



**Submission to International Commission of Jurists
ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights**

25 April 2007

A. Introduction

The Canadian Council for Refugees (CCR) is an umbrella organization with approximately 170 member organizations, committed to the protection of refugees in Canada and around the world and to the settlement of refugees and immigrants in Canada. The CCR has long been concerned that security-related measures are implemented in a manner that infringes on the rights of refugees and immigrants.

B. Laws, policies and practices justified as necessary to counter-terrorism

The Canadian government uses immigration procedures in preference to criminal proceedings, by policy and in practice. These immigration procedures include, but are not limited to, security certificates. Since many others will be speaking in detail about security certificates, this submission will focus on other security provisions of the *Immigration and Refugee Protection Act* (IRPA).¹

The *Immigration and Refugee Protection Act* came into effect on 28 June 2002. Although its implementation followed the attacks of 11 September 2001, the bill had already been passed by the House of Commons in June 2001. In the fall of 2001, there were reports of discussions within government about whether further amendments should be made in the light of the attacks in the US, but the final decision was against such changes, on the grounds that the bill already included a number of measures that strengthened the enforcement powers of government in cases of alleged security concern.

Many of the provisions described below already existed in the same or similar form in the legislation in effect prior to the implementation of the *Immigration and Refugee Protection Act*.

i) Definition of security inadmissibility

IRPA contains an extremely broad definition of inadmissibility on the basis of security.² This definition applies to people subject to a security certificate³ as well as to other non-citizens. Persons found

¹ The submission was prepared for the hearings held in Canada by the Eminent Jurists Panel 24-25 April 2007. Information about the Panel is available at <http://ejp.icj.org>.

² IRPA s. 34: “(1) A permanent resident or a foreign national is inadmissible on security grounds 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; (b) engaging in or instigating the subversion by force of any government; (c) engaging in terrorism; (d) being a danger to the security of Canada; (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c). (2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.”

inadmissible on security grounds are ineligible to have a claim to refugee status considered⁴, are denied permanent or temporary residence in Canada and lose any such status that they already have⁵, without the right of appeal normally available to persons facing a loss of status.⁶

It should be noted that, although people often talk loosely about persons inadmissible on security grounds as being “security risks” and “threats to security”, there is **no** requirement that a person represent, or be suspected of representing, a security risk in order to be found inadmissible on security grounds. IRPA provides for a person to be found inadmissible and deported on security grounds, or a security certificate to be signed and upheld by the Federal Court as reasonable, even if the person is not alleged to represent **any** kind of actual security risk.

Second, even apart from the fact that a person need not be suspected of representing a security *threat*, the language of IRPA gives the government extremely broad parameters for finding a person inadmissible on security grounds. A person may be found inadmissible on the basis of “membership” in a “terrorist group”, where membership can be construed so widely it includes *unknowingly associating* with someone *suspected* of being involved in a so-called terrorist group, where “terrorist” is itself also undefined.⁷ The person does not need to have been a member at the time that the organization committed acts of violence. What is more, this “membership” need not even be established as a fact. All that is required for a finding of inadmissibility is that there be “*reasonable grounds to believe*” that the facts on which the inadmissibility allegation is based “have occurred, are occurring or may occur” some day in the future.⁸

To illustrate the broad scope of the definition, consider the following examples of people who are inadmissible on security grounds by the *Immigration and Refugee Protection Act*:

- Any past or current member of the African National Congress.
- A person who was a member of a non-violent organization and who left that organization out of opposition to a decision within the organization to use violent methods.
- A person who was active in support of a political cause led by an organization that is later accused of having engaged in violence, without the person at the time having known of the allegations of violence.

ii) Due process

Use of secret evidence

The use of secret evidence under the security certificate provisions is of course widely known and criticized. It has recently been held by the Supreme Court to offend Charter rights guarantees.⁹ Less

³ Security certificates can also be signed for persons alleged to be inadmissible on grounds of violating human or international rights, serious criminality or organized criminality. The term “security certificate”, though in common use, does not actually appear in the Act.

⁴ IRPA, s. 101(1)(f). Persons determined inadmissible on security grounds may apply for a Pre-Removal Risk Assessment (s. 112), but consideration will not be given to the refugee definition, only risk of torture and/or risk to life or of cruel and unusual treatment or punishment (s. 113(d)).

⁵ IRPA, ss. 21-21, ss. 44ff.

⁶ IRPA, s. 64.

⁷ In the April 2000 report of the Security Intelligence Review Committee on the complaint by Suleyman Goven the Hon. Robert Rae said: “I recommend that a more sophisticated analysis framework be developed for officials making assessments and that better guidelines be made available to the different interveners with respect to the definition of ‘membership’ and the definition of a ‘terrorist’ organization.”

⁸ IRPA s. 33 tells us that facts constituting inadmissibility “include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.”

⁹ *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, 23 February 2007.

well-known is that IRPA also provides for the use of secret evidence in other circumstances. Under s. 86, the Minister can apply for “non-disclosure of information” in an admissibility hearing, a detention review or an immigration appeal before the Immigration and Refugee Board (IRB). In these cases, the same provisions for reviewing the secret evidence apply as in security certificates, with the IRB member substituted for the Federal Court judge.¹⁰ In May 2006, after an apparent increase in applications under s. 86, the IRB adopted a “Policy on the Treatment of Applications for Non-Disclosure of Information”.¹¹

Lack of expertise in decision-making

Despite the complexity of decision-making in the area of security, applicants for permanent residence are rejected based on security inadmissibility by immigration officers who have no specialized training and who sometimes rely on unreliable evidence. Applicants frequently report frustration in dealing with decision-makers who do not appear to have an adequate grasp of the basic facts affecting their case (for example, failing to distinguish between Iraqi and Iranian Kurdish organizations). Some negative decisions depend on newspaper articles or internet sources that are of dubious reliability.

Arbitrariness and political bias in decision-making

Given the extremely broad nature of the security inadmissibility class, it is clear that if strictly applied, very large numbers of people would be denied admission to Canada. In practice, though, it appears that it is applied selectively, according to criteria that are not transparent, and therefore give the appearance of arbitrariness. For example, it does not seem that past and current ANC members are routinely declared inadmissible on security grounds. At a meeting with the CCR a few years ago, an immigration official informed us that the government had decided not to apply the security inadmissibility bar to regular members of the Kosovo Liberation Army, but only the leaders, on the basis that Kosovar men had little practical choice but to join the KLA. Other people, in objectively similar situations, do not receive the same favourable treatment. It appears that unspoken political biases affect whether or not the provisions are applied.

iii) Detention

Detention is of course a major issue under the security certificate provisions. Although there is no logical connection between the need for certain information or sources to be kept secret and the need for detention, IRPA provides a separate scheme for detaining those named under a security certificate, with the detention of non-permanent residents being mandatory. Until the provision was recently struck down by the Supreme Court, there was no possibility of review of this mandatory detention. As is well-known, those named in security certificates have faced long-term detention, in appalling conditions. Conditions on release have been draconian and unlike anything previously seen in Canada.

IRPA also provides for the detention, on entry to Canada, of a non-citizen where an officer “has reasonable grounds to suspect” that the person is inadmissible on security grounds or for violating human or international rights.”¹² This contrasts with the standard of “reasonable grounds to believe” that exists elsewhere in the section. The person so detained will remain in detention, if at the detention review the Immigration Division is satisfied that “the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international

¹⁰ IRPA s. 86 states that s. 78 (from the security certificate provisions) applies, with the necessary modifications.

¹¹ Immigration and Refugee Board, *Policy on the Treatment of Applications for Non-Disclosure of Information*, 15 May 2006, http://www.irb-cisr.gc.ca/en/references/policy/policies/nondisclos_e.htm. The CCR provided comments on a draft version of this policy.

¹² IRPA s. 55(3)(b).

rights.”¹³ This means that, unless even the “suspicion” is unreasonable or the Minister is not moving the inquiry forward, the person remains in detention on the basis of a mere “suspicion.”

iv) Deportation to torture

IRPA contains no absolute prohibition on return to torture. IRPA s. 98 applies the refugee exclusion clauses to applications for protection based on danger of return to torture, even though the Convention Against Torture of course provides for no such exceptions. In the case of persons deemed by the legislation not deserving of refugee protection, there is a balancing within the Pre-Removal Risk Assessment of the risk to the applicant if removed against the danger to the public or to the security of Canada.¹⁴ The Canadian government has repeatedly asserted its willingness to deport individuals to their home countries where, according to the government’s own analysis, they face a probable risk of torture.

v) Security issues and long delays

Threats of deportation under security certificates or other provisions are the most dramatic of immigration security measures and deserve special attention. However, they represent just a small proportion of the larger group of people in Canada and overseas who suffer serious hardships as a result of the unfair security provisions of IRPA. Though not faced with imminent deportation, they are instead forced to wait years – in several cases more than 10 years – in a legal limbo because of vague and unsettled allegations of security concerns. Because there is no legislated obligation on the government to make a decision on admissibility within a reasonable period of time, many people have their lives put on hold for years, even though the government eventually finds that they are not inadmissible on security grounds.¹⁵

Furthermore, the provision in the Act, known as ministerial relief, which allows the Minister to exempt from inadmissibility people whose “presence in Canada would not be detrimental to the national interest” is a largely illusory safeguard against injustice, particularly since the responsibility was transferred in December 2003 to the Minister of Public Safety and Emergency Preparedness.¹⁶

The CCR has addressed concerns about delays in landing on the basis of security in its paper, *Refugees and Security*, February 2003.¹⁷

Refugee claimants awaiting a hearing have also faced indefinite delays because of security clearances. In July 2004, the Chairperson of the Immigration and Refugee Board issued instructions according to which no hearing was to proceed until a claimant’s front-end security screening had been finalized. In February 2006, following pressures from the Canadian Council for Refugees among other groups, the instructions were revised to provide for the scheduling of a hearing after a year, although the Minister can still apply for a further postponement.¹⁸

¹³ IRPA s. 58(1)(c)

¹⁴ IRPA s. 113(d).

¹⁵ An example is Suleyman Goven, who finally received his permanent residence in 2006, thirteen years after he applied. He is currently suing the Canadian government.

¹⁶ IRPA s. 34(2) provides for ministerial relief for security cases. Similar relief is also offered in cases of human or international rights violations (s. 35(2)) and organized criminality (s. 37(2)). The Supreme Court of Canada found in *Suresh* that the security inadmissibility provision was saved from violating the Charter right to freedom of association by the availability of ministerial relief (para. 110). In practice, ministerial relief is not made available in the way the Court assumed.

¹⁷ Available at www.ccrweb.ca/security.PDF

¹⁸ Immigration and Refugee Board, *Instructions Governing the Management of Refugee Protection Claims Awaiting Front-end Security Screening*, 15 February 2006, http://www.irb-cisr.gc.ca/en/references/policy/instructions/securit_e.htm

C. Impact of these measures on rule of law and international human rights

i) Discrimination

The Canadian Council for Refugees is profoundly concerned about discrimination in both law and practice, in the area of anti-terrorism measures. In Canada as in other countries, there has been a widening gap between the rights of citizens and non-citizens, as the security agenda is pursued. The preference for applying immigration rather than criminal law measures to suspected terrorists in itself points to a double standard, since immigration measures by definition cannot be used against citizens. Furthermore, Canada's immigration security provisions impose serious penalties, including deportation potentially to torture, on non-citizens for actions or associations that are completely legal for citizens.

Security measures are also being applied in a manner that discriminates against particular ethnic and religious groups, including Arabs and Muslims. Provisions in the IRPA, and the manner in which they are applied, increase the risks of discrimination by giving extensive powers to government, with minimal oversight and a cover of secrecy, which provide the circumstances in which abuses easily flourish.

A particularly clear and distressing example of the discriminatory approach to security issues is the case of Citizenship and Immigration Canada's "Operation Thread" which resulted in the summer of 2003 in the arrest of 23 Pakistani and Indian men. The individuals arrested were formally and publicly identified by Citizenship and Immigration Canada as suspected terrorists, leading to wide and excited media coverage. However, it soon became clear that the suspicions were based on the flimsiest of evidence, some of which consisted of little more than stereotypes.¹⁹ The allegations were soon dropped. However, because Citizenship and Immigration Canada failed to issue a public disclaimer or apology clearing those who had been arrested, media stories continued to carry headlines referring to "suspected terrorists". This illustrates clearly how, particularly in these security-conscious times, the terrorist label, once applied, remains attached to the person. The reputations of those arrested on the basis of suspected terrorism have been ruined. There was also a broad and devastating impact among South Asian, Muslim and Arab communities in Canada, heightening their sense of vulnerability to discrimination.

ii) Obligations under the Convention against Torture

In the context of its counter-terrorism efforts, Canada has disavowed its obligations under the Convention against torture. This includes an unwillingness to comply with requests from the UN Committee Against Torture. In June 2006, the Minister of Public Safety Stockwell Day refused a formal request for interim measures from the Committee against Torture in the case of Sogi Bachan Singh, who was deported back to India.²⁰

Canada's position on return to torture recently drew the criticism of the UN Committee Against Torture²¹ which expressed its concern over "the failure of the Supreme Court of Canada in *Suresh v Minister of Citizenship and Immigration* to recognise, at the level of domestic law, the absolute nature of the protection of article 3 of the Convention that is subject to no exceptions whatsoever." (para. 4(a)) The Committee recommended that Canada "unconditionally undertake to respect the absolute nature of article

¹⁹ For example, the government included in its evidence against the men the fact that a number of them came from the Punjab, said to be a hotbed of extremism.

²⁰ See media release, "CCR calls for stay of removal while threat of torture examined", 29 June 2006 <http://www.ccrweb.ca/releasesogi.html>. In a letter to the CCR dated 19 January 2007, the Minister of Public Safety and Emergency Preparedness, responding to concerns raised about Mr Sogi, noted "that the Supreme Court of Canada has left open the possibility of removal of an individual to possible risk of torture in exceptional circumstances." He goes on to state that the government takes very seriously its international obligations. "At the same time, however, the government also has an obligation to maintain the security of Canadian society."

²¹ Conclusions and recommendations of the Committee against Torture: Canada. 07/07/2005. CAT/C/CR/34/CAN

3 in all circumstances and fully incorporate the provision of article 3 into the State party's domestic law.” (para. 5(a))

iii) Increasing disregard for rights and rule of law

The measures that exist in law, combined with the government's practices and discourse, have the effect of promoting a disregard, among government officials and the public, for the basic rights of non-citizens, and especially of vulnerable persons such as refugee claimants and others without permanent status in Canada.

In at least one case there is evidence that immigration officials broke the law in their enthusiasm for pursuing counter-terrorism efforts. On 12 September 2001, Benamar Benatta, a detained refugee claimant in Canada, was illegally transferred to US authorities, who immediately identified him as a suspect in relation to the September 11 attacks. Despite being cleared by the FBI in November 2001, he remained in detention in the US for nearly five years, until in July 2006 he was brought back to Canada and allowed to reinstate his refugee claim.²²

In the last five years, the rights of refugees in Canada have suffered a number of setbacks. While the changes introduced cannot be entirely attributed to the security agenda, their adoption owes a significant part to the climate of suspicion towards non-citizens. These changes include the government's decision to implement the *Immigration and Refugee Protection Act* without the sections giving claimants the right to an appeal,²³ the increase in detention of refugee claimants on identity grounds,²⁴ and the designation of the USA as a safe third country for refugee claimants.²⁵

D. Justification of measures by government

The Canadian government leans heavily on deportation as a strategy for responding to security threats, relying on the fact that non-citizens do not have the right to enter and remain in Canada enjoyed by citizens. This strategy takes priority over a strategy of prosecution. Canada's *National Security Policy* has a section on “border security” which addresses how the government plans to identify and deny access to individuals who pose a security threat, while there is no equivalent section dealing with a prosecution strategy (and in fact the word “prosecution” only occurs once in the whole document).²⁶

In the 1990s, the government made a shift in policy away from prosecution to deportation in the case of war criminals, in the wake of a Supreme Court decision that made prosecution difficult.²⁷ The Canadian Council for Refugees has criticized this policy towards modern day war criminals: deportation without any attention to whether they will be brought to justice, in a fair trial, does not promote international

²² See press kit, “Canadian involvement in Benamar Benatta's ordeal cries out for review”, 18 April 2007, <http://www.ccrweb.ca/eng/media/pressreleases/benattapresskit.pdf>. The Canadian government argues that Mr Benatta voluntarily withdrew his application to enter Canada on 12 September 2001, but Mr Benatta denies this and the Canadian government can produce no evidence of him doing so.

²³ See CCR, Refugee Appeal Division, <http://www.ccrweb.ca/RADpage/RADpage.htm>.

²⁴ See CCR, Submission on the occasion of the visit to Canada of the UN Working Group on Arbitrary Detention, 8 June 2005, <http://www.ccrweb.ca/WGAD.HTM>.

²⁵ See CCR, *Closing the Front Door on Refugees: Report on the First Year of the Safe Third Country Agreement*, 29 December 2005, <http://www.ccrweb.ca/closingdoordec05.pdf>

²⁶ Privy Council Office, *Securing an Open Society: Canada's National Security Policy*, April 2004, http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=NatSecurnat/natsecurnat_e.htm. There is also one occurrence of “prosecuting”.

²⁷ Citizenship and Immigration Canada, *Public Report: Canada's War Crimes Program*, 1998, <http://www.cic.gc.ca/english/pub/war1998.html>.

justice. The policy of deporting people on security grounds, which may have been influenced by the war criminal policy, raises similar concerns.

In continuing to give priority to deportation over prosecution for security cases, the Canadian government is failing to take seriously its own observations about the globalized nature of security threats. It is not useful to deport people who may be a security threat without reference to what will happen to them after deportation, including whether they will engage in the planning or commission of acts of violence.

The UN Committee against Torture has recently advised Canada against the deportation approach, raising its concern regarding Canada's "apparent willingness, in the light of the low number of prosecutions for terrorism and torture offences, to resort in the first instance to immigration processes to remove or expel individuals from its territory, [...] rather than subject him or her to the criminal process." (para. 4(e)). The Committee points out that the focus on removal increases the chances that issues involving potential removal to torture, prohibited under article 3 of the Convention, will arise.

It is worth noting as well that both the UN Security Council and the General Assembly have repeatedly called on governments to either prosecute alleged terrorists or to extradite them to face charges elsewhere, and to respect fundamental human rights throughout their anti-terrorism programs.²⁸ Deportation violates both of these principles.

E. Lessons for policy-makers

i) Lack of oversight

One of the crucial shortcomings of Canada's immigration security measures is the lack of adequate oversight, judicial or otherwise. Other services responsible for security, such as the Canadian Security Intelligence Service or the RCMP, have oversight bodies, although they are not fully adequate. The Canada Border Services Agency, however, which enforces IRPA, has *no oversight mechanism*, even though those affected are, as non-citizens, particularly vulnerable.²⁹

Prior to the implementation of IRPA, permanent residents had access to review of security inadmissibility determinations by the Security Intelligence Review Committee. That review was removed in IRPA.

Without an independent, accountable and effective oversight mechanism, the actions of the Canada Border Services Agency go unmonitored and individuals who believe their rights have been violated have nowhere to address their complaints, except the agency itself.

²⁸ UN Security Council Resolution 1456 (2003), 20 January 2003, UN Doc. S/RES/1456 and UN General Assembly Resolution 58/81 (2003), 9 December 2003, UN Doc. A/RES/58/81

²⁹ The second report of the Commission of Inquiry into the actions of Canadian officials in relation to Maher Arar, "A New Review Mechanism for the RCMP's National Security Activities", December 2006, <http://www.ararcommission.ca/eng/EnglishReportDec122006.pdf>, recommends a new oversight mechanism that would also consider actions of the Canada Border Services Agency.