Given that the goal of the refugee determination system is to ensure that refugees receive the protection they need, and are not sent back to persecution in violation of human rights law, the focus should be on ensuring that all relevant evidence is considered.

It should also be noted that the amendments set different standards for presenting additional evidence for the claimant and for the Minister. According to the bill, the claimant can only present new evidence or evidence that was not reasonably available, while the Minister is allowed to present <u>any</u> additional evidence he chooses. Given that the Minister does not always participate in the first level hearing, it may be reasonable to not always apply the same rule. However, where the Minister did participate in the hearing before the Refugee Protection Division, it is clearly unfair that different and stricter rules should apply to the claimant than to the Minister.

**RECOMMENDATION**

6. Amend the wording regarding new evidence to say that the claimant may provide additional evidence that is relevant to the claim.

7. Amend the bill so that the same restrictions on new evidence apply to the Minister as to the claimant, at least when the Minister has participated in the first instance hearing.

**6) Pre-Removal Risk Assessment (PRRA)**
S. 15, amending IRPA 112.

The amendment bars claimants from an application for a Pre-Removal Risk Assessment (PRRA) within 12 months of their claim being rejected or determined to be abandoned or withdrawn. However, this bar does not apply to claimants who were rejected on the basis of the exclusion

clauses in the refugee definition, or claimants from a specific country or class named by the Minister.

**Concerns**

The CCR has long argued that there shouldn't be a separate PRRA: all issues of refugee protection should be handled at the IRB, and new evidence should be addressed through re-opening a prior claim.

Since most refused claimants will have had a recent opportunity to submit new evidence at the RAD, it is reasonable to suppose that another opportunity is not generally necessary. The bill rightly recognizes that there will however be exceptions, by giving the Minister the power to designate nationalities or groups that will have access to PRRA (presumably due to important changes in the country of origin, although the bill does not specify this). The bill does not however address the situation of an individual with compelling new evidence because of a change that affects them individually. Take for example the case of a claimant from a politically active family who is rejected as a refugee, but learns two months after the negative decision that several members of the family have just been arrested: this new information needs to be evaluated to see if the claimant now has a well-founded fear of persecution in the home country.

If there is no mechanism to address new evidence of risk to an individual in the 12 months following a negative decision, Canada will be in danger of violating its international non-refoulement obligation, i.e. its obligation not to send refugees back to persecution or anyone to torture.

A second area of concern is the fact that the amendments leave in place the problematic PRRA process for certain cases:

- Claimants who are found ineligible to make a refugee claim because they made a previous claim in Canada (163 claims in 2009).
- Claimants who are not removed within 12 months of refusal.
- Claimants who were rejected at the IRB on the basis of one of the exclusion clauses.
- Claimants who are found ineligible on other grounds (very small numbers).

The PRRA is well-known to those familiar with the refugee process as being both ineffective and inefficient. It routinely takes months or years for a decision. According to a CIC evaluation report, the average time to decide a PRRA application rose from 125 days in 2003 to 202 days in 2006.[20] The proposals for Refugee Reform completely ignore the delays at PRRA.

PRRA is terrifically inefficient, by requiring a whole second structure to do the same work of refugee determination that the IRB does. Under C-11, this inefficiency would be even more striking because of the small number of cases dealt with at PRRA.

[20] CIC, *Formative Evaluation of the Pre-Removal Risk Assessment Program*, February 2008, http://www.cic.gc.ca/english/resources/evaluation/prra/index.asp

**RECOMMENDATION**

8. Eliminate the separate PRRA altogether and transfer all of the decision-making currently assigned to PRRA to the IRB, so that all refugee and other risk determinations (s. 96 and s. 97) are made by the IRB. In the case of claimants who have had a previous hearing at the IRB, provide for an application to re-open based on new evidence.

## 7) Humanitarian and compassionate applications (H&C)

### a) Claimants barred from applying while claim pending and for 12 months following rejection

S. 4(1) (amending IRPA 25(1)), also S. 3 (amending IRPA 24 barring application for Temporary Residence Permit (TRP)).
The amendment would bar refugee claimants from applying for permanent residence on humanitarian and compassionate (H&C) grounds, while the refugee claim is in process and for 12 months afterwards.

**Concerns**
H&C is a crucial recourse because it permits consideration of human rights issues, including the best interests of the child, and potential risks to persons, that do not fit into the narrow refugee definition. Closing off this recourse may be contrary to the Canadian Charter of Rights and Freedoms and international human rights law.

The impact on children must be a particular concern. The government is required under the Convention on the Rights of the Child to consider the best interests of an affected child:

> "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." Convention on the Rights of the Child, Article 3(1)

H&C is the only avenue to consider the best interests of a refugee claimant child.

In passing the *Immigration and Refugee Protection Act*, Parliament made clear that it intended to ensure compliance with the Convention on the Rights of the Child. The Act requires that the Minister, in considering H&C applications, take into account "the best interests of a child directly affected" (IRPA, 25(1)).

In its most recent report to the UN Committee on the Rights of the Child, the Canadian government emphasizes the relevance of access to H&C for compliance with the Convention:

> "Humanitarian and Compassionate consideration (H&C) is always available for migrant children who may have special circumstances which should be taken into consideration in the assessment of their application."[21]

If Bill C-11 is passed as presented, this statement would no longer be true. Instead, the Act would bar some children from access to the only mechanism by which their best interests can be considered.

> Three children fled to Canada after their parents were killed by drug traffickers in Mexico. The IRB found that they did not meet the refugee definition, but an H&C application offered an avenue to argue that it was against the best interests of the orphans to send them back to the scene of their parents' murder.
>
> Under C-11, there would be no opportunity to consider the best interests of refugee claimant children, although this is required by the Convention on the Rights of the Child.

Canada has other human rights obligations that may be relevant in the cases of rejected refugee claimants, including under the Convention Against Torture, and the Covenants on Civil and Political Rights and on Economic Social and Cultural Rights. Currently, H&C offers an avenue for consideration of a claimant's fundamental human rights. The Canadian government frequently argues to courts and in submissions to UN bodies that the possibility of an H&C application ensures rights are respected. This argument will no longer be true if Bill C-11 is adopted in its present form.

There are also from time to time cases with other compelling humanitarian factors that most Canadians would agree deserve favourable consideration, even though the claimants do not meet the narrow refugee definition. It would therefore be wrong to close off this recourse.

H&C applications do not prevent removal, so there is no obvious reason for closing off access to this recourse. The Federal Court can issue a stay while an application is being considered but only if irreparable harm can be shown, a test which is very difficult to meet.

It is also possible that if the H&C door is closed, the Federal Court will be faced with numerous applications for a stay of removal. In the absence of the H&C avenue, the Federal Court may decide it must look more closely than it would otherwise at applications raising serious rights issues, such as best interest of the child or risk to life.

The ban on H&C applications would have the effect of painfully prolonging the limbo status of refused claimants who cannot be removed because the government has temporarily suspended removal to their country on account of the generalized insecurity there. H&C is the only recourse available those affected to regularize their status and reunite with family members.

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[21] *Canada's Third and Fourth Reports on the Convention on the Rights of the Child*, January 1998 – December 2007, p. 205.

Keeping them in limbo is bad public policy: without proper status they are unable to contribute fully to Canadian society. Where there are children abroad, it is also a violation of the children's right to be with their parent.

> Canada has suspended removals to Haiti. Under the proposed new rule, refused Haitian claimants would have to wait one year before they could apply for H&C. Consider the situation, for example, for a Haitian man with children left behind in Haiti. He cannot apply for them to join him in Canada until he has been accepted under H&C, and he cannot apply for H&C until a year after his claim is rejected.

If there are concerns about H&C representing a separate and additional recourse for claimants, consideration could be given to allowing the IRB to grant favourable H&C where warranted to a claimant who did not meet the refugee definition.[22] The IRB already considers H&C in some matters at the Immigration Appeal Division, so it has experience and competence in this area. In fact, the IRB might be considered a better place than CIC for determination of rights, notably children's rights, as required under the Convention on the Rights of the Child. It would also be more efficient to address H&C considerations at the IRB, in the context of the refugee hearing, as it avoids an extra step. Given the extraordinarily long processing times for H&C, CIC is obviously struggling with this responsibility: turning it over to the IRB, which could hold an expeditious hearing, could be much more efficient.

**RECOMMENDATION**

9. Delete amendments barring access to H&C for claimants. Alternatively, give IRB jurisdiction to accept a claimant based on H&C considerations.

**b) Sections 96 and 97 factors cannot be considered in H&C applications**

S. 4(1), amending IRPA 25(1) to add new clause. This amendment would prevent the consideration within an H&C application of the factors that are taken into account in the determination of whether a person is a Convention refugee (section 96) or a person in need of protection (section 97 – risk of torture or cruel and unusual treatment, and risk to life).

**Concerns**

This proposal is completely unworkable. It is not clear what it is trying to achieve.

It is impossible to clearly and simply separate out s. 96 and s. 97 factors. Neither applicants nor decision makers will know what can and cannot be considered.

If passed into law, this amendment will inevitably generate enormous quantities of litigation. If someone says they suffered discrimination in their home country, we can expect a legal argument over whether the discrimination rises to persecution and therefore "counts" under s. 96.

[22] In some cases, the Immigration and Refugee Board already notes in its refugee decision that although the claimant is not a refugee, there are strong humanitarian aspects to the case.

It could lead, for example, to the absurd situation in which an applicant will be obliged to argue that the discrimination in question falls short of persecution (and is thus admissible for consideration in the H&C process) while the government may attempt to argue that it actually rises to the level of persecution and thus, paradoxically, cannot be considered.

A similar question will arise over whether the risk is faced generally by the whole population. Generalized risks should in theory be considered under H&C since they cannot result in protection under s. 97.

> Is risk of rape a factor taken into account under s. 96 and s. 97? It is well documented that sexual assault in Haiti is widespread and some women are recognized as refugees on the basis that they have a well-founded fear of rape. Other women, however, are rejected on the basis that they fear a generalized rather than a personal risk. Given this, would an H&C decision maker be allowed to take into consideration that a Haitian girl faced a generalized risk of rape?

How will decision makers deal with the issue of standard of proof? To be accepted under s. 97, you must show that the harm you fear is more likely than not. This would suggest that H&C decision makers would be allowed to consider a risk of harm that is a serious possibility, but less than a balance of probabilities. This would lead to the absurd situation where the applicant argues that there is a less than 50% risk of torture, but the H&C decision maker concludes that the risk of torture is greater than 50% and that it therefore cannot be taken into consideration in the decision!

There are human rights obligations at stake – the government needs to have the power to take into consideration whether a person faces serious human rights violations, including torture.

An important aspect of H&C is that it offers an assessment of the totality of the applicant's situation. Often, it is a combination of factors that together lead to a positive finding: for example, an applicant who has begun to establish herself in Canada, has family here and also faces some degree of risk if removed.

**RECOMMENDATION**

10. Delete proposed amendment adding IRPA 25 (1.3) (provision excluding sections 96 and 97 factors from H&C decisions).

**c) Fees must be paid**

S. 4(1) amending IRPA 25(1), adding new 1.1, specifying that fees must be paid for an H&C application to be considered.

**Concerns**
Fees for H&C applications already exist, although they are not currently specifically required in the statute. Experience shows that fees constitute a discriminatory barrier, and perversely affect most severely persons with some of the most compelling humanitarian cases. For example, a single mother struggling to support her children may well be unable to afford the fees ($550 per adult, $150 per child). A woman who has been severely abused physically and psychologically in a situation of trafficking will likely also be in no position to pay the fee.

The bill already provides for the possibility of exempting fees in H&C cases initiated by the Minister: the same possibility should be allowed in the case of applications by individuals.

**RECOMMENDATION**

11. Amend proposed 25 (1.1) to read: "The Minister may exempt the foreign national from the payment of any applicable fees in respect of the examination of their circumstances under subsection (1)."

**8) Coming into force**

S. 31, replacing IRPA 275, + S. 42. These provisions state that all sections of the bill must come into force at the latest two years after royal assent.

**Concerns**
Given that the amendments are presented as a "balanced" reform, it is important to ensure that implementation is balanced, i.e. that some provisions are not brought into effect before others.

**RECOMMENDATION**

12. Amend coming into force provisions so that all sections come into force on the same day.

## SUMMARY OF RECOMMENDATIONS

1. Delete the reference to an interview in the law.

2. Schedule hearings taking into account when they will be ready to proceed.

3. Amend the Act so that RPD and RAD members are appointed for a fixed term by the Chairperson of the IRB. The Chairperson would be required to appoint only the most highly qualified candidates recommended by a selection committee, according to clear criteria established in law. Candidates could be from the civil service or from outside the civil service.

4. Delete provisions relating to designated countries of origin.

5. Amend the wording regarding new evidence to say that the claimant may provide additional evidence that is relevant to the claim.

6. Amend the bill so that the same restrictions on new evidence apply to the Minister as to the claimant, at least when the Minister has participated in the first instance hearing.

7. To address concerns about manifestly unfounded claims, amend the Act to give authority to the Minister of Public Safety (CBSA) to identify a limited number of claims (say 5%) that the IRB would be required to hear on a priority basis.

8. Eliminate the separate PRRA altogether and transfer all of the decision-making currently assigned to PRRA to the IRB, so that all refugee and other risk determinations (s. 96 and s. 97) are made by the IRB. In the case of claimants who have had a previous hearing at the IRB, provide for an application to re-open based on new evidence.

9. Delete amendments barring access to H&C for claimants. Alternatively, give IRB jurisdiction to accept a claimant based on H&C considerations.

10. Delete proposed amendment adding IRPA 25 (1.3) (provision excluding sections 96 and 97 factors from H&C decisions).

11. Amend proposed 25 (1.1) to read: “The Minister may exempt the foreign national from the payment of any applicable fees in respect of the examination of their circumstances under subsection (1).”

12. Amend coming into force provisions so that all sections come into force on the same day.