



## **New refugee system – one year on 9 December 2013**

On December 15, 2012, major changes to Canada's refugee determination system were implemented. The changes were controversial: the Canadian Council for Refugees (CCR) had consistently raised concerns that the new system would fail to offer some refugees the protection they need from Canada.

One year later, how has the system been working in practice?

### **Summary**

The following points summarize key aspects of the new refugee system, as experienced by the members of the CCR.

- The short timelines are causing serious problems: they create high levels of stress and many claimants are unable to prepare themselves adequately for their hearing.
- The short timelines are particularly damaging for vulnerable claimants, such as survivors of torture and people with health problems or disabilities.
- The new rules are extremely complex, leading to significant confusion. Some provisions have been poorly thought out and are ambiguous or unworkable.
- We have a two-tier system that discriminates against some claimants, who have less access to protection, on arbitrary grounds, notably based on their country of origin.
- The lack of adequate – or any – access to health care, as a result of recent cuts to the Interim Federal Health Program, compounds the difficulties faced by claimants in the new system.
- The system depends heavily on community organizations providing extensive support for claimants. However, community organizations are not funded by government to provide these services. As a result only a minority of claimants are adequately supported.

The system is working for some refugees, especially those who have good legal representation and community support. One such refugee, who was recently accepted along with her husband and child, said of her experience, “We were welcomed, and offered the security and protection that our country was not able to provide.”

Unfortunately, the system is failing many other claimants, including some of the most vulnerable. When Canada does not offer claimants a fair opportunity to present their case for why they need protection, there is a real danger that refugees will be wrongly refused and deported to face persecution, in violation of their basic rights.

Canadians are proud of our history of welcoming refugees. Under the new system, Canada is now a less welcoming country. Significant changes are needed if Canada is to recover its former role as a world leader on refugee protection.

## Timelines

Under the new system, claimants face very tight timelines for submitting documents and for preparing for a hearing. Claimants arriving at our borders have just 15 days to complete the Basis of Claim form, in which they must explain why they fear return to their country. The refugee hearing takes place within 60 days of arrival. While it is important to ensure a timely hearing, it is even more important that refugees have sufficient time to prepare themselves and gather relevant evidence. The decision in a refugee claim is among the most important in any Canadian judicial process: the consequence may be life or death.

What we have seen:

- Refugee claimants are under immense stress as a result of the tight timelines, in some cases resulting in severe panic. Some claimants have been so seriously affected by the stress that they have had to seek medical attention.
- Some claims are poorly presented because the claimants were not mentally prepared to provide a coherent account so soon after arrival.
- Some refugee claimants panic when the date of the hearing comes and they have not yet received important evidence they had sent for from their home country.
- Refugees in detention are particularly disadvantaged, as it is difficult to get documents ready, find a lawyer, get access to information, etc. More claimants are in detention at key moments in the refugee process (filing the Basis of Claim form, going to the hearing) because of the shorter timelines.

For example, one claimant was detained for 1 ½ months. A relative had to put his life at risk in order to mail the claimant a picture ID from his country.

- Claimants need a significant network of support to succeed. Claimants are coming to NGOs for help with completing their Basic of Claim forms, translating and copying documents, and so on. These demands are placing a heavy burden on NGOs, who lack resources and are not funded by the government to provide such services. Claimants also benefit greatly from NGO support in orienting and accompanying them, but only a small percentage has this support. For example, one shelter in Toronto reports that it has the capacity to support only 10 families a year.
- The tight timelines are particularly stressful for refugees who have experienced serious trauma such as war, torture or sexual assault.
- There is not time to get psychological reports for claimants who are suffering from trauma as a result of persecution.
- The Immigration and Refugee Board (IRB) has guidelines for vulnerable claimants, including survivors of torture. However, in many cases there is not time for these vulnerable claimants to be identified, especially as the guidelines rely heavily on medical or other expert reports to identify vulnerable claimants.
- The short timelines are particularly difficult for women making gender-based claims and those making claims on the basis of sexual orientation or gender identity, since they often need time to build trust before they can tell their stories.

- Claimants with fears of persecution based on sexual orientation face particular problems establishing their sexual orientation, especially when they have been forced to hide their identity all their life. Some Board Members still ask for proof of participation in gay culture in Canada – but claimants have not been in Canada long enough for this.
- People making their claim from within Canada face a dilemma: they can delay making their claim until they have fully prepared themselves, but in the meantime they have no access to services and may be without status and in fear of arrest. On the other hand, if they make their claim earlier, their forms may not be adequately filled out and they may not be able to gather all the evidence in time for the hearing. In some cases, claimants have health issues – they can't fill out their forms properly while sick, but they have no access to health care until their forms are filled out and submitted.
- Some people making an inland claim have been told that they cannot make their claim until they have translated all their documents. With no means to pay for translation, some claimants are forced to rely on free services such as Google Translate.

One family had over 40 documents to translate: they were lucky to be able to rely on volunteer translators at a shelter. The process meant a delay of more than a month before they could make their claim.

- There has been a particular problem for people making inland claims on arrest. According to the regulations, the Basis of Claim form is due the same day. There is a lack of consistency across the country in how this has been handled. The Canada Border Services Agency (CBSA) has acknowledged that this is a problem.
- While claimants have struggled to meet the deadlines imposed on them, the system itself has not always been able to respect the legislated timelines. Some claimants find their hearings postponed indefinitely without any clear explanation. Often the delay is caused by the government's inability to complete the security screening within the timeline. Other claimants go to their hearing according to the timeline, but then wait months for a decision.
- The government has given priority to processing quickly claims made after 15 December, 2012. Claimants who arrived before that date find themselves largely forgotten in the process and are given low priority in scheduling hearings, even though they may have been waiting years for a decision on their claim.

The government has given significant priority to speeding up the claim process, but has been silent on the intolerably long delays for family reunification for accepted refugees. The average processing time for immediate family members abroad is 17 months. The timelines at some visa offices are even worse: at Nairobi it is 26 months, at Colombo it is 21 months.

### **'Designated Countries of Origin'**

The law now provides for 'Designated Countries of Origin', to be identified at the discretion of the Minister of Citizenship and Immigration. Nationals of these countries face even shorter timelines. In many countries that seem peaceful and 'safe', some people face serious problems of persecution, discrimination and violence, often with the participation of state officials. These include in particular women experiencing gender-based violence, lesbians, gay men and trans individuals and certain minority groups, such as Roma.

What has happened:

- A large number of countries have been designated, including countries from which significant numbers of refugees have been coming to Canada: Hungary (297 Hungarians were accepted January-September 2013) and Mexico (154 Mexicans were accepted January-September 2013). Hungary was the country with the third largest number of refugees accepted by the IRB from January to September 2013; Mexico was ninth. These countries are clearly not safe for many of its citizens.
- There has been a significant decrease in the number of Hungarians – it is not clear why.
- Nationals of designated countries, including Mexicans and Hungarians have no access to health care during the claim process (except in cases involving public health or public danger). Nevertheless, they may have significant medical needs, including as a result of the persecution they have suffered.
- The different and prejudicial rules for nationals of Designated Countries of Origin are causing particular confusion and problems in cases where members of a family are of different nationalities. Of particular concern is the fact that children accompanying their parents are without access to health care, simply because of where they were born.

### **Appeal**

The implementation of the Refugee Appeal Division is an important development in Canada's refugee system. However, the appeal is inaccessible to a significant number of claimants, including nationals of 'Designated Countries of Origin', 'Designated Foreign Nationals' and persons who passed through the US. This means that mistakes go uncorrected, risking the lives of refugees.

What has happened:

- It is too early to comment on decision making at the Refugee Appeal Division (RAD).
- There is concern that RAD members may include Board Members who failed the test to be Refugee Protection Division members. It is perverse that individuals found not competent to hear a claim at the first instance, should be sitting on the appeal tribunal.
- A legal challenge has been filed on the discriminatory bar on access to the Refugee Appeal Division for nationals of Designated Countries of Origin. The case, which raises issues of persecution on the basis of sexual orientation, mounts a comprehensive challenge to the designation of countries of origin. A decision on leave to the Federal Court is awaited.
- There is confusion about who has access to an appeal. The Refugee Protection Division sends claimants a decision letter with information about the RAD appeal even when the claimant is not eligible. This creates significant frustration and anxiety for people who receive this letter but do not have access to the RAD.
- The legislation is confusing about access to the RAD and there are unresolved questions of interpretation – it is expected that these will be litigated.
- For refused claimants who have no right of appeal to the RAD, there is no longer an automatic stay when filing for judicial review. Some people are called in for removal proceedings even while their case is before the Federal Court. It is possible to request a stay

from the Federal Court, but this requires a lawyer and many claimants do not have the necessary resources for the extra cost this involves.

### **Designated Foreign Nationals - ‘Irregular Arrivals’**

Groups of two or more people identified at the discretion of the Minister of Public Safety face mandatory detention under the new law, with limited review of detention. Children aged 16 or 17 also face mandatory detention. Even if accepted as refugees, designated foreign nationals cannot apply for permanent residence for five years. There are numerous other severe consequences to designation.

What has happened:

- Happily there have not been many designations.
- The December 2012 designations show the breadth of the power to designate – the Minister designated small groups of individuals crossing the land border by vehicle, months after their arrival.
- There are very serious rights issues at stake – the provisions will certainly be challenged if further groups are designated.

### **One-year bar on access to Pre-Removal Risk Assessment (PRRA) for refused claimants**

Since 15 August 2012, refused refugee claimants are not eligible for a Pre-Removal Risk Assessment for a year following refusal. In the case of claimants from a Designated Country of Origin, the bar is for three years. This means that they have no opportunity to submit new evidence of risk that becomes available after the refusal and before removal.

What has happened:

- There have been cases where there is important new information within the period of the bar. Citizenship and Immigration Canada (CIC) and CBSA have been improvising solutions case by case for some individuals. A significant concern is that this only works for individuals that can get public attention through the media or have a good lawyer.

Example: An Iranian woman faced deportation from Canada despite new evidence that she faced adultery charges, punishable in Iran by stoning, as reported in the Toronto Star, “Iranian woman may be deported and stoned to death - despite new evidence in her case”, 19 September 2012. Following the media report, the deportation was deferred, on a discretionary basis.

In another case, a Burundian woman who feared persecution as a member of a minority group was refused refugee status. After she was refused, she received more documentation that confirmed her fears of persecution, but there was no forum in which she could present it. She was forced to appeal to the United Nations (UN), which granted interim measures in her favour (i.e. asked Canada not to deport her while the matter was examined).

### **One-year bar on applications for humanitarian and compassionate consideration**

Refused refugee claimants can no longer apply for humanitarian and compassionate consideration for one year following refusal, unless they are invoking best interests of the child arguments or a life-threatening medical condition. Most people have no avenue to present compelling humanitarian factors before removal.

What has happened:

- CIC and CBSA have not implemented any measures to ensure review before deportation of cases involving the best interests of the child or serious medical conditions, even though the legislation provides exceptions in such cases to the general bar on Humanitarian and Compassionate applications. Citing changes to the legislation, removals officers are increasingly unwilling to use their discretion to postpone deportation. The only recourse available is to apply to the Federal Court for a stay of removal. This requires a lawyer – many claimants don't have one. By not ensuring that cases meeting these two legal exceptions are actually examined prior to removal, CIC and CBSA are violating the spirit of the law, as well as international human rights obligations.
- The bar also affects access to Temporary Resident Permits for trafficked persons. Traffickers sometimes make their victims make a refugee claim – the trafficked persons are then barred from applying for a Temporary Resident Permit, which is the protection mechanism intended for trafficked persons. CIC has acknowledged that this is an issue and have said that they are looking for a solution.

### **Loss of permanent residence if cessation (reavailing)**

Changes to the law mean that a person automatically loses their permanent residence if the IRB decides that they are no longer a refugee, based on cessation provisions of the Refugee Convention.

What has happened:

- The government is making more cessation applications, including in cases where permanent residents apply for citizenship and reveal on their application that they returned to their country of origin on a passport issued by their country. Return may be for limited purpose, for example to visit a sick family member.

For example, a woman from Iran who had been found to be a refugee based on her religion faces a cessation application and thus the threat of loss of permanent residence. She had traveled temporarily back to her home country to take care of her sick father who she thought would die without her help.

### **Reduced access to services**

The tightening of the rules in the refugee determination system has been accompanied by a reduction in access to services, making vulnerable people even more vulnerable.

- Cuts to the Interim Federal Health Program implemented in June 2012 are having devastating impacts on many claimants and adding pressures on community organizations that struggle to meet the needs of claimants in crisis. Some claimants are left without access to health care.

For example, an Iranian couple were found to be refugees, but their two year old child was rejected, leaving him without any health care coverage.

- The Ontario government has begun to cut social assistance payments to refugee claimants as soon as they are informed by the federal government that their claim is refused, even though

claimants have not yet been called for removal. This is leading to families being made homeless and completely without means while they await removal.

### **Concerns about discourse**

We are deeply concerned at the negative way in which refugee claimants continue to be discussed by the government. Making a refugee claim is a legitimate way, in both Canadian and international law, for a person fleeing persecution to seek protection. It is also wrong to characterize refused claims as false or abusive. The refugee definition is restrictive and technical. Many people making claims have legitimate fears even if they do not meet the narrow refugee definition. Their search for protection is genuine. Constant negative references to refugee claimants undermine the independence of Canada's refugee system and the support of Canadians for those who come to Canada hoping for safety and freedom, and to be treated with dignity.

### **Very low number of refugee claims**

Based on the numbers from January to September it is likely that Canada will receive only about 10,000 claims this year, unless there is a major change in the final quarter. This would be a **record low**. The average annual number of claims since the creation of the Immigration and Refugee Board in 1989 is 27,660.

The government has "succeeded" in its apparent objective of discouraging refugees from seeking Canada's protection, thus joining other Western countries in slamming the door on refugees.

There is a concern that Canada will see a growth in the undocumented population, as people conclude that it is not useful to make a claim because the refugee system is not fair.

### **Promise to increase resettlement numbers**

Former Minister of Citizenship and Immigration Jason Kenney announced that the implementation of restrictions in the refugee claim process would be accompanied by an increase in the numbers of refugees resettled from overseas.

We do not accept that refugees in Canada should be traded off against those overseas. However, in practice, resettlement numbers were dramatically down in 2012 (26% lower than 2011) – see *CCR decries dramatic drop in refugees resettled to Canada*, 7 March 2013, <http://ccrweb.ca/en/bulletin/13/03/07>.