Canadian Council for Refugees
Conseil canadien pour les réfugiés

Refugee Reform: Weighing the proposals

The Minister of Citizenship and Immigration has recently tabled Bill C-11, which if approved would make important changes to Canada's refugee determination system.

Everyone agrees that there are problems in the current system. Everyone agrees that the goal is a system that fairly and quickly determines who needs refugee protection.

How far do the proposals meet that goal? The Canadian Council for Refugees believes that there are some positive elements, but also several serious flaws that would put refugees, particularly the most vulnerable, at risk of being deported to persecution.

Some provisions might also make the system more inefficient.

The CCR urges Parliamentarians to address the bill's shortcomings.

Key Concerns:

Designated countries of origin

Bill C-11 would empower the Minister to designate countries whose nationals would not have access to the refugee appeal. Although the Minister refers publicly to "safe countries of origin", neither the word "safe" nor any criteria are included in Bill C-11.[1]

Unfair?

- Treating claimants differently based on country of origin is discriminatory. Refugee determination requires individual assessment of each case, not group judgments.
- Claimants that will be particularly hurt include women making gender-based claims, and persons claiming on the basis of sexual orientation. In many countries that otherwise seem fairly peaceful and "safe", there can be serious problems of persecution on these grounds.
- Claimants from designated countries will face a bias against them even at the first level, since decision-makers will be aware of the government's judgment on the country.
- Claims from countries that generally seem not to be refugee-producing are among those that most need appeal, due to difficult issues of fact and law, such as availability of state protection.
- Denial of fair process to these claimants may lead to their forced return to persecution, in violation of human rights law.

Other concerns?

- Having a list of "safe countries of origin" politicizes the refugee system: there will be new diplomatic pressures from countries unhappy about not being considered "safe".
- As currently drafted, the amendment gives the Minister a blank cheque to designate any country, part of country or group within a country, without reference to the principles of refugee protection.

The fatal cost of denying an appeal

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

Grise might be alive today if she had had access to a refugee appeal. If Mexico were designated a safe country of origin, Grise would face the same risk of death under C-11.

[1] The bill also allows the Minister to designate one part of a country or a class of nationals from a country.

Note: Throughout the document, names have been changed to protect identity.

8-day interview and hearing after 60 days

The government proposes that claimants be interviewed by the Immigration and Refugee Board after 8 days and that their hearing take place 60 days later.[2]

Unfair?

- 8 days after arrival is too soon for a formal interview. If the interview is used to take the claimant's detailed statement about their claim, it will be unfair to the most vulnerable claimants, such as those traumatized by experiences of torture or women unaccustomed to speaking to authority figures.
- Some claimants are ready for a hearing after 60 days, but others are not, including refugees who need to build trust in order to be able to testify freely (such as persons who have experienced sexual assault).
- Many refugees need more than 60 days to gather relevant documentation to support their claim (especially if they are fleeing a newly emerging pattern of persecution, or are in detention).

Inefficient?

- Gathering information from claimants through interview is a slow process, especially soon after arrival. Either the interviews will be unmanageably long, or, if short, they won't gather much useful information.[3]
- Holding a hearing before the claimant is ready or evidence has been collected will lead to more bad decisions, which will need to be corrected on appeal. It is better to take the time necessary to get the decision right the first time.
- Alternatively, if the 60-day hearings routinely end with a postponement because the claimant is not ready, much hearing room time will be wasted. It is better to schedule hearings based on individual case readiness.

[2] *The specific timelines are not included in the legislation: they would be established through regulation.*

[3] *Until they recently decided it was inefficient, Canada Border Service Agency was taking an average 4-5 hours to interview claimants on arrival.*

Impact of Trauma

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

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

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

Marie has applied for humanitarian and compassionate consideration and is waiting for a decision.

Gathering Evidence

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

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

Respectful language

Use of language such as "bogus claims" is extremely damaging. We need reasoned, fact-based discussion, not name-calling and oversimplifications. Not everyone who makes a claim needs protection but that doesn't make them "abusers". They may have compelling reasons for leaving their country, even if they don't meet the narrow refugee definition.

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

Decision makers

First instance decision-makers would be civil servants, rather than Cabinet-appointees.[4] Members of the Refugee Appeal Division (RAD) would be appointed by Cabinet.

Positives?

> For the first instance, the proposal would avoid the current problematic political appointments, which are frequently tainted by partisan and political considerations, and not made in a timely way.

Unfair?

> Assigning refugee determination to civil servants is fundamentally problematic because they lack the necessary independence.

> Limiting appointments to civil servants will exclude some of the most highly qualified potential decision-makers, from a diverse range of backgrounds, such as academia, human rights and social service. This will affect the quality of decision-making.

> The question of appointments to the RAD remains unresolved. Under this bill, they would be political appointees. This will affect the quality of decision-making.

Inefficient?

Systems using civil servants in other countries have proven unsuccessful, with a large number of cases overturned on appeal, adding to processing times and costs.[5]

Appeal and Pre-Removal Risk Assessment

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

Positives?

> An appeal on the merits is necessary to correct the inevitable errors at the first instance.

> PRRA is ineffective and inefficient: it makes much better sense to look at new evidence at the RAD.

Inefficient?

> For some claimants, the bill leaves in place the highly inefficient PRRA, which routinely takes months or years for a decision (average in 2006: 202 days). In addition to the lengthy delays, PRRA is terrifically inefficient, by requiring a whole second structure to do the same work of refugee determination that the Immigration and Refugee Board does.

Refugees in Canada versus overseas

Wherever they are in the world, refugees have the same needs: protection and a durable solution. Canada has specific legal obligations towards refugees who are in Canada, so it is wrong to suggest trading off refugees here in favour of refugees abroad. But we have a moral responsibility towards refugees elsewhere in the world.

We could and should do more to resettle refugees, including addressing the huge delays and low quality of decision-making at some visa offices.

See CCR reports, *Nairobi: Protection delayed, protection denied* and *Concerns with refugee decision-making at Cairo.*

Abandoned and withdrawn claims

In explaining the need for Refugee Reform, Minister Kenney has repeatedly referred to 97% of Hungarian claims being withdrawn or abandoned in 2009.

The 97% figure is seriously misleading, as most Hungarian claimants were still waiting for a hearing at the end of the year. 2,440 Hungarians made claims, only 8 Hungarians received a decision, 259 withdrew or abandoned their claims in 2009.

Most claimants who withdraw leave Canada soon after. There is no need to change the law to address the small numbers of claimants who remain.

[4] *They would be members of the Immigration and Refugee Board, in the Refugee Protection Division.*
[5] *For example, 28% of asylum decisions in the UK were overturned on appeal in 2009: http://www.homeoffice.gov.uk/rds/pdfs09/immiq309suppa.xls*

At risk, but not a refugee?

Isabel, a kindergarten teacher, was repeatedly harassed and assaulted over several years by the powerful Mara Salvatrucha gang in El Salvador. When she complained to the police, they did nothing.

The Immigration and Refugee Board decided that Isabel was at a real risk if returned to El Salvador, but denied her protection on the ground that all Salvadorans face the same risk.

Under Bill C-11, people in Isabel's situation would have no opportunity to have the risk they face considered. Refused claimants would not be able to make H&C applications. And in any case, the bill prohibits consideration of risk factors in H&C applications.

Isabel has made an H&C application and is waiting for a decision.

Checklist for good refugee determination

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

Humanitarian and compassionate consideration (H&C)

Bill C-11 would bar refugee claimants from applying for H&C (while the claim is in process and for 12 months afterwards). Applicants for H&C would also be barred from raising factors related to risks feared in the country of origin.

Unfair?

- H&C is necessary as a recourse to consider human rights issues, including the best interests of the child, and potential risks to persons. Closing off this recourse may be contrary to the Canadian Charter of Rights and Freedoms and international human rights law.

Inefficient?

- The bar on raising risk factors will be very difficult to apply and lead to lots of litigation.
- Prohibiting consideration of risk factors will force some H&C applicants to make a refugee claim, thereby clogging the system unnecessarily.
- H&C applications have no impact on removals.

Considering the best interests of three orphaned children

Three children fled to Canada after their parents were killed by drug traffickers in Mexico. The IRB found that they did not meet the refugee definition, but an H&C application offered an avenue to argue that it was against the best interests of the orphans to send them back to the scene of their parents' murder.

Under C-11, there would be no opportunity to consider the best interests of refugee claimant children, although this is required by the Convention on the Rights of the Child.

Recommendations

The CCR will be submitting detailed recommendations to address the shortcomings in the bill. They will include:

- Having IRB members appointed through a merit-based selection system that is not restricted to civil servants.
- Eliminating the designation of safe countries of origin.
- Allowing claimants more time to prepare themselves for their hearing.
- Eliminating the bar on claimants making humanitarian and compassionate applications.

For more information on proposed reforms to Canada's refugee system, see: http://ccrweb.ca/en/refugee-reform

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