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LIVES ON HOLD – THE LIMITS OF H & C

6 September 2006

> House of Commons, 9 May 2006, responding to a question about the situation of people from moratorium countries without status, Hon. Monte Solberg Minister of Citizenship and Immigration, said: **"Mr. Speaker, today I met with a number of people who are without status in this country. Obviously they have a very difficult situation. I talked to them about the need to use humanitarian and compassionate avenues to permit them to stay, where it is warranted. Clearly, I am open to hearing what they have to say and will continue to look for solutions to their situation."**

Introduction

Significant numbers of people from moratorium countries have had their lives on hold in Canada for years. They are in a state of legal limbo because they have not been given permanent residence status and yet they are unable to return to their home country because of insecurity there – a danger explicitly recognized by the Canadian government, which has imposed a moratorium on removals. The countries affected are Afghanistan, Burundi, Democratic Republic of Congo, Haiti, Iraq, Liberia, Rwanda and Zimbabwe.[1]

The affected communities have organized themselves to make known the problem and advocate for a solution, and have been working with the support of Canadian organizations and individuals. They have brought the situation to the attention of parliamentarians and government officials, who have acknowledged the difficulty.

In discussions, government officials have regularly pointed to "humanitarian and compassionate" applications (popularly known as H & C) as the appropriate way for moratorium country nationals to acquire permanent status.

H & C has indeed proven a solution for a significant number of moratorium country nationals. However, as discussed in the 2005 CCR report, "Lives on Hold", "[t]he H & C route is both ineffective and inefficient, since it leaves many people from moratorium countries without permanent residence and is cumbersome and resource-intensive for the government since each case needs to be individually studied in all its complexity."

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[1] The situation of these people is described in the Canadian Council for Refugees report "Lives on Hold: Nationals of Moratoria Countries Living in Limbo", July 2005, available from http://www.web.ca/ccr/livesonhold.htm. A pamphlet and DVD outlining the situation are also available.

Among the problems with the H & C process are the long processing delays (applicants routinely wait 2-3 years for a response – and sometimes even longer), the processing fee of $550 per adult ($150 per child) and above all the discretionary nature of the decision which makes it difficult for an applicant to know whether they are likely to be accepted or what information to submit in order to be successful.

This report examines some of the refused H & C applications and shows how the H & C process is inadequate to respond to the situation of moratorium nationals. While some 85% of applicants may be accepted, according to Citizenship and Immigration Canada statistics, the 15% who are refused are not necessarily any less deserving – they are simply victims of a discretionary process that is inherently inconsistent and that leaves some people in long-term legal limbo – with their lives indefinitely on hold.

Hon. Monte Solberg, Minister of Citizenship and Immigration, 10 May 2006, responding to a question about moratorium country nationals posed by Bill Siksay, MP, at the Standing Committee on Citizenship and Immigration: "First of all, I have tremendous sympathy for these people. They are really and truly in a very difficult situation. Obviously they can't be sent back to these countries. There's a moratorium on sending them back because of the dangerous situations in those countries. So I have great sympathy for their situation.

The good thing is that about 85% of them, I've discovered, who apply under H and C are accepted, which is good. But there are still 15% who don't make it."

Analysis of negative H & C decisions

This report is based on an analysis of a number of recent negative H & C decisions regarding applications submitted by nationals of moratorium countries, all of which have been rendered since Minister Solberg made his above statement of concern on 10 May 2006 (with the exception of one Federal Court judgement regarding a 2005 H & C decision). These decisions, while certainly not representative of H & C decisions in general (we know that most similar applications are accepted), demonstrate the grave limits of H & C as a mechanism for ensuring that moratorium country nationals do not remain indefinitely in legal limbo in Canada.

The recent negative decisions reviewed involve applicants from the Democratic Republic of Congo, Zimbabwe and Rwanda. In ALL cases, the applicants:

- Are self-supporting.
- Have been in Canada for more than 4 years (one has been here for 13 years).

In addition, some applicants:

- Have done significant volunteer work.
- Have minor children overseas, with whom there remains no possibility of family reunification in the absence of a positive H & C decision.

One applicant was managing to study full time at university (with a major in French) while working full-time.

None of the applicants had any criminality in their background, nor were they subject to any other inadmissibility under the Act, such as security or health. None of the applicants was currently in receipt of social assistance.

All of these applicants were doing their best in their difficult circumstances to get on with their lives and contribute towards Canadian society. All should have been allowed to get their lives off hold. Yet, all were refused.[2]

Scope of Officer's discretion

A recent Federal Court decision (2006 FC 561, 4 May 2006) illustrates very clearly the inherent limitations of the current H & C process. This case involved a man from the Democratic Republic of Congo (DRC) who arrived in Canada in 2001. Commenting on the officer's negative H & C decision, Mr. Justice Strayer states in par. 10:

> There was evidence before her that the applicant was earning his living in Canada, that his employer was satisfied with his work, that he was successfully participating in track teams in significant competitions (and further that his opportunities for competition internationally for Canada and his opportunities for making money from sponsorships would be greatly enhanced if he had the possibility of permanent residence and potentially of Canadian citizenship) I would agree that an Officer could very well have found a significant degree of establishment from these facts as well as a hardship imposed on the applicant because of the state of limbo in which he finds himself. Nevertheless I am unable to say that the Officer's negative conclusion on "significant degree of establishment" was unreasonable. [emphasis added]

And in his conclusion:

> [12] Although there was certainly enough evidence before the Officer that she could have found that the applicant met the requirements of paragraph 5.21 of the Guidelines[3] with respect to "significant duration" and "significant degree of establishment", I am unable to say that the Officer's decision was unreasonable in terms of paragraph 5.21 or in terms of the general discretion given by subsection 25(1) of the Act. I will therefore dismiss the application for judicial review.

The judge is here drawing attention to the fact that subsection 25(1) of the *Immigration and Refugee Protection Act*, which provides the basis for H & C applications, gives the officer making the decision a very wide degree of discretion. The Federal Court can only overturn such a decision if it is unreasonable. Thus, even where a Federal Court judge believes that there is enough evidence to find a "sufficient degree of establishment" over a "significant duration", a negative H & C decision is allowed to stand, because the officer's decision was "not unreasonable". Another immigration officer, reviewing the same application, might well have reached a positive decision. In other words, decision-making in such cases is inevitably going to be inconsistent, with similar cases treated differently, depending on how the individual decision-makers choose to use their discretion.

[2] It is also worth noting that, based on experience with the special Algerian program instituted after the lifting on the moratorium on removals to Algeria in 2002, all of the applicants included in this analysis would almost certainly have been accepted under that program. The special Algerian program had a 93% acceptance rate.

[3] Paragraph 5.21 states: "When the period of inability to leave due to circumstances beyond the applicant's control is of a significant duration and where there is evidence of a significant degree of establishment in Canada, these factors may combine to warrant a favourable H&C decision."

Establishment in Canada

One of the factors that H & C decision-makers consider is the degree of the applicant's "establishment in Canada."[4] In the section of the immigration manual that corresponds to the situation of moratorium country nationals, it is stated that: "When the period of inability to leave due to circumstances beyond the applicant's control is of a significant duration and where there is evidence of a significant degree of establishment in Canada, these factors may combine to warrant a favourable H&C decision."

Yet in the decisions analysed, the "significant degree of establishment" suggested by the manual has been interpreted by officers in a manner that makes it very difficult for an applicant to meet the test.

For example, in the case cited above that was reviewed by the Federal Court, the officer did not consider that four years' residence in Canada, contributions through employment (the employer described the applicant as a good employee) and significant athletic involvement constituted sufficient establishment in Canada.

In another case, also involving an applicant from the DRC, the officer counted against the person that he is working in an unskilled job in Canada, despite having been a doctor in his home country, and that his family members remain the DRC:

> Je note que le requérant travaille comme étalagiste au Dollorama depuis peu après son arrivée au Canada. Je note que l'emploi occupé ne nécessite pas de formation spécialisé[e]. De plus, le requérant déclare être médecin dans son pays d'origine. [translation: "I note that the applicant has been working as a shelver at Dollorama since shortly after he arrived in Canada. I note that his job does not require any specialized training. In addition, the applicant states that he was a doctor in his country of origin."]

This completely fails to take account of the very substantial barriers to establishment that applicants face, precisely because of their lack of permanent status. Without status, they are generally forced to work at unskilled jobs, because employers are not interested in investing in employees who they fear may be gone tomorrow, and because most training and educational programs are effectively inaccessible to people in legal limbo. Without status, people have no means of bringing their family members to Canada. Thus, the decision-maker in this case is penalizing the applicant for the problems caused by his lack of status.

Length of time in Canada

The immigration manual states that "[p]ositive consideration may be warranted when the applicant has been in Canada for a significant period of time due to circumstances beyond the applicant's control." A moratorium on removals to the country of origin is given as an example of circumstances beyond the applicant's control. The notion of "significant duration" is undefined, and, like the concept of "significant establishment", may be interpreted in different ways by different people.

In the Federal Court case cited above, the judge notes that there may be different, equally valid, interpretations of "significant duration":

[4] CIC Manual IP5 *Immigrant applications in Canada made on Humanitarian or Compassionate Grounds*, par. 5.21: *Prolonged stay in Canada has led to establishment*

> [10] The Officer did not consider that four years was of "significant duration" as called for by paragraph 5.21. While that conclusion was by no means inevitable given the language of the paragraph, I am unable to say that it was on its face unreasonable.

This means that moratorium country nationals are left in a state of uncertainty about whether and when to apply for H & C. If they have been in Canada for "only" four years, should they pay up the $550 fee and put in the application, hoping for an officer who appreciates that four years is quite a long time, and risking being turned down by an officer who considers four years not long enough? Or should they wait until they have been in Canada so long that almost everyone would have to agree it was "a significant duration." Given that different interpretations are admitted, how does the refused applicant with "only" four years in Canada feel when he sees applicants with less time spent in Canada who have been accepted by an officer who considers three years a "significant duration." (As noted above, in one of the recent negative decisions, the applicant has been in Canada for 13 years.)

The results of the different possible interpretations of "significant duration" and "sufficient degree of establishment" are starkly illustrated by a comparison of two H & C cases which appear to differ little, save for the final outcome:

A tale of two H & C decisions	
Mr. Y - Liberian national - Age 36 - Arrived in Canada in August 2002 - Single, no children - No relatives in Canada - Parents still in Liberia - Has worked since 2004 as a doorman - Pays taxes every year - No problems of criminality or other grounds of inadmissibility - No significant volunteer work - Result: positive H & C decision, August 2006	Mr. X - DRC national - Age 33 - Arrived in Canada in February 2002 - Single, no children - No relatives in Canada - Parents still in DRC - Has worked since 2002 as a store clerk - Pays taxes every year - No problems of criminality or other grounds of inadmissibility - Has done volunteer work since his arrival - Result: negative H & C decision, July 2006

Besides the question of consistency, what is achieved by making applicants wait four years or more in limbo? In July 2005, the date of the original H & C decision considered by the Federal Court in the case quoted above, there was no prospect of the moratorium to the DRC being imminently lifted, as the next review wasn't due until the end of 2005. As it happened, over a year later, the moratorium remains in place, and the applicant has now been in Canada for five years. Even if the government decides after the next review in early 2007 to lift the moratorium, we may guess that the applicant, and others like him, will end up being allowed to remain in Canada, as happened with most of the Algerians who had been in Canada for some time when the moratorium to Algeria was lifted. Yet, years of these future Canadian citizens' lives will have been wasted by holding them in limbo – years when they could have been advancing themselves and contributing more fully to Canadian society.

Failure to even take the existence of a moratorium into account

While most of the recent H & C decisions reviewed at least mention the existence of the moratorium in assessing establishment in Canada – while ultimately being inconsistent in interpretations of "sufficient duration" and "sufficient degree of establishment" – some decisions fail to even do this. For example, in a recent decision involving a 27 year-old Rwandan man who has been in Canada since October 2000, who has held the same job since July 2002 and who is active in his religious community, the officer does not refer to the moratorium at all in the analysis of establishment in Canada. The officer merely states:

> Bien que je reconnaisse que le demandeur se soit assuré d'être indépendant financièrement et qu'il respecte les lois canadiennes depuis son arrivée, j'en viens à la conclusion que des gestes sont de ceux auxquels on s'attendrait de n'importe qui habitait au Canada, peu importe son statut. Conséquemment, je suis satisfait que ce n'est pas suffisant pour justifier une dispense des catégories réglementaires. [translation: "Although I acknowledge that the applicant ensured that he was financially independent and that he has respected Canadian laws since his arrival, I conclude that these acts are what one would expect from anyone who lived in Canada, regardless of their status. In consequence, I am satisfied that this is not enough to justify an exemption from the regulatory categories."]

In other words this, Rwandan man, who is now 27 and has been in Canada since the age of 21, is just another "ordinary" refused claimant. The officer views the six years in Canada under a moratorium as nothing special. Presumably, this officer would not accept this applicant even after 10 or 15 years of self-sufficiency in Canada, since the duration of his stay, and the existence of a moratorium appear to be irrelevant, as far as this officer is concerned.

Erroneous belief that risk is an absolute requirement for a positive H & C

Some of the decisions analysed base their negative outcomes on the faulty assumption that applicants *must* demonstrate that they face a "risk of return" in order to receive a positive H & C decision. For example, the following statement comes from the reasons for a negative decision sent to an applicant from the DRC:

> Le demandeur s'est certes impliqué dans la société canadienne en travaillant, en participant activement à l'économie du Canada, en se faisant un cercle d'amis et en étant actif au sein de sa communauté. <u>Cependant le demandeur doit également démontrer qu'il y a des risques de retourner dans son pays.</u> » (emphasis added). (translation: "The applicant has indeed got involved in Canadian society by working, by participating actively in the Canadian economy, by creating for himself a circle of friends and by being active in his community. <u>However, the applicant must also show that he faces risks of return to his country.</u>")

This is a clear error: to be accepted as a refugee (or protected person) one must face a risk of persecution or torture, etc, but an H & C application may be accepted based on any number of different humanitarian considerations, of which risk is only one possibility, and by no means a requirement. The above-cited passage clearly demonstrates the decision-maker's confusion on this fundamental point of H & C decision-making.

Blanket dismissal of generalized risk as a potential form of "hardship"
Even where the decision-maker did not fall into the error of believing that demonstration of "risk" is an absolute requirement for a positive H & C outcome, none of the recent negative decisions we studied recognized situations of generalized risk, on which the moratoria are based, as representing a potential form of "unusual or undeserved hardship" for the applicant.

For example, in another decision, also involving an applicant from DRC, the decision-maker does acknowledge the government's suspension of removals due to generalized risk but makes a distinction between generalized risk (which is deemed not sufficient to merit positive H & C consideration) and personalized risk. The decision-maker states:

> Il faut d'abord mentionner que malgré certains signes encourageants les conditions au Congo demeurent très difficiles. Le Canada a même cessé d'y retourner les ressortissants congolais depuis près de neuf ans. Par contre, cela n'est pas suffisant pour démontrer qu'un retour au Congo causerait au demandeur des difficultés excessives, inhabituelles ou injustifiées. Il lui appartient de démontrer qu'il serait personnellement à risque au Congo. (translation: "One must first mention that despite certain encouraging signs the conditions in the Congo are still very difficult. Canada has even stopped returning Congolese nationals for the last nearly nine years. On the other hand, this is not sufficient to show that a return to the Congo would cause the claimant disproportionate, unusual or undeserved hardship.")

The officer concludes that she is not « satisfaite que le fait de demander au requérant de déposer sa demande de résidence permanente de l'étranger serait excessif, inhabituel ou injustifié. » (translation: "satisfied that asking the applicant to submit his application for permanent residence abroad would be disproportionate, unusual or undeserved"). Thus, it seems that even though the existence of a generalized risk is acknowledged, it carries no weight in the H & C analysis. Even though the Canadian government finds that there is a situation of generalized risk in the country of origin, and even though the decision-maker recognizes that conditions are, indeed, "very difficult", the applicant is still apparently expected to return to the DRC and apply from there to immigrate to Canada (not that such an application is likely to have much chance of success).

Another recent decision, concerning a Zimbabwean applicant illustrates this same contradiction. As the officer states:

> J'ai constaté lors de mes recherches que, malgré certains signes encourageantes, les conditions au Zimbabwe demeurent difficiles. Le Canada a cessé d'y retourner les ressortissants zimbabwéens depuis plus de quatre ans. (translation: "I observed during my research, that despite certain encouraging signs, the conditions in Zimbabwe are still difficult. Canada has stopped sending Zimbabwean nationals back there for more than four years.")

But the officer then goes on to conclude:

> La requérante travaille depuis peu après son arrivée au Canada. Elle a aussi entrepris des études universitaires. Elle mentionne également avoir travaillé bénévolement et faire partie d'une église de Montréal. Ces éléments sont positifs certes. Par contre, je note que la requérante était étudiante au Zimbabwe avant sa venue au Canada. Je n'ai pas trouvé au dossier d'information

> qui permet de croire qu'elle ne pourrait poursuivre ses études et/ou travailler advenant un retour dans son pays d'origine. (translation: "The applicant has been working since shortly after her arrival in Canada. She has also undertaken some university studies. In addition, she mentions that she has done volunteer work and is a member of a church in Montreal. These elements are certainly positive. On the other hand, I note that the applicant was a student in Zimbabwe before she came to Canada. I have found no information in the file that would lead us to believe that she could not pursue her studies and/or work should she return to her country of origin.")

In other words, the officer feels that despite the situation of generalized insecurity in Zimbabwe, on which the present moratorium is based, and despite her own recognition that "les conditions au Zimbabwe demeurent difficiles" ("the conditions in Zimbabwe are still difficult"), the applicant could simply resume her normal work, academic and other activities if returned to Zimbabwe. It should be noted that the applicant has been in Canada more than five years and is both working full-time and studying at university full-time. (She is able to avoid paying prohibitive international student fees by majoring in French.)

We believe it is fundamentally contradictory for an immigration officer to say that there are no risks in returning to the country of origin, when the Minister is maintaining a moratorium to that country because circumstances "pose a generalized risk to the entire civilian population" (*Immigration and Refugee Protection Regulations*, s. 230). It would seem that the officer is essentially stating that he or she disagrees with the Canadian government's assessment of the situation of generalized risk. How can it not be at least an "excessive or undue hardship" to return to a country to which the Canadian government deems it too dangerous to return people?

We note that in the three last decisions quoted above, the decision-makers were Pre-Removal Risk Assessment (PRRA) officers. PRRA officers are trained to make determinations on personalized risk in the context of an application for protection. Given these decisions, we may wonder whether some PRRA officers who are also called upon to make H & C decisions are having some difficulty distinguishing between the PRRA determination (involving personalized risk) and the H & C decision (where there is no requirement of personalized risk, or even any risk, *per se*).

Failure to view past and future legal limbo as a form of "hardship"

The Federal Court, in the case cited above, recognized (at par. 10) "the state of limbo in which [the applicant] finds himself" as a form of hardship in itself. None of the negative H & C decisions we have seen take this into account.

Consequences for the individual applicants

What is the practical result of such decisions? Even where the applicant or his/her counsel views the decision as clearly "incorrect", in order to contest it in court, the applicant would need to come up with several thousand dollars in legal fees, at the risk of ending up with a Federal Court judgement such as the above-cited case in which the judge appears to disagree with the decision, but does not feel it rises to the level of being "unreasonable", and therefore dismisses the application.

The applicants thus face the prospect of an indefinite period of continued limbo, during which they will continue to have access only to "precarious" types of work (which was one of the reasons for their negative H & C decision) and will be denied access to higher education, family reunification and a chance to get on with their lives.

Solutions

The H & C avenue has undoubtedly provided an opportunity for many moratorium country nationals to achieve permanent residence. In many cases permanent residence has only come after many years living in legal limbo, with all the stress and anxiety that go with the uncertainty and long delays of the process. For some, as illustrated by the cases analysed above, H & C has not provided a solution, even though they might well have been accepted had they happened to have a different decision-maker. Others hesitate to apply for H & C, because of the cost, the uncertainty of the result and, in some cases, questionable advice. It is in fact often difficult to know how to advise people, because the results and even the processing time of an H & C application cannot be predicted. These are the circumstances in which rumours and bad advice flourish.

Can H & C be adapted to make it respond better to the situation of moratorium country nationals? Might one, for example, improve the situation by strengthening the guidelines in the IP-5 Manual to create a "favourable presumption" that a person from a moratorium country should be accepted, if they have been here for a certain period of time and in the absence of criminality or other countervailing factors? The evidence of the Federal Court judgement cited suggests that this would not provide a satisfactory solution. As Mr. Justice Strayer indicates in his decision (at Par. 9), even if he had found that the officer had not respected the guideline in the IP 5 Manual, this in itself would not have led him to the conclusion that the decision was "unreasonable", in the context of the discretion granted by subsection 25(1) of the Act. In other words, according to this judgement, a decision which violates the guidelines of the IP 5 manual might still stand because of the broad discretion granted in subsection 25(1) of the Act.

Will the Canadian government return the persons who have been here 5, 10 or 15 years, once the moratoria are lifted? We believe that not only would this be cruel to thousands of individuals, but also it would violate fundamental Canadian humanitarian values, provoking a wave of outrage. Nor can it be in the interest of either the individuals or Canadian society to prolong the long-term limbo of people who are eventually almost certainly going to permitted to remain in Canada.

An effective solution would be the **adoption of a regulatory class providing permanent residence to all persons from countries to which Canada does not remove who have been in Canada for three or more years**.[5] Advantages of such a solution include that it would:

- Be simple and quick for immigration officers to apply, avoiding long hours spent studying voluminous H & C applications.
- Be clear and transparent for nationals of moratorium countries, allowing them to know the criteria on which their application will be evaluated.
- Ensure that moratorium country nationals, most of whom in any case will most probably eventually become Canadian citizens, can get on with their lives without too much delay, avoiding lives being kept needlessly on hold for years and even decades.

A regulatory mechanism as proposed would address, in a manner consistent with Canadian values, the uncertainty and suffering of thousands of persons who have been living in Canada for many years under circumstances which the Canadian government rightly views as beyond their control.

[5] Applicants to such a regulatory class would of course be subject to the standard inadmissibility provisions of the *Immigration and Refugee Protection Act*, including criminal and security inadmissibility.

In the interim, we would suggest that the government:

- Immediately implement strengthened guidelines in the IP5 Manual to create a "favourable presumption" in the case of persons under moratoria, who have been in Canada for three years or more (and recognizing that being in a prolonged state of legal limbo is itself a form of "unusual hardship").
- Review the decision-making by PRRA officers deciding such cases and the training provided to them, in order to identify and correct any confusions relating to the dual PRRA/H & C responsibilities.