

# REFUGEE UPDATE

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## SECURING THE NATION BY AUDREY MACKLIN

This article is an edited excerpt of "Borderline Security" in *The Security of Freedom*, by Ron Daniels et al. (eds.), *The Security of Freedom* (Toronto: U of T Press, 2001).

**Abstract:** *The Anti-Terrorism Act permits police to do to citizens what has long been done to non-citizens. Yet non-citizens will still be the primary targets for investigation. Found to be a security risk, a non-citizen is more likely to be deported than prosecuted. Deportation is no solution for terrorism.*

The events of September 11 elicited a public clamour throughout Canada and the media response has generally failed to



distinguish between problems of policy and failures of implementation, enforcement and intelligence. For instance, the inadequacy of security checks at airports contributed to the tragedy of September 11, but this is not an immigration matter. Nevertheless, systemic explanations cannot compete with the power of invoking the spectre of the foreigner as a menace to national security.

The immigrant-as-security-threat motif already figured prominently in Bill C-11, the Immigration and Refugee Protection Act (IRPA). The Bill was introduced in spring 2001, but passed into law on November 1, 2001. The IRPA makes many changes

in the name of security, including expanded inadmissibility and detention and reduced access to review of ministerial decisions.

Until the Anti-Terrorism Act (ATA), "terrorism" as a legal category of conduct only existed in immigration legislation. However, immigration legislation has consistently refused to *define* terrorism.

In the recent *Suresh* and *Ahani* appeals, the Supreme Court of Canada declined to find the terms "member" and "terrorism" unconstitutionally vague. Why did the drafters of the ATA elect to leave out membership and define terrorism? Probably in the course of "Charter-proofing" the ATA, the government recognized that prohibiting membership would likely violate freedom of association and "terrorism" was too vague to withstand constitutional scrutiny --- at least where the rights of citizens were concerned.

The truth is that laws that arouse deep concern about civil liberties for citizens are standard fare for non-citizens. Critics of the ATA are alarmed by the imprecise definition of terrorism, non-disclosure of information to an accused, and warrantless, preventive detention. I anticipate that the "terrorism" definition in the ATA will eventually be incorporated into regulations under the IRPA.

Immigration law *already* permits automatic, indefinite warrantless, preventive detention of a non-citizen if the Minister of Citizenship and Immigration and Solicitor General sign a certificate declaring the person to be a security risk. That process inspired the certificate process in the ATA. Immigration lawyers have years of experience trying to represent clients without proper access to the evidence against them. The Supreme Court has partially rectified this problem with the recent ruling in *Suresh*. The certificate process, used against a permanent resident allegedly involved in organized crime, survived constitutional challenge in *Chiarelli v. Canada*.

Under immigration legislation, the standard of proof for inadmissibility and deportation (including *réfoulement*) is merely *reasonable grounds to believe*, as applied to past, present or future membership in organizations, and to the past, present or future activities of those organizations. This standard is even lower than the civil standard of *balance of probabilities*, and compounded in the case of membership by its double usage. Conversely, conviction for a criminal offence related to terrorism will require proof *beyond a reasonable doubt*.

Contrary to the cries of media pundits and anti-immigrant crusaders, the Constitution has proved a thin cloak protecting non-citizens. The main exception is *Singh v. MEI*, which guaranteed refugee claimants a right to an oral hearing to determine their claim. It is technically true that most Charter rights apply to all persons physically in Canada. In practice the courts have curtailed the nature and extent of those rights for non-citizens faced with removal, based on the rationale that:

1. Non-citizens have no unqualified right to enter or remain in Canada.
2. Therefore, deportation (aside from *réfoulement*) does not engage the right to life, liberty or security of the person, nor is it cruel or unusual treatment.
3. Even if a personal security interest is violated by deportation, the intensity of the violation is diminished by the feebleness of the non-citizen's right, such that the principles of fundamental justice demand no more than whatever the state has already elected to do.

Immigration law has long done to non-citizens what the ATA proposes to do to citizens -- without public outcry and with judicial blessing. By shifting the locus of terrorism from immigration to criminal legislation, the Government has destabilized the stereotype of the foreigner as a danger to national security, and the border as the site for removal of the danger.

This shift seems a positive development for non-citizens. Where imprisonment for a criminal offence is at stake, citizenship is irrelevant to Charter considerations. However, in practice the primary targets for surveillance, investigation, apprehension, detention and prosecution under the ATA will be persons born outside Canada. By extension, the organizations that will attract greatest scrutiny as potential "terrorist groups" and the charities most likely to be deregistered will be those serving communities connected to regions of conflict, repression, and civil strife.

The security provisions in immigration law already have a chilling effect on lawful political expression, advocacy and association by diasporic communities. The temperature will plummet under the security gaze of the ATA.

If they are prosecuted under the criminal law, non-citizens accused of terrorism-related offences can claim Charter protection as accused, a status that attracts significantly greater judicial consideration than the status of non-citizen. The history of war crimes prosecutions shows criminal prosecution for terrorism-related offences will be prove difficult, if not futile, precisely because it must be

done in a manner that respects fundamental rights and freedoms of accused. I anticipate that the state will take advantage of the broad investigative powers conferred under the ATA to gather evidence to issue a security certificate under the IRPA.

Simply put, it is easier in law to deport than to imprison. This is true even if the deportee has lived in Canada since infancy. Furthermore, according to the Supreme Court judgment in *Suresh*, it is even possible to deport a person who faces torture upon return. Only in the case of an immigrant who has acquired Canadian citizenship will resort to the criminal law be necessary. I forecast that reliance on immigration law will reinforce the border dividing citizens and non-citizens that the ATA effaces in theory.

Taking seriously the proposition that terrorism transcends national borders invites another perspective on the decision to deport or prosecute. If terrorist acts can be committed beyond the territory of the target state (US embassies, the USS *Cole*), if anyone armed with a computer and a modem can wreak havoc on international financial markets, if anthrax can be mailed from anywhere, how much security can expulsion buy? Will deporting persons who are determined to engage in acts of terror prevent them from pursuing their objective? If the War Against Terrorism is indeed global, and the objective is to "get the guilty off the international streets" then deporting the "guilty" to another neighbourhood is a narrow and ineffectual reaction.

*Audrey Macklin is a professor at the University of Toronto Law School.*



## THE MEANING OF "TERRORISM"

BY DAVID MATAS

The Minister of Citizenship and Immigration went all the way to the Supreme Court of Canada, in the case of *Suresh*, to fight for her right not to define the word "terrorism". In light of the International Convention for the Suppression of Financing of Terrorism and the new Anti-Terrorism Act, one has to wonder what all the fuss was about.

The International Convention for the Suppression of Financing of Terrorism, which Canada has signed, defines terrorism as:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

The new Anti-terrorism Act defines terrorist activity as:

(a) an act or omission that is committed in

or outside Canada and that, if committed in Canada, is an offence that implements one of the various anti-terrorism conventions, or

(b) an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

The definition of terrorism in the legislation requires the

Crown to prove an element that is not intrinsic to the offence and may be difficult to prove, namely, the requirement that the act or omission is committed "in whole or in part for a political, religious or ideological purposes, objective or cause". That requirement may be difficult where the perpetrator has said or written nothing to explain what he/she did. Or the motive may be something other than political, religious or ideological. Yet, why should that allow for an acquittal?

This requirement is not in the definition of terrorism in the Convention on the Suppression of Financing of Terrorism which the legislation is supposedly to allow Canada to ratify. By making the Canadian definition unnecessarily restrictive, Canada may end up violating the Convention, by not prosecuting or extraditing those the Convention requires Canada either to prosecute or extradite.

As well, the definition of terrorist activity in the legislation is too broad. Paragraph E, which defines terrorist activity as including "serious interference with or disruption of an essential service facility or system", originally appears to criminalize something as benign as stopping a bus. A pile of words are added to remove that possibility. It would have been simpler to drop E altogether. It has no parallel in the Convention.

Alternatively, E could have been amended to look like paragraph D. Paragraph E could then have read:

to cause serious interference with or serious disruption of an essential service facility or system, whether public or private, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A), (B) or (C).

An issue with the label "terrorism" that is more difficult than the question of its general formulation is the application of that formulation to concrete facts. Debates are much more likely to revolve around whether a particular group is terrorist than around what the word "terrorism" means. In applying the word "terrorist" to any group it is important to keep two related principles in mind, non-discrimination and non-excuse.

We have already seen plenty of discriminatory discourse, distinguishing between the September 11 terrorists and other terrorists. That discourse does not discriminate so much against terrorists, who are not entitled to equal rights as disadvantaged groups, but rather against victims.

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C), and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

One can quarrel with the definition in the new Act in light of the definition in the UN Convention. But it is hard to argue for no definition at all in light of these two instruments.

Yet, the government continues to do so. The new Immigration and Refugee Protection Act does not define terrorism. Neither do its proposed regulations. A definition would dissipate uncertainty in the application of the Act.

Given the choice the government has made in the Anti-Terrorist Act, it is probably too late to argue for the definition in the International Convention. But the Convention definition is better, and not only because it is shorter.

That sort of discrimination is unconscionable. The law must be applied in a non-discriminatory way so that other terrorists fall under its sway as much as anti-American terrorists. A terrorist is a terrorist is a terrorist. One person's terrorist should be every other person's terrorist. It would be unacceptable for Canada to say that terrorism against Americans is illegal, but that terrorism against others is legal.

Nothing excuses terrorism. Discriminatory discourse on terrorism is reprehensible not only in its own right, but also because it ends up excusing terrorism. The various international anti-terrorist treaties provide that the acts prohibited by those treaties are "under no circumstances justifiable by considerations of a political, philosophical,

ideological, racial, ethnic, religious or other nature".

Yet, proponents of various causes excuse terrorist acts and groups, indeed, even the September 11 attacks, by reference to political, philosophical, ideological, racial, ethnic, or religious considerations. As long as these twin principles of non-discrimination and non-excuse are kept firmly in mind, a good deal of the fog around the application of the concept of terrorism should dissipate.

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## **SAFE THIRD COUNTRY NEGOTIATIONS - BACK FROM THE GRAVE**

BY ROBERTA L. FARKAS-HUEZO

In light of the September 11th tragedy and the increased concerns for security that followed, many former border practices relative to the processing of refugee claimants have been reinstated. Many practices which refugee advocates had fought long and hard to eliminate (such as direct-backs to the United States, lengthy port of entry interviews at which claimants do not have access to legal counsel, and the maintenance of port of entry notes detailing the reasons for a claim) have been reinstituted at the Niagara Region border crossings. It seems that everything old is new again.

Unfortunately, a particularly onerous addition has recently been made to the list of resurrected ideas and practices related to the handling of refugee claims at the border. Specifically, as part of the December 2001 Joint Statement of Cooperation on Border Security and Regional Migration Issues, Canada and the United States have agreed to again enter into negotiations to establish a safe third country agreement between the two nations. Under such an agreement, both Canada and the United States would recognize the other nation as having a fair and mature refugee determination system that offers adequate protection to refugee claimants. After recognizing one another as "safe third countries," Canada and the United States would then require refugee claimants to make their claim in the first of the two nations that the claimant entered (known as

the country of first arrival). Gone would be the opportunity to enter Canada from the United States to make a refugee claim. If a claimant reached the United States first, the claimant would be required to apply in the United States; likewise, claimants who reached Canada first would be required to claim in Canada. In addition, claimants who had been denied refugee status in either Canada or the United States would be prohibited from applying in the other country. Under a safe third country agreement, a refugee claimant would have only one opportunity to make a claim in North America, and that claim would have to be made in the North American country of first arrival.

As most refugee advocates are aware, this is not a new concept. Canadian law has allowed for the return of refugee claimants to safe third countries since 1989, although no safe third country agreements have been implemented. Many will remember safe third country negotiations that took place between Canada and the U.S. in the early and mid-1990s. These negotiations advanced to the stage of producing a draft Memorandum of Agreement (MOA), although negotiations were suspended in 1996. The official reason given by Canadian officials for the 1996 suspension was to allow for implementation of the United States' then-new immigration law, but many feel that the true reason for the suspension was U.S.

### Harry Rankin, 1920-2002

It was with sadness that we learned of the death of Harry Rankin on February 26 at the age of 81. He was a lifelong resident of Vancouver, where he was a lawyer and served as an alderman on city council for 24 years. He championed the underdog vigorously throughout his career, standing up for women, aboriginal people, workers, and immigrants, even into his last year, when he led a seniors' protest at City Hall. Rooted in deep socialist convictions, he was a founder of the legal aid system in BC, which is considered one of the most supportive ones for refugee claimants. Mr. Rankin was the father of Phil Rankin, a dedicated immigration and refugee lawyer in Vancouver, and a key CCR member. Our sympathies go out to Phil and his family at this time.

*Roberta L. Farkas-Huezo is the Vice President of the Fort Erie Multicultural Centre.*

In the end, however, perhaps the most compelling argument against a safe third country agreement is the fact that such agreements strip refugees of the right to choose where they will rebuild their lives. How can we endorse the injustice of stripping choice, of stripping the right to determine one's own destiny, from persons who have so often lost almost all else in their lives?

Mr. Lubbers makes an important point. Although the Canadian and U.S. systems are more similar now than they were in the early 1990s when the safe third country agreement was first being negotiated, significant differences do exist between the two systems, and these differences can have a profound effect on refugee claimants. The eligibility criteria differ in Canada and the U.S., meaning that a claimant may be denied access to one system but allowed access to the other. This may happen, for example, if a claimant has been in the U.S. for more than a year, which would invoke the American one-year bar to asylum. Another difference lies in the interpretation of the refugee definition. Gender-based claims, for instance, are widely held to receive fairer examination in Canada than in the U.S. Finally, detention is a very serious problem in the American asylum system. In some U.S. Immigration and Naturalization Service districts, asylum-seekers are routinely detained -- often in awful conditions, often in county jails. In addition, thousands of minors who are seeking asylum in the U.S. are currently held in detention. This should not be acceptable to Canada as it seeks to recognize the U.S. as a safe third country.

For Refugees, said during a February visit to Canada that, rather than watering down its refugee determination system in order to harmonize policies with the United States, Canada should try to influence the Americans "to duplicate certain elements of the systems here... There is an obligation to try to influence the big brother, the United States, in their systems of handling asylum seekers."

Refugee advocates will have to watch developments in the current round of safe third country negotiations very carefully. Thankfully, it appears that talks are currently at a standstill. Rumours are surfacing that the United States is again getting "cold feet," although Canadian officials tell NGOs that they have been assured by their American counterparts that such is not the case. Raud

do so. only because geography or flight patterns force them to border upon entering the U.S., passing through the U.S. claimants who currently come straight to the Canadian closing the border to the many Canada-bound refugee central to their thinking. This will have the effect of unaccompanied minors, travel exceptions are not reunification and for the best interests of although they plan to retain exceptions for family (CIC) held with NGOs, CIC officials reported that consultation that Citizenship and Immigration Canada first arrival rule. In a recent safe third country of to curtail even these narrow exceptions to the country of negotiators (at least on the Canadian side) are looking air). Unfortunately, it seems that current government three days in the country of first arrival (if travelling by first arrival (if travelling by land or sea) or less than claimants had spent less than ten days in the country of unaccompanied minors, and for cases in which reunification, for cases involving the best interests of versa). Exceptions were made for cases of family claims, despite having traversed the U.S., and vice persons who would have been able to make Canadian exempt from the country of first arrival rule (i.e. several categories of persons who would have been starting point for negotiations. That agreement detailed preliminary stages, are using the former draft MOA as a Canada-U.S. safe third country talks, which are in told by Canadian government officials that current Non-governmental organizations (NGOs) have been

apply in the U.S. had the MOA been implemented. Canada-bound but who would have been forced to refugee determination system -- claimants who were added thousands of refugee claimants to the U.S. reluctance to enter into an agreement that would have

# TORTURE: WHY MUST PROHIBITION BE ABSOLUTE?

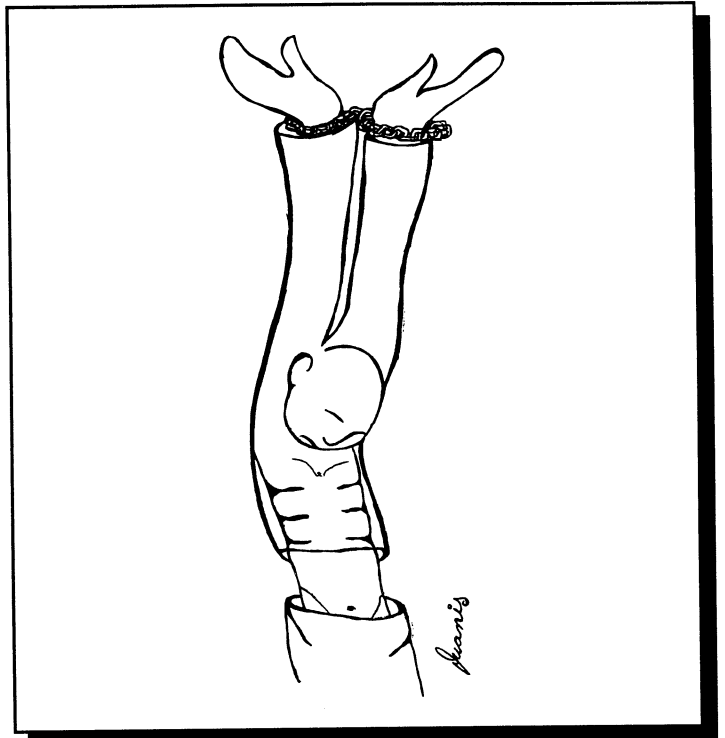
BY EZAT MOSSALLANEJAD

Torture is the ultimate denial of humanity and an appalling betrayal of its aspirations. The torturer, face to face with another human being, denies any common bond between them through the purposeful infliction of suffering. As such, torture is a shattering of the common bonds of empathy that should exist among members of the human family. When torture is involved, trust in others and humanity itself are under threat.

The Canadian Centre for Victims of Torture is dedicated to helping victims of torture and their families, and contributes towards the investigation, prevention and eradication of torture at a global level. As a member of an organization that works with the aftermath of torture on a daily basis, I would like to share the following viewpoints with your readers:

In the aftermath of September 11, the argument has been raised from time to time that torture, while an extreme measure, may be acceptable in exceptional circumstances. Yet a closer look at the scenario reveals that, first of all, we are dealing here with the illusion that torture *is* an effective means to obtaining information. Even from the point of view

of the perpetrator, torture can lead to more defiance and intransigence on the part of the victim, who may come to view his or her suffering as a virtue. Secondly, there is an assumption that interrogators *could* resort to torture in order to deal with emergency cases. The Supreme Court of Canada has in a recent decision confirmed that "The Canadian rejection of torture is reflected in the international conventions to which Canada is a party." (Suresh, pg. 35). Those international conventions, among others, include the Universal Declarations of Human Rights, the International Humanitarian Law (4 Geneva Conventions), UN Covenant on Civil and Political Rights, the Convention Against Torture, and the Statute of Rome. States do not advertise their torture practices; torture takes place in secret, behind the closed doors of prisons and police stations. To advocate that an interrogating officer could resort to torture in "extreme circumstances" is tantamount to suggesting that police or security forces should be permitted to arbitrarily act in a fashion contrary to both Canadian and international law. To legalize the use of torture in emergency situations would not only fly in the face of such norms but could easily lead down a slippery slope where torture



becomes the rule, rather than the exception, thereby entangling the whole society in a vicious circle of violence. Torture is a crime against humanity regardless of objectives or circumstance. It not only damages the psyche of its immediate victims, but also the social fabric of a society that permits it to take place.

Humanity is presently undergoing one of the darkest periods in our history. We are confronted with very difficult questions about our understanding of and commitment to human rights. As experience attests, tyranny has always taken an ominous root in fear and often invokes the argument that "desperate times call for desperate measures". It is imperative that, even under conditions of war and terror, we uphold our commitment to international human rights standards and adhere to fundamental principles of civil and political rights.

*Prepared with the contribution of Paulina Wyrzykowski by Ezat Mossallanejad, Policy Analyst for the Canadian Centre for Victims of Torture.*

# SEPTEMBER 11<sup>TH</sup> PUT THE SPIN DOCTORS TO WORK

BY N. GITANJALI LENA

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C'est en 1984 que le CAR (Comité d'aide aux réfugiés), organisation non-gouvernementale, fut créé. Cette initiative fut le fruit d'une prise de conscience collective sur la nécessité de protéger le droit d'asile au Canada. Hélas, depuis les événements du 11 septembre 2001, nous assistons à l'érosion des droits fondamentaux des réfugiés. Les demandeurs d'asile font maintenant face à des discriminations. Au nom de la guerre au terrorisme, les agents de l'immigration canadienne ont vu leurs pouvoirs accrus en matière de détention. Par exemple, le centre de prévention à l'immigration à Laval n'a jamais été aussi rempli que depuis les attentats terroristes; les ordres de déportation s'intensifient. Les décisions de la Commission de l'immigration et du statut de réfugié (CISR) sont le plus souvent négatives sans même que l'on évalue les risques de retour. De plus, les médias n'aident pas la situation déjà précaire des réfugiés. Ils ont tendance à présenter les réfugiés comme des terroristes potentiels!

Il est clair que notre mission de défense de droits des

réfugiés se compliquera et que les nouvelles lois de l'immigration canadienne et américaine rendront nos tâches plus ardues. C'est pour cela qu'il est essentiel d'unir nos efforts afin d'affirmer notre position quant à la protection et à la défense des droits des réfugiés. Pour conclure, tout en maintenant la condamnation des actes terroristes, nous croyons que toute lutte au terrorisme doit mener à une réflexion sur les problèmes fondamentaux de la misère dans ce monde. Et que cette lutte ne doit pas affecter le devoir des pays souscrits à leurs obligations internationales en vertu de la Convention de Genève en 1951.

La protection des réfugiés n'est pas négociable!

*Saada Farah Abdi est la Coordinatrice (anciennement réfugiée) à la Comité d'aide aux réfugiés en Montréal.*

The mainstream media appears ever ready to create an immigration crisis where none exists. The events of September 11, dramatic as they were, had little to do with Canadian immigration and asylum practices and everything to do with US foreign policy stratagems. Unfortunately, newsrooms took advantage of the emotional impact of the graphic breaking news using it to increase anti-newcomer sentiment by linking the attacks to immigration almost instantly.

Media pundits soon began calling for draconian changes to immigration and refugee policies:

- "Canadian Connection" *Montreal Gazette*, Sept. 12,
- "Conduit for Terror" *National Post*, Sept. 13,
- "A Wake-up Call to Canada" *Toronto Sun*, Sept. 13,
- "Cross-border terror: 5 hijackers entered US through

"Out of six photographs of Palestinians, four depicted them celebrating. No other people of colour from overseas were shown. On September 13, the *National Post* printed a large colour photo of a Palestinian woman waving a machine gun in front of a cheering crowd, with the caption "Radical Muslims who kill in the name of religion." The two banners for the day were "Canada a Soft Touch for Terrorists" and "Death of Liberty."

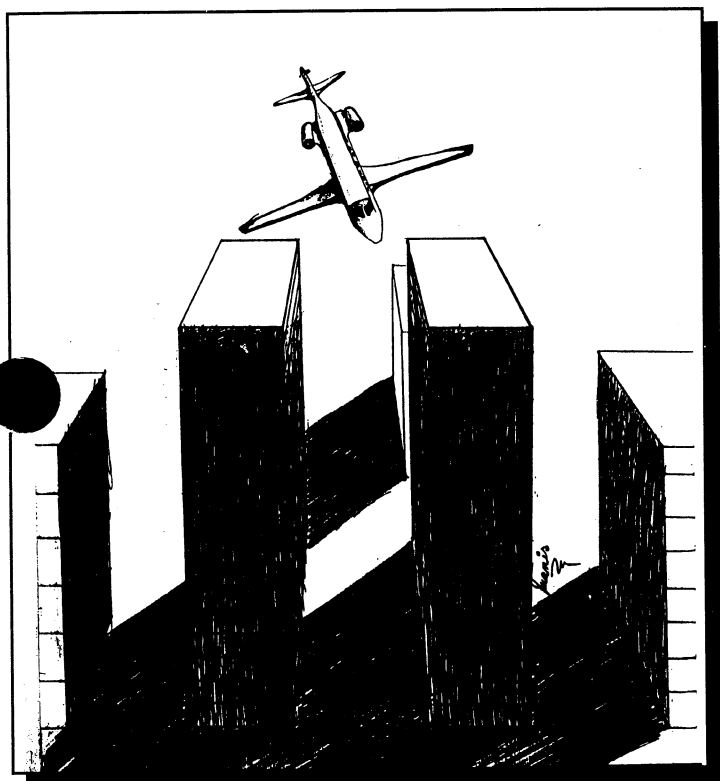
*"Il suffit de bien peu de choses pour devenir réfugié : votre race, votre religion, vos affiliations politiques et sociales..."*

LES TERRORISTES POTENTIELS!  
BY SAADA FARAH ABDI

Canada" erroneous front page headline, *Montreal Gazette*, Sept. 14,

- "Welcome tightening of refugee screening" editorial *Toronto Star*, Oct. 3
- "What are Ottawa's plans to tighten immigration rules?" *Globe and Mail*, Oct. 3
- "Only in Canada: the al-Qaeda connection" Margaret Wente, *Globe and Mail*, Oct. 25

US officials and opposition MPs were quoted as saying that border security needed to be beefed up, and refugee policies should be harmonized with those of the US. In comparison, quotes from Jean Chretien and former Immigration Minister Elinor Caplan vis-à-vis national security actually provided cautionary voices!



In his column titled "Lax refugee policy now under critical spotlight" from Sept. 13, the *Montreal Gazette*'s Brian Kappler begins by saying "Maybe now our government will do something about this refugee mess." He goes on to speculate that some of the hijackers entered the US via Canada. However, he then states that it doesn't matter if this week's terrorists didn't make refugee claims in Canada at all, but that what's important is that many Canadians immediately thought that the hijackers were refugee claimants. To Kappler, this was proof that the system is too lax, a soft touch, and Canadians are scared to admit it for fear of being branded racist.

It is interesting that many newspapers focused on the

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desire for revenge in the days after September 11, reflecting the anger that the public felt over the loss of their sense of security. "Revenge" was soon replaced by the word "justice" as the spin changed again, and politicians sought to justify war plans and appear less bloodthirsty. This may have been a form of damage control, as politicians reacting to the backlash against people of colour began to make pleas for racial harmony and a need for tolerance. The word "evil" continued to be used unilaterally to refer to the culture that supposedly produced the terrorists. For example:

- "The consequences of finessing evil" *National Post*, Sept. 12,
- "The face of evil, US will punish terrorists" *Montreal Gazette*, Sept. 12
- "Good vs Evil" editorial *Montreal Gazette*, Sept. 15

Articles about a backlash against Canadians of colour appeared in all national newspapers for several weeks starting on September 13:

- "Stay inside, Muslims warned" *National Post*, Sept. 13,
- "Backlash against Arab-Canadian community continues with threats, vandalism" *Canadian Press*, Sept. 13,
- "City Muslims appeal for calm" *Montreal Gazette*, Sept. 14,
- "Arab Americans face mounting backlash" *Toronto Star*, Sept. 15,
- "BC's Muslims, arabs fear backlash" *The Province*, Sept. 16.

Christie Blatchford, a notoriously anti-refugee columnist, was true to form in attempting to deny the backlash:

- "Backlash against Muslims a myth: incidents are few and far between as civility shines" *National Post*, Oct. 13

Initially, editorials and columns moralized to readers using ethnocentric statements asserting the moral superiority of North American society over "Islamic societies":

- "Blaming the US, whitewashing terror" *National Post*, Sept. 19,
- "Hard truths: Respecting human rights and prosperity is not racist" Peter Worthington, *Toronto Sun*, Oct. 12,
- "What the Afghans need is colonizing" Mark Steyn, *National Post*, Oct. 9
- "A war between civilizations" Robert Fulford, *National Post*, Oct. 9
- "The pacifists are wrong" Peter Stockland, editor-in-chief of the *Montreal Gazette*, Oct. 16

screw) comparing interviews with Stockwell Day and

- Elizabeth Garant of the Centre for Justice and Faith, *La Presse*, Oct 3
- "Legal right to label people: New law against terrorism allows police to become thugs" Stephen Kimber, *Halifax Daily News*, Oct 19
- "The enemy within" Sharry Aiken's commentary *Globe and Mail*, Oct 24

According to the United Nations Food and Agriculture Organization about 36,615 children in poor countries died from conditions of starvation on September 11, 2001. There were no newspaper articles, special television programs, or minutes of silence.

*N. Gitanyali Lena is former Coordinator of the CCR Media Network.*

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## BARRIERS TO SOCIAL PARTICIPATION FACED BY PEOPLE RELEASED BY IMMIGRATION DETENTION

BY EZAT MOSSALLANEJAD

money to pay rent and even if they have, landlords do not rent their flats without knowing their tenants or at least having an official letter about their identity. One can go to a shelter but shelters are always crowded and overcrowded. There is no bed and no welcoming hand. The only option is joining homeless people and suffering the agony of living penniless in a big city. "Freedom," as it was put to me by a released detainee, "is not a big deal; it is just being transferred from a small jail to a bigger one, a town without pity."

Different people are detained in Canadian detention centres:

- Refugee claimants who are suspected not to have reported to the immigration officers.

- Visitors who are suspected of posing risks for Canada.

- Rejected refugee claimants who have exhausted legal means of staying in Canada and are under removal order.

Finally, towards the end of September some pieces

- appeared warning against racial targeting : "Immigrant or Terrorist?" *Globe and Mail*, Sept. 19
- "The Danger of listing terrorists" Hugh Windsor, *Globe and Mail*, Oct. 24

Some of the worst racism came from readers who submitted opinion editorials:

- "Why are Muslims involved in so many conflicts?" William Johnson, *Globe and Mail* Oct. 11
- "Welcome to Canada Liar" Lubomyr Luciuk, *Winnipeg Free Press*, Vancouver Sun, Ottawa Citizen, Sept. 25.

Still, there were flickers of reason to be found in the media morass after September 11 :

- Dipthi Gupta's letter to the *Montreal Gazette*, Sept. 15, questioning the media's concentration on pro-US commentators
- "Réfugiés: serrer la vis? (Refugees: tightening the

Incarceration, whether detention or imprisonment, is one of the most bitter experiences in the life of a human person. You are not only deprived of your freedom--the most basic need of human nature--but also you remain helpless in the hands of your detention authorities. It leaves such a devastating impact on one's personality that the bad memories will remain for the rest of the life. The problem will not be over after freedom form custody. Victor Hugo, in his eternal masterpiece, *Les Misérables*, speaks about released prisoners who used to carry a yellow passport in France and be rejected everywhere and by everybody.

In Canada we do not provide people who are released from Immigration detention yellow passports as such, so they can apparently live like everybody else and enjoy their freedom. However, they are not provided with any kind of authorization, and this means that their plight is worse than Victor Hugo's yellow passport holders would be. They have no access to employment or to education because they have no permit. As ex-detainees who usually have no status, it is extremely difficult for them to get social assistance. Their situation is worse when it comes to housing. They have no

- Refugees and immigrants who have been found inadmissible to Canada as "danger to public security" or "national security risks".

lucky, detainees will be taken to the immigration detention centre in Toronto, the Celebrity Inn. Otherwise, they will be sent to jails and have to live with convicted criminals. There are reports about maltreatment of detainees by prison guards and their lack of access to medical and psychiatric care. The situation was so bad that a few years back that a detainee called Michael Atkin died because he did not receive adequate treatment for his diabetes. What will follow is taken from the testimony of a Sudanese woman who travelled legally to Canada but was caught



up in the deterrence strategy of immigration officers:

We were returned directly to the detention centre holding room. I felt very vulnerable as there were three men in the room, and I was left with my hands cuffed behind my back, unable to care for myself or my daughters. When the officer returned to uncuff my hands, his face showed that he too found the stench in the room somewhat overwhelming. I was taken outside and the handcuffs were removed. I was then returned to the holding cell. Just before I was returned I asked for food but was told that I could not have food now. A cleaning woman who heard my request for food

brought us two cups of milk and two juices. (For full story see Refugee Update, No. 21, Spring 1994)

Following the death of Michael Atkin and complaints to immigration authority, the situation was somehow improved in immigration detention centres. But still, there are problems like detainees' lack of access to counsel, proper and meaningful detention reviews (it is done once a month as a kind of formality), no psychological and psychiatric care and the absence of any kind of access to social workers who could prepare the detainees for future participation in social life. Detention could be very harmful for vulnerable groups like women and children as well as survivors of war and torture. It could lead to their retraumatization and irreparable lifelong mental damages.

Bail programs or friends and relatives who put cash or performance assurances for them usually bail out detainees. Some of them have to report regularly to police or probation officers. Bail programs are responsible for ascertaining their addresses and availability to the immigration officials when the need comes. There are some benevolent people among probation officers and bail program workers. I have seen compassionate officers who have gone far out of their way to help helpless people released from detention centres. Their work is not, however, mandated and they do it as a personal favour.

Detainees who were used to a specific mode of life in detention centres suddenly find themselves in an unwelcoming atmosphere. They have to adapt to their new condition quickly and rely on themselves. This is a source of stress, which could affect the daily functioning of the person. I have seen depression after detention was over in the case of victims of torture. One person told me that he preferred to go back to detention rather than being abandoned in a merciless atmosphere. Most of these people are unhappy to report regularly to the authorities. This has reminded them of their persecutions at home. Some of them have to report every week to two or three places. This leaves them no time and peace of mind to work and plan for future.

All these problems could easily be resolved if there is compassion as well as strong will and responsibility on the part of the authorities. Following are some useful recommendations:

- Detention should be avoided as much as possible at the point of entry by providing immigration officers with adequate education about different countries as well as about the psychology of newcomers, specifically refugee claimants.

► Detention officials should receive regular training on anti-racism, religious and cultural sensitivity as well as the minimum standard of treatment with regards to detainees, especially victims of torture.

► Detainees should enjoy all their civil and human rights as well as the right to habeas corpus.

► There should be an ombudsperson to receive complaints about detention on a regular basis.

► Immigration detention centres should be inspected regularly by a body independent from Immigration.

► A minimum standard of living, including medical and psychological care, should be provided in detention centres. There should be access to outside care on a regular as well as an emergency basis.

► Volunteers as well as social workers should be permitted to have access to detention centres in an attempt to help detainees. There are some detention workers from NGOs who help detainees and their services are highly appreciated. There is a need for more consistent and permanent workers for detention centres.

► Professional development programs should be considered in detention centres with the intention to make life meaningful for detainees.

► Reporting to the authorities after getting released from detention should be replaced by other kinds of monitoring systems, like reports from doctors, teachers, or employers.

► Detainees should be provided with temporary work permits before their release from detention.

The Supreme Court decision on *Mavis Baker v. MEI* in 1999 was a win in terms of the improvements it made to the widely discretionary administrative law. It gave grudging recognition to a role for binding international human rights treaties in administrative decision making. It failed to recognize rights as an issue and to deal with them as rights.

# UPDATE ON CASE OF MAVIS BAKER V. MEI

BY TOM CLARK

## The Case and Judgement

Mavis Baker came to Canada as a visitor from Jamaica in 1981. She found work as a live-in domestic and never returned. In 1992 she was ordered deported on grounds that she had worked illegally and overstayed her visa. By this time she had given birth to four children in Canada: Paul, born in 1985, twins Patricia and Peter, born in 1989, and Desmond, born in 1992.

- Similar attempts should be made to connect them to social assistance programs before their release.
- There is also a need for special arrangements with shelters.
- Detainees need psychiatric and psychological support after their release. This is specifically important for victims of torture.
- Vulnerable groups like women and children should be given utmost priority.
- Finally, there should be a close mutual connection between non-governmental organizations and the Department of Citizenship and Immigration to initiate a nation-wide detention standard and to protect detainees whenever and wherever it is necessary.

An issue of future concern is the possibility of Immigration detention centres being managed by private companies. These companies go only with their profit incentive and, as experienced in US, have a tendency to hide the truth and to add to the suffering of detainees.

I would like to end by emphasizing that detention itself leaves a negative feeling with a detainee that s/he is judged by the host society as *persona non-grata*. The feeling should be reversed through indefatigable humanitarian advocacy for innocent Immigration detainees.

*Ezat Mossallanejad is a Policy Analyst for the Canadian Centre for Victims of Torture.*

Ms. Baker applied to remain in Canada based on humanitarian and compassionate grounds (H & C) in 1993. Her request was denied.

In addition to the application of children's rights, the case raised issues about protection of rights in a deportation, the adequacy of H & C requests and the related court review. Should Canadian Charter rights 7 (right to life, liberty or security of the person unless taken away by a process conforming with the fundamental principles of justice) and 15 (non-discrimination) be engaged in challenging deportation of parents from their children? Can the *Immigration Act* limit the legal issues about international rights which the courts can address?

Judge L'Hureaux-Dube and the majority of the Supreme Court said:



Section 83(1) of the Immigration Act does not require the Court of Appeal to address only the certified question. Once a question has been certified, the Court of Appeal may consider all aspects of the appeal lying within its jurisdiction ...

The duty of fairness owed in these circumstances is more than minimal, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered ...

Though discretionary decisions will generally be given considerable respect, that discretion must be

exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter ...

The appropriate standard of review is ....  
reasonableness simpliciter ....

The wording of the legislation shows Parliament's intention that the decision be made in a humanitarian and compassionate manner. A reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children since children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of these values may be found in the purposes of the Act, in international instruments, and in the Minister's guidelines for making humanitarian and compassionate decisions.

### The Implications

*Baker* changed the process to require attention to the needs of children and, by implication, to pay attention to the protection of refugees and the protection of persons from torture and cruel treatment because these are also "values in Canadian society" with indications in the aims of the Immigration Act. Humanitarian and Compassionate review must be just that. The case appears to have had a positive affect on administrative decision making under the immigration act.

*Baker* made the appeal from a negative H&C possible if the decision was unreasonable. Again, lawyers tell me that this has had a positive affect on the access to appeal against a range of unreasonable decisions.

### Will the 2001 *Suresh* decision change things?

There should be no change for persons not considered some form of security threat. Courts should read the decisions so as to maintain the integrity of each. *Suresh* reinforces the administrative law approach taken in *Baker*. It retains administrative procedural safeguards. But the *Suresh* situation involved a national security concern described in the law which was to be taken into account alongside a protection from torture concern. I thought *Baker* was bad news for human rights. After *Suresh*, and the anti-terrorism law, I think we need to begin to rewrite the Constitution. But that's another article!

*Tom Clark is former staff of the Interchurch Committee for Refugees and lives in Toronto.*

# BOOK REVIEW

*The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, Ed. by Ronald Daniels, Patrick Macklem and Kent Roach (Toronto: University of Toronto Press, 2001) \$24.95

Canada's Anti-Terrorism Act is now law, having received royal assent December 18, 2001. Some change was made to its definition of "terrorist activity", after the outburst of alarm from across Canada. Yet most of it remains, and is extensive; it amends the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime Act and other acts, and enacts the Charities Registration (Security Information) Act, in order to combat terrorism.

The book *The Security of Freedom* is a collection of 26 essays by law professors and practitioners that attempt to decipher what was then still Bill C-36, could mean for our future. A review of the book by Lesley Jacobs of York University highlights some of its important themes.

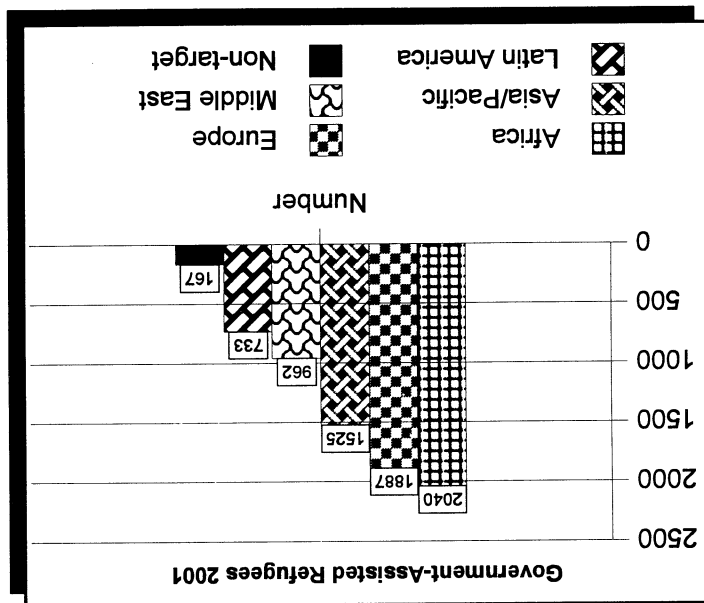
One is that the bill adopts a crime model for anti-terrorism measures. One of the writers situates this within a broader trend -- the "criminalization of politics" -- where there are pressures on "the state to place more and more reliance on the criminal law." Others argue that existing criminal law is sufficient for fighting terrorism, and another that quick-fix additions to the Criminal Code may have unintended consequences that will make it harder to fight terrorism.

Another is questioning whose rights and freedoms are secured by the bill. In spite of attempts by parliamentarians to present this law as leading to greater security for all, the reviewer concludes that the truth is that rights of some will be sacrificed for the security of the majority.

A third concern, although not addressed by the book's authors, is a need to consider the significant implications of this law for the ethical and professional responsibility of advocates of all kinds.

This book provides much insight into the potential repercussions of this new legislation.

Catherine Balfour, *Amnesty International*



There were 7,314 government-assisted landings in 2001, just over the target of 7,300.

There were 3,560 privately sponsored refugee landings in 2001, representing 127% of the lower range target of 2,800. This compares with 2,914 in 2000.

# Canadian Council for Refugees

*Spring Consultation  
St. John's, Newfoundland  
May 17 - 19, 2002*

## **Between "The Rock" and a Hard Place**

- ☺ *Not Just Meetings*
- ☺ *Boat Tours (Birds, Whales and maybe Icebergs)*
- ☺ *Newfoundland Kitchen Party (May 18)  
Traditional Food, Music, Dancing*
- ☺ *Partner and Family Programme*
- ☺ *Arranged Tours Before and After Consultations*
- ▶ *Proposed Destinations: St. Pierre et Miquelon, Lanse aux Meadows, Gros Morne National Park, or St. John's area*

**44,038 claims were referred to the Board in 2001 (compared to 34,253 in 2000).**

A 3D bar chart showing the number of cases for four different outcomes. The vertical axis represents the count, ranging from 0 to 14,000 in increments of 2,000. The horizontal axis lists the outcomes: positive, negative, declared abandoned, and withdrew. The bars are dark gray with a 3D effect. The values for each bar are displayed in white boxes above them.

| Outcome            | Count |
|--------------------|-------|
| positive           | 13336 |
| negative           | 9551  |
| declared abandoned | 2632  |
| withdrew           | 2798  |

Montreal: 49.6%  
 Ottawa/Atlantic: 57.6%  
 Toronto: 46%  
 Calgary: 54.6%  
 Vancouver: 37.5%

✧ ✧ ✧ ✧ ✧ ✧ ✧ ✧ ✧ ✧ ✧ ✧

The Department of Justice (US) has terminated Argentina's participation in the Visa Waiver Program. Argentine nationals who intend to travel to the United States for legitimate business or pleasure are now required to obtain a non-immigrant visa at a U.S. consulate or embassy prior to their arrival into the U.S.

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