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Comments on the Proposed Immigration and Refugee Protection Regulations

Submission to the House of Commons

Standing Committee on Citizenship and Immigration

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UNHCR

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❖ Introduction

UNHCR appreciates the extensive consultations undertaken by the Canadian authorities, prior to the publication of the Immigration and Refugee Protection Regulations (the Regulations). UNHCR has met with Citizenship and Immigration Canada (CIC) for briefings and discussions throughout the process of drafting the Regulations. Similarly, the Immigration and Refugee Board (Board) consulted UNHCR before publishing its Rules of Practice. These consultations reflect the cooperative working relationship between UNHCR and Canadian Government institutions.

In its March 2001 comments to the Standing Committee on Bill C-11, UNHCR urged the Government to hold broad consultations on the Regulations, in light of the "framework" nature of the Bill. UNHCR commends the Standing Committee for holding public hearings on the Regulations. These comments focus on specific parts of the Regulations which, in UNHCR's view, could better reflect the particular circumstances and needs of asylum-seekers and refugees.

❖ Definitions and Interpretation

Common-law partner

UNHCR welcomes the inclusion of common-law partners, and the recognition of difficulties they may confront in cohabiting, in particular same-sex partners. However, inability to cohabit may also be the result of fear of treatment not amounting to persecution, but may result from various forms and effects of discrimination. Demonstrating persecution or "any form of penal control" may set the bar too high and preclude recognition of a bona fide common-law union.

UNHCR also welcomes the inclusion of a common-law partner's child as a "family member" for immigration purposes (section 1(3)b)) and the definition of dependent child in section 2 (up to 22 years of age).

❖ Protection for persons outside Canada

➢ Refugee Resettlement

As the international organization mandated to provide international protection to refugees and to seek solutions to refugee problems, UNHCR is grateful to Canada for continuing to provide resettlement opportunities for refugees. UNHCR welcomes the recognition in section 135 of the Regulations of UNHCR's statutory role. That passage identifies UNHCR as a "referral organization" mandated to identify and present to Canada refugees to be considered for resettlement.

Although the Act leaves most issues concerning refugee resettlement to Regulations, the Regulations do not contain any surprises, since they reflect policy directions set out during the legislative review. Over the past few years, Canada has been working to strengthen its resettlement program by focussing on refugees' protection needs. This has entailed: relaxing the requirement that refugees be able to reach economic self-sufficiency within one year; making a more concerted effort to facilitate the reunification of refugee families; developing a closer relationship with non-governmental partners; and establishing a mechanism for the rapid admission of urgent protection cases. Canada has already begun implementing many of these measures. UNHCR welcomes their inclusion in the Regulations, as this establishes a stronger legal foundation than inclusion in policy manuals or operations memoranda.

UNHCR has repeatedly urged Canada to eliminate requirement that refugees applying for resettlement demonstrate the ability to "successfully[1] establish" themselves in Canada. UNHCR believes that resettlement should be a response to refugees' needs for protection and long-term solutions to their plight, and should not be dependent on their socio-economic potential. The Regulations do not eliminate this requirement, but they do

[1] While the draft regulations use the term "economically", according to Citizenship and Immigration, this was an error and this term will be replaced by "successfully".

reduce its impact, by eliminating a time period for "successful establishment" and by introducing new factors to be considered.

Recommendation: The factors set out in sub-section 136(1)(g) should be examined collectively, so that a weakness in one area would not bar admission. Principal applicants and their family members should be evaluated as a group, so that family members with stronger settlement potential can compensate for those whose potential is weaker.

UNHCR welcomes the fact that sub-section 136(2) removes the "successful establishment" requirement for refugees determined to be vulnerable or in urgent need of protection. In order to ensure that attention is given to refugees in greatest need of resettlement, UNHCR urges that priority in considering refugees for resettlement be accorded to those with legal and physical protection needs, followed by persons with other special needs (such as medical problems, or victims of trauma) and those seeking family reunification through resettlement. Finally, other refugees in need of a durable solution should be considered.

The Regulations define terms such as "urgent need of protection" and "vulnerable", in ways which largely parallel UNHCR's approach. However, UNHCR suggests that the definition of "urgent need of protection" within the Regulations should encompass not only the threat of *refoulement*, but also of expulsion.

The Regulations' definition of "vulnerable" is similar to the "special needs refugees" identified by UNHCR. The Regulations refer to persons with "a greater need of protection" because of their personal circumstances. Special needs refugees have a greater need for not only for physical and legal protection, but also for *care*, including medical treatment. UNHCR categorizes "special needs refugees" as those with medical needs, survivors of violence and torture, women-at-risk, children, adolescents and elderly persons. UNHCR encourages Canada's special needs resettlement program to be responsive to all special needs groups.

Recommendation : The definition of "urgent need of protection" in section 135 should be amended to include refugees facing expulsion as well as *refoulement*. The definition of "vulnerable" should refer to persons with a greater need of protection and care.

Canada's resettlement procedure has long suffered from lengthy processing times. Section 148 should help to reduce processing time by enabling visa officers to issue temporary travel documents to individuals being resettled to Canada. This will eliminate delays when UNHCR or the International Committee of the Red Cross is unavailable or unable to issue travel documents for refugees being resettled by Canada.

Section 14 also affects resettlement processing. As noted previously, Canada is committed to improving its response to refugees in urgent need of protection. Currently, in cases where urgent resettlement processing is required, Canadian missions may issue Minister's Permits. These will be replaced by "temporary resident visas" under the new Regulations. However, section 14(a) does not include refugees being resettled among the persons eligible for "temporary resident visas." This should be remedied. Section 14 (c) is also problematic for refugees because it requires that a person have a passport or other document in order to receive a temporary resident visa. Refugees frequently are not in possession of such documents.

Recommendation: Section 14 should be amended so that refugees who are being resettled to Canada may receive temporary resident visas in exceptional cases.

- **Reunification of Refugee Families**

Section 138 puts into Regulation the policy known as the "one year window of opportunity." This allows dependent family members of refugees resettled in Canada to join their relative(s) in Canada under the same program, if they apply at a Canadian mission within one year of the principal applicant's arrival in Canada. The establishment of this policy in regulation is an important watershed in facilitating the reunification of refugee families. However, UNHCR is concerned that the one-year limit is an arbitrary cut-off date. In rare cases, refugees may be out of contact with family members for

longer than one year. Separated refugee families should be subject to the same regime, regardless of time periods. UNHCR is also concerned about the strict limitation of section 138 to spouses and minor children. UNHCR applies a broader definition of family based on dependency. Canada is taking policy measures to resettle family members who are emotionally, economically and culturally dependent on one another. It seems inconsistent that this policy would only apply to those processed concurrently, and not also to those processed subsequently.

Recommendation: Amend section 138 to allow for extension of the "one year window" in exceptional cases. Further amend section 138 to allow for the admission under this arrangement, on a case-by-case basis, of family members other than spouses and minor children, where such family members are dependent on the relative in Canada.

❖ Convention Refugees in Canada

➢ Identity and Convention travel documents for refugees, and access to permanent resident status

UNHCR has repeatedly drawn attention to the obligations of States, under Articles 25, 27 and 28 of the Refugee Convention[2], to issue identity and travel documents to Convention Refugees. Article 27 provides that "Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document". Article 28 provides that Contracting States "shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory…." However, Canada does not issue identity papers to Convention refugees, and issues Convention Travel Documents only to those refugees who have been "landed".

[2] See opinion prepared by Professor Guy S. Goodwin Gill entitled « The 1951 Convention relating to the Status of Refugees and the Obligations of States under Articles 25, 27 and 28, with reference to refugees without identity or travel documents » (available at www.web.net/~ccr/unhcr.html).

Landing of Convention refugees in Canada remains conditional on the applicant's ability to provide one of the identity documents listed in section 48 of the Regulations. UNHCR considers that it is inconsistent with the object and purpose of the Refugee Convention to require Convention refugees to approach their countries of origin for such documents. Moreover, many refugees are not able to obtain identity or travel documents issued by their country of origin. As a result, the landing of many refugees is delayed for long periods.

Section 31 of the Act provides that protected persons "shall be provided with a document indicating their status." However, the Regulations do not set out the procedures for protected persons to obtain this document, nor do they set out the rights attached to it. UNHCR is concerned that the *status quo* with regard to the identity document requirement will be maintained, and will continue to delay landing of Convention refugees and therefore also the issuance of Convention travel documents.

Recommendation: The Regulations should set out a transparent procedure for obtaining a status document pursuant to Section 31 of the Act. This status document should serve as identity document under Article 27 of the Refugee Convention and enable a Convention refugee to obtain a Convention travel document.

As mentioned above, the Act makes landing conditional on the ability of the applicant to provide one of the documents listed in Section 48. UNHCR notes with satisfaction that Section 48 exempts protected persons entering Canada from abroad from this requirement "when it is not possible for the person to obtain a passport or identity or travel document". This provision gives visa officers abroad the flexibility to deal with permanent residence applications from refugees since, unlike immigrant applicants, refugees are often unable to obtain documents from the authorities of their home country.

UNHCR believes that the same exemption should apply to applications for landing made by protected persons in Canada. Section 171 offers some flexibility, by allowing protected persons in Canada to submit an identity document issued by the country of origin before the individual entered Canada, together with statutory declarations.

However, experience with individual cases since the so-called *Aden* agreement suggests that this approach is not sufficiently flexible.

Recommendation: Section 48(2) should apply to all protected persons, in and outside of Canada

- **Undocumented Protected Persons in Canada Class**

Sections 172-175 define the Undocumented Protected Persons in Canada (UPPC) Class, which mirrors the existing Undocumented Convention Refugees in Canada (UCRC) class in the current Immigration Act. The UPPC class is for Somali and Afghan protected persons not in possession of identity documents considered satisfactory by CIC, and permits them to (re-)apply for landing after three years have passed since obtaining protected person status.

The experience with the UCRC class has shown that the waiting period imposed on these refugees did not serve its purpose, which was to detect refugees involved in serious criminality before coming to Canada, or in Canada. UNHCR notes that the UCRC class has delayed family reunification and created hardship for refugees. UNHCR believes that once an individual is recognized as a protected person by the Board, no further determination of identity should be required. The Board, as a specialised tribunal, conducts its own examination into identity. Additionally, the Act contains all the provisions necessary to inquire into grounds of inadmissibility, and to deny or revoke refugee status sought or obtained on false pretenses. Consequently, UNHCR recommends that the UPPC class be abolished and that sections 172-175 be deleted. As suggested above, the exception in section 48(2) should also be exercised in favour of the refugees targeted by the UPPC provisions.

Recommendation: Sections 172-175 regarding the UPPC class should be deleted. The exception in section 48(2) should be exercised in favour of the refugees targeted by the UPPC provisions.

❖ Asylum-seekers in Canada

➢ Bars to refugee protection hearings (R39, R219-228)

Access to a refugee determination procedure is a fundamental principle of refugee protection. This means that persons who express fear of returning to their countries of origin should not be returned, directly or indirectly, to that country, without first examining the well-foundedness of their fear. UNHCR notes with satisfaction the express prohibition (R39) against directing protected persons and refugee protection claimants to leave Canada.

The Act provides that individuals who fall into one of four inadmissibility categories (security, human rights violations, serious or organised criminality) are not entitled to a refugee hearing. Furthermore, some regulations irrefutably deem certain persons to be inadmissible, without the benefit of a hearing before the Immigration Division. Although the Refugee Convention permits States to exclude persons from protection, UNHCR maintains its position that such decisions should be made in the context of a full refugee hearing before the Board, on the basis of an individualised determination, and not be based merely on a person's status or associations (see March 2001 Comments, paras 13-20, 45-64).

UNHCR has previously expressed concern about the inadmissibility of "senior officials" as set out in section 35(1)(b) of the Act. Section 221 of the Regulations clarifies that this is intended to encompass persons who were able "to exert a significant influence" on their governments. However, this section also renders senior officials inadmissible on the basis of "benefit" derived from their position. Without further clarification, this may lead to exclused based on what may amount to a purely economic factor.

Recommendation: The reference to the phrase "benefit from their position" should be deleted.

UNHCR is particularly concerned about the absence of any guidance in the Regulations regarding the exceptions to the inadmissibility provisions relating to security, human rights violations and criminality (ss.34-37 of the Act). The Act clearly stipulates exceptions for persons who "satisfy the Minister" that their presence in Canada would not be detrimental to the national interest, or that they have been rehabilitated. Yet, the Regulations fail to set out any procedural or substantive guidelines for the implementation of these important provisions. The consequences of these inadmissibility findings are grave since they make an individual ineligible for a refugee hearing before the RPD and preclude a pre-removal risk assessment on Refugee Convention grounds. Similarly, with regard to the inadmissibility provision on grounds of misrepresentation (section 40(1)(b) of the Act), which also has an exception founded on the Minister's opinion, UNHCR believes that the Regulations should also set out the procedure and criteria according to which such relief may be sought.

Recommendation: The regulations should set out the procedure and criteria according to which persons may apply for Ministerial relief pursuant to sections 34-36 and 40 of the Act.

- **Detention of asylum-seekers (R251-257)**

The right to liberty is a fundamental right affirmed in universal and regional human rights instruments. The detention of asylum-seekers is therefore inherently undesirable, and should be avoided. Where detention is necessary, it should only take place in circumstances prescribed by law and subject to due process safeguards.

UNHCR has long urged states to make special efforts to avoid the detention of asylum-seeking children, and of persons with special medical or psychological needs. States should also avoid separating children from their parents through detention. UNHCR welcomes the inclusion, in the Section 60 of the Act, of the principle that children should not, as a rule, be detained, and related considerations set out in section 256 of the

Regulations. Where detention is contemplated or does occur, Article 37 of the Convention on the Rights of the Child must be respected, including the right to prompt access to legal counsel and other appropriate assistance.

UNHCR also welcomes recognition in the Regulations that a child's "lack of cooperation" in providing evidence of his or her identity shall not have an adverse impact on decision-making (R254(1) and 254(2)). However, it is important to be aware of the special circumstances of other persons who may (mistakenly) be perceived as uncooperative. Persons with special medical or psychological needs or who have suffered mistreatment or trauma at the hands of authorities may, in the presence of authorities, behave in a manner which is perceived as uncooperative.

Recommendation: Prescribed factors set out in section 254 should include elements of wilfulness and intention to deceive. Similarly, for the purposes of subsection 251(c) and 254(d) and (e), reasonable explanations for contradictory information on identity should be considered along with other factors set out.

Section 252(f) of the Regulations includes arrival as part of a criminally organized smuggling or trafficking operation as a factor to consider when assessing "flight risk". UNHCR notes with concern that the "flight risk" ground for detention goes beyond the grounds for detention of asylum-seekers set out in the UNHCR Executive Committee Conclusion 44 (XXXVII). UNHCR cautions against prescribing detention based on the mode of arrival of asylum-seekers. Many refugees are forced to resort to the services of smugglers in order to reach safety, and Article 31 of the Refugee Convention prohibits punishment of refugees for illegal entry or presence under specified circumstances.

Similarly, section 44 of the Regulations prescribes that performance bonds may be imposed on persons *or groups of persons* seeking to enter Canada. These provisions may assign to a group of persons the responsibility to arrange and be liable for a performance bond, imposed on them collectively rather than pursuant to an individualized determination. These provisions fail to recognize that persons seeking to enter Canada as part of a group may have no association to each other, and that some may be asylum-

seekers who had no choice but to resort to the services of a smuggling operation. Asylum-seekers may also be victims of trafficking operations. Section 44 imposes an unfair burden on such individuals, who may come to Canada with legitimate protection needs. When dealing with asylum-seekers, states should refrain from measures which amount to penalties based on mode of arrival.

Recommendation: UNHCR urges that states refrain from measures which amount to penalties based on mode of arrival. UNHCR also recommends that section 44 be limited to individualized determinations.

UNHCR welcomes the safeguard included in subsection 257(2). This provides that the signature by an asylum-seeker of an application for a passport or travel document (as a condition imposed by an officer or by the Immigration Division) will not be divulged to the authorities of the person's country of nationality or former habitual residence, as long as the removal order is not enforceable. UNHCR encourages CIC to ensure that all protection claimants are formally informed of this assurance. Moreover, the logic of this provision would appear to militate against CIC's practice of requiring protected persons to approach their countries of origin for travel or identity documents after recognition.

❖ Pre-removal risk assessment

UNHCR views the PRRA as an important safeguard, both in cases where circumstances have changed since a negative decision was taken on an application for protection and, in particular, for individuals who are not allowed access to the refugee determination procedure. While the PRRA must remain expeditious, an oral hearing will, in UNHCR's view, be essential in all cases where an application for protection was not examined in a full hearing before the Board.

UNHCR notes a number of difficulties with the language of the Regulations pertaining to the PRRA, and urges that this section be clarified. The following issues warrant attention.

Sections 156(1)-(3) and 157 prescribe notification and application deadlines for the purpose of determining whether a stay of removal will be granted. However, the intent and scope of subsection 156(4), and in particular the manner in which the Regulations intend to address "subsequent applications", remains unclear.

Section 159 prescribes the factors that will determine whether an oral hearing should be conducted. In UNHCR's view, an oral hearing should be held in *all* cases where a protection claim was not heard by the Immigration and Refugee Board. Moreover, in cases of persons whose claims were heard by the IRB, UNHCR recommends limiting the factors to those set out in subsections 159(a) and (b). Subsection 159(c) appears overly restrictive, in providing for a hearing only where evidence "would justify allowing the application for protection". This determination should be made in the course of an oral hearing.

Recommendation: UNHCR recommends that an oral hearing into a PRRA be held in all cases where a protection claim was not heard by the Immigration and Refugee Board. UNHCR further recommends that subsection 159(c) be deleted.

The Regulations are silent about whether a hearing into a PRRA application will be held *in camera* or otherwise. UNHCR urges that *all* protection applicants enjoy equal protection of the confidentiality of their claim, regardless of the procedure engaged.

UNHCR urges clarification of the intent of subsection 156(5), and in particular of the phrase "without Department notification". This provision permits a PRRA application to be made at a port of entry, without Department notification, at the time a removal order is made. The application and submissions must be made simultaneously. UNHCR is concerned that individuals who are determined inadmissible and issued a removal order at the port of entry (for example, an exclusion order) are expected to perfect their application immediately, in contrast to inland applicants who have 15 days in which to do so. Requiring applicants to set out a comprehensive protection application at the port of entry at the time the removal order is made may limit their ability to demonstrate the merit of their claim. Furthermore, the Regulations should specify whether this category of

applicants would benefit from a stay of removal pending a final determination of their application. In UNHCR's view, persons whose protection concerns were never heard in a regular procedure by the RPD/RAD must be afforded a fair opportunity to present their case. UNHCR urges clarification of these points. UNHCR further recommends that unaccompanied or separated children in all cases be notified of the availability of a PRRA and be afforded a fair opportunity to present their case, with the necessary addult assistance.

Recommendation: Persons whose protection concerns were never heard in a regular procedure by the RPD/RAD must be afforded a fair opportunity to present their case. UNHCR further recommends that unaccompanied children be notified of the availability of a PRRA and be afforded a fair opportunity to present their case.

UNHCR suggests that the Regulations set out procedures for cases where an applicant's (alleged) inadmissibility has been overcome while PRRA proceedings are pending. For example, evidence of rehabilitation in cases involving criminality (section 36(3)c) of the Act) should be taken into consideration by CIC in determining the PRRA application. In cases involving criminality, the applicant may initially be assessed as a person described in section 112(3) of the Act. If the person's application is accepted, this would only result in a temporary stay of removal (section 114(1)b) of the Act). However, if, during the course of the proceedings, the applicant overcomes the inadmissibility, the decision-maker, upon positive consideration of the application for protection, should grant protected person status, rather than a temporary stay of removal. Similarly, if a person described in subsection 112(3) of the Act who was granted a temporary stay of removal pursuant to section 114(1)b) of the Act can satisfy the Minister of his or her rehabilitation, UNHCR recommends that s/he be granted protected status.

Recommendation: UNHCR recommends that applicants who show evidence that their inadmissibility has been overcome during the course of the proceedings or following a positive determination be granted protected status.

Section 112(1) of the Act defines persons who may apply for a PRRA as persons "other than person(s) referred to in subs.115(1)", i.e., other than those who are protected against

refoulement by reason of their protected status in Canada or Convention refugee status elsewhere. Clarification is needed on what form of relief and status would be afforded to persons who, although accorded refugee status elsewhere, articulate a fear of persecution in that country. Regulations should provide clear guidance on the determination of such applications.

Recommendation: UNHCR urges that the Regulations set out the transparent procedural and substantive criteria according to which the PRRA will ensure protection against *refoulement.*

UNHCR notes with concern that subsections 238(d) and (e) grant different rights to protected persons under the PRRA than to protected persons pursuant to an IRB determination. Persons granted protection by the Board have the right to remain in Canada, notwithstanding a delay in filing an application for permanent residence (section 49(2) of the Act and section 168 of the Regulations). It is argued that the right to remain in Canada should apply in the same manner to persons who receive protected status pursuant to a PRRA or to an IRB decision (section 49(2) of the Act). However, subsections 238(d) and (e) suggest that protected persons pursuant to a PRRA would not be permitted to remain in Canada if they do not file an application for permanent residency. Furthermore, the English version of subsections 238(d) and (e) of the Regulations (referring to "temporary" residence) are at variance with the French version (which refers to "permanent" residence).

Recommendation: UNHCR urges that protected persons described in section 112(1) of the Act be afforded the same right to remain in Canada as protected persons pursuant to a final decision by the IRB. UNHCR further recommends that the English text of subsections 238(d) and (e) be consistent with the French version, in accordance with subsection 21(2) of the Act, in reference to the right to apply for *permanent* residence.

❖ **Applications based on humanitarian and compassionate considerations (R17, 107-112)**

UNHCR has a special role as intermediary to resolve cases of statelessness. The agency has always had responsibility for stateless refugees, and has also been entrusted by the General Assembly with fulfilling the functions foreseen under Article 11 of the 1961 Convention on the Reduction of Statelessness, to which Canada is party.

UNHCR does not believe that there are significant numbers of stateless persons in Canada, and note is taken that the Bill's definition of "foreign national" includes stateless persons. Nonetheless, UNHCR suggests that the Regulations should explicitly include the possibility for non-refugee stateless persons to achieve a legal status in Canada, by obtaining permanent residence based on humanitarian or compassionate considerations. Section 110 allows discretion to land persons who do not meet the categories set out in section 17(2).

Recommendation: Include in the Regulations guidance and factors to address and resolve situations of statelessness through the decisions under Section 110.

❖ **Removal orders and Stays (R229-25; R236-240)**

Section 236 allows the Minister temporarily to suspend removals to a country owing to generalized conditions of risk. The factors set out in subsection 236(1)(b) include a "substantial temporary disruption of living conditions". In the wake of an environmental disaster, it is often difficult to predict the duration of disruption of living conditions. It should be sufficient to demonstrate that the disruption of living conditions is substantial.

Subsection 236(c) prescribes the existence of "other conditions" which would prevent nationals from returning in safety. This appears broad enough to encompass different situations, including those involving widespread violations of human rights. An explicit

reference to situations involving widespread violations of human rights would, in UNHCR's opinion, be preferable.

Recommendation: Include in subsection 236(c) a reference to situations involving widespread violations of human rights.

Section 237 appears to have no basis. That section prescribes that no stay of removal order is available pending leave for judicial review of a RAD decision for persons found ineligible to have their protection claims referred to the RPD by reason of having come to Canada from a designated country. However, eligibility determinations which are made by the Immigration Division cannot be appealed to the RAD.

Recommendation: Section 237 should be deleted.