

CANADIAN COUNCIL FOR REFUGEES

**REFUGEES AND NON-CITIZENS IN CANADA:
Key concerns regarding Canada's compliance with the
Covenant on Civil and Political Rights (CCPR)**

Submission to the Human Rights Committee of the United Nations

16 September 2005

Preamble

While Canada has a reputation for its generally good human rights record, there are a number of areas where Canada falls far short of its obligations. Nowhere is this failing more obvious than with respect to Canada's treatment of First Nations. However non-citizens have historically also faced very significant barriers to the enjoyment of fundamental human rights including those guaranteed under the Covenant. In the period since Canada's last Report to the Committee, the federal government has been moving backwards in a number of important respects. This submission highlights what are in the view of the Canadian Council for Refugees (CCR) the areas that may be of greatest concern to the Committee vis-à-vis the ability of non-citizens to enjoy the rights guaranteed to them under the Covenant.

The following submission is based on the experience on the ground of the membership of the CCR (more than 180 organizations across Canada), who see on a daily basis the impacts on people's lives of the provisions discussed below.

Canada's approach to its treaty obligations

As a preliminary matter, Canada has not complied with its obligation to interpret its CCPR responsibilities in good faith, in conformity with the principle of *pacta sunt servanda* and Article 26 of the Vienna Convention on the Law of Treaties. Covenant rights themselves do not have full force and effect in Canadian law. Canadian caselaw is replete with judicial findings that Canada is not bound by international conventional law in the absence of domestic legislation explicitly incorporating the treaty in question.

The CCR was gratified that the Canadian legislature opted to include in the *Immigration and Refugee Protection Act* the explicit requirement that the Act be construed and applied "in a manner that complies with international human rights instruments to which Canada is signatory." (s.3(3)f) However, this is far from ensuring CCPR rights given that it is difficult to construe and apply several provisions of IRPA in a manner compatible with the Covenant. In practice, when faced with non-citizens attempting to assert their CCPR rights in Canadian courts, including the absolute right not to be subjected to torture pursuant to Article 7, counsel for the Department of Justice regularly argue that the executive is not bound by international law, including the CCPR. It is this belief that Canada is free to flout its treaty obligations that led to the deportation of Mansour Ahani to Iran in 2002, despite the Human Rights Committee's interim measures request pursuant to Rule 86 of the

Optional Protocol.¹ The CCR urges the Committee to pursue this matter vigorously with the Government of Canada, and to remind Canada of its obligations to give effect to, to ensure and to provide an effective remedy for CCPR rights.

Likewise of serious general concern to the CCR is Canada's apparent misinterpretation of its CCPR obligations in respect of extraterritorial activities. Specifically, it appears from informal discussions between CCR representatives and senior officials of Citizenship and Immigration Canada that Canada takes the position that the activities of overseas officers engaged in migrant interdiction at foreign airports are not subject to the constraints and obligations of the Covenant or other international human rights instruments, a position which is inconsistent with the Human Rights Committee's own jurisprudence.² The CCR urges the Committee to question Canada on this matter, and to request details on the steps taken, if any, to ensure that its extraterritorial migrant interdiction activities do not result in violations of the Covenant.

Article 2(1), 14.1 and 26: Non-discrimination

Interdiction:

Between 1996 and the end of 2002 Canada's interdiction program resulted in some 40,000 "improperly documented" travellers being denied boarding on flights bound for Canada. In 2004 alone the number was 5,644. Based on documented practices by other states as well as anecdotal evidence regarding Canadian practice, the CCR fears that persons are being selected for additional document screening, interrogation, and denial of boarding on the basis of race, religion and/or national origin. Repeated requests for more detailed information regarding Canada's policies and practices with regard to its interdiction program have gone unanswered. It is feared that interdiction is intensifying the impact of Canada's discriminatory visa policies and unequal global distribution of visa posts.

Limbo:

Excessive delays in processing permanent resident applications of certain groups violate Article 2. Canadian policies and practices vis-à-vis the processing of permanent resident applications of refugees and others discriminate on the prohibited grounds of race and national origin in that security inadmissibility provisions are applied disproportionately to Arabs and Muslims and to nationals of specific countries with resulting delays, sometimes indefinite, in the processing of their applications. As well, the processing fees required for permanent resident applications have an adverse and discriminatory impact on certain groups on the basis of their property and social status.

Security certificates:

There are several ways in which certificates violate Article 2. Four persons are currently being detained by the Canadian Government on the basis of security certificates: all four are Arab; all four are Muslim; a fifth individual who was recently ordered released by the Federal Court of Appeal was also Muslim and an Arab (he continues to be subject to the

¹ *Ahani v. Canada*, Human Rights Committee, Communication No. 1051/2002 (15/06/2004). The inherent contradiction and even hypocrisy of Canada's position is well articulated in the Ontario Court of Appeal dissenting judgment in the case of *Ahani v. v. Canada (Attorney General)* (2002), 58 O.R. (3d) 107 (OCA).

² *Lopez Burgos v. Uruguay*, Communication No. 52/1979, Views of the HRC, July 1981.

security certificate and has been released under extraordinarily stringent conditions). They have been discriminated against on the basis of race and/or national origin, and religion. Further, Canadian intelligence and security authorities recognize that there are both citizens and non-citizens of concern to them as potential terrorists; yet the citizens of concern remain free on the streets of Canada, while the non-citizens have been subjected to security certificates. The legislation itself provides for differential detention provisions depending on the immigration status of the person in question. A Canadian citizen alleged to represent a security threat is subject to the Criminal Code anti-terrorism provisions, which include fair hearing provisions, detention reviews, alternatives to detention, and detention for a fixed term following a trial and sentencing, with access to appeal. Non-citizens may be instead, and are in fact, subjected to the security certificate regime, which includes arrest and detention on the basis of secret allegations and secret evidence; *in camera ex parte* hearings; indefinite detention in inhumane conditions; and the prospect of deportation, possibly to torture.

Detention:

Sections 55(2)b and 58(1)d of the *Immigration and Refugee Protection Act* provide for the arrest and detention of non-citizens on the basis of their failure to establish their identity. The application of the provision has the effect of discriminating against refugee claimants based on national and/or social origin (where the country of origin is not able to produce high quality documents or where the individual does not have the means to speedily obtain the documents required).

Safe Third Country Agreement:

The Canada-US Safe Third Country Agreement has an adverse impact on members of specific groups on the basis of prohibited grounds of discrimination, including, for example Muslim and Arab asylum-seekers who face differential treatment in the US, Colombian asylum-seekers who are often refused in the US but accepted in Canada, and women asylum-seekers seeking protection on the basis of gender-based persecution, who are likely to be refused in the US but would be granted protection in Canada were they allowed entry.

Article 2(3): Access to legal remedy

Refugee determination by an independent quasi-judicial tribunal:

Canada is to be commended for assigning refugee determination to the Immigration and Refugee Board, an independent quasi-judicial tribunal with significant accumulated expertise. However, its independence and competence has historically been undermined by practices of political patronage appointments. These concerns persist, despite some reforms introduced to the appointment process in 2004. Also of concern is the fact that some asylum seekers who may nevertheless need protection from refoulement are denied a hearing before the Immigration and Refugee Board and forced instead to make their application through the Pre-Removal Risk Assessment process, which is conducted by an immigration official, not an independent tribunal.

Definition of security inadmissibility:

While the definition of “terrorism” in Canada’s *Anti-Terrorism Act* has justly provoked criticism as overly broad, it is important to note that the *Immigration and Refugee Protection Act* offers no definition at all of “terrorism” despite the fact that non-citizens can be denied a wide range of rights on the basis that they have engaged, are engaging or may engage in terrorism, or that they were, are or may become a member of an organization that has engaged, is engaging or may engage in terrorism. The allegations do not need to be proven to render the person inadmissible on security grounds: there only needs to be reasonable grounds to believe the allegations. Thus a person can be found inadmissible on security grounds because there are reasonable grounds to believe that they were in the past a member of an organization that there are reasonable grounds to believe may in the future engage in terrorism. Given the breadth of this inadmissibility category and the lack of definition of “terrorism” (and also of “membership”), legal remedies are frequently ineffective in cases involving allegations of security inadmissibility.

Security Certificates:

A person named in a security certificate has no access to a fair hearing to seek a remedy for the violation of a CCPR right. Court proceedings related to the certificate, including the determination of whether the person constitutes a security threat, detention reviews and requests for protection, are subject to *ex parte in camera* proceedings where decisions can be rendered on the basis of secret evidence. There is no opportunity in the legislation to seek relief from inhumane conditions of detention, and for those who do not have permanent resident status there may be no opportunity even to review the legality of the detention until the person has spent several years in detention. Non-citizens subject to the secret evidence provisions of s. 86 of the *Immigration and Refugee Protection Act*, which uses the same *ex parte in camera* proceedings as security certificates, are similarly denied their right to a fair hearing.

Interdiction:

No measures exist to ensure asylum-seekers or others who are interdicted in a third country have access to a remedy when their interdiction violates their Covenant rights.

Safe Third Country Agreement:

Refugee claimants who are denied the right to have their claim heard in Canada have no access to an effective remedy where the refusal amounts to a violation of Covenant rights, as access to judicial review in the Federal Court is in practice unavailable for persons returned to the US, especially if they are detained or deported.

Even more disturbingly, an asylum-seeker may be denied the opportunity even to request consideration of their eligibility to seek asylum in Canada due to a policy of “direct back” by which those making claims may be summarily returned to the US based on administrative convenience. Upon being returned to the US pending an appointment at a Canadian port of entry, these individuals are in some cases detained by US immigration authorities, preventing their return to the Canadian border for their appointment and resulting in their deportation, possibly to persecution or torture. In this case too the legal right to judicial review is in practice illusory.

Article 7: Torture, cruel, inhuman or degrading treatment or punishment, *refoulement**Interdiction:*

Access to asylum is frustrated by Canadian interdiction practices at airports and at other points in third countries. In the absence of any information or evidence regarding asylum-screening at interdiction points or other safeguards to ensure access to asylum for those who require it, it can only be assumed that some refugees are therefore being exposed to persecution, torture or cruel, unusual and degrading treatment or punishment upon return to their countries of origin, violating the principle of non-*refoulement*.

Limbo:

Many refugees suffer a prolonged wait, without explanation from the Canadian Government, for finalization of their permanent resident applications. These delays constitute an unreasonable interference with their personal security. The anguish endured by these refugees, including extended family separation, limited access to education and employment, lack of access to credit or loans, etc, results in serious incursions on their emotional and mental integrity.

Security certificates:

Canadian policies and practices with respect to security certificates, whereby individuals may be detained for months or years without charge based on secret allegations, in substandard conditions including in some cases solitary confinement, violate the security of the person and constitute ill-treatment. These policies fail to protect the dignity and the physical and mental integrity of the individual. Non-citizens may be detained under a security certificate without a warrant and without any review of the legality of the detention for several years or possibly indefinitely. Further, Canada is seeking to deport those named in the certificates to countries where they face a serious risk of torture, in violation of the absolute prohibition on torture at international law.

Lack of appeal:

Section 110 of IRPA provides for access to an appeal on the merits for refugee claimants who have been refused protection. While the Canadian legislature passed the legislation in 2001 with the appeal provisions, the Executive “delayed” implementing the appeal when the Act came into force in mid 2002. At that time the Minister of Citizenship and Immigration guaranteed that the appeal would be implemented within one year. However, three years have passed and the appeal has still not been implemented. At the same time safeguards at the first instance were reduced by relying on a single decision maker rather than the previous practice of using one positive decision of either of a panel of two decision makers. The non-implementation of the refugee appeal means that wrongly rejected claimants risk being removed to a risk of torture.

*Principle of non- *refoulement*:*

In 2002, the Supreme Court of Canada considered Canada’s *non-refoulement* obligations in the case of *Suresh v. Minister of Citizenship and Immigration*.³ The Court failed to recognize as binding the absolute nature of the prohibition on *refoulement*, leaving open the possibility

³ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3

that in exceptional circumstances it might be open to the government to return a person to torture. Canadian government lawyers have been using this opening to argue that the so-called “war on terror” constitutes an exceptional circumstance that justifies derogation from Article 3 of the Convention Against Torture and Article 7 of the CCPR.

Equally disturbing is section 115(2) of IRPA, which sets out an explicit exception to the principle of *non-refoulement*, allowing the government of Canada to return a person to torture on the basis of allegations of criminality or security, in direct violation of the absolute prohibition on *refoulement* to torture.

Article 9: Liberty, security of the person, arbitrary detention

Detention:

The broad discretionary power given to immigration officers by s. 55 of IRPA to detain a foreign national on grounds of identity or flight risk leads to arbitrary detention. Moreover, IRPA provides for no review by an independent decision-maker of a decision by an immigration officer that a non-citizen’s identity has not been satisfactorily established. In addition, the absence of time limits on immigration detention results in practice in long-term and even indefinite detention in certain circumstances, including in cases of stateless persons who cannot provide a passport to establish their identity or who are in pre-removal detention but cannot be removed due to their lack of a right of entry to any country. Although the *Immigration and Refugee Protection Act* affirms that children shall be detained only as a measure of last resort, the application of this provision in the law remains unclear and in practice children continue to be detained in situations where no alternatives appear to have been seriously considered.

Security certificates:

The security certificate process amounts to arbitrary arrest and detention, as has been tentatively observed by the UN Working Group on Arbitrary Detention. Those arrested without warrant as well as those arrested with a warrant, where they are denied the opportunity to see the evidence against them or to rebut spurious or unlawful claims, and have limited or no access to a review of the lawfulness of detention, are deprived of even the most basic procedural protections offered by the CCPR. Their detention amounts to indefinite and arbitrary detention.

Article 10(1): Treatment of detainees

Detention:

Non-citizens in detention on immigration grounds are frequently held in provincial prisons or remand centres, where they are mixed with accused criminals. They may be subjected to disciplinary sanctions or security measures such as isolation at the discretion of the staff of detention facilities. People suffering from mental illness are more often placed in isolation and in maximum security institutions (jails), leading to further deterioration of their psychological and mental health. Canadian authorities frequently fail to give adequate consideration of the needs of vulnerable groups such as children and youth.

Security certificates:

As noted above, security certificate detainees are being held in conditions that violate their human dignity, mixed in with those accused of criminal activity and those awaiting trial, and convicted criminals serving short sentences or awaiting transfer to a penitentiary or reformatory after trial. Of the three security certificate detainees currently detained at Toronto West Detention Centre, two are in solitary confinement, and have been for several years. A third is mixed in with the general accused/criminal population. The detention centre lacks any of the facilities and programs normally available to long-term detainees. The detainees are being denied some of the most basic of human needs, including simple “touch” visits with their own children and spouses, or a chance to exercise for an hour a day. IRPA provides no opportunity for the detainees to challenge the conditions of their detention. While permanent residents have access to a detention review which includes secret evidence in violation of fair trial norms, a person lacking permanent resident status may be denied even this severely curtailed opportunity to challenge the very legality of their detention until they have been detained for several years.

Article 12(2): The right to leave any country*Interdiction:*

In the absence of any information or evidence regarding safeguards, it can only be assumed that Canada’s interdiction practices may prevent those whose documents are deemed unsatisfactory not only from travelling to Canada to seek asylum but also from leaving their country as they choose.

Articles 17 and 23: Family and privacy*Limbo:*

The state of limbo forced upon many refugees applying for permanent resident status impacts the right to privacy and family life. These people waiting indefinitely in limbo are unable to bring any family members overseas. Delays in obtaining permanent residence include:

- Immigration processing fees for permanent resident status of \$550 per adult and \$150 per child;
- A requirement to provide identity documents satisfactory to an immigration officer (often impossible for refugees, because for example they never had identity documents, their documents were lost during refugee flight or the immigration officer is not satisfied with the documents produced, which particularly tends to happen with persons from less technologically advanced countries);
- Delays in processing, particularly with respect to security.

Deportation separating families:

Families in Canada are routinely separated through deportation of one or more members of the family.

Barriers to family reunification:

Although one of the objectives of the *Immigration and Refugee Protection Act* is “to see that families are reunited in Canada” (s. 3(1)(d)) many provisions in the law and practices of Citizenship and Immigration Canada prevent or delay significantly family reunification for refugees and others in Canada with immediate family overseas. These include:

- A category of “excluded family members” in the *Immigration and Refugee Protection Regulations* (117(9)(d)) which excludes a person from being considered a family member if they were not examined by a Canadian immigration officer when the sponsor immigrated to Canada.
- A requirement in some cases to undergo expensive and time-consuming DNA testing to prove family relationships.
- The exclusion of informally adopted children as family members, since s. 2 of the *Immigration and Refugee Protection Regulations* defines a child as the biological or adopted child. This excludes children who are not biological children but who have no other family.
- the lack of a legal avenue for children to reunite in Canada with parents and siblings. While refugee adults can include spouses and children in their application for permanent residence in Canada, thus making reunification possible, refugee children may not include their parents and siblings.
- Slow processing, particularly at visa posts covering areas many refugees have fled. 50% of cases of dependants of refugees take more than 13 months to be processed by visa offices. In the case of the Abidjan visa office (which covers various countries including the DRC), 50% of cases take more than 30 months. This processing time takes account only of visa office processing time: even before the application reaches the visa post, it has been in processing for some time.

Security certificates:

Detainees on security certificates have been arbitrarily denied the opportunity to have visits with their families, including the arbitrary refusal to permit “touch” visits between detainees and their children or spouse. In at least one case, the detainee has not been able to hold and to hug his own very young children in four years.

Article 19(2): Freedom of expression*Limbo:*

People are sometimes kept in a state of limbo for vague or spurious reasons related to previous involvements in political opposition or community activism. Their freedom of expression is curtailed by withholding permanent residence in Canada based on what they might have said in the past, in another country. Even associations and expressions within Canada, including those which are perfectly legitimate at Canadian law, are curtailed.

Articles 21 and 22: Freedom of association and assembly*Limbo:*

The right to peaceful assembly and association is curtailed for those persons in a state of limbo. They are kept in limbo for vague, unspecified reasons, often related to past political or personal associations. In some cases allegations of inadmissibility due to security concerns have been founded on nothing more than participation in perfectly legal political assemblies such as peaceful demonstrations in support of independence for the person's own people.

Article 24: Protection of children*Limbo:*

Children of refugees in Canada are denied protection when forced to remain in precarious or dangerous situations abroad while the parent's application for permanent residence is subject to long delays. The child of a refugee parent in Canada has no right of entry to join the parent in Canada until the status of permanent residence is attained.

Separated refugee children must each apply for permanent residence as a "principal applicant" and pay a processing fee of \$550 each. Many important rights are denied to refugees who do not become permanent residents.

Further details about the issues of concern raised above are contained in the attached backgrounders.

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BACKGROUNDERS

16 September 2005

These backgrounders are intended to provide further details on issues raised in the CCR submission to the Human Rights Committee. Additional information, including case examples, can be found in many of the CCR documents referred to in the text below.

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I. Safe third country agreement

In December 2004, after several years of negotiations, the Canadian and US governments implemented an agreement that bars most refugees from making a refugee claim at the US-Canada land border. Asylum seekers are instead forced to remain in the country of first arrival and make a refugee claim there. In practice this overwhelmingly affects refugee claimants who pass through the United States on their way to making refugee claims in Canada. Most are now forced to make their claims in the United States instead of in Canada. Canada and the United States have different approaches to the treatment of claims based on gender-based persecution and in relation to those who arrive and make a refugee claim without appropriate documents. In addition, the US imposes a one-year filing deadline for asylum claims and detains asylum seekers in circumstances that violate international standards. Those forced by the safe third country agreement to seek protection in the US therefore risk serious human rights violations, including arbitrary detention, imprisonment in prison conditions which may constitute cruel treatment, and *refoulement*.

U.S. asylum policy relies on procedures which fall short of providing minimal procedural safeguards.

- A February 2005 study by the US Commission on International Religious Freedom found shortcomings with respect to a number of procedures within the expedited removal process. (Asylum Seekers in Expedited Removal, A Study Authorized by Section 605 of the International Religious Freedom Act of 1998).
- REAL ID Act (H.R. 418) allows immigration judges to deny asylum based on subjective grounds.

Substantive interpretations of the Convention refugee definition in the U.S. diverge in many respects from international norms, particularly with respect to gender persecution.

- In the United States, the legal situation for cases involving gender persecution is currently in a far more tenuous and unsettled state than in Canada, and in many cases the victims of gender persecution are being denied protection on the argument that the persecution they suffered does not raise a claim for asylum, and/or because of a rigid application of the “nexus” requirement.
- US policy is in violation of international standards with respect to detention. Discriminatory detention on the basis of nationality has been ordered by the US government. Asylum-seekers detained in the USA have often been treated like criminals: stripped and searched; shackled and chained; sometimes verbally or physically abused. Many are denied access to their families, lawyers and non-governmental organizations (NGOs) who could help them.

Direct backs

On 27 January 2003 the Canadian government brought in a new direct back policy which allows Canadian officials to send a refugee claimant back to the US with an appointment date to pursue the claim at a time more convenient to the officials. Claimants are directed back without regard to whether they will be detained by the US authorities and therefore likely unable to show up for the appointment to pursue the claim. While at some ports of entry it is possible to make an appointment in advance, and therefore normally avoid the danger of a direct back, other ports refuse to make appointments and therefore claimants don't know until they arrive whether the officials will consider it a convenient time to process their claim.

In November 2004 a Togolese refugee claimant presented himself at the Emerson port of entry for an appointment to make a claim. The border officials decided that he should do the interview in French and, since there was no French-speaking official available, that he should be directed back. Despite his protests that this would mean that he would be detained, he was sent back to the US, where, as he predicted, he was detained. In December 2004 the US deported him to Togo, even though the Canadian government had indicated that he would be admitted to pursue his claim in Canada if he presented himself at the border. He has reported that he was persecuted in Togo and has since fled the country again.

Further information on safe third country can be found in *Closing the Front Door on Refugees: Report on Safe Third Country*, August 2005, available at www.web.ca/~ccr/closingdoor.pdf

Further information on direct backs can be found in the petition to the Inter-American Commission on Human Rights, 1 April 2004, available at <http://www.web.ca/~ccr/IACHRpet.PDF>.

II. Lack of appeal

In the Canadian refugee determination system, refused refugee claimants have no right to an independent appeal on the merits of the decision denying them refugee status.

In 2001, the Canadian Parliament passed the *Immigration and Refugee Protection Act* (IRPA), a law that created a Refugee Appeal Division (RAD) where refugee determinations made by the Refugee Protection Division could be reviewed. They balanced this new recourse with the reduction of the number of decision-makers hearing the claimant from two to one. In 2002, the government implemented the *Immigration and Refugee Protection Act* without implementing the Refugee Appeal Division. On the other hand, the government went ahead with the reduction of board members hearing a claim, leaving claimants' fates in the hands of a single person.

In May 2002, then Minister of Citizenship and Immigration Denis Coderre made a commitment to the Canadian Council for Refugees to implement the appeal. He repeated his promise in the House of Commons on 6 June 2002: "I have already made a commitment to the Canadian Council for Refugees that we will have an appeal system in place in one year's time." On 14 December 2004, the Parliamentary Standing Committee on Citizenship and Immigration unanimously adopted the following motion: "Whereas: The Refugee Appeal Division is included in the Immigration and Refugee Protection Act; Parliament has passed the Immigration and Refugee Protection Act and can therefore expect that it be implemented; and The House of Commons and parliamentarians have a right to expect that the Government of Canada will honour its commitments; The Standing Committee on Citizenship and Immigration requests that the Minister of Citizenship and Immigration implement the Refugee Appeal Division or advise the Committee as to an alternative proposal without delay."

In the absence of an appeal on the merits, there is no other mechanism that can ensure that errors are corrected. A refused refugee claimant can apply to the Federal Court, but only with leave (or permission) from the Court and only on technical legal matters.

The inability of the Canadian refugee determination system to correct errors has recently been highlighted by the UN Committee against Torture. Hearing a complaint from Enrique Falcon-Rios, a rejected refugee claimant, the Committee found that the Canadian refugee determination system had been unable to correct a wrong decision in his case. The Committee found that the Immigration and Refugee Board had discounted strong evidence that Mr Falcon-Rios had been tortured and that the way the evidence had been treated represented a denial of justice. It concluded that removing him would constitute a violation of article 3 of the Convention against Torture.¹

Further information on the lack of appeal for refugee claimants can be found in *The Refugee Appeal: Is No One Listening*, 31 March 2005, available at <http://www.web.ca/~ccr/refugeeappeal.pdf>

III. Principle of non-refoulement

Canada does not comply with its binding international human rights obligation to refrain from deporting, extraditing or otherwise returning individuals to countries where there is a substantial risk of being tortured.

¹ Communication No. 133/1999: Canada. 17/12/2004. Available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/ffb5d14bea7f5f30c1256faa0053845f?Opendocument>

The Canadian government maintains that deportation to torture is allowable in exceptional circumstances. The Supreme Court of Canada, in the case of *Suresh v. Canada*, has affirmed that normally no one should be deported to face a substantial risk of torture, but left open the possibility that such deportations might be justified in exceptional circumstances.

In its 2005 examination of Canada, the UN Committee against Torture expressed its concern at:

“The failure of the Supreme Court of Canada, in *Suresh v. Minister of Citizenship and Immigration*, to recognize at the level of domestic law the absolute nature of the protection of article 3 of the Convention, which is not subject to any exception whatsoever.”²

The non-respect of the non-refoulement principle is found in the text of the *Immigration and Refugee Protection Act* at section 115:

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

(2) Subsection (1) does not apply in the case of a person

(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

The concern regarding the non-refoulement principle was also raised by the Committee Against Torture which expressed its concern at:

“The explicit exclusion of certain categories of persons posing security or criminal risks from the protection against refoulement provided by the *Immigration and Refugee Protection Act 2002* (sect. 115, subsect. 2)”

Further problems in the Canadian system with respect to the principle of non-refoulement relate to the lack of appeal on the merits (see above) and the fact that some claimants are denied access to a hearing before the Immigration and Refugee Board, despite the fact that they may need international protection. In addition to ineligibility on the basis of safe third country agreement, refugee claimants may be found ineligible because:

² Conclusions and recommendations of the Committee against Torture Canada. 07/07/2005. CAT/C/CR/34/CAN.

- a) they are inadmissible on the basis of security, organized criminality, serious criminality or violating human rights (categories that are defined extremely broadly in Canadian immigration law);
- b) they have previously made a refugee claim in Canada, whether the claim has been rejected, withdrawn or declared abandoned or the person was found to be a refugee;
- c) the person has been granted refugee status in a country to which they could return (even if they claim they are persecuted in that country);
- d) a removal order has been issued against the person.

Claimants who are ineligible have access at best to a Pre-Removal Risk Assessment, conducted by immigration officials. Even the Pre-Removal Risk Assessment is not available to some ineligible claimants (those in c) and d) above, as well as those ineligible on the basis of safe third country and those in b) above unless they have been outside Canada for more than 6 months).

The denial of access to a hearing before the Immigration and Refugee Board (IRB) drew the attention of the Committee Against Torture which expressed its concern at:

The blanket exclusion by the Immigration and Refugee Protection Act 2002 (sect. 97) of the status of refugee or person in need of protection for persons falling within the security exceptions set out in the Convention relating to the Status of Refugees and its Protocol; as a result, such persons' substantive claims are not considered by the Refugee Protection Division or reviewed by the Refugee Appeal Division.

There are a number of individuals currently subject to security certificates who will be at risk of torture if they are removed from Canada (see below).

IV. Detention

In the Fifth Report of Canada regarding compliance with the International Covenant on Civil and Political Rights, there is no mention of federal government initiatives to ensure respect for the rights of detained refugee claimants and others experiencing immigration hold. This is an important omission. From 1997 to 2002, the number of people detained annually on immigration grounds grew a dramatic 41%, from 5,401 to 11,509. For 2003-2004, the figure was a startling 13,413 (Citizenship and Immigration Canada statistics). The UN Working Group on Arbitrary Detention, in a press release issued on June 16, 2005, has stated concern at the wide net cast by immigration officers in detaining people on grounds of identity and flight risk.

Detention on the basis of identity

Article 9.1 of the International Covenant on Civil and Political Rights protects against arbitrary arrest and detention. Under Canadian immigration law, an immigration officer can detain a foreign national if not satisfied of the person's identity. However, NGOs report that immigration officers often have unrealistic demands regarding the quantity and quality of identity documents that should be provided by refugees.

Action Réfugiés Montréal reports cases where documents from economically depressed countries have been rejected on the basis of ink or paper quality. The same organization reports a case where the detainee submitted a birth certificate, driver's license, national identity card and two school diplomas, but still was not able to convince the immigration officer of his identity. In other cases,

asylum seekers had to contact their embassy to obtain a passport. This could have serious consequences for a person fleeing persecution or for loved ones who remain in the home country.

The Vancouver-based NGO Mosaic also reports an increase in cases of detention on identity grounds since the implementation of the *Immigration and Refugee Protection Act*.

The *Immigration and Refugee Protection Act* provides broad powers to immigration officers to detain on identity grounds. The relevant provision reads as follows:

“An officer may, without a warrant, arrest and detain a foreign national, other than a protected person [...] (b) if the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act.” [IRPA 55(2)]

This power is not supervised by an independent decision-maker. Detainees are brought before the Immigration Division of the Immigration and Refugee Board. However, in the case of those detained on the basis of identity, the Immigration Division has no power to review whether the immigration officer was reasonable in concluding that the identity of the detainee was not established. IRPA 58(1) states that the Immigration Division shall release the detainee “unless it is satisfied, taking into account prescribed factors, that [...] (d) the Minister is of the opinion that the identity of the foreign national has not been but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity.”

The legislation thus fails to offer judicial oversight of the decision to detain based on identity. The Immigration Division can only intervene if it finds that the Minister is not making a reasonable effort to establish the detainee’s identity: the question of whether the person’s identity is established as well as the question of whether it will be possible to establish identity is a matter for the opinion of the Minister alone. This lack of meaningful review of the decision to detain results in arbitrary detention. The construction of the Act also makes it unlikely that persons detained on grounds of identity will be released by the Immigration Division in the short-term since the Division will tend to allow a certain period of time to pass to see whether reasonable efforts are being made. Furthermore, the phrase “reasonably cooperated” is vague and can be interpreted in different ways by different decision-makers.

The arbitrary nature of detention decisions on the basis of identity seems to be indicated by significant regional variations. In data compiled by the Immigration and Refugee Board, Montreal consistently leads the country in the number of refugee claimants detained over 30 days on grounds of identity, despite the fact that more than twice as many claims are made in Toronto than in Montreal.

Detention of minors

The *Immigration and Refugee Protection Act* establishes as a principle that minors are only to be detained as a measure of “last resort” (IRPA 60). Despite this positive development in the legislation, minors continue to be detained, including in cases where it doesn’t seem to be a measure of last resort, since there is no indication that alternatives have been seriously considered.

The application of the principle of detention as a last resort does not appear to be clear.³ For example, in the case of one minor detained on the basis of identity, the member of the Immigration Division said in his reasons for maintaining her in detention: “the legislator mentioned that if the Minister was making reasonable efforts to investigate identity, no distinction is made between the identity of a minor and the identity of an adult. When these efforts are reasonable, it is not legally open to me to examine alternatives to detention.” [translation from French]

From 15 June 2003 to 31 March 2005, there were on average 16 minors in detention each week.⁴ Most were minors accompanying an adult (13 on average a week), but some were unaccompanied minors (4 on average a week).⁵ Happily the numbers have been falling: in the second half of 2003 there were 20 minors detained each week on average, falling to 15 in 2004 and 11 in the first quarter of 2005. Similarly, the number of unaccompanied minors has fallen: from 5, to 4 to 1 for the same periods. In April 2005, the Canada Border Services Agency began compiling detention data on a monthly rather than a weekly basis. From April to June 2005, there was an average of 47 accompanied minors detained each month and 7 unaccompanied minors.

Minors in detention include Canadian citizens accompanying a detained parent and very young children. The conditions of detention are not appropriate for detention of children, especially when, as sometimes happens, the detention lasts weeks and even months.⁶ CCR members have reported that in some cases the basic needs of detained babies, such as baby food and diapers, have not been supplied by the detention centre.

Detention on the basis of flight risk

Immigration officers can also detain on the basis that the person is unlikely to appear for the next hearing or for removal. Immigration officers often conclude that asylum seekers are unlikely to appear, given their stated fear of persecution if deported. The UN Working Group on Arbitrary Detention states: “We are concerned that this line of reasoning leads, in practice, to persons being detained on the basis of having claimed refugee status.”

Other discriminatory practices

Canadian detention practices are discriminatory in that they disproportionately target boat arrivals for enforcement, as compared to those who arrive by other means. In 1999, 4 ships carrying 599 Fujianese people arrived on the west coast of Canada. Canada detained most of these people on the basis of flight risk. Eleven spend over a year and a half in detention. Some suffered inappropriate treatment, including handcuffs and leg shackles, punitive isolation, and inadequate access to translation, information, or counsel. Five women were severely beaten at the Prince George Correctional Centre.

³ The UN Committee on the Rights of the Child recommended in 2003 that Canada “[r]efrain, as a matter of policy, from detaining unaccompanied minors and clarify the legislative intent of such detention as a measure of “last resort”.”

⁴ The average is calculated from weekly statistics provided to the CCR by Citizenship and Immigration Canada and subsequently Canada Border Services Agency.

⁵ The figures have been rounded which is why the total is less than the sum of accompanied and unaccompanied.

⁶ An analysis by the Immigration and Refugee Board of detained minors in 2004-2005 shows, for example, that a seven-year-old child spent two months in detention, accompanying her mother, who was detained on the ground that she was unlikely to appear.

There are serious concerns of racial profiling post 9-11. In August 2003, as part of “Operation Thread” 23 Pakistani and Indian men were arrested and publicly identified as terrorist suspects. It soon became clear that the suspicions were based on the flimsiest of evidence, some of which consisted of little more than stereotypes. The allegations were soon dropped. However, because Citizenship and Immigration Canada (CIC) failed to issue a public disclaimer or apology clearing those who had been arrested, media stories continued to carry headlines referring to “suspected terrorists”. Despite the allegations of terrorism having been dropped, the men continued to be held in maximum security for several months. Most were deported. No statement of exoneration has ever been issued to clear their names.

Long-term detention

There is no formal time limit for immigration detention in Canada. Some detainees experience major obstacles to securing their release, resulting in extremely long periods of detention. In some cases, once the identity requirements have been met, the grounds for detention simply shift to flight risk. In Toronto, even after detainees have proved their identity, they are often still required to post bail in order to secure their release. Bail requirements are unevenly applied across the country. Detainees who are de facto or de jure stateless sometimes spend very long periods of time in detention before being released because they cannot be deported.

Access to counsel

Access to counsel is a major problem for immigration detainees. Provision of free legal services is uneven since legal aid is administered at the provincial level. In the province of Quebec, more legal aid resources have recently been devoted to detention cases. However, this is not the case in every province. Even where legal aid is available, detainees have difficulty finding a lawyer willing to take on a detention case on a legal aid certificate and travel to the detention centre or jail. This is particularly true for those detained outside of major centres. This has a major impact on the quality and therefore the chance of success of asylum applications, when these are completed in detention without adequate assistance.

Conditions of detention

Article 10.2 of the Covenant states that accused persons shall be segregated from convicted persons. This is not always the case for immigration detainees, many of whom are held in provincial correctional facilities. Only in Ontario and Quebec does the federal government run detention facilities exclusively for immigration holds (there is also a facility in Vancouver but for 72 hour maximum detentions). The UN Working Group on Arbitrary Detention has expressed concern that immigration holds in Canada, who are not held on criminal charges or serving a sentence, are held in custody among persons in the criminal process, sometimes over long periods of time. In some provinces, this automatically implies detention in maximum security. Such treatment is extremely detrimental to the mental health of asylum seekers, who may have experienced torture while in detention in their home countries.

In Lindsay, Ontario, individuals with minor criminal records are kept on immigration hold in a maximum security mega-jail, where they have very restricted privileges. Few lawyers are willing to go out to the facility. Phone access is a serious issue since prisoners cannot receive calls and can only place collect calls. Immigration detainees face a great deal of uncertainty, not knowing how long they will be held and whether or not they will ultimately be deported. Prison psychologists have expressed serious concern about the mental health of long-stayers.

Article 10.1 of the Convention states that all persons deprived of their liberty shall be treated with humanity. Humane treatment implies special consideration of the needs of vulnerable groups such as children and youth. NGOs report instances where separated children have been detained for up to nine months with minimal access to schooling, fresh air, play time and exercise (although there have been some improvements in recent years with respect to the detention of minors). Youth have also experienced abuse by other inmates in cases where immigration detainees have been held together with juvenile delinquents. In Toronto, there have been expressions of concern and goodwill by officials but little action has been taken to improve the conditions of child detainees.

Article 1 of the Guiding Principles of the High Commissioner for Refugees state that detention is undesirable for vulnerable people. Detention has a negative effect on the physical and psychological health of vulnerable detainees, such as victims of torture, people suffering from physical or mental illness, pregnant women, and children. However, detention staff seem unconcerned by the immigration status of detainees or the special needs of refugee claimants, who have experienced physical and/or psychological trauma. People with psychiatric illness are often detained for long periods without proper health care. Action Réfugiés Montréal also reports the case of a diabetic detainee whose health deteriorated due to an inadequate food regime. Alternatives to detention should be sought for such people. Guards should also receive adequate training, so as to allow them to be sensitive to the special needs of immigration detainees. This should include the elimination of or at least tight restrictions on the use of handcuffs on immigration detainees.

Disciplinary sanctions or security measures such as isolation or transfers to jail are used at the discretion of the staff of detention facilities. People suffering from mental illness are more often placed in isolation and in maximum security institutions (jails), leading to deterioration of their psychological and mental health.

There is a lack of accountability by immigration agents and management officers in their decisions to apply disciplinary sanctions and in their handling of complaints made by detainees. There is no external and independent complaint mechanism.

Further information on detention can be found in the *Submission of the Canadian Council for Refugees on the occasion of the visit to Canada of the UN Working Group on Arbitrary Detention*, 8 June 2005, available at <http://www.web.net/~ccr/WGAD.HTM>

V. Security certificates

Definition of security inadmissibility

The *Immigration and Refugee Protection Act* provides for special procedures to apply to persons alleged to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and against whom a certificate has been signed by two Ministers. The certificate is commonly called a “security certificate” and all of those currently subject to a certificate are alleged to be inadmissible on security grounds. The same extremely broad definition of security inadmissibility applies whether a person is subject to a certificate or to the more usual procedures.⁷

⁷ IRPA s. 34: “(1) A permanent resident or a foreign national is inadmissible on security grounds for: (a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood

The definition is broad in a number of ways:

- There is no requirement that a person represent a security risk in order to be found inadmissible on security grounds and for a security certificate to be upheld.
- A person may be found inadmissible on the basis of “membership” in a “terrorist group”, where membership is undefined and can be construed so widely it includes *unknowingly associating* with someone *suspected* to be involved in a so-called terrorist group. Terrorism is also undefined.
- The facts alleged (such as that the person is a member of an organization and that the organization has engaged in terrorism) need not be established as a fact. All that is required for a finding of inadmissibility is that there be “reasonable grounds to believe” that the particular grounds for inadmissibility “have occurred, are occurring or may occur” some day in the future.⁸

Thus a person can be found inadmissible on security grounds because there are reasonable grounds to believe that they were in the past a member of an organization that there are reasonable grounds to believe may in the future engage in terrorism.

Use of secret evidence

The core purpose of a security certificate is to allow the Minister to introduce evidence which will be kept secret, including from the person subject to the certificate and their counsel. If the Federal Court judge hearing the case agrees that the information or evidence is relevant but that its disclosure would be injurious to national security or to the safety of any person, the judge prepares a summary that enables the person concerned “to be reasonably informed of the circumstances giving rise to the certificate” while excluding information whose disclosure would be injurious to national security or the safety of any person.

A hearing where a person whose rights are being adjudicated does not know the evidence brought against them or its source is unfair. The injustice is only the greater in the security context, given the unreliability of security intelligence services, the prevalence of untrustworthy and morally unacceptable confessions obtained under torture and the way in which trivial associations can lead to innocent people becoming suspects. All of these problems have been shown to be real concerns in the Canadian context in the past few years. These are all additional reasons to doubt that justice can be done when a person accused of security inadmissibility is unable to test the evidence on which a decision will be made.

In February 2000, the Inter-American Commission on Human Rights had already made significant criticisms of Canada’s security certificate process. They found the use of secret evidence incompatible with Canada’s human rights obligations. In the judgment of the Commission, “[a]

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

⁸ IRPA s. 33 tells us that facts constituting inadmissibility under s. 34 (security) “include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.”

person named in a certificate who is the subject of secret evidence will not enjoy a full opportunity to be heard with minimum guarantees, the essence of the right to due process.” (para. 157) They recommended that Canada take measures to ensure that the person named in the certificate “has the ability to know the case he or she must meet, and to enjoy the minimum procedural guarantees necessary to ensure the reliability of the evidence taken into account.” (para. 179c). Unfortunately this recommendation has not been implemented and those subject to a security certificate continue to be denied their due process rights. In fact, with the introduction of the *Immigration and Refugee Protection Act* in 2002, the government has on the contrary reduced still further the rights of those subject to security certificates, by stripping permanent residents of the right to review by the Security Intelligence Review Committee.

While the use of secret evidence in the security certificate process is relatively well-known and widely condemned in Canada, it is less well-known that IRPA also provides for the use of secret evidence in non-security certificate cases. In an admissibility hearing, a detention review or an immigration appeal before the Immigration and Refugee Board (IRB), the Minister can apply for “non-disclosure of information” under s. 86 of IRPA. In these cases, the same provisions for reviewing the secret evidence apply as in security certificates, with the IRB member substituted for the Federal Court judge.⁹ The government may be increasing its use of s. 86 provisions in preference to using security certificates. According to the IRB, the section has been used 10 times already. The s. 86 provisions raise the same concerns about lack of due process when secret evidence is used.

Long-term and mandatory detention

A second major concern relating to security certificates is long-term detention and, in the case of those who are not permanent residents, mandatory detention. Permanent residents named in security certificates are arrested on the basis of a warrant and have their detention reviewed after 48 hours in detention, although in practice anyone held on a security certificate is detained for a long time before being released, even under tight conditions.¹⁰ Persons who are not permanent residents are detained without a warrant and are not entitled to a review of their detention until 120 days after a certificate has been determined to be reasonable. Since the process of reviewing the certificate is very long, this means that people are held in detention, without **any** review or possibility of release, for years, based solely on the fact that two Ministers have signed a certificate. One of the current security certificate detainees, Mahmoud Jaballah, has been detained since August 2001, and under the IRPA provisions he has no prospect of having the lawfulness of his detention reviewed any time soon.

As noted above, persons detained on the basis of security certificates may not even be alleged to represent a security risk. Given that the purpose of the security certificate is to keep certain information or sources secret, there is no logical requirement for the person to be detained simply because there is information the government wants to keep secret. Even where the government does allege that that person represents a threat, it is a violation of the right to liberty when people are kept locked up for weeks, let alone years, based solely on ministerial fiat, without any possible recourse to a court.

⁹ IRPA s. 86, which states that s. 78 (from the security certificate provisions) applies, with the necessary modifications.

¹⁰ This was the experience of Adil Charkaoui, a permanent residence who was released with draconian conditions after 21 months in detention.

Also of very serious concern to the CCR and to many other Canadians are the inhumane conditions of detention. For example, three of the security certificate detainees are being held at Toronto West Detention Centre, a provincial remand facility intended for short-term detention, for those awaiting trial, serving short sentences, or awaiting transfer to a penitentiary or reformatory after trial. Two of the three individuals are in solitary confinement there, and have been for several years. The detention centre lacks any of the facilities and programs normally available to long-term detainees. Thus persons who have actually been charged, tried and convicted of a crime and sentenced to a fixed term in detention are treated much more humanely than the security certificate detainees, who are not even accused of a crime. The detainees are being denied some of the most basic of human needs, including simple “touch” visits with their own children and spouses, or a chance to exercise for an hour a day!

The Inter-American Commission on Human Rights also found the detention provisions relating to security certificates incompatible with international standards. The Commission noted that Canada’s mandatory detention provisions violate the obligation to provide detainees a prompt review of their detention (para. 147-151) and that “the assessment of the need to detain must in principle be based on the circumstances pertaining to the individual.” (para. 153) They note that “[w]hile international human rights law allows for some balancing between public security and individual liberty interests, this equilibrium does not permit that control over a detention rest exclusively with the agents charged with effectuating it.” (para. 152)

In June 2005, the Working Group on Arbitrary Detention of the United Nations Commission on Human Rights conducted a visit to Canada. Their report is expected in October. In a press statement delivered on 15 June in Ottawa, at the conclusion of their visit, the Working Group representatives recognized the Canadian government’s responsibility to protect its citizens and combat terrorism but continued:

“Nonetheless, the Working Group is gravely concerned about the following elements, which undermine the security certificate detainees’ rights to a fair hearing, to challenge the evidence used against them, not to incriminate themselves, and to judicial review of detention:

- the security certificate procedure applies only to suspects who are not Canadian citizen [sic]; in fact, all four men currently detained under security certificates are Arab Muslims;
- if the person certified is not a permanent resident, detention is mandatory;
- the duration of this detention without charges is indeterminate; one of the security certificate detainees has been detained for five years now;
- the only way out of detention appears to be deportation to the country of origin; all four men currently detained argue – not without plausibility – that they would be exposed to a substantial risk of torture in case of deportation;
- the evidence on which the security certificate is based is kept secret from the detainee and his lawyer, who are only provided with a summary of the information concerning them. They are thus not in a position to effectively question the allegations brought against him;

- the Federal Court judge tasked with confirming the certificate has no jurisdiction to review, on the merits, whether the certificate is justified. His jurisdiction is limited to assessing the “reasonableness” of the government’s allegations.”¹¹

Deportation to torture

As part of the security certificate process, a person named in a security certificate may request protection on the basis that they face a serious risk of torture or a risk to their life or of cruel and unusual treatment or punishment (s. 79). In such a case, the Canadian government is obliged to assess the danger of torture as well as the risk to life or of cruel and unusual treatment or punishment, if the person is deported, but they then balance this risk against the alleged threat to Canadian security posed by the individual (s. 113(d)). Consistently alleging that the individuals named in the certificates present serious threats to national security, the Canadian government regularly refuses to seriously consider releasing the individuals on strict terms and conditions and instead insists that they should be deported to their home countries where, according to the government’s own analysis, they face a probable risk of torture.

As signatory to the Convention against Torture, Canada is obliged to respect the absolute prohibition, affirmed in article 3 of that Convention, against deportation to torture. International law allows no exceptions to that prohibition, in keeping with the utter moral unacceptability of torture, with which no State may be in any way complicit. Given the prevarications of some, notably in the United States, regarding the prohibition of torture, it is particularly important that Canada, along with other countries, unequivocally condemn any complicity with torture, including deportation to torture.

However, to Canada’s enormous shame, federal government lawyers have been taking the position, incompatible with our international legal obligations, that in exceptional circumstances people may be returned to torture. This position recently drew the criticism of the UN Committee Against Torture which expressed its concern over “the failure of the Supreme Court of Canada in *Suresh v Minister of Citizenship and Immigration* to recognise, at the level of domestic law, the absolute nature of the protection of article 3 of the Convention that is subject to no exceptions whatsoever.”¹² The Committee recommended that Canada “unconditionally undertake to respect the absolute nature of article 3 in all circumstances and fully to incorporate the provision of article 3 into the State party’s domestic law.” (para. 5(a))

Discrimination

Security certificates are discriminatory in principle and in practice. In the context world-wide of a widening gap between the rights of citizens and non-citizens in the pursuit of the security agenda, it is a matter of grave concern that the Canadian government has preferred to apply immigration rather than criminal law measures to suspected terrorists. This in itself points to a double standard, since immigration measures by definition cannot be used against citizens. Furthermore, Canada’s

¹¹ Press Conference by the Working Group on Arbitrary Detention of the United Nations Commission on Human Rights. UNHCR Office, Ottawa, Canada, 15 June 2005. Statement by Ms. Leila Zerrougui, Chairperson of the Working Group on Arbitrary Detention, Ms. Soledad Villagra de Biedermann and Mr. Mohammad Hashemi, members of the Working Group.

¹² Conclusions and recommendations of the Committee against Torture: Canada. 07/07/2005. CAT/C/CR/34/CAN, para. 4(a).

immigration security provisions impose serious penalties, including deportation potentially to torture, on non-citizens for actions or associations that are completely legal for citizens. Immigration processes fail to respect non-citizens' basic rights, including the right to due process, the right to liberty and the right to be free from torture.

In the context of security threats that are global and transnational, it is not appropriate to build responses that focus on the distinction between citizens and non-citizens.

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

All four persons currently in detention on a security certificate are Muslim and Arab. A fifth person who has been released, on extraordinarily stringent conditions, is also Muslim and Arab.

Further information on security certificates can be found in the CCR *Brief to the House of Commons Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, Anti-Terrorism Act Review*, 8 September 2005 available at <http://www.web.net/~ccr/ATAcomments.pdf>

VI. Limbo

Refugees recognized by the Immigration and Refugee Board or granted protection in the Pre-Removal Risk Assessment are entitled to apply for permanent residence and in fact need to achieve permanent residence status in order to have full access to their rights, since refugee status by itself gives access to few rights in Canada. Of particular concern is the fact that family reunification is only available to refugees once they have obtained permanent residence.

It is therefore troubling that refugees face a number of barriers that delay or prevent their gaining permanent residence:

- The permanent residence application must be accompanied by processing fees, which are \$550 per adult and \$150 per child (children who are principal applicants must pay \$550).
- The application must be made within 180 days of the decision finding them a "protected person".
- Applicants must satisfy an immigration official as to their identity.
- Applicants must satisfy officials that they don't represent a danger to public health or safety (medical examinations need to be re-done if they lapse before processing is completed).
- Applicants must clear relevant security and criminality inadmissibility provisions.

Processing fees

[Regulations 175, 176, 295(1)(2) of the *Immigration and Refugee Protection Act and Regulations*]
The application for permanent residence is returned and not processed if the fee is not included. If the person has a spouse and/or children who are outside Canada, the fee must be paid for these family members as well, or they cannot be processed concurrently.

This fee, which acts as a barrier to family reunification, could be removed by a simple waiver of the fee for all protected persons and their dependants. The amount of money collected through these cost recovery fees applied to refugees and their dependants is relatively small in comparison to the amount collected through the immigration program for non-refugee immigrants. According to our calculations it amounts to about 0.34% (less than half of 1%) of the total monies collected in processing fees and Right of Permanent Residence Fees from immigrants and refugees coming to Canada each year¹³.

In the case of separated refugee children who are being processed for permanent residence in Canada without their parents, each child is treated as a “principal applicant” and must pay a processing fee of \$550 each. This constitutes a serious barrier to the child becoming a permanent resident in Canada, and potentially reunifying with parents through sponsorship. In fact, in some of these cases local child welfare bodies have been asked to pay the cost recovery fee. This often takes a long time and results in the young person remaining in a situation of uncertainty and insecurity in Canada. If there are several siblings without a parent, each of them must make a separate application and pay \$550 each. Thus, 3 siblings who are separated children must pay a total of \$1650 for their applications, whereas if they were accompanied by one parent, they would pay a total of \$1000 *including the parent*. The fee structure thus has the perverse effect of imposing higher fees on children, precisely because they are separated from their parents.¹⁴

Most separated children, of course, have very limited financial resources. They are generally in school and relying on some form of social assistance. This means that, unless funds are provided by a charitable organization, the child may not be able to apply for permanent residence as a protected person. Without permanent residence, the child is in a legal limbo.

¹³For example, based on the CIC website Facts and Figures for 2004, there were 11,265 protected persons (PPs) recognized as such in Canada in 2004 and 3,959 dependants abroad of these PPs, for a total of 15,224 protected persons. If about 1/3 of these are adults (it is probably a higher percentage), then the fees collected just for the applications for landing of these refugees amount to about (5000 x \$550 = \$2,750,000 for adults and 10,000 x \$150 = \$1,500,000 for the children, for a total of \$4,250,000. No fees are collected from government assisted and privately sponsored refugees: the number of these in 2004 was 10,757.

The total numbers of immigrants and refugees for 2004 was 221,352; the total of just immigrants for 2004 was 195,371. Fees and Right of Permanent Residence Fees for all immigrants (assuming again that 1/3 are adults) would be about 65,000 x [\$550 + \$975 = \$1,525] = \$99,125,000 + [129,000 children x \$150 = \$19,350,000] = \$118,475,000. So the total fees collected from immigrants and refugees = \$4,250,000 + \$118,475,000 = \$122,725,000. So the \$4,250,000 collected from refugee and their dependants amounts to only about 0.34% of the total fees and RPRF collected from immigrants and refugees in 2004.

¹⁴ A good example is the case of AM and MM, a brother and sister from Angola who arrived in Canada in March of 2001 and were granted Convention refugee status in September of 2002. Within the six months of their positive refugee decision, in January of 2003, they applied to be landed and a request was made that they be exempted from the \$550 processing fee since they were both full time high school students receiving social assistance and had no funds to pay the \$1,100 required. The request was refused and counsel sought to judicially review that decision but the Federal Court refused to grant leave for judicial review. Finally, two years later, the Children’s Aid Society of Toronto approved grants to pay the processing fees for these two young people. The applications were submitted in 2005 and no decision has yet been made on the applications. Since they were sent well past the 6-month period for applying for landing as refugees, they are being dealt with as “humanitarian and compassionate” applications for landing, a process that normally takes 3 to 4 years in Toronto, so it may be several more years before they are landed.

Question: In paragraph 156 of Canada's Fifth Report, it is stated that IRPA "incorporates references to the best interests of the child throughout". Why has the government failed to address this issue of the \$550 cost recovery fee for the processing of permanent residence applications of refugee children when it is clear that the refugee children are not in a position to pay this fee themselves since they are children?

180 day deadline

Some refugees do not apply within the 180 day deadline. This is sometimes because of the inability to raise the processing fee (this is especially the case with vulnerable groups such as single-parent families, often women) or because of mental or physical illness. Refugees who miss the deadline must apply under the special provisions of section 25(1) for processing on "humanitarian and compassionate" (H&C) grounds, and cannot include family members outside Canada. The H&C process takes much longer to process (about three years in some parts of the country). In addition, applicants under H&C are subject to inadmissibility on broader health grounds than refugees. This means, for example, that a refugee who fails to apply within the 180 days because she is sick may then be refused H&C on the basis that she is medically inadmissible.

Identity

Some refugees cannot produce passports and other identity documents acceptable to an immigration officer because of the situation in the country from which they have fled or because of their lack of status in their country of habitual residence. This issue has been the focus of concern and criticism and has resulted in several Federal Court cases prior to the passage of the *Immigration and Refugee Protection Act* of 2001¹⁵. It was a particularly serious problem for Somali and Afghan refugees and resulted in litigation that after several years culminated in an agreement that in such cases, the refugee could satisfy the identity document requirement with statutory declarations by themselves and by people who knew them before they came to Canada or by reputable community organizations in Canada. This is now set out in section 178 of the *Immigration and Refugee Protection Regulations*. Yet, despite the fact that the refugee's identity and nationality must be established at their hearing before the Refugee Protection Division of the Immigration and Refugee Board before they can be determined to be Convention refugees, permanent residence is still often delayed because of identity.

One of the communities affected is the Tibetan community. It is well-documented that Tibetans living in exile in India and Nepal can very rarely obtain Indian or Nepalese citizenship because they are considered "foreigners" even if born in those countries or after many years of residence. They have great difficulty obtaining any kind of identity documents from India and Nepal. The Tibetan refugees who reach Canada have often travelled with false Indian or Nepalese passports which are destroyed upon reaching Canada or turned over to Canadian authorities upon arrival. At their refugee hearings, Tibetan refugees provide evidence of their identity as Tibetans in exile including their Tibetan *Rangzen* or "Green Book" and when they are granted refugee status, this same information is provided to immigration authorities with their application for landing. Often

¹⁵ See *Aden et al v. Canada (Minister of Citizenship and Immigration)*, Court Docket IMM-500-96, Order of Federal Court, December 14, 2000; Andrew Brouwer, *What is in a Name? Identity Documents and Convention Refugees*, Ottawa, Caledon Institute of Social Policy, March 1999; Guy S. Goodwin-Gill and Judith Kumin *Refugees in Limbo and Canada's International Obligations*, Ottawa, Caledon Institute of Social Policy, September 2000; "Rule change gives refugees a break" *Globe and Mail*, Toronto, December 22, 2000; "Ottawa to relax refugee regulations" *Toronto Star*, Toronto, December 14, 2000.

additional statutory declarations by Canadian Tibetans who knew them personally before they came to Canada are also provided to establish identity. Yet in some cases, inconsistently and inexplicably, CIC officials refuse to accept the identity determination of the Immigration and Refugee Board and pursue their own long-drawn-out inquiries as to whether or not a particular Tibetan refugee has acquired Nepalese or Indian citizenship. This leads to serious delays in landing and tragically long family separations. A recent press report on the case of TDA describes the hardship experienced by refugees who cannot reunite with their families for years, despite having been granted Convention refugee status in Canada¹⁶.

In some cases, Citizenship and Immigration Canada requires refugees to approach the government of the country which they fled to request identity documents, a requirement that is clearly incompatible with their status as refugees and could endanger family members back home. For example, an Iraqi refugee received in April 2005 a letter from CIC stating “You were previously advised that the Id documents you submitted were not acceptable for purpose of establishing your identity. You also submitted two statutory declarations from individuals who knew you in Iraq before you came to Canada. Now there is an issuing body for Iraqi passports we are requesting that you confirm your identity by obtain [sic] a valid Iraqi passport. Should you not provide the requested information by that date your application will be refused for non compliance. As a convention refugee you will however continue to receive the protection of Canada although your application for permanent residency has been refused.”

It should be noted that, if facts indicating misrepresentation should come to light after a refugee has been granted permanent residence, the *Immigration and Refugee Protection Act* has procedures to strip the person of permanent resident status and to vacate refugee status.

Security clearance

In some cases, security and criminality clearances are delayed for extremely long periods. Security clearances are particularly problematic, with several known cases of more than 10 years delay. Because there is no legislated obligation on the government to make a decision on admissibility within a reasonable period of time, many people have their lives put on hold for years, even though the government eventually finds that they are not inadmissible on security grounds. Furthermore, the provision in the Act, known as Ministerial Relief, which allows the Minister to exempt from inadmissibility people whose “presence in Canada would not be detrimental to the national interest” is a largely illusory safeguard against injustice, particularly since the responsibility was transferred in December 2003 to the Minister of Public Safety and Emergency Preparedness.¹⁷

¹⁶ “Trying to find a home: Tibetans face years caught up in the system, awaiting landed immigrant status” Nicholas Keung, *Toronto Star*, July 4, 2005. TDA, a Tibetan woman from Nepal, came to Canada in 1998 with her sister and both were granted Convention refugee status. Although her sister was soon granted permanent residence, TDA’s application for landing has been delayed for six years and she has been unable to bring her husband and four children to join her in Canada because of this. Through access to information requests by the office of Parkdale Community Legal Services, it was learned that CIC officials suspected that the false Indian passport TDA used to reach Canada might be genuine and they have been making inquiries in this regard to Canadian visa officers abroad. When TDA travelled with a refugee travel document to visit her family in Nepal last February, her younger children treated her as a stranger, having grown up without their mother, despite the fact that she has been sending half of her monthly income from a factory job to support them since her arrival here.

¹⁷ IRPA s. 34(2) provides for ministerial relief for security cases. Similar relief is also offered in cases of human or international rights violations (s. 35(2)) and organized criminality (s. 37(2)). The Supreme Court

The long delays in security clearances and the threat that permanent residence may be denied effectively curtails freedoms of expression and association, since those awaiting a security clearance fear, with reason, that their words or acts could delay further or prevent their clearance. Some also report that they refrain from social relations with others from their community of origin for fear that the suspicions that are attached to them will be transferred to the people with whom they associate.

The CCR has observed that delays in security clearances affect some people disproportionately by nationality, ethnicity or religion. Among those particularly targeted are Iranians, Kurds, Sri Lankan Tamils, Sikhs, Algerians, Palestinians and other Arabs and Muslims. Many refugees from these groups who are caught up in the security screening net are people who in no way could be described as playing a significant role in any organization or activities that might reasonably be viewed as constituting a security risk. By contrast, certain other groups seem to be relatively untouched by the security net, despite the fact that the same allegations of association with “terrorism” could be made. For example, many Kosovars are known to have been involved directly or indirectly with the Kosovo Liberation Army. Although it appears that a small number of Kosovars have been found inadmissible because of their leading roles within the KLA, there are indications of a deliberate policy not to pursue security inadmissibility allegations against ordinary members. The fact that the policy appears to be applied differently by national group points strongly towards discrimination on grounds prohibited by the CCPR.

Further information on limbo can be found in *Impacts on children of the Immigration and Refugee Protection Act*, November 2004, available at <http://www.web.ca/~ccr/children.pdf> and *Refugees and Security*, February 2003, available at www.web.ca/~ccr/security.PDF.

VII. Family reunification

The *Immigration and Refugee Protection Act* includes in its objectives a commitment to family reunification. Yet, problems with barriers to and delays in family reunification are rife. In the spring of 2005, the Parliamentary Standing Committee on Citizenship and Immigration held cross-country hearings on the issue of family reunification. Briefs were received from groups across Canada pointing out the problems and the Standing Committee is expected to publish its report in the fall. Because of the significant scale of the problem and the breadth of its impact, family reunification has become the major current focus of concern for the Canadian Council for Refugees.

Delays in and barriers to family reunification because of limbo

Since refugees cannot be reunited with their family until they have become permanent residents, the barriers described in the previous section on limbo are all causes of delays in family reunification.

Long delays in processing

Statistics from Citizenship and Immigration Canada show long processing times at visa offices for applications by refugees’ family members abroad. More than 50% of cases took more than 13 months to complete (these figures are for the period July 2004 to June 2005). This processing time is calculated from the moment at which a completed application from the family member is received at the visa post. It is important to note that visa office processing times do not reflect the

of Canada found in *Suresh* that the security inadmissibility provision was saved from violating the Charter right to freedom of association by the availability of ministerial relief (para. 110). In practice, ministerial relief is not made available in the way the Court assumed.

total time of family separation. Refugees may have already been separated from their families for days, weeks or years before they arrive in Canada. They then need to go through the refugee determination system, which takes on average a year. Once accepted as a refugee, they can apply for permanent residence for themselves and for their spouse and children, but it may take them several months to gather the relevant documents and the money for the processing fees. The Vegreville Case Processing Centre may take some time to send the file to the visa office overseas. Then there may be a possible subsequent delay before the visa office sends the application to the family members to complete and sign.

While 13 months is a very long time for a family to be separated, one in five cases takes more than 25 months to process. In the region of Africa and the Middle East, the region with the slowest processing times, 50% of cases take more than 15 months and one in five cases takes more than 29 months. The visa post with the slowest processing times is Abidjan, which covers Burkina-Faso, Cameroon, Cape Verde, Central African Republic, Chad, Democratic Republic of Congo, People's Republic of Congo, Equatorial Guinea, Gabon, Guinea-Bissau, Ivory Coast, Mali, Mauritania, Niger and Senegal. It took more than 30 months to process 50% of cases, with one in five cases taking more than 40 months.

Excluded family members

The *Immigration and Refugee Protection Regulations* have a category of "excluded relationships" which prohibit some family members, including children, from being sponsored in the Family Class. The immigration regulations state that a person is not a family member if they were not examined by a visa officer when the person trying to sponsor them immigrated to Canada.¹⁸

Because the regulations define the excluded family member as not even being part of the definition of family, it is not possible to appeal the refusal to the Immigration Appeal Division, where humanitarian and compassionate considerations, and the best interests of the child, could be taken into account.

This regulatory provision is preventing family reunification in a significant number of cases, as reported to the CCR. There are a variety of reasons why family members may not have been examined when the sponsor immigrated to Canada. In one case, a woman came to Canada fleeing persecution based on her gender. Her refugee claim was accepted. She had left her two children with her mother (one was 12 years old, the other 6). However, in the applications she submitted to the Canadian government she did not mention the older child, because he was born out of wedlock and she was ashamed. In another case, a man was told that he could not sponsor a child whose existence he had not even known of at the time of his immigration to Canada. Another person who married just before immigrating to Canada and who did not report the wedding due to lack of understanding of Canadian requirements is now faced with the impossibility of sponsoring his wife.

In July 2004 the government changed the regulations to allow an exception if the visa officer decided that the family member didn't need to be examined.¹⁹ This amendment is welcome in that it will allow families to be reunited if members of the family were not available for examination. This is a frequent situation for refugee families who become separated from each other through displacement or imprisonment.

¹⁸ *Immigration and Refugee Protection Regulations*, 117(9)(d)

¹⁹ SOR/2004-167, subsection 41(4) amending section 117 of the Regulations.

However, the exception does remedy the problem in that some non-accompanying family members continue to be excluded from the Family Class. The exclusion is perpetual, unlike provisions in the *Immigration and Refugee Protection Act* for misrepresentation where the bar is for two years (s. 40).

Delay and frustration of family reunification due to DNA testing to prove relationships; refusal to recognize informally adopted children as family members

Refugees and immigrants from some countries have difficulty obtaining birth certificates, school documents or other proof of relationship to their children to satisfy the requirement that their dependent child is their “biological child” or their “adopted child” under section 2 of the Regulations. Although CIC policy states that DNA testing is only to be requested if there is no satisfactory documentary evidence of the parentage, it has been the experience of NGOs working with refugees and immigrants that DNA testing is often required from families from Africa and South Asia. DNA testing is very expensive (over \$900 or more depending on the number of persons to be tested), and it can be difficult to arrange.

Furthermore, it can result in irreparable harm in situations when DNA testing reveals that a child is not the biological child of the person who has always acted as the child’s parent and believed himself to be the biological parent.²⁰

²⁰ The case of *MAO v. Canada*, Federal Court Docket IMM-459-02, [2003 FC 1406], December 2, 2003, is a good illustration of this problem. MAO is a Somali man who had immigrated to Canada and was attempting to sponsor three children of his first marriage (his wife had died after the birth of the third child and the children had all been cared for after his wife’s death by the man’s older married sister with financial support from MAO who was working outside of Somalia). Although he obtained a Somali passport with his three children listed in the passport, he did not have any other documents as the family papers had all been destroyed during the civil war that erupted in Somalia in 1991. The Canadian visa officer asked for DNA tests to prove that the three children were his biological children. The man paid for the tests and the youngest child was found not to be his biological child, much to his dismay and personal grief. He was granted immigrant visas for the two older children but the youngest child was not issued a visa, and was left behind in the care of a guardian in Kenya. The father appealed to the Immigration Appeal Division of the Immigration and Refugee Board and the appeal was refused on grounds that despite evidence of the on-going parent-child relationship between this father and his youngest son who has his father’s name and was born within his marriage to the boy’s mother, the lack of biological connection was all that was needed to determine that this child was not the sponsor’s child. Since the Board found he was not the child of the sponsor, the Board had no jurisdiction to consider humanitarian and compassionate factors as to why the child should be permitted to join his family in Canada. The father sought judicial review of the decision and the Federal Court found that the visa officer had given the father no other option than DNA to establish the relationship; the visa officer had indicated that the application to sponsor the children would be refused unless DNA testing was done. According to the Federal Court, DNA testing is “qualitatively different” from providing documentary evidence of relationship. The Court stated: “The intrusion into an individual’s privacy that occurs with DNA testing means that it is a tool that must be carefully and selectively utilized [para. 84].” The Federal Court judge then set aside the DNA evidence and ordered that the father’s sponsorship appeal be heard again at the IAD without the DNA evidence so the father would have the opportunity to show his relationship to his son by other means. Unfortunately the second IAD appeal, heard on July 7, 2004, five years after the original application to sponsor his son had been refused, was unsuccessful because the Board found that the father had not shown the Board enough evidence of a parent-child relationship. In fact, the father had been supporting the child since birth and continued to do so while the boy remained in the care of the guardian in Kenya. He had only been able to arrange a few visits with his

In many countries, adoption is an informal matter and there is no paperwork involved. The child may or may not know of the adoption. The requirement of DNA testing or formal proof of adoption means that the child may be separated permanently from the only family he or she knows and from the only family willing to care for the child. The cost of arranging to do a formal adoption in Canada after the child arrives can also be prohibitive for refugees attempting to resettle in Canada.²¹

Question: Particularly in the situation of refugees from countries of great civil upheaval and conflict, why does the government not specifically provide for declarations of parentage in lieu of acceptable birth certificates and DNA testing?

On the same basis that many refugees cannot obtain identity documents, they often cannot obtain satisfactory birth certificate evidence. Family reunification should not be delayed and children should not be placed in jeopardy due to requirements to confirm biological relationship or formal adoption. Since it is not necessary to prove biological relationship for children who have satisfactory birth certificates, it is discriminatory to require this in the case of refugees who cannot provide such documents.

Question: Why is there no policy guideline for including as *de facto* family members for the purpose of sponsorship and family reunification, children who have been raised as members of the refugee's family and who would otherwise be left without a guardian?

Bar on family reunification for refugee minors

Canada has recognized the "principle of family unity" by permitting refugees (known as protected persons) to include their family members in their application for permanent resident status. This is mentioned as a positive step for promoting family reunification for refugees in paragraphs 139 and 140 of the Fifth Periodic Report of Canada to the HRC. However "family member" is defined in Regulation 1(3) as including the spouse or dependent child of a protected person. Conspicuously excluded from the definition of family member of a protected person is the parent of a protected person who is herself a dependent child.

The situation has arisen in a number of cases in Canada in which children have been granted protected person status, but their parent has been refused such status. One of the most notorious cases is that of North Korean trade minister and diplomat Song Dae Ri who defected to Canada with his wife and child in August of 2001. His wife then returned to North Korea and was executed. The child was granted Convention refugee status in Canada but Song Dae Ri was excluded from refugee protection because of his former position with the North Korean government.²² This was a

son, although he had exactly the same relationship with his two biological children who were permitted to join him in Canada. Adoption was not an option for this man since he is Muslim and adoption is contrary to his religious beliefs. The legal proceedings took six years and the father essentially gave up on Canadian legal procedures to reunify with his son after the failure of the second IAD appeal. He went to Kenya to make other arrangements for the future of his son who by then was 17 years old and by all accounts, terribly hurt and demoralized by what had happened. This case has been described in some detail in articles published in the *Canadian Family Law Quarterly*. See "Second Class: Law Meets Family in the Immigration Context" *CFLQ*, Volume 21, 2003 and "Biology not Destiny? O.(M.A.) V. Canada (M.C.I.) And the Recognition of Relationship" *CFLQ*, Volume 22, 2004, by Lene Madsen. See also "DNA tests add a risky delay, refugees say," *Globe and Mail*, Toronto, June 21, 2005.

²¹ Case of SD (Tibet), Case of JM (Rwanda), Case of IM (Rwanda)

²² See "Defector's Canadian ordeal drags on." *Globe and Mail*, Toronto, April 26, 2005.

notorious case but, in fact, there is a steady stream of decisions by the Immigration and Refugee Board in which children have been granted convention refugee status and their parents have been refused.²³ When advocates have sought to challenge the restrictive definition of “family member” of a protected person in section 1(3) of the Regulations, the Minister’s counsel has vigorously opposed the challenge on grounds that it is necessary to protect children from unscrupulous parents who might send their children abroad to Canada with smugglers in an attempt to establish a “beachhead” or an “anchor” in Canada, so that the rest of the family might be able to join the child if the child’s refugee claim is granted. No evidence of such action by parents has actually been presented to back up this concern. Furthermore, it is irrelevant in the cases in which the parent, or parents are already in Canada and are caring for the child who has been granted refugee status.

Citizenship and Immigration Canada officials have argued that the parents are able to apply for permanent residence on “humanitarian and compassionate” grounds pursuant to section 25(1) of the *Immigration and Refugee Protection Act*, but this is a discretionary remedy and even if approved in principle, the parent and any dependents would still have to meet all of the normal admissibility criteria, including medical and financial criteria. The “family members of protected persons” are exempted from the medical inadmissibility due to excessive demand and financial admissibility criteria, meaning that they are much more likely to be granted permanent resident status.²⁴

Question: Why not permit dependent refugee children to include their parents and siblings, upon whom they depend for their emotional security, in their application for permanent residence in Canada?

Further information on family reunification can be found in *More than a Nightmare: Delays in Refugee Family Reunification*, November 2004, available at <http://www.web.net/~ccr/nightmare.pdf>, in *Impacts on children of the Immigration and Refugee Protection Act*, November 2004, available at <http://www.web.net/~ccr/children.pdf> and in *Families Never to be United: Excluded Family Members*, April 2005 available at <http://www.web.net/~ccr/excludedfam.html>.

VIII. Interdiction

Canada has long been a global leader in interdiction efforts to prevent so-called “irregular migration” to its territories. Through a combination of restrictive visa policies, carrier sanctions and the deployment of Canadian officials, known as Migration Integrity Officers, to air transit hubs around the world, Canada, like other western countries, has severely restricted access to asylum for people fleeing persecution and torture. It has done so apparently without regard to international human rights and refugee law norms, based on the belief that the activities of overseas officers engaged in migrant interdiction at foreign airports and at other points abroad are not subject to the constraints and obligations of the Covenant or other international human rights instruments, a

²³ See “Canada’s Treatment of Separated Refugee Children” by G. Sadoway, *European Journal of Migration and Law*, Volume 3, Nos. 3 - 4, 2001, Kluwer Law International, The Netherlands, at pages 374 - 378.

²⁴ Cases of AF, ZM, AS, DT, AH

position directly at odds with the Human Rights Committee's own jurisprudence²⁵ (eg *Lopez Burgos v. Uruguay*) and the international law of state responsibility.²⁶

According to government statistics, in the period 1996 through 2002, Canada's interdiction program directly resulted in some 40,000 "improperly documented" travellers being denied boarding on flights bound for Canada. Last year alone the number was 5644.

Visa policies constitute the first step in Canada's interdiction program. Canadian visa policy appears to be directed specifically at restricting access to Canada by potential asylum seekers. The introduction by Canada in December 2001 of visa requirements for citizens of Hungary and Zimbabwe, for example, was in direct response to the increased number of asylum seekers from those two countries.

In order to enforce visa requirements, Canadian legislation imposes steep penalties on transport companies that bring "improperly documented" persons to Canada, including fine as well as costs of detention, return, and, in some cases, medical care. Carriers, seeking to avoid such sanctions, are thus put into the position of having to check travellers' documents before allowing them to board. Airline representatives and, in some cases, private security companies hired by airlines identify false or improper documentation and prevent the embarkation of persons without adequate travel documents and visas. The possibility of refolement resulting from such actions appears not to be a consideration, nor do private agents have the expertise to make such assessments.

In order to assist carriers in complying with carrier sanctions legislation, Canadian interdiction officers, known as Migration Integrity Officers, are stationed at air transit hubs and provide training and advice to airlines with respect to the identification of false or unsatisfactory documents. Like airline personnel themselves, these officers do not appear to have any mandate to examine the interdicted person's motivation for migration or to address any need for international protection. There appears to be no monitoring of the impact of interdiction, nor any follow up to assess the circumstances of persons who have been interdicted. The very real possibility that refusing the person embarkation will result in either refolement or a violation of the person's right to leave their country appears not to be considered.

For example, in one case familiar to the UNHCR Ottawa office, an Iranian man attempted to seek asylum in Canada. He travelled by air, via Moscow and Havana. In Havana, the fraudulent documents on which he was travelling were discovered and he was denied permission to board his flight to Canada. Cuba, which is not a signatory to the Refugee Convention, returned him to Moscow, where despite the intervention of the UNHCR, who had been alerted by the man's brother in Canada, he was detained at the airport and then refoled to Tehran. According to his brother, he was detained on arrival back in Iran. He had never had an opportunity to have his request for asylum examined.²⁷

²⁵ E.g. *Lopez Burgos v. Uruguay*, Communication No. 52/1979, Views of the HRC, July 1981.

²⁶ See, e.g., Articles 1, 2, 4.1, 5 and 8 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, as well as *Loizidou v. Turkey*, ECHR, 23 February 1995, Series A, No. 310, 103 ILR 622.

²⁷ This case is reported in "Interception and Asylum: When Migration Control and Human Rights Collide", by Andrew Brouwer and Judith Kumin, in *Refuge*, Vol. 21, No. 4, December 2003.

Despite repeated requests over the course of several years, the Canadian government has refused to provide details, beyond numbers of persons interdicted by nationality, that would allow an assessment of the human rights impact of its interdiction program. The Canadian government has not provided information, for example, about how many of the 40,000 “improperly documented” travelers reportedly interdicted by or with the assistance of Canadian immigration control officers between 1996 and 2002 were given an opportunity to indicate their need for asylum, if any, or what procedures were followed. The Canadian government has provided no information about whether and how many interdicted persons were referred to UNHCR, how many were referred to local asylum authorities and in which countries, how many were simply turned back, or what happened to them.

Further information on interdiction can be found in *Interdicting Refugees*, May 1998, available at <http://www.web.ca/~ccr/Interd.pdf> and *Interdiction and Refugee Protection: Bridging the Gap*, Proceedings of International Workshop, 29 May 2003, available at <http://www.web.ca/~ccr/interdictionproceedings.PDF>.

IX. Taking the measures necessary: Canada and its CCPR treaty obligations

“Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees.” HRC General Comment 31, Para. 13.

It is time for serious measures to give effect to international treaty rights, to ensure these rights and to provide an effective remedy for violations of these rights. Two simple measures would be (a) legislative change making explicit that the *Canadian Charter of Rights and Freedoms* is intended to be applied so as to give effect to Canada's ratified international human rights treaty obligations and (b) legislative change requiring the Supreme Court to ensure individuals before it benefit from *Charter* rights.

In 1982 the *Canadian Charter* may have seemed a bold step towards international rights. In 1984 Ambassador Beesley assured the UN Human Rights Committee (HRC), that “although the *Charter* [Canadian Charter of Rights and Freedoms] and the Covenant were not identical ... differences could not hide the high degree of similarity ... The Charter gave effect to many of Canada's obligations under the Covenant.”²⁸ Since then, new democracies with new constitutions with more rights and freedoms have appeared in Europe, in Latin America and in South Africa. The UK has incorporated the European Convention of Rights and Freedoms into its domestic law. Canada's *Charter* has become a more parochial instrument for giving effect to “Canadian values.” It no longer looks like an adequate “measure” to ensure CCPR rights for the individual.

The principal obligations of the Covenant on Civil and Political Rights (CCPR) were and are clear.²⁹ These obligations are listed by the Standing Senate Committee on Human Rights in its 2001 report.³⁰ The HRC has recently elaborated on them.³¹ Paraphrased, they are:

²⁸ Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation*, Butterworths, Toronto/Vancouver, 1992, at. 54.

²⁹ Under the CCPR the State Party undertakes: art 2.1 “to respect and to ensure to all individuals ... the rights ... in the present Covenant without distinctions of any kind...”; art. 2.2 “to take the necessary steps ... to adopt such

- ensure CCPR treaty rights for everyone (Article 2.1)
- take the measures necessary to give effect to these rights (Article 2.2)
- ensure an effective remedy if rights and freedoms are violated (Article 3)

Beyond the CCPR obligations, for Canada, a member of the OAS, the remedy needed under CCPR Art.2.3 must be a judicial remedy for rights,³² and must allow every person “the right to resort to the courts to ensure respect for legal rights” and access to “a simple brief procedure whereby the

legislative measures or other measures as may be necessary to give effect to the rights recognized in the present Covenant”; art. 2.3 “to ensure that any person whose [CCPR] rights ... are violated shall have an effective remedy ...and to develop the possibility of judicial remedy”.

³⁰ “Promises to Keep: Implementing Canada’s Human Rights Obligations”, Report of the Standing Senate Committee on human Rights, December 2001, page 14.

³¹ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004). In particular:

- “The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party.” Para. 4
- “States Parties are required ... to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means ... to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 ... (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.” Para. 10
- “Moreover, the article 2 obligation ... entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [right to life] and 7 [no torture or cruel treatment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.” Para 12.
- “Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant’s substantive guarantees. ... The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order...” Para. 13
- “Article 2 (3) requires ... States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. ... The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law.” Para 15

³² ““The right of access to judicial protection to ensure respect for a legal right requires available and effective recourse for the violation of a right protected under the [American] Declaration [of Rights and Duties of Man] or the Constitution of the country concerned.”, Inter-American Commission on Human Rights, “Report on the Situation of human Rights of Asylum Seekers Within the Canadian Refugee Determination System, OAS Doc. OEA/Ser.L./V/II.106 Doc.40 rev. Feb 28, 2000, (“ IACHR, Report on Canada 2000”), para. 95.

courts will protect him or her from acts of authority that violate any fundamental constitutional rights.”³³

It is remarkable how little has been done since 1984 to give effect to CCPR rights within Canada by a country that cultivates an image as a promoter of human rights on the international stage. The HRC has found violations of CCPR rights by Canada in individual complaints in which the courts and the federal government have not ensured CCPR rights, have not acted to give effect to these rights and have not ensured an effective remedy for some refugees and non-citizens: HRC *Ng v. Canada*; HRC *Judge v. Canada* ; HRC *Ahani v. Canada*.

In contrast with the expectations in 1984, the courts have not given effect to CCPR rights in their application of the *Canadian Charter of Rights and Freedoms* in deportation and extradition and non-citizen cases. Their use of international law has been unprincipled. Worse, the courts have interpreted the *Canadian Charter of Rights and Freedoms* in a manner which puts it at odds with CCPR obligations in several areas.

- In *Chiarelli* the Supreme Court interpreted *Charter* s.6 right to freedom of movement as excluding non-citizens from rights of return to Canada in conflict with the CCPR article 12 right to freedom of movement as applied by the HRC in *HRC Stewart v. Canada*.³⁴
- In *Kindler, Ng, Burns, Suresh*, despite some evolution in thinking over the cases, the fundamental CCPR article 7 right to protection from torture and cruel treatment was found inapplicable³⁵ or reduced to a factor to be weighed in balancing whether limiting a *Charter*

³³ IACHR Report on Canada 2000, para. 95, 96, 98.

³⁴ The Supreme Court concluded in *Chiarelli*: “The distinction between citizens and non-citizens is recognized in the Charter. While permanent residents are given the right to move to, take up residence in, and pursue the gaining of a livelihood in any province in s. 6(2), only citizens are accorded the right ‘to enter, remain in and leave Canada in s. 6(1). ... Thus Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada.” The HRC views originally expressed in *HRC Charles E. Stewart v. Canada*, Communication No. 538/1993, Views 1 November 1996, UN Doc. CCPR/C/58/D/538/1993.at Para.13.2 became part of General Comment 27 Freedom of Movement: “The wording of [Covenant on Civil and Political Rights] article 12, paragraph 4, does not distinguish between nationals and aliens (“no one”) [with respect to the right to enter or leave his own country]. Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase “his own country”. The scope of “his own country” is broader than the concept “country of his nationality”. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien...” Charter s. 6.1 states: “Every citizen of Canada has the right to enter, remain in and leave Canada.” The Charter right is for citizens. However, the Charter is silent about non-citizens and the Charter as a whole was not necessarily at odds with the corresponding international right, CCPR article 12.

³⁵ SCC *Kindler v. Canada*, “While the *Charter* applies to extradition matters, including the executive decision of the Minister that effects the fugitive’s surrender, the guarantee against cruel and unusual punishment found in s. 12 of the *Charter* has no application to s. 25 of the *Extradition Act* or to ministerial acts done pursuant to that section ...” page 782; “Section 25 of the *Extradition Act*, which permits the extradition of fugitives without assurances that the death penalty will not be applied in the requesting states, does not offend the fundamental principles of justice enshrined in s. 7 of the *Charter* ... Bearing in mind the nature of the offence and the penalty, the justice system of the requesting state ... and according due latitude to the Minister to balance the competing interests involved in particular extradition cases, the extradition of a fugitive to a state where he may face capital punishment, if convicted, is not a situation which is shocking

s.7 right to life liberty and security of the person would shock the conscience of Canadians. In addition, the substantive CCPR article 6 right to life and substantive article 9 right to liberty and security of person have been lost in this balancing of *Charter* s. 7 substantive rights with a sense of fundamental principles of justice.³⁶ The balancing test is far from the accepted international test for limiting international rights. The HRC has shown how CCPR article 7 right to no torture or cruel treatment applies in the context of extradition to the death penalty in HRC *Kindler v. Canada* and *Ng v. Canada*.³⁷

- In *Reza* the Supreme Court failed to ensure the CCPR article 9.4 right to have lawfulness of detention determined by a court when the Supreme Court presumed that provisions of the *Immigration Act* were substantially similar to the *Charter* s.10 right to *Habeas Corpus*. A related issue arose when the HRC determined that the prolonged detention of Ahani in HRC *Ahani v. Canada* violated his CCPR article 9.4 right.³⁸
- In *Baker* the Supreme Court avoided applying the *Canadian Charter of Rights and Freedoms* and so avoided giving effect to CCPR article 17 and 23 family rights and CCPR article 24 special protection of the child, all at issue.³⁹ Instead, the Court gave the

and fundamentally unacceptable in our society. There is no clear consensus in this country that capital punishment is morally abhorrent and absolutely unacceptable.” page 783.

³⁶ SCC *United States v. Burns*, [2001] 1.S.C.R. 283, “Section 7 (“fundamental justice”) applies because the extradition order would, if implemented, deprive the respondents of their rights of liberty and security of the person since their lives are potentially at risk. The issue is whether the threatened deprivation is in accordance with the principles of fundamental justice. Section 7 is concerned not only with the act of extradition, but also with its potential consequences. The balancing process set out in *Kindler* and *Ng* is the proper analytical approach. The “shocks the conscience” language signals the possibility that even though the rights of the fugitive are to be considered in the context of other applicable principles of fundamental justice, which are normally of sufficient importance to uphold the extradition, a particular treatment or punishment may sufficiently violate our sense of fundamental justice as to tilt the balance against extradition. The rule is not that departures from fundamental justice are to be tolerated unless in a particular case it shocks the conscience. An extradition that violates the principles of fundamental justice will always shock the conscience.”

³⁷ HRC *Ng v. Canada*, “... the Committee observes that what is at issue is ... whether by extraditing Mr. Ng to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant. ... The starting point for consideration of this issue must be the State party's obligation, under article 2, paragraph 1, of the Covenant, namely, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant.” Para 14.1 ; “If a State party extradites a person within its jurisdiction in such circumstances that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.” Para 14.2; “... by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant; on the other hand, article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes. Nonetheless, the Committee reaffirms ... that, when imposing capital punishment, the execution of the sentence ... must be carried out in such a way as to cause the least possible physical and mental suffering.” Para 16.2.

³⁸ HRC *Ahani v. Canada*, “... The Committee observes, however, that when judicial proceedings that include the determination of the lawfulness of detention become prolonged the issue arises whether the judicial decision is made “without delay” as required by the provision, unless the State party sees to it that interim judicial authorization is sought separately for the detention. In the author’s case, no such separate authorization existed although his mandatory detention until the resolution of the “reasonableness” hearing lasted four years and ten months.” Para. 10.3.

³⁹ The Supreme Court was asked to apply the Charter to give effect to these rights and to provide a judicial remedy by interveners in the *Baker* case.

Convention on the Rights of the Child article 3 best interests of the child principle the role of “factor” to be weighed in a discretionary administrative decision. The administrative decision had the effect of deportation or not of a non citizen mother, a disabled non citizen child potentially from citizen children. The HRC has shown how CCPR article 17 and 23 family rights and article 24 special protection of the child apply to preclude deportation in the related circumstances of HRC *Winata v. Australia*.

- In *Reza, Kindler, Burns, Baker, Suresh and Ahani*, the Supreme Court did not act as if the *Canadian Charter of Rights and Freedoms* was the supreme law to be used to give effect to and to ensure CCPR rights. Rather the Supreme Court acted as if the federal Immigration Act and the federal Extradition Act were the ultimate authority in their designated areas of regulation. CCPR rights were largely ignored. In *Burns* and *Suresh*⁴⁰ the Court found these two laws constitutional where they allow a government Minister to adjudicate the fundamental CCPR rights to life and to protection from torture in discretionary decision making on extradition and deportation.
- In the above and in *Pushpanathan* the Supreme Court accepted administrative hearings with restricted forms of judicial review as the “effective remedy” for the rights engaged. The Inter-American Commission was critical of such forms of judicial review as not qualifying as an effective court remedy for unrecognized refugees and for non-citizens detained under a security certificate.⁴¹ In the particular circumstances of the HRC *Judge v. Canada* case, the HRC found that a person “extradited” to a death penalty in the U.S.A. should have had prior access to the Quebec courts.⁴²
- In *Andrews* and in subsequent non discrimination case law the Supreme Court failed to give effect to the equal treatment dimension in the CCPR article 14.1 and article 26 rights,⁴³ thus

⁴⁰ SCC *Suresh v. Canada* [2002] 1.S.C.R. 3, “ In exercising the discretion conferred by s. 53(1)(b) of the *Immigration Act*, the Minister must conform to the principles of fundamental justice under s. 7. Insofar as the Act leaves open the possibility of deportation to torture (a possibility which is not here excluded), the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture. Applying these principles, s. 53(1)(b) does not violate s. 7 of the *Charter*”... “Section 7 of the *Charter* does not require the Minister to conduct a full oral hearing or judicial process.” “... procedural protections apply where the refugee has met the threshold of establishing a *prima facie* case that there may be a risk of torture upon deportation.”

⁴¹ IACHR Report on Canada 2000, Para. 100 - 103 and 157.

⁴² HRC *Judge v. Canada*, Communication No. 829/1998, Views 20 October 2003, UN Doc. CCPR/C/78/D/829/1998. “... this response [by Canada] is unsatisfactory for three reasons, namely: (1) Canada deported the author knowing that he would not have the right to appeal in a capital case; (2) the speed with which Canada deported the author did not allow him the opportunity to appeal the decision to remove him; and (3) in the present case, Canada took a unilateral decision and therefore cannot invoke its obligations under the Extradition Treaty with the United States, since at no time did the United States request the extradition.” “... Canada has violated its obligations under article 2 of the Covenant to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant because, when it deported the author to the United States, it did not take sufficient precautions to ensure that his rights under article 6 and to article 14, paragraph 5, of the Covenant would be fully observed.”

⁴³ See, for example, the interpretation of the Ontario Court of Appeal in *Philippines (republic) v. Pacificador*: ““The appellant [Pacificador] reaches into s.7 of the *Charter* [Canadian Charter of Rights and Freedoms] for an equality right which is not tied to the concept of discrimination. He submits that it is a principle of fundamental justice that all persons must be treated equally before the law, except to the extent that distinctions in their treatment can be justified by some reasonable or rational legislative policy. The Concept of equality based on unjustifiable distinctions is not new. It was accepted in the British Columbia court of Appeal in [*Andrews v. Law Society of British Columbia* (1986) at 178-182] and applied to a claim

permitting the violation found in the HRC *Ahani v. Canada* case where the Supreme Court had not allowed Ahani to enjoy his CCPR article 13 right to give reasons against expulsion in equality with Suresh.⁴⁴

This analysis does not question the wisdom or outcome of Supreme Court judgments. It simply concludes that the judgments did not in fact give effect to important CCPR rights, did not ensure them, and did not ensure, that is guarantee, an effective judicial remedy for the individuals involved.

The education seminars provided for some judges expose them to largely general views on the application of international law. Although such initiatives can only help, waiting for academics and courts to solve the serious deviation of *Charter* interpretation from CCPR rights is not good enough.

The federal government, when appearing before the courts, has largely obstructed efforts to have the court give effect to or to ensure CCPR rights or to ensure an effective judicial remedy for the individuals before the Court.

The federal government has not ensured CCPR rights or given effect to CCPR rights in legislation like the *Extradition Act* or in the *Immigration and Refugee Protection Act 2002*. A possible exception is the vague reference to international human rights obligations in the *IRPA 2002*. Even if this reference proves over time to be effective for non-citizens, it does nothing to ensure CCPR rights or effective remedies for other individuals affected by extradition or anti-terrorism measures. Otherwise, *IRPA 2002* has done little to give effect to CCPR rights and has done nothing to ensure CCPR rights, preserving substantially similar provisions from the former *Immigration Act* which prompted comment and recommendations by the Inter-American Commission on Human Rights. The government has never implemented the appeal on the merits, the one new feature in *IRPA 2002* that the Commission had deemed an essential part of an “effective remedy” for a refugee claimant in the Canadian refugee status determination procedures.

Finally, Canadians deserve to know about the international treaty human rights promised for them. There is very little media coverage or interest in case views or in examinations. Holding a press conference about the examination by the HRC was promised to the HRC by the Minister during the 1999 examination, but it never took place.

made under s. 15. The Supreme Court of Canada however, specifically rejected that approach to equality in the context of s.15.”, *Philippines (Republic) v. Pacificador* (1993), 14 OR No.3, 29 July 1993, 321, at 336.

⁴⁴ HRC *Ahani v. Canada* “... the failure of the State party to provide him, in these circumstances, with the procedural protections deemed necessary in the case of Suresh, on the basis that the present author had not made out a *prima facie* risk of harm fails to meet the requisite standard of fairness.” Para 10.7; “...article 13 is in principle applicable to the Minister’s decision on risk of harm, being a decision leading to expulsion. Given that the domestic procedure allowed the author to provide (limited) reasons against his expulsion and to receive a degree of review of his case, it would be inappropriate for the Committee to accept that, in the proceedings before it, “compelling reasons of national security” existed to exempt the State party from its obligation under that article to provide the procedural protections in question. In the Committee’s view, the failure of the State party to provide him with the procedural protections afforded to the plaintiff in Suresh on the basis that he had not made out a risk of harm did not satisfy the obligation in article 13 to allow the author to submit reasons against his removal in the light of the administrative authorities’ case against him and to have such complete submissions reviewed by a competent authority, entailing a possibility to comment on the material presented to that authority. The Committee thus finds a violation of article 13 of the Covenant, in conjunction with article 7.” Para. 10.8.