Canadian Council for Refugees | Conseil canadien pour les réfugiés

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Budget Implementation Act (BIA) 2024

Submission to the Standing Committee on Finance studying Bill C-69

Overview

The Canadian Council for Refugees (CCR) is a leading voice for the rights, protection, sponsorship, settlement, and well-being of refugees and migrants, in Canada and globally. The CCR is driven by over 200 member organizations working with, from, and for these communities from coast to coast to coast.

The CCR's advocacy centres the rights and perspectives of people whose migration is forced and who are often shouldering multiple vulnerabilities. Our work is informed by members who are front line agencies, accompanying and supporting those in the refugee claims process and immigration detention. Many of our members also have lived experience of these processes.

CCR appreciates the opportunity to submit views and recommendations to the Standing Committee on Finance on the Budget Implementation Act (BIA). These same recommendations were submitted earlier to Senate Committees undertaking a pre study of the Bill. CCR welcomes the goal of supporting claimants by streamlining the initial stage of the claims process and reducing determination backlogs. But the details of reforms to eligibility and determination matter and require careful consultation.

Many of the proposed changes to refugee and immigration law are major and extremely concerning. Indeed many, we feel, have been so hastily crafted as to lead to unintended negative consequences. All of them deserve in-depth and review by parliament. For Division 38, most of the proposed changes are to make way for intended regulations that have not been released for public comment, making interpretation of the legislative reforms challenging and informed public debate next to impossible. **CCR objects to the BIA being used in this undemocratic way to bring in potentially sweeping changes to the immigration and refugee system.**

This brief provides an overview of concerns and recommendations for Divisions 38 and 39 of Bill C-69. CCR would like to draw parliamentarians' attention to four priority areas of concern in particular.

Division 38:

1. **The introduction of a worrisome new step in the refugee claim process between eligibility and referral** that could lead to backlogs and long delays and even create indefinite limbo for claimants for undetermined reasons. As well as jeopardizing claimants' rights to fair process, the amendments may counter progress made to date with Canada Border Service Agency's (CBSA) OneTouch system to streamline processing, delay family reunification efforts, and risk undermining the role of the Immigration and Refugee Board (IRB).

2. **Introduction of new provisions that trigger an early opportunity for a claim to be declared abandoned** before it has been referred to the IRB. The measure is likely to lead to claims being unfairly declared abandoned merely because people had inadequate communication and support in a complex system that denies them access to formal support services and accessible legal aid. Those most at risk of losing the right to ever again make a refugee claim in Canada, are likely to be the most vulnerable—victims of torture, unaccompanied minors, claimants who must take care of their children as well as manage their claim and those who are living in an unsafe situation. The provision will contribute to a backlog of abandonment hearings at the IRB.

3. **Introduction of an overly vague provision permitting "the Minister" to designate a representative for a minor or someone who cannot understand the nature of the proceedings**. There is an urgent need for better protections and access to qualified designated representatives. However, there is a fundamental conflict for the CBSA (an enforcement agency) to name and fund a representative to act in the interests of children and vulnerable persons against whom they want to enforce the law. BIA amendments are focused in the wrong direction, bypassing the need to create a single system in which the IRB is responsible for designating representatives for unaccompanied minors and adults who don't understand the proceedings.

Division 39

4. **Amendments to enable the creation of "Immigrant Stations" at federal correctional facilities** for the purposes of immigration detention are a major and deeply troubling misstep. Imprisoning immigration detainees in jails is punitive and does not respect human rights. For refugee claimants, jail not only retraumatizes but also further jeopardizes their claim, given the difficulty of pursuing a claim while imprisoned. Most immigration detainees are racialized. Most are detained based on a subjective assessment of being a flight risk and often because of missing identity documents and many have mental health or addiction issues. The focus should be on supports in community and mental health services, not incarceration. The move to open immigrant stations in federal jails goes counter to the clear public outcry against the practice, as well as the decision by all ten provinces to end their participation in such detention. This direction should be rejected by Parliament.

Further detail and our full recommendations are below.

CCR's detailed analysis and recommendations

Part 4, Division 38

A. Overall concern on regulations

Proper review and public debate of the changes is not possible without access to the proposed regulations. Members of Parliament are being asked to approve changes to a process without knowing what it will look like, and whether it will ensure refugees are protected. (This comment applies to the many proposed changes that involve provisions to be established in regulations.)

Recommendation

1. The House of Commons Standing Committee on Citizenship and Immigration should hold hearings on proposed regulations once they are published for consultation in the Canada Gazette to ensure fulsome review and consideration.

B. Refugee claim process: new step pre-referral

The Budget Implementation Act will amend the Immigration and Refugee Protection Act (IRPA) to create a new stage in the process between a refugee claim being determined eligible and the claim being referred to the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB). After the claim is determined to be eligible, "the Minister must consider it further". Claimants must provide information and documents (BIA 410). There is no timeline for the claim to be referred to the RPD. Before it is referred, the person must provide all the information required, and the Minister must have the opportunity to consider the information submitted (BIA 411).

Major concerns:

- An indefinite gap between eligibility and referral may lead to backlogs and long delays for some claimants.

- Claimants whose Front-End Security Screening (FESS) is delayed could be in indefinite limbo. Since 2001, all claimants are required to undergo a Front-End Security Screening conducted by the CBSA. While the screening is generally completed quite rapidly for most claimants, a few claimants experience long delays. Because it was recognized as unfair for claimants to be asked to wait indefinitely for the FESS to be completed, the IRB Chairperson issued instructions, originally in 2004, updated in 2017, which enable the refugee hearing to proceed after six months without needing to wait for the FESS.

Under the proposed amendments, claimants whose FESS is delayed may be forced to wait years for their claim to be referred to the IRB, with no recourse. As the IRB notes in its instructions, "delays in security screening can occur for several reasons and may not reflect on the merits of an individual's claim for protection, nor do they necessarily imply a security concern."

- The government could also potentially hold back groups of claims where they want to explore "integrity" concerns or are considering intervening (for example, if they had suspicions about claimants from a certain region or with a specific profile).

- The new provisions also open the door to the Minister to request documents from claimants that are not currently required for the claim to be referred to the IRB but are needed only by the time IRB hearing itself. It often takes claimants some time to gather necessary documents, including identity documents, and there may be costs involved in obtaining documents, and potential risk to family members who are asked to seek them. Giving the Minister the power to hold the claim back indefinitely from referral until requested documents are received will not only lead to delays for some claimants, but also undermine the role of the IRB as the tribunal responsible for deciding what evidence is necessary to determine the claim.

- While waiting in this (possibly indefinite) new stage for a referral, the person will not be able to serve as an anchor relative for family members seeking to enter Canada from the US under the terms of the Safe Third Country Agreement, slowing down family reunification efforts that are crucial for protection and refugee well being and integration. [1]

Note: referral to the IRB does not prevent the government from pursuing its investigations into individual cases, in parallel with the IRB's efforts to determine the claim. Where the government needs more time to conclude its investigations, the government can request a postponement of an individual claimant's hearing – such requests are routinely granted. It is therefore not necessary to hold up a claim before referral in order for the government to pursue its investigation, and such delays may in many cases undermine the government's stated aim of improving efficiency, and undermining progress made to date with the Canada Border Service Agency's (CBSA) OneTouch system to streamline processing.

Recommendations

2. Amend BIA 410 to delete "If it is determined to be eligible, the Minister must consider it further":

[1] To be an anchor relative as a claimant, a person must have a claim for refugee protection that has been referred to the IRB for determination – Immigration and Refugee Protection Regulations, paragraph 159.5(c)).

100 (1) An officer must, after receiving a claim referred to in subsection 99(3), determine whether it is eligible to be referred to the Refugee Protection Division. ~~If it is determined to be eligible, the Minister must consider it further.~~

and BIA 411 to delete "and has had the opportunity to consider":

100.1 (1)(b) the Minister has been provided with~~, and has had the opportunity to consider,~~ the documents and information referred to in subsection 100(4);

3. Amend BIA s. 411 to add a provision specifying that an eligible claim must be referred to the Refugee Protection Division no more than one month after the documents and information required have been submitted, and following that period the claim would be deemed referred to the Refugee Protection Division, if the Minister did not refer it. (Prior to 2019 amendments, the IRPA gave the Minister 3 days to consider whether the claim was eligible to be referred, and the claim was deemed referred if no decision was taken within the 3 days.)

100.1 (1) Subject to subsections 100(1) to (3) and section 102.2, the Minister must, within one month of receipt of the documents and information referred to in subsection 100(4), refer a claim for refuge protection to the Refugee Protection Division if…

C. Refugee claim process: new abandonment provision pre-referral

The Budget Implementation Act introduces a new provision to jumpstart the opportunity for a claim to be declared abandoned before it has been referred to the IRB. Under the proposed amendments, if a claimant doesn't provide the required information and documents, or fails to appear for an interview, the claim must be sent to the Refugee Protection Division (RPD) at the IRB to decide whether to declare it abandoned (before it has been referred). (BIA 412)

Currently, a claim can only be declared abandoned after it has been referred to the RPD.

Major concerns:

- The new abandonment provisions are likely to lead to claims being declared abandoned because unsupported people did not receive or understand communications or could not navigate the portal. These challenges are compounded by inadequate access to housing, legal representation, and other supports.

- Those most at risk of unfairly having their claims abandoned are likely to be those who are the most vulnerable. This includes those with mental or physical health issues (in some cases as a result of torture and other experiences of persecution), unaccompanied minors, claimants who must take care of their children as well as manage their claim and those who are living in an unsafe situation within Canada.

A person whose claim has been declared abandoned has no right to ever make a refugee claim again in Canada. The stakes are thus extremely high – both for the individual and for Canada's compliance with its legal obligations to protect refugees.

- The consequences of having a refugee claim declared abandoned include a 12-month bar on a Pre-Removal Risk Assessment, meaning that people may be removed without any assessment of whether they face danger in their home country.

  In addition, eligibility for the Interim Federal Health Program is ended when a claim is declared abandoned. Even if a person eventually succeeds in reopening their claim, they will be without health coverage during the time the claim was declared abandoned. People from countries to which they cannot be removed because of generalized insecurity will remain indefinitely in Canada without health coverage (unlike refused claimants who maintain eligibility for the Interim Federal Health Program).

- The proposed amendment states that the claim must be referred to the RPD for abandonment proceedings if the person does not submit all the information or fails to show for an interview (BIA 412). This gives no flexibility to IRCC and the CBSA to take individual circumstances into account. It may indicate plans for automatic referral of cases where the deadline for completing the portal is missed.

  The refugee claim process needs to take account of realities such as people being moved from one IRCC hotel to another, and missing their mail, or being bused by IRCC to a new location, thereby missing their eligibility interview. CBSA recently started conducting eligibility interviews without providing an interpreter, leaving claimants who don't speak English or French unclear on the process and their obligations. There is also inconsistency in how officials communicate with claimants – some explain the process, others don't. In addition, claimants often don't have access to a computer and internet, struggle to find a lawyer and don't have support from an NGO. Sometimes, claimants believe that they have completed the requirements of the refugee portal, but in fact there is information missing (for example, they may not have uploaded the required documents).

  Many people making an inland claim initiate the claim before they have a lawyer because they need access to services, which are only available to them once they have made a claim. There is a shortage of available refugee lawyers making it challenging to find one in a timely way. Currently, if claimants don't manage to find a lawyer within the timelines to complete the portal, the claim may simply be closed. They are not prevented from starting again when they have found a lawyer. Following application of the proposed amendment, the claim would be referred for abandonment, and if the claim is declared abandoned, they will be barred for life from making a claim.

- Referring all claims for abandonment proceedings where a person has not met a deadline or appeared for an interview is not efficient. It will likely lead to the RPD being

forced to hold numerous abandonment hearings with claimants who are attempting to comply with the system but struggling due to lack of supports noted above,. Presumably, many of these claims would not be found abandoned, just as the RPD currently regularly gives claimants another opportunity if they show their commitment to completing the Basis of Claim forms.

Due process would be better served by leaving the authority to initiate an abandonment hearing to the IRB rather than inviting IRCC or the CBSA to also take on this role. Failing that it is imperative for IRCC and CBSA to be able to exercise discretion to take individual circumstances into account rather than requiring the RPD to hold abandonment hearings for each case with a missed document or appearance.

Recommendations

4. Delete 412 (providing for new powers for abandonment of claims prior to referral).

5. In the alternative, amend BIA 412 to give discretion to the Minister to not refer a claim for abandonment, for situations where claimants are trying to comply with requirements (but prevented due to issues such as lack of counsel, lack of stable housing, lack of support, lack of knowledge of English and French, etc):

   102.1 (1) If a person who makes a claim for refugee protection inside Canada that has not been referred to the Refugee Protection Division and that has not been determined to be ineligible for referral fails to provide documents or information in accordance with subsection 100(4) or fails to appear for an examination when requested to do so, the Minister ~~must~~ may transmit the claim to the Division to determine whether, as a result of the failure, the claim has been abandoned.

D. Designated representatives (DRs)

The Budget Implementation Act proposes a new provision permitting "the Minister" to designate a representative for a person under 18 years or who cannot understand the nature of the proceedings. Regulations will specify where and when a rep can be designated, where they can make decisions for the person, responsibilities and requirements, and remuneration. (BIA 386).

Currently, only the Immigration and Refugee Board can designate representatives, and only for proceedings before one of its divisions (IRPA sub-section 167 (2)). Thus the Refugee Protection Division Protection can designate a representative once a claim has been referred to it.

Currently, unaccompanied minors who make a refugee claim are referred to the IRB Immigration Division for the issuance of the conditional removal order, and at that point the IRB designates a representative (although that representative is only designated for the proceeding before the Immigration Division). With the proposed elimination in the BIA of Conditional Removal Orders for claimants, unaccompanied minors will no longer be referred to the Immigration Division and

will not be appointed a designated representative by the IRB until the claim is referred to the RPD.

Major concerns:

- There is an urgent need for better protections – currently unaccompanied minors and adults who can't understand the proceedings only have access to a designated rep with respect to proceedings before the IRB. That leaves them unrepresented at crucial processes such as examinations at Ports of Entry and removal interviews with the CBSA, or in the Pre-Removal Risk Assessment, for which IRCC is responsible. Refugee claimants are left without representation for completing the portal, a crucial step in the refugee determination process, where information omitted or poorly presented can have serious negative repercussions.

- However, representatives designated by the Minister, as proposed in the BIA, will not achieve the goal of ensuring better protection where the Minister may be the Public Safety Minister. There is a fundamental conflict for the CBSA (an enforcement agency) to name and fund a representative to act in the interests of children and vulnerable persons against whom they want to enforce the law.

  There is a risk that the CBSA would have inferior standards for the designated representatives, compared to those appointed by the IRB. To be effective, a representative needs an adequate knowledge of immigration and refugee claim processes. The IRB has a developed program for designated representatives. With the proposed change, there would be two parallel systems.

- The proposed new provision (IRPA 6.1 (1)) says that the Minister may (not the Minister must) designate a rep in the prescribed circumstances. This means that CBSA would have discretion not to appoint a representative, raising concerns that when officers are eager to move enforcement activities along they may choose not to appoint a designated representative. For example, officers might decide that a 16- or 17-year-old is mature enough and doesn't need a representative. They might also be tempted to conclude that someone with evident signs of intellectual disability is nevertheless able to understand the proceedings well enough, so that they can complete the process they have undertaken.

- Important rights are at stake, including the right to be protected from refoulement. An interview with a CBSA officer can lead to a person losing the right to make a refugee claim (when a removal order is issued against them) or waiving the right to a Pre-Removal Risk Assessment. Ensuring vulnerable adults and unaccompanied minors are effectively represented is thus crucial for avoiding sending someone back to face persecution.

- The issues for unaccompanied minors and adults who cannot understand the proceedings are significantly different. CCR believes the two categories should be considered separately to ensure that their distinct needs and realities are taken into account. Determining who is a minor is usually straightforward, based on the age of the child, whereas determining whether an adult understands the proceedings is much more complex.

  CBSA officers may confuse a person's mental health issues with a lack of credibility. For example, where a person's health issues are undiagnosed and they are facing removal, their confusion and inability to fully respond may be interpreted as the person trying to avoid removal. Asking CBSA officers to determine whether a person needs a designated representative puts them in a situation of conflict of interest, since it may facilitate them advancing their enforcement goals if they conclude that the person is able to understand the proceedings and doesn't need a representative.

- Vulnerable persons who are making a refugee claim need a designated representative that will support them through the claim process, from the beginning of the process through to the hearing at the Refugee Protection Division. The early stages of the refugee claim process are crucial – mistakes made at the beginning can cause significant problems further on, so it is extremely important to ensure that unaccompanied minors have from the beginning an effective representative who understands the claim process, and not only after the claim is referred to the IRB.

  In any immigration proceedings where a decision is needed, such as examinations at the Port of Entry or removals interview where a person may be asked to waive the Pre-Removal Risk Assessment), proceedings need to be deferred whenever a designated representative may be needed, so that a qualified representative can be appointed and they have time to connect with the child/person before the proceeding takes place, in order to be able to provide meaningful support.

- We need a coherent system – there should not be two systems of designated representatives, and designation only for certain defined proceedings. Designated representatives need to be appointed by an independent entity. Wherever possible, the same designated representative should follow the person through all immigration and refugee proceedings, whether before the CBSA, the IRB or IRCC, so that vulnerable individuals can be effectively supported through the complex processes that they need to navigate.

Recommendations

6. Delete section 386 (IRPA 6.1) and instead call for separate legislation to amend IRPA to create a single system according to which the IRB would be responsible for designating representatives for unaccompanied minors and adults who don't understand the proceedings. The DR would be responsible for supporting the person through all parts of the

refugee and immigration system (rather than having distinct designations for each IRB division and for CBSA or IRCC proceedings, and instead of limiting the applicability of DRs to certain proceedings named in the regulations).

The process should also provide for a process where an individual or third parties could flag the need for a designated representative. Third parties might be an NGO worker, social worker or lawyer who is working with the person.

E. Other concerns

1. Status for refugee claimants

Under the BIA amendments, people who make a refugee claim will lose any temporary status they hold. (BIA 397)

Major concerns:

While we welcome the proposed change in the BIA to cease issuing conditional removal orders to refugee claimants, it is regrettable that the government is proposing to cancel out one of the main benefits by introducing a provision to make claimants lose their temporary status.

- People in Canada are being put in a more precarious status because they have made a claim.

There are compelling reasons why a person might make a claim and deserve to revert to their existing status if the claim is refused or withdrawn. For example, a person in Canada on an international student visa might be affected by political events in the country of origin, or by changes in their personal situation. They might make a refugee claim in order to have more security. If the claim is not accepted, instead of being able to at least finish their studies in Canada and seek other options for the future, they will face immediate removal from Canada.

Recommendation

7. Delete BIA 397:

> ~~Section 47 of the Act is amended by striking out "or" at the end of paragraph (b) and by adding the following after that paragraph: (b.1) if they make a claim for refugee protection inside Canada; or~~

2. Mandatory conditions for refugee claimants

The BIA introduces provisions requiring the imposition on claimants of certain conditions to be prescribed in regulations.

Major concerns:

- Mandatory conditions in regulations for claimants are worrying. Even if the conditions initially prescribed are minimal, other conditions might be added in the future (for example by a government wanting to treat claimants in punitive ways). There is no room for discretion, based on individual circumstances (for example, a claimant who is hospitalized.)

- Claimants may not understand the conditions and therefore fail to comply. We know from experience that claimants often do not receive a detailed explanation of their obligations, or do not take in what they are told at a stressful encounter with border officials. Written documentation is provided in English and French, which is not understood by many claimants.

- A condition requiring the claimant to complete the portal potentially puts the claimant in breach of conditions even if they were trying their best. There will be tremendous pressure on claimants, as well as underfunded NGOs that support them, to try to navigate complex digital processes, despite language barriers, lack of access to legal representation, lack of access to technology, lack of knowledge of new processes and lack of stable housing.

- Vulnerable claimants, such as those with mental health issues, are particularly likely to find conditions challenging to meet, yet their mandatory nature gives no opportunity for officials to vary the conditions in light of the individual circumstances.

- Conditions continue to be in place during the refugee claim process, which can take many years. They may become unreasonable over time, but there is no provision to request that the conditions be modified.

- CCR is concerned about the potential consequences of being found in breach of conditions, including the possibility of arrest and detention. Individuals may also face the imposition of stricter conditions (such as more frequent reporting).

Recommendation

8. Amend BIA 394, 398, 402 and 406 to give discretion to officers/Immigration Division to exempt persons from mandatory conditions if they would be unjust, taking into account the person's circumstances.

   394 – IRPA 44(6) If a foreign national who makes a claim for refugee protection becomes the subject of a report, or if a foreign national who is the subject of a report makes a claim for

refugee protection, an officer must impose the prescribed conditions on the foreign national, unless it would be unjust, taking into account the person's circumstances.

402 – IRPA 56 (5) If an officer orders the release of a foreign national who has made a claim for refugee protection, the officer must impose the prescribed conditions on the foreign national, unless it would be unjust, taking into account the person's circumstances.

406 – IRPA 61 (a.1) the conditions that may or must be imposed under this Division, unless it would be unjust, taking into account the person's circumstances.

3. Designated Foreign Nationals

The BIA proposes to make some adjustments to the Designated Foreign Nationals regime.

Major concerns:

- The Designated Foreign Nationals regime, which subjects designated groups of people to mandatory arrest and detention, and deprives them of numerous rights, is fundamentally in violation of the Canadian Charter of Rights and Freedoms. The regime should be eliminated entirely from the legislation, not tinkered with.
- The introduction of amendments to the regime raises the concern that the government may be planning to use the Designated Foreign Nationals provisions. The CCR opposes this entirely.

Recommendation

9. All references to Designated Foreign Nationals (DFNs) should be eliminated from IRPA. (BIA 401, 403, 404, 405 should be used to delete references in IRPA to DFNs)

Part 4, Division 39: Immigration Stations

The BIA proposes the creation of Immigrant Stations at federal correctional facilities, primarily through amendments to the *Corrections and Conditional Release Act*. (BIA 433-441). It is deeply disturbing that the government is proposing to expand places of detention on immigration grounds to federal correctional facilities, particularly at a juncture where the public and all ten provinces have clearly expressed a rejection of this practice.

Immigration detention is an administrative measure – those subject to the measure should not be treated as criminals, nor should they be held in facilities designed for people who have been convicted of a crime.

The CCR has long argued that immigration detention is over-used in Canada and that the law and its application frequently violate people's rights to liberty and to protection from arbitrary detention.

Most detainees are low risk and should not be in detention. They are largely racialized individuals –including people who have overstayed their visa, people whose refugee claim was refused and are detained because they say they fear returning to their country of origin. Some are people who have just arrived and made a refugee claim, but they don't have their identity documents with them. In our experience, many detainees also have mental health or addiction issues, especially those who may be considered higher risk.

Although detention is supposed to be a measure of last resort, given the vast majority are low risk, there has been inadequate investment and attention in seeking out community-based Alternatives to Detention. In practice border officials have wide discretion to detain people, and most—over 90%-- are detained based on a subjective assessment of the person being at risk of not appearing for an immigration proceeding or for lack of full identity documents.

The BIA indicates the use of federal jails would end in five years, or at most 10 years, through a sunset clause. We understand this is in order to mobilize resources and implement plans for alternative higher security detention centres to be administered by CBSA. This is a wrongheaded approach.

Energies and financial investments are going in the wrong direction with this bill and budget. We should be focusing on avoiding detention in the first place and releasing individuals wherever possible, including through Alternatives to Detention, especially those who are low risk. Investments should go towards supporting those with mental health issues and addiction issues while outside detention. With adequate training, humane treatment and appropriate Alternatives to Detention, CBSA can and should manage risk itself with appropriate independent oversight.

Major concerns:

- Imprisoning immigration detainees in federal jails is as bad or worse than in provincial jails. It is punitive and does not respect human rights. It contravenes international standards and guidelines for detention of refugee claimants as set out by the UNHCR.
- There is a risk of those detained in federal jails being geographically isolated, if they need to be moved across the country to a facility with an Immigrant Station. This may mean separating them from family and friends, their lawyer and support networks.
- For refugee claimants, federal jails is not only retraumatizing, it further jeopardizes their claim, given the difficulty of pursuing a claim while imprisoned.
- Our current understanding is that there has yet to be a scan of which facilities could meet the conditions of separation of detainees intended. If, as suggested by the government,

federal jails will be little used, there is the risk that individuals may find themselves effectively in a kind of solitary confinement for long periods.

- CBSA has made no clear public commitment on NGO access to Immigrant Stations – this increases concerns that those in these facilities will be severely isolated.

Recommendation

10. Delete the provisions (BIA 433 – 441) enabling use of federal correctional facilities for immigrant detainees.