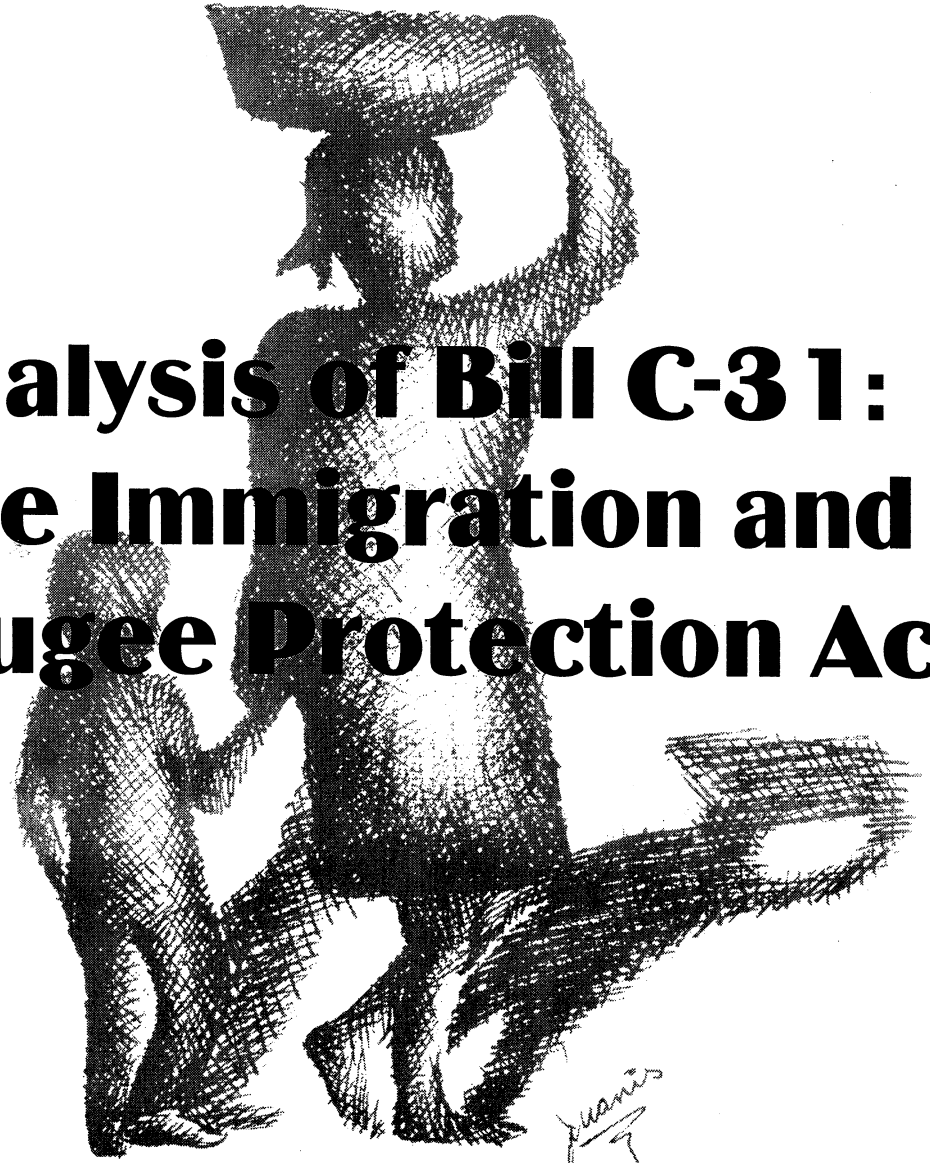


• REFUGEE UPDATE

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Special 10th Anniversary Issue



Analysis of Bill C-31: The Immigration and Refugee Protection Act

CLOSING THE DOOR ON THE WRONG PEOPLE

BY FRANCISCO RICO-MARTINEZ

(As published in the Windsor Star on May 24, 2000)

Immigration Minister Elinor Caplan announced recently that she was introducing a "tough" immigration bill. In so doing, she earned her credentials as a member of the ever-expanding international club of "tough" immigration ministers.

In Europe countries have for several years been vying with each other to be as inhospitable as possible to asylum seekers. The United States has adopted the "quick exit" policy of expedited removals and has applied to refugees and immigrants its

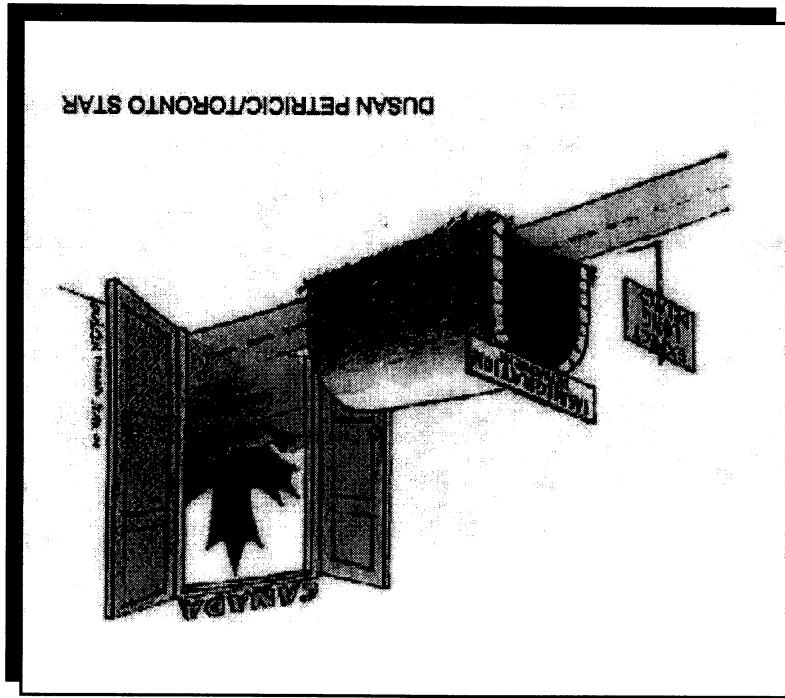
favourite problem-solving measure: detention. The Australian government, as if in an effort to be heard across the ocean, has outdone itself in the shrillness of its response, legislated and rhetorical, to unwelcome arrivals.

Joining the international trend, Canada's Immigration Minister promises to "close the back door to those who would abuse the system". On the face of it, what could be more reasonable? Who wants to welcome to Canada the criminals and abusers she is targeting?

Yet a closer look at the immigration bill raises many concerns about who will be affected by the proposed changes. Consider the following:

- The bill would allow no one who has made a refugee claim in Canada ever to make a second claim. This is intended to prevent abusive repeat claims. But it would also exclude the woman who withdraws her claim because the situation in her country has improved and goes home, only to experience a coup d'état which puts her in worse danger than ever. Also excluded is the child who, aged 5, is refused refugee status along with his family and then grows up in the home country to become a political

DUSAN PETRICIC/TORONTO STAR



dissident. Under the bill anyone who returns to Canada after less than a year is immediately sent back. Those who return after more than a year are entitled to no more than a "risk assessment" conducted, apparently on paper, by immigration officials. Yet what have these two people done to have the door close on them?

- The bill also excludes refugee claims from people who are deemed serious criminals. This is not the appropriate way to do things, from the point of view of the UN High Commissioner for Refugees. It recommends that issues of criminality be reviewed within the context of the refugee hearing, where all the facts of the case can be weighed (the same recommendation has just recently been made by the Inter-American Commission on Human Rights). The automatic exclusion of people convicted of crimes outside Canada is particularly dangerous for refugees. Prosecutory states often use the criminal justice system as a mechanism of persecution. Not infrequently, people who are being persecuted are convicted on the basis of trumped up charges for crimes that they have not in fact committed. Under the proposed system, such people will have no opportunity to show that they were wrongly convicted.

- Even in cases where people have committed horrific crimes, we can ask whether closing the door is the right response. After all, Spain's efforts to bring Pinochet into their country in order to try him gave hope to all those longing to see the perpetrators of crimes against humanity brought to justice. Canada, however, persists in its policy of dealing with war criminals simply by deporting them, rather than trying them, and is writing this into the objectives of the immigration bill. Is this really, as the bill claims, the way to "promote international justice"?

- Going from the worst to the best, consider how the bill treats the "best and brightest" (to borrow the Minister's terms) who choose to take up our invitation to become

permanent residents. In a variety of ways, their rights are downgraded to be on a par with other non-citizens (this is reflected in the bill's terminology, which mostly lumps all non-Canadians together under the alienating term "foreign national"). Their residence status is no longer really "permanent", but rather renewable every five years. If they fail to meet the residency requirements, they will find themselves pretty much thrown out on their ear, with no right to a hearing and no more than a paper review by the Immigration and Refugee Board. Under the new bill, it seems we will be closing the door on "permanent" residents who, for example, need to care for sick family members abroad.

The Minister described her proposals as "closing the back door" in order to open the "front door" wider. But, as the examples above show, distinguishing between the two doors is far from obvious. A better goal would be to have a single door, and ensure that everyone trying to come through it is treated fairly and in conformity with our international human rights obligations.

Francisco Rico-Martinez is the President of the Canadian Council for Refugees



INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

BY TOM CLARK

The February 28, 2000 Report of the Inter-American Commission on Human Rights is by far the most comprehensive international statement about the rights of refugees and asylum seekers. It vindicates the views of many non-governmental organizations. It captures many of the earlier recommendations by other human rights treaty committees. Previously, human rights arguments put to a court or a parliamentary committee could be dismissed by the government. Now the regional authority - the Inter-American Commission - has evidently studied carefully and has spoken. Entitled "*Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*", the Report is an invaluable reference and advocacy tool available on the web:

<http://www.cidh.org/countryrep/Canada2000en/table-of-contents.htm>

Like many non-governmental groups, the Commission recognizes the need to deal with national security and public danger. However, if there is one thing the Commission wants the Minister to get tough on it is getting tough about protecting rights. If the Commission has priorities, they may be taken from the order of the rights-related issues considered: 1) Access to the refugee determination system and 2) The right to asylum and ... to seek judicial protection therefore 3) Specific rights at issue in exclusion and removal proceedings.

International rights at Issue

It is a sad commentary that discourse about rights of persons in Canada has become virtually taboo. The

Immigration and Refugee Protection Act, Bill C-31, is no exception. Put before parliament April 2000, the Bill avoids almost all reference to rights. Yet the Commission reminds the government that Canada has promised rights and judicial protection of those rights for everyone - including refugees and migrants. For those working with refugees and migrants, the only practical recourse for a range of situations is to plead with the Minister or with immigration officials:

- a person is a refugee but was not recognized and faces deportation (rights to asylum, life liberty and personal security, right to judicial protection for rights);
- a person faces deportation and consequent separation from a wife and children living in Canada (family and children's rights);
- a person is declared a security risk or a public danger and excluded from refugee status or landed immigrant status (at least right to asylum and personal security, often family unity and sometimes the right to protection from torture consequential to deportation);
- a person is detained (right to liberty);
- a husband trying to get to Canada to join his refugee wife and refugee children is found to be a "serious criminal" for trying to come without the approved documentation (right to asylum, family and children's rights);

... the list goes on. There is at present no simple way in which a person deemed to qualify or not qualify under some category of the present Immigration Act can vindicate him or herself.

Ensuring all Rights including Family and Children's Rights

The Commission brings a new dimension. It talks about all the above situations in terms of "rights". It specifically talks about the rights of the child and family life in removal proceedings and urges additional action aimed at enhancing:

"The conformity of decision-making at all levels with the international obligation to consider the principle of family reunification and unity" ... and ... "The adherence of such decisions to the standard by which removals separating families are a highly exceptional measure requiring an extremely serious justification to override the resulting interference with family life" §180

The Commission is critical of delays in family reunification for refugees who lack required identity documentation. The Commission presents this issue as a matter of family rights. Unfortunately, the Commission does not discuss the issue of equal treatment or non-discrimination between refugees and permanent residents with respect to these family rights. And Bill C-31 does not provide for refugees in Canada to be reunited with immediate family members as of right, although this may be an issue intended for *Regulations*. But *Regulations* are not enough.

The Commission's final recommendation relating to all the rights at issue calls for "additional measures" to:

"Ensure that where these obligations [international human rights obligations] are not expressly incorporated into domestic law, there are policies and procedures in place to assure that the relevant provisions are observed and given full effect as rights" §181

Ensure is a strong word. It is difficult to see how Canada can ensure that these rights to asylum, family rights and children's rights are "given full effect of rights" if these rights are left to Regulations or departmental guidelines without any explicit reference in Bill C-31. This is a general problem with other rights and Bill C-31.

Without explicit reference to the rights at issue as rights in Bill C-31, it is difficult to see how Canada will "inform and train relevant officials at all levels, particularly judges and other decision-makers ... to ensure that they are aware of and understand those [human rights] obligation under applicable international law" (§181). By far the best way to get the attention of the legal community is to make reference to these international rights in law.

Unfortunately, Bill C-31 is largely silent on the rights to be protected. True, the Bill mentions the definition of

"torture" from the Convention against Torture, CAT, article 1, which is already elsewhere in Canadian law. But the Bill fails to mention the highly relevant absolute prohibition of expulsion in the face of a real risk of torture which is required under CAT article 3 and correspondence in international case law. The Bill manages to speak about the "best interests of the child" without making any reference to the Convention on the Rights of the Child, CRC. Under the CRC Canada has many other obligations such as family unity and family reunion for children separated from parents and such as the right of the child to be heard in proceedings. The UN Committee on the Rights of the Child raised these matters with Canada in its Report of June 1995.

Rights to Due Process and Judicial Protection of Rights

The Commission brings a new dimension by talking about immigration and refugee issues in terms of "rights" because rights call for the necessary due process and equal treatment which the Commission pursues at considerable length. Indeed, one of the most important rights dealt with by the Commission is the right to effective judicial protection for international human rights - an issue also raised by the UN Human Rights Committee in its Report of April 1999. Bill C-31 makes the present restricted court access situation worse by requiring "leave" for any judicial review.

The Commission says:

"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 Declaration [American Declaration of Rights and Duties of Man] of the Constitution of the country concerned." at §95, and "The effect of this right is to require the provision of a domestic remedy which enables the relevant judicial authority to deal with the substance of the complaint and grant appropriate relief where required ..." at §98

This observation questions the adequacy of "judicial



review” because judicial review does not “deal with the substance of the complaint”.

Access

The first concern of the Commission is the present “eligibility” provisions which can prevent a person from being heard before the Immigration and Refugee Board under the present Immigration Act and implicitly under the provisions of Bill C-31. Eligibility is similar to the permitted “exclusion” from refugee status provided in the 1951 Convention relating to the status of refugees. (See §59)

However, the Commission adds a new dimension by viewing eligibility in the light of a right to asylum promised by Canada under the American Declaration:

“... the right to asylum ... necessarily requires that the claimant be heard in presenting the application.
§60

The Commission concludes that determinations in several exclusion or eligibility situations are not administrative but substantive in nature requiring appropriate procedural guarantees. “It is axiomatic that the effective protection of rights requires a procedural framework which offers the necessary minimum guarantees.” Noting the views of the government of Canada otherwise, the Commission considers that neither CIC officials nor adjudicators are appropriate persons to provide the necessary procedural guarantees but does view the Convention Refugee Determination Division an appropriate place..

Bill C-31 does nothing to address the Commission’s concerns. Rather the Bill continues to propose classes of persons who will be “inadmissible” and ineligible according to decisions made by officials. Some categories are the same as the present “catch all” categories which catch inappropriate persons - like the husband of a refugee who qualifies as a “serious criminal” because he was caught trying to fly on to Canada to join his wife and children without the approved documentation. Other categories proposed in Bill C-31 are too broad. The category for human rights violator is like the present category for members of a government which the government of Canada declares to have committed acts of torture. Bill 31 fails to provide safeguards for either situation. This category caught a former Ambassador of Afghanistan who presents impressive evidence of efforts to promote human rights and the purposes of the UN!

Appeal

The Commission is adamant that a refused refugee claimant must be able to re-open a file for new information, calling for:

“establishing procedures necessary to enable refused refugee claimants to present newly available information relevant to their situation of risk...refugee claimants be able to petition the CRDD for the reopening of the determination process ...up to the point of exhaustion of all recourses and removal from Canada.” and

“ensure that refused claimants have access to a review on the merits of the original decision...an independent decision-making authority with access to the expertise and resources to make informed decisions ... for example ... a unit within the IRB which would be separate from the CRDD”

Bill C-31 contemplates a paper review of a negative decision within the present Immigration and Refugee Board. Yet the Bill does not ensure that this paper review meets the conditions set out by the Commission. A paper review cannot deal with issues of credibility. Sending a person back for a re-hearing at the CRDD as Bill C-31 provides is not consistent with a unit “separate from the CRDD” and capable of dealing with “the substance of the complaint”.

Bill C-31 does nothing to address the problems uncovered by the Commission about the application of the “leave” test by the Federal Court Trial Division. The Bill preserves the need for a Federal Court Trial Division judge to certify an issue in order for a person to access the Federal Court of Appeal on that issue. The Commission is critical of this provision. The Commission insists that a person must have effective access to the courts for an international or Constitutional right at issue.

Right to Liberty and Judicial Protection

The Commission is concerned about protection of right to liberty in detention in the context of the “danger to the public” and “security risk” procedures and the right to judicial protection:

“The ... requirement that any deprivation of liberty comport with preexisting norms of law and procedure implies that those norms be sufficiently ‘accessible and precise’ so as to ‘avoid all risk of arbitrariness’...” §139.

“... the longer detention as a preventive measure continues, the greater the resulting burden on the rights of the person deprived of liberty ... Where the burden on the rights of the detainee becomes too great, the continuation of preventative detention may no longer be justified as a security measure and may effectively be converted into a penalty imposed absent due process.” §142

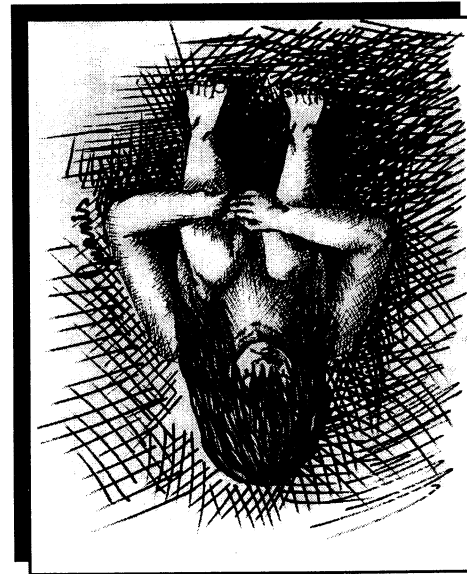
("The Solidarity of the Church with Migrants and Itinerant People", Rome 2000)

Persecution and violence do not allow their victims the luxury of getting passports and visas before a forced departure. Some have little choice but to use traffickers and arrive irregularly in safe countries. This should question any equation of migrants or refugees with criminals. The rhetoric of "zero tolerance" for illegally entering a country means the destruction of the already fragile international asylum regime and betrays the ignorance of its proponents.

Clearly, the general principles set out by the Commission relating to international human rights obligations have not been adopted in this legislation. Canada is largely unwilling to make any new references to any new "rights". As usual Canada has "picked and chosen" from among the human rights promised and as usual it has chosen to adopt

Conclusion

review of detention of persons detained under a security certificate by "a judge". Bill C-31 provides for an individual to apply to a judge for release after 6 months in detention if the person could not be removed.



The process criticized by the Commission for a "security certificate" remains in similar form in Bill C-31. This process allows two Ministers to sign a certificate that a person qualifies. Provided a judge finds this "reasonable", the person is deemed to qualify and may be detained. However, the use of the certificate process is expanded in Bill C-31 to

include several grounds: "security; violating human rights; criminality; seriousness; criminality or organized criminality". The former "danger to the public" basis for mandatory detention no longer remains. At the same time, Bill C-31 provides for

Bill C-31 does little in response to the international obligations on detention in general. There is no new provision which progressively shifts the onus onto the government to show the need for continuing the detention as detention grows longer. Rather Bill C-31 expands the basis of detention to provide that identity must be established to avoid detention and to allow for detention on grounds of what is essentially administrative convenience.

The small step proposed in Bill C-31 towards judicial control of detention under the proposed variations on the present "security certificate" procedure is a step towards compliance. However, adding more categories under which the certificate may be issued without adding to the due process appear to be a formula for increasing the number of injustices which were noted by the Commission.

Ultimately, Bill C-31 is a tragedy because it reveals Canada's unwillingness to take on the challenge posed by the international human rights bodies. That challenge is to take international human rights with related judicial protection seriously. To have accepted that challenge would have meant modifying the Federal Court and administrative justice system with its huge discretion for officials and its restrictive "leave" provisions which shut out some people whose rights are threatened or violated. It is a tragedy because Bill C-31 could have marked the beginning of allowing Canadians and everyone else in Canada to enjoy some benefits from the international human rights treaties which successive governments have ratified. Instead, Bill C-31 appears to continue the joint "deterrence and detention" policy of Western governments, maintaining a "legal homeland" within Canada for refugees and refugee claimants.

The failure of Bill C-31 to incorporate the right to family unity for spouses and children of refugees in Canada is surprising given the several "Conclusions" and "Resolutions" of UN bodies which Canada has endorsed in the last two years about family reunion for refugees and the fact that other Western countries, including the US, allow family reunion for refugees.

Few recommendations, and partially.

Tom Clark is the Coordinator of the Inter-Church Committee for Refugees

"The proposed establishment of an appeal on the merits in the Canadian refugee status determination system is a long-awaited, positive step," said Judith Kumin, UNHCR's Representative in Canada. UNHCR considers that the possibility to appeal negative, first-instance decisions is fundamental to a credible refugee status determination system. The proposed new procedure would provide an opportunity to correct errors in the refugee determination process and help to ensure consistency in decision making.

The draft Bill also suggests consolidation of decision-making on all protection aspects of a refugee claim, including those covered by the 1984 UN Convention against Torture as well as the 1951 Convention relating to the status of refugees. At present, the Immigration and Refugee Board (IRB) reviews the refugee elements, while Citizenship and Immigration assesses other risk-related questions. "We think it will enhance fairness and efficiency for the IRB to look at all aspects of a claim," said Kumin. "The idea of a consolidated protection decision is a good one."

UNHCR is concerned, however, that the Bill may introduce new barriers to Canada's asylum procedure. "All over the industrialized world it is getting more difficult for persons in search of protection to have access to refugee status determination procedures. We hope that Canada will maintain its humanitarian tradition, and not be tempted by policies of exclusion and control which have taken root elsewhere," said Kumin.

Another worry is that the Bill may lead to increased detention of asylum-seekers. UNHCR considers that detention of asylum-seekers is inherently undesirable, and asks governments to resort to detention of persons seeking protection only when absolutely necessary. Detention of children should not take place.

(UNHCR)



RESETTLEMENT IN BILL C-31

BY MICHAEL CASSASOLA

Understanding the government's plans for refugee resettlement based on the content in bill C-31 is a challenge. While the bill is entitled the Immigration and Refugee Protection Act, there is little in the bill that deals with the 10,000 or so refugees who find protection in Canada each year through resettlement programs. Instead, the bill leaves much of the specifics of Canadian resettlement to regulations, which have not yet been made available. This approach mirrors the government's white paper which also had little to say about resettlement. Nevertheless, positive resettlement initiatives are promised. Unfortunately, these initiatives are introduced almost as a counter to some of the more punitive actions that the government plans to take against those seeking asylum in Canada.

Refugee resettlement is an important part of the selling of the bill to the Canadian public. The proposals the government has put forward around resettlement are being used as part of the front door vs. back door refugee or the good vs. bad refugee spin doctoring surrounding the bill through which refugee populations are being pitted against each other. In presenting the bill, the Minister of Citizenship and Immigration outlined a number of proposed initiatives concerning Canadian resettlement programs, though they were not actually contained in the bill. In the media she referred to the Urgent Protection Pilot, which is currently underway, as an example of Canada's concern for refugee protection and as a response to concerns about the limitations the bill gives to those attempting to access the Canadian Refugee Determination process. The positive changes for resettled refugees are

presented as a seeming counter-balance or excuse for the negative actions used to deny refugees access to the inland refugee determination system.

It should be noted that many of the proposed resettlement related initiatives are welcome. They are indeed good news for refugees. Some of these proposals have already begun to be put in place. Having them put into regulations will give these policies stronger legal footing.

The government proposes to water down the ability to successfully establish requirement. This means that when a visa officer is measuring a refugee's ability to successfully establish she will no longer look at a refugee's ability to do so in one year but will instead look at a 3 to 5 year period. Thus, less

emphasis will be made on whether a refugee would make a good immigrant as opposed to their need for protection. In addition, refugees can no longer be found medically inadmissible on the basis of excessive medical demand. These two proposals mark a major turning point in that they respond to years of criticism and effectively diminish structural barriers to the use of Canada's resettlement program as a tool of protection

In addition there are initiatives that will respond to another area of concern, the assistance of refugee families. The government will be putting into regulation policies which can already be found in the immigration manual. Refugee families overseas are to be processed together as much as possible. Furthermore, dependent extended family members are to also be processed as part of the refugee family. For refugees already landed in Canada - apparently whether resettled or whether arriving as refugee claimants - the family members (spouse and dependent children) will have a one year window of opportunity to process remaining family members as part of the permanent resident's application. This means that if a refugee comes to Canada as a government-assisted refugee who was somehow separated from her spouse and dependent children and if these dependents are discovered and their case can be brought to the attention of a visa post within one year of her arrival in Canada, she is not required to sponsor the dependents under the family class. Instead, her dependents could also come to Canada as government-assisted refugees. This means she would no longer face the difficulty of submitting and qualifying under the family class.



The government will also be entering into agreements with what are referred to as Overseas Service Providers. These are organizations overseas to assist with the identification and selection of refugees. Negotiations are in place with organizations in Africa, Turkey and Columbia.

At the same time the bill also includes items which negatively effect resettlement and are cause for concern. The overarching federal court leave requirement will impact refugees selected overseas. Currently there is no appeal system for refused cases. Though seldom used, the federal court is the only appeal route available. The fact that resettled refugees will have to seek leave should not be seen simply as the resettlement program being swept up in the changes being made. Including applicants for resettlement among those required to seek leave was quite deliberate because CIC has been experiencing litigation in this area and has had to re-examine how it selects refugees as a result of a recent court case. The unfortunate result is that applicants for resettlement will have their meager appeal rights even more limited.

The bill also provides for the establishment of quotas surrounding visa post activities such as the numbers of applications accepted, approved, visas issued, etc. This may lead to the establishment of ceilings for the number of refugees sponsored each year. The imposition of ceilings for those sponsored has been an issue which resurfaces every few years. Under the previous minister the government tried to impose ceilings on the number of refugees selected each year, but declined in the face of public criticism. The ceiling issue is important in that the private sponsorship program is founded in part on the concept of additionality, meaning that each refugee sponsored by a group in Canada is in addition to those selected by the government of Canada. The refugees sponsored are not to replace those resettled under the government-assisted program but are in addition to them. The imposition of a ceiling could effectively undermine the positive contribution of groups by either limiting the number they could select in a year or diminishing the government program in response to a strong sponsorship request. Either way, it is a huge loss for refugees, in that the ability to bring additional refugees to Canada may be diminished.

Ultimately, the resettlement proposals mirror actions that have already begun to be put in place. The impact of C-31

will not be clear until draft regulations are produced. In the face of so many other important issues raised by the bill, the greatest challenge relating to resettlement in C-31 will be trying to cultivate concern about issues like access to Federal Court and ceilings on admissions. Nevertheless, these issues are important in that they impact the thousands of refugees who are resettled to Canada each year. At the same time the spin doctoring must be

challenged. The positive proposals being put forward to strengthen the protection of resettled refugees cannot be allowed to be used as an excuse to limit the protection provided to other refugees.

Michael Cassasola is Director of the Diocese of London Refugee Office.

Bill C-31 is flawed legislation that seriously and negatively diminishes established rights of immigrants and refugees in Canada. Bill C-31 is aimed at reducing established rights of status and diminishing processes designed to protect those rights. It is aimed at leaving the fate of individuals to practically unchallengeable determination by department officials and is for that reason inconsistent with the image of fair-minded reasonableness which we want to project to ourselves and to the world.

Raising the barriers for access to the refugee determination process:

The Bill purports to reaffirm the objective of providing protection to persons entitled to refugee determination, but its provisions actually limit or prohibit access to the inland refugee determination process.

Access to the inland refugee determination system will be restricted by:

Preventing claimants with improper documents from boarding aircraft to Canada; Imposing stricter barriers to referral of claims to the determination process; and allowing only one application to the inland determination process in the lifetime of the claimant.

(Canadian Bar Association, National Citizenship and Immigration Section)



OBJECTIVES OF BILL C-31

BY DAVID MATAS

1. Bill C-31 divides what is now one section in the present Act into three components. The first component is immigration objectives. The second component is refugee objectives. The third component is titled "application". This third section provides interpretative guides to the Act.

2. Both the immigration and refugee objectives refer to

family reunification. Section 3(1)(d), for immigrants, states: "to see that families are reunited". Section 3(2)(f), for refugees, states: "to support the self-sufficiency and social and economic well-being of refugees by facilitating reunification with their family members". These have to be contrasted with the present Act objective which states, in section 3(c), "to facilitate the reunion in Canada of

Canadian citizens and permanent residents with their close relatives from abroad".

Under the present Act, where there is a humanitarian application of a family member abroad, the Department sometimes denies the application on the basis that there are other, non-applicant, family members abroad and that entry into Canada of the applicant family members would not achieve family reunification. The courts have overridden this Departmental consideration by reference to the current Act objective, which states explicitly "reunion in Canada". However, the new objective does not state that. So, I expect, when and if the Bill becomes law in its current form, a revival and increase of refusals of humanitarian applications of family members on the basis that there are other family members abroad and that bringing the applicant family members to Canada would not achieve the Act objective of family reunification.

3. One of the Bill refugee objectives, [subsection 3(2)(d)] is "to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion, membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment". Objective 3(2)(b) is, in part, "to fulfil Canada's international legal obligations with respect to refugees". Objective 3(2)(a) is "to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted". These compare with the present Act objective "(g) to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted".

Offering protection to the displaced and the persecuted, the new formulation, is preferable to upholding Canada's humanitarian tradition with respect to the displaced and the persecuted. Some of Canada's traditions have not been that humanitarian. Furthermore, protection asserts entitlements. Humanitarianism suggests discretion.

As well, offering safe haven to persons with a well-founded fear of persecution based on race, religion,

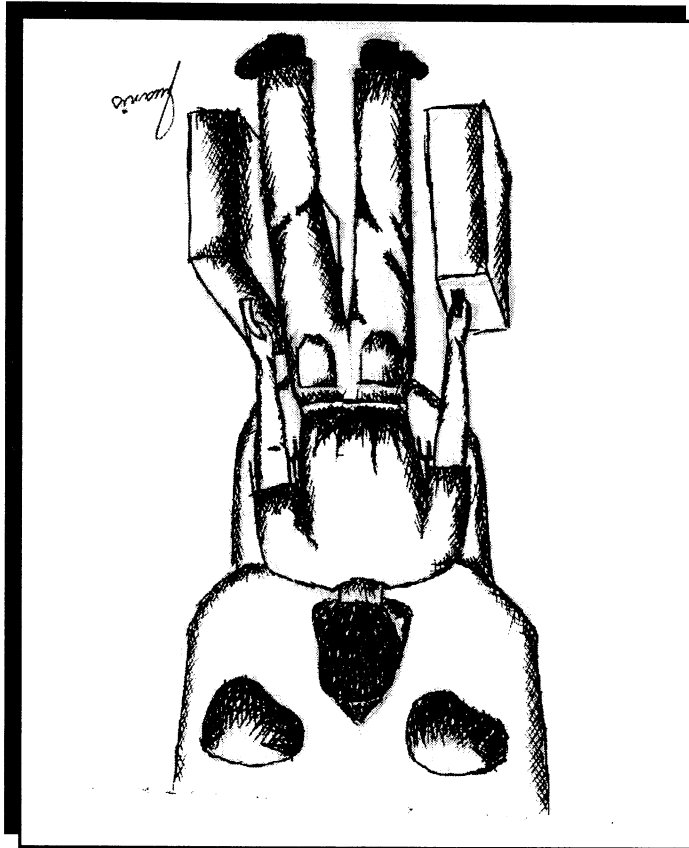
nationality, political opinion, membership in a particular social group is part of the Refugee Convention definition, but not all of it. The notion that the person has to be outside of his or her country of nationality is omitted. The idea behind what is now the Source Country Class is incorporated directly into the objectives of the Act and would, if continued into law, provide an argument that the Source Country Class be expanded to cover all countries.

Nonetheless, the limitation to refugees and torture victims is troubling. The Refugee Convention and the Torture Convention are not the only international instruments relating to forcible return. The United Nations Declaration on the Protection of All Person from Enforced Disappearance prohibits removal to enforced disappearance [General Assembly resolution 47/133, December 18, 1992, Article 8]. The United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions prohibits removal to arbitrary execution [Economic and Social Council Resolution 1989/65 of May 24, 1989, Article 5].

Forcible return to generalized danger is a violation of the customary international law norm of temporary refugee [See Deborah Perluss and Joan Hartman, "Temporary Refugee: Emergence of a Customary Norm" (1986) 26 Virginia Journal of International Law 551]. It is also, in situations of both internal and international war, a violation of the Geneva Convention on the Protection of Civilians in Time of War and Protocols I and II to the Geneva Conventions on the Laws of War.

Offering safe haven to those at risk of arbitrary execution, enforced disappearance, violations of grave breaches of the Geneva Convention, or generalized danger are not objectives of the Immigration Act, according to the Bill. Yet, according to international human rights and humanitarian law standards they should be.

4. The Bill provides that "This Act is to be construed and applied in a manner that...(d) ensures that any person seeking admission to Canada is subject to standards, policies and procedures consistent with the Canadian



Charter of Rights and Freedoms" [Section 3(3)]. The present Act provides "It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need...(f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the Canadian Charter of Rights and Freedoms". The new formulation is preferable to the present formulation because the Bill refers to the whole of the Canadian Charter of Rights and Freedoms and not just the equality component of it.

Even this provision does not go far enough, since it refers only to "any person seeking admission". What about those undergoing removal? Surely any person subject to removal should be subject to standards, policies and procedures consistent with the Canadian Charter of Rights and Freedoms. Why is that not an Act objective?

The criminality objectives in the Bill are, for immigrants, "to promote international justice and security by denying access to Canadian territory to foreign nationals who are criminals or security risks" [section 3(1)(i)] and, for refugees, "to promote international justice and security by denying access to Canadian territory to foreign nationals, including refugee claimants, who are serious criminals or security risks" [section 3(2)(h)]. This contrasts with the present Act objective which is "to promote international order and justice by denying the use of Canadian territory to persons who are likely to engage in criminal activity" [section 3(j)].

One can see that the objectives in the Bill are different for immigrants and refugees. For immigrants, the objective is keep out "criminals". For refugees, the objective is to keep out "serious criminals".

Both of these objectives also differ from the objective in the present Act, which is to keep out those "likely to engage in criminal activity". The objective of the Bill is to keep out those who have done something wrong in the past, whether or not they are likely to commit a crime in

the future. The Bill is harder on access to Canada than the present Act.

6. One of the objectives, for refugees only, is "to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution" [section 3(2)(c)]. This provision has no counterpart in the immigration objectives. Nor does it have a counterpart in the current Act objectives. Again, here the addition of the objective of fairness is welcome, but one can question whether its limitation to only those who come to Canada claiming persecution is appropriate.

7. As mentioned earlier, one of the Bill objectives is "to fulfil Canada's international legal obligations with respect to refugees" [section 3(2)(b)]. This objective is also in the present Act [section 3(g)]. However, Canada has international legal obligations that impact on other aspects of immigration besides refugee protection. For example, there are the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights and the American Declaration of Rights and Duties of Man. Why is there no reference, even in generic form, to these obligations?

I also mentioned earlier that admissions policy but not removals policy is, according to

the Bill, to be consistent with the Canadian Charter of Rights and Freedoms. Why should the Act not also state that both admissions and removal policy should be consistent with all Canada's international human rights obligations?

There is a refusal to recognize or, at least neglect in failing to recognize, the results of the Baker case in the Supreme Court of Canada. The Baker case decided, contrary to the position of the Government, that the Immigration Act must be interpreted consistently with Canada's international human rights obligations. The Bill seems to carry forward the Government position in the Baker case, and fails to acknowledge what the Court decided.

David Matas is an immigration lawyer from Winnipeg and a former president of the Canadian Council for Refugees.



INTERDICTION AND ELIGIBILITY IN C-31

BY MICHAEL BOSSIN

continue her voyage to Canada.

Eligibility to Have a Claim Determined by the Refugee Protection Division

In the past, Amnesty International has expressed concern about the breadth of provisions which define classes of people who are ineligible to have their refugee claims determined by the Refugee Division of the IRB. These provisions increase the risk that individuals facing persecution or torture in their countries will be denied protection by Canada. In the proposed legislation, the grounds for ineligibility have been expanded.

The provision dealing with eligibility to have a claim determined by the Refugee Protection Division is s. 95. Under s. 95 (1) (d) those ineligible to have their claims heard include "claimants determined to be inadmissible on grounds of security, violating human rights, serious criminality or organized crime".

Under "security" a person is inadmissible for, among other things, engaging in "terrorism", a term that is not defined in the Act. As well, a person is inadmissible to Canada for "being a member of an organization that there are reasonable grounds to believe engages, or has engaged, will engage in terrorism". In many countries, persons involved in a struggle against a repressive regime are labeled "terrorists". Moreover, the wording of the section is so broad that persons who are members of organizations that *no longer* engage in terrorism, and who, personally, had no involvement in such activities, might be ineligible to make a claim for refugee status or protection. Amnesty believes that exceptions should be made for persons who, although members of an organization that may have engaged in terrorism in the past, had no personal involvement in such activities.

A more serious concern arises out of the ineligibility provision for "serious criminality". A person is ineligible who has "been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament that may be punished by a maximum term of imprisonment of at least 10 years." This provision significantly broadens the definition of those ineligible to make refugee claims for reasons of criminality.

The proposed provision regarding ineligibility on grounds of criminality is problematic for several reasons. First, it takes no account of the context in which the conviction took place. That is, in countries where the criminal law is used as a weapon to suppress dissent, a person may have

In releasing Bill C-31, the Minister of Citizenship and Immigration declared that one of her goals is to "close the backdoor to those who would abuse the system." In order to achieve this goal, the Minister has secured funding to "strengthen overseas interdiction." According to the Background paper "Closing the Back Door", the government intends to have "more immigration control officers stationed at our offices abroad to direct genuine refugees to appropriate missions or international organizations while preventing undocumented persons from seeking irregular channels of migration to Canada."

The language in the background paper suggests that "undocumented persons" "seeking irregular channels of migration to Canada" are not "genuine refugees". In many cases, nothing could be farther from the truth. It is this apparent misconception of what constitutes a "genuine refugee" which raises concerns about the welfare and safety of those interdicted abroad.

There is little recognition in the government documents released in conjunction with the introduction of Bill C-31 that interdiction measures impact directly and seriously on asylum seekers and their right to seek asylum. Amnesty International has frequently expressed concern not only about interdiction abroad but about other measures used by the Canadian government to block the entry of asylum-seekers into Canada, such as visa restrictions and carrier sanctions. Our consistent concern has not been with the measures themselves, but with the fact that there are no, or inadequate, mechanisms to allow exceptions for individuals who are fleeing persecution to come to Canada, or to ensure that they have access to a fair and effective procedure for refugee determination elsewhere.

The legislation needs measures which clarify and limit the powers of immigration control officers stationed abroad. Officers must ensure that asylum-seekers, whether properly documented or not, are referred to an authority before which they can exercise their right to seek asylum. The authority must be recognized as one that upholds its country's obligations under the Refugee Convention, in policy and practice. If such a referral cannot be guaranteed, the asylum-seeker should be allowed to

been wrongly convicted for expressing a political opinion. Moreover, the provision does not take into account the actual sentence imposed for the crime, only the potential sentence. All sorts of mitigating circumstances may affect the seriousness of the punishment. None of these will be taken into account in determining eligibility under Bill C-31. Currently, considerations regarding the legitimacy of the prosecution and the actual sentence imposed may be taken into account by the Minister in determining whether the claimant is a "danger to the public". That logical discretion has now been removed. As a result, there is a concern that many legitimate refugees will be excluded from the refugee determination process.

Finally, under s. 31 of the new Bill, a "prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in human rights

violations" will also be ineligible to make a claim for refugee status or protection. In our experience, not all senior officials in such governments were involved in the crimes described in s. 31 (b). An examination of the exact culpability of former senior official would best be conducted in the context of a refugee/protection hearing - before the expert tribunal. Amnesty believes that all claims be allowed to proceed to a hearing. At the hearing, the exclusion clauses of the Convention will apply. In this way, those persons who have personal involvement in war crimes or crimes against humanity will be denied refugee protection. On the other hand, those who are innocent of such crimes will be given the protection they may need.

Michael Bossion is a member of Amnesty International's Refugee Network.



REFUGEE DETERMINATION IN CANADA IN BILL C-31

BY MAUREEN SILCOFF

The new Bill affects not only the way in which Canada will determine who is a refugee, but the proposed legislation also impacts on who is determined to be a refugee in Canada. The following represents the major changes introduced in the Bill.

Think about the way refugees are referred to in the Bill. Instead of the current "refugee claimant", the label "foreign national" will be used. Is this the Canadian more polite term for the American term "alien", stripping refugee claimants of their specific identity as such and replacing it with a general label of "foreigner"? Perhaps we Canadians are not really so polite after all.

On a more positive note, refugee protection would be extended to not only Convention refugees but to those in need of protection. This broadened category of persons would include what is now known as the Post Determination Refugee Class in Canada (PDRCC) and there is also protection for persons at risk of torture (the legislation mentions the Convention Against Torture). Canada is already obliged to conform to the international human rights conventions - does this category widen the group of persons who will receive protection or does it just sound good?

There are proposed restrictions on who is eligible to make a refugee claim that go further than the current eligibility provisions. One important change is that repeat claims have been eliminated, unless the Minister agrees to hear the claim. While the rationale behind this proposal is to reduce perceived abuse in the system, the shortfall is that there is now absolutely no method of the Board assessing new evidence in a refugee claim, as a refugee hearing cannot be re-opened for this purpose. Another change is that persons convicted of offences punishable by certain maximum sentences, whether in Canada or elsewhere, cannot make a refugee claim. This means that persons convicted of political crimes cannot institute claims in Canada.

The number of panel members who hear and determine refugee claims has been reduced from two to one (although there are certain circumstances where there may be three members). With two members, the refugee claimant simply needs one of the two members to accept the claim, whereas the proposed legislation would have one member deciding the claim. This may only be seen as one of the checks and balances and having been removed from the process.

Mr Fontana is keen to engage in dialogue with groups interested in refugee and immigration issues. He said he would like to have working days during the summer to review the bill and said he would be willing to travel to different parts of Canada for such days. He hopes to have briefs in by August so that committee members can start reading them. He also suggested that he would urge Liberal caucus members to have an immigration day in their ridings to discuss the bill with local partners. He responded positively to a request that the Committee give feedback through the process on where they are going, so that NGOs know, for example, if the committee has already been convinced of an issue. He was also willing to discuss having a working meeting at the beginning of the process. He noted that he is just developing ideas and has

Mr Fontana wants to have the bill adopted by the end of the year [an ambitious target]. He also would like there to be amendments to the bill and noted that the Minister has said she is ready to accept amendments.

clause by clause, voting on any amendments.

CCR UP-DATE AND STRATEGY ON BILL C-31 BY JANET DENCH

evidence that was presented at the refugee hearing only, and there is no hearing of the review of the refugee claim. Further, there is not even an obligation for the review to accept submissions, as the Bill provides that submissions "may" be accepted. In addition, although redress may be sought by seeking leave to the Federal Court after the review is completed should the review not be favourable to the refugee claimant, claimants are removable, as the statutory stay of removal is finished 15 days after the internal review is dismissed.

In conclusion, a question to consider is: who is the "protection" in the title of the new Bill directed at - will refugees will receive protection or will Canada be protected from refugees?

Maureen Silcoff is an immigration and refugee lawyer in Toronto.

The Bill specifies that the lack of ID may impact on the credibility of the refugee claim. On one hand, the Board's current practice, without the Bill, is that corroborative ID documents are required, even though the U.N.H.C.R. instructs that the nature of a refugee often means a person has no ID documents. On the other hand, incorporating the requirement in the legislation puts even greater importance on an already suspect practice of the Board. Further, while no one wants to condone international document forging and profiting by smugglers, the Bill provides that it will be an offence to even possess forged or altered ID documents. Who will be affected by this - the refugees or the smugglers?

The Bill provides for a review of the determination by the new Refugee Appeal Division. While this may appear as a welcome step, caution must be paid to the fact that this is a review only, and not an appeal, in the sense that no new evidence may be represented as the review is based on the

This is an update on Bill C-31 issues as informed by a series of recent meetings with the Standing Committee, the Minister and Department officials.

CONSULTATION PROCESS

a) IN THE HOUSE

It is expected that Bill C-31 will complete Second Reading (when it is debated in the House) in a couple of weeks (by mid-June). It then goes to the Standing Committee on Citizenship and Immigration for study. The Committee will start by hearing from the Minister and officials from the department about the bill. The Committee Chairperson, Joe Fontana, does not expect to get any further before they break for the summer in early or mid-June. Then in the fall they will hear from NGOs etc. Mr. Fontana expects the committee to travel across Canada for hearings. At the end of the hearings, he suggested there could be a roundtable involving key organizations and the committee, to go as far as possible towards reaching a consensus, on the bill and the regulations. The final stage in the committee study is when the MPs go through the bill

not yet discussed things with the committee.

REGULATIONS

The Minister has made a commitment to have the draft regulations available by the time the Committee gets to clause-by-clause study of the bill. The Department will be working on the Regulations over the summer. They will develop the regulations through a process largely internal to the Department, with teams formed to work on different parts. These teams will be responsible for consulting externally.

STRATEGY

We will have an opportunity to clarify strategies around Bill C-31 at the upcoming CCR conference in Vancouver. In the meantime, here are some ideas for groups to think about:

1. Organize local public meetings so that groups and individuals can learn about the bill and think about its impact on their communities.
2. Organize a day (or half-day) over the summer in your community for discussions with MPs about the bill. You could invite Joe Fontana. Consider including presentations from people who would be hurt if the bill were in place.
3. Identify an issue or two that your community will focus on (e.g. Windsor will focus on repeat claims,

Ottawa is considering deportations of long-term residents and ID issues). The CCR could coordinate so that all key issues are picked up somewhere across the country. The CCR could also provide a list of key issues that all communities should raise (it was also suggested that CCR provide list of good things about the bill, so that groups can endorse them before moving on to concerns).

4. Meet with provincial governments to discuss the bill (especially family sponsorship provisions: the provinces are a major factor in restrictions on family sponsorship).
5. Encourage groups to sign on to the CCR Joint Declaration on Bill C-31 (See CCR webpage for text: www.web.net/~ccr) and send to CCR the names of signatories (we will send a list of signatories to the government at beginning of June).
6. Please keep the CCR informed about what your community is doing and let us know what materials/support you need.

Janet Dench is the Executive Director of the Canadian Council for Refugees (CCR)



GENDER ANALYSIS OF BILL C-31

BY THE CCR GENDER CORE GROUP

The federal government has committed to conducting a gender-based analysis of future laws and policies. In the case of the legislative review process leading to Bill C-31, the gender analysis conducted by the government has not been made public. It would be helpful to have open discussion about the possible differential gender impacts of the bill and proposed accompanying regulations.

The Minister proposes to bar from family sponsorship people who are on social assistance. Since women, more often than men, are single parents (and must rely on social assistance), they are likely to be disproportionately affected by this provision. In many cases, reuniting the family leads to the family being able to get off social assistance. The proposal to reduce the length of spousal sponsorship from ten years to three years will have a

positive impact on sponsored women, by reducing their financial dependence on their husband. The sponsorship relationship reinforces the patriarchal model and makes sponsored women more vulnerable to abuse.

The elimination of any possibility of making a second refugee claim will hurt women who never had an opportunity in the first claim to explain their persecution because the spouse was the principal applicant. Current experience shows that some women who have strong grounds of their own for claiming refugee status are not heard in their first claim made with their husband, because they are not asked, or because they are intimidated or traumatized.

The proposals for regulations include a commitment to

The proposals for regulations include a commitment to shift the balance in resettlement decisions away from "successful establishment" and towards protection concerns. This is positive since potential for "successful establishment" is evaluated using criteria that are unfavourable to women (e.g. education, professional experience and training). However, maintaining the "successful establishment" fails to address the underlying problem of the gender bias in this test.

The bill fails to address a range of current problems that hurt women in particular. The requirement for refugees to produce identity documents for landing has a particularly negative impact on women and children, who tend to have been issued fewer documents than men. Similarly, demands for DNA testing to establish family identity delays family reunification, (with the women more often than not waiting in precarious situations overseas). The costs of DNA testing are particularly burdensome to single

mothers. In general, delays in family reunification cause serious hardship to both men and women separated from their spouses, and to separated parents and children. While the proposal to facilitate processing of spouses in Canada is welcome, this does not address the problem faced by many refugee families, where those overseas cannot travel immediately to Canada because nationals of their country require visas.

Increased measures of interdiction have a differential impact on women in that the more barriers are set up, the more expensive the prices of the smugglers, and the less women can afford the price of escape from persecution. In addition, although the bill aims to get tough on traffickers, whose victims are often women, it does nothing to protect the rights of the victims of trafficking.



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