Bill C-4 – Comments on a bill that punishes refugees

11 November 2011

1. Introduction

Bill C-4, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*, is currently before Parliament. Despite its title, Bill C-4 mostly targets refugees, not smugglers.

Under Bill C-4, some refugees, including refugee children, will be mandatorily detained, without possibility of independent review for a year. The bill also provides for some refugees to be denied permanent residence for five years, even after they have been accepted as refugees by Canada. During these five years, they will not be able to bring even their immediate family (spouse and children) to Canada. They will also be prevented from travelling outside Canada.

Under Bill C-4, refugees will be victimized three times: first by their persecutors, secondly by the smugglers and finally by Canada.

Refugees often have no legal way to escape and are forced to turn to smugglers to save their lives. Many Canadians would not be alive today if they or their parents had not been helped by a smuggler as they fled persecution. Punishing people for taking life saving measures is particularly perverse.

Bill C-4 would violate Canada's international human rights obligations, as well as the Canadian Charter of Rights and Freedoms. It would represent a betrayal of Canada's better traditions of welcoming and protecting refugees. Evidence suggests that it would not even achieve the intended objective of deterring arrivals. Its implementation would be expensive for the taxpayer, both in short-term detention expenses, and in long-term social and health costs. The adoption of Bill C-4 would significantly damage Canada's international moral authority with respect to refugee protection. Canadian public support for refugees is being undermined by the damaging and misleading rhetoric used to justify Bill C-4.

We call for Bill C-4 to be withdrawn or defeated. The bill is so fundamentally flawed that it cannot be saved by amendments.

2. Violations of international human rights commitments

Bill C-4 violates Canada's international obligations, including our obligations under the Refugee Convention and the Convention on the Rights of the Child.

2.1 Punishing refugees for illegal entry

The Refugee Convention prohibits governments from imposing penalties on refugees for illegal entry (article 31). But Bill C-4 does exactly that, by punishing "designated" persons in various ways, including by detaining them.[1]

2.2 Arbitrary detention

The International Covenant on Civil and Political Rights says that governments must not detain anyone arbitrarily. Arbitrary detention is detention without the proper legal protections, including detention without the possibility of review of the grounds of their detention by an independent decision-maker.[2] Bill C-4 does exactly this, by requiring the detention of designated persons without possibility of review for one year.

2.3 Separation of families

A number of international conventions oblige governments to promote and protect the right of families to be united.[3] The Convention on the Rights of the Child specifically requires governments to respond quickly to applications for family reunification (article 10).[4] But Bill C-4 does the opposite, by denying designated persons the right, for five years, to apply to reunite with their spouses and children.

2.4 Right to travel

The Refugee Convention says that governments must issue refugees a travel document in order to allow them to travel outside the country (article 28). Bill C-4 denies this right to designated refugees, for at least five years after they are accepted as refugees. This would prevent them, for example, from visiting a family member in a third country (a country other than Canada or the refugee's country of origin) even if they are sick or in a refugee camp.[5]

2.5 Best interests of the child

The Convention on the Rights of the Child says that governments must take into consideration the best interests of any child affected by a decision (article 3). But under Bill C-4, some children

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[1] Section 133 of the *Immigration and Refugee Protection Act* responds to Canada's article 31 obligations by exempting refugee claimants from charges relating to illegal entry.

[2] International Covenant on Civil and Political Rights, Art. 9 (1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.[...] (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

[3] International Covenant on Civil and Political Rights, Art. 23; International Covenant on Economic, Social and Cultural Rights, Art. 10. See also Convention on the Rights of the Child, Art. 9.

[4] "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner." Convention on the Rights of the Child, Art. 10 (1).

[5] A legal opinion commissioned by the UNHCR explores Canada's obligations in this regard: *The 1951 Convention relating to the Status of Refugees and the Obligations of States under Articles 25, 27 and 28, with particular reference to refugees without identity or travel documents*, May 2000, by Guy S. Goodwin-Gill, Professor of International Refugee Law, available at http://ccrweb.ca/legalop.PDF.

could be deported from Canada without any consideration of their best interests. The only application to remain in Canada in which the best interests of a child are considered is an application on "humanitarian and compassionate (H&C) grounds". However, the bill denies designated persons, including children, the opportunity to make such an application for five years. Children will almost certainly be deported long before they are able to make an H&C application.

Bill C-4 also imposes mandatory detention on children, without any consideration of their best interests. Currently the *Immigration and Refugee Protection Act* says that children are only to be detained as a last resort, taking into account their best interests.[6] But under Bill C-4, this safeguard would be overridden for designated children by the mandatory detention rule.

3. Violations of the Charter

Bill C-4 violates the Canadian Charter of Rights and Freedoms. The Supreme Court has recently said that long-term detention without review is contrary to the Charter.[7] In the case of people subject to a security certificate, the Court found that detention without review violates the guarantee against arbitrary detention in s. 9 of the Charter. The Court said that reviews after 48 hours, as elsewhere in the immigration legislation, or after 24 hours, as in the Criminal Code, provide timelines that "indicate the seriousness with which the deprivation of liberty is viewed, and offer guidance as to acceptable delays before this deprivation is reviewed."[8]

The Court also found that sections 7 and 12 of the Charter were violated when a person was detained for an extended period, without "a meaningful process of ongoing review that takes into account the context and circumstances of the individual case."

If adopted, Bill C-4 would impose on designated persons long-term detention without review, in defiance of the Supreme Court's finding that this is illegal. It is difficult to understand how the government could have received legal advice that Bill C-4 complies with the Charter, given that it appears to be so flagrantly contrary to the Charter.

4. Betrayal of Canada's humanitarian tradition

Refugees have fled persecution and come to us looking for safety and protection – jailing them is a shocking response. Children, victims of torture and violence, people traumatized by cruel treatment – none of them belong behind bars.

Canadians have been used to taking pride in the welcome that Canada has offered to many refugees. Bill C-4 would result in Canadians having to feel shame at the way our country is treating refugees.

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[6] *Immigration and Refugee Protection Act*, s. 60. See also article 37 of the Convention on the Rights of the Child, which states: "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

[7] Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9.

[8] Charkaoui, §91.

5. Ineffective

Australia already tried to deter arrivals by detaining refugees and denying them family reunification. It didn't work.

Australia has imposed large scale, long-term detention of refugee claimants. The policies resulted in refugees, including many children, being traumatized by their experiences in detention. The Australian Human Rights Commission found that children in Australian immigration detention centres had suffered numerous and repeated violations of their human rights.[9] Just recently a detained Sri Lankan refugee committed suicide in Australia: he had been in detention for two years.[10]

Despite all the suffering caused, detention does not work as a deterrent. The head of the Australian immigration department recently told a Senate committee: "Detaining people for years has not deterred anyone from coming."[11]

A recent UNHCR study similarly found that there is no empirical evidence that detention deters arrivals.[12]

Australia also adopted a policy of denying refugees permanent status even after they were granted refugee status. Far from discouraging people, depriving refugees of their right to family reunification appears to have caused more boat arrivals: later boats brought the wives and children of refugees in Australia who were unable to bring their families through legal channels.[13]

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[9] Australian Human Rights Commission, *A Last Resort?: The report of the National Inquiry into Children in Immigration*, 2004, http://www.hreoc.gov.au/human_rights/children_detention_report/report/index.htm

[10] Daily Telegraph, "Refugee advocates slam mandatory detention after suicide at Villawood", Patrick Lion, AAP, 26 October 2011, http://www.dailytelegraph.com.au/sri-lankan-detainee-death-highly-regrettable-says-chris-evans/story-fn6b3v4f-1226177646466

[11] Andrew Metcalfe, Senate Legal and Constitutional Affairs Legislation Committee, Estimates, 17 October 2011, http://bit.ly/u3WKTc.

[12] UN High Commissioner for Refugees, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1, http://www.unhcr.org/refworld/docid/4dc935fd2.html.

[13] Andrew Metcalfe, head of the Australian immigration department, recently testified about the impacts of giving refugees only Temporary Protection Visas, which prevented sponsorship of family members: "we did see irregular arrivals move largely from comprising single adult men to comprising family groups [...] there were no lawful means for people to come and therefore they chose irregular means." Senate Legal and Constitutional Affairs Legislation Committee, Estimates, 17 October 2011, http://bit.ly/u3WKTc. A woman reportedly drowned in Australian territorial waters as she attempted to enter Australia clandestinely in order to join her husband, an Iraqi refugee in Australia, because his Temporary Protection Visa did not allow him to apply for family reunification. Khan, I. "Trading in Human Misery: A Human Rights Perspective on the Tampa Incident" Pacific Rim Law and Policy Journal 12(1), 2003, 9-22, http://bit.ly/uFyubS.

The Australian public was deeply divided over the policies, with many previously unengaged citizens joining a grass-roots network to protest at their country's inhumane treatment of refugees.[14]

In 2008 the Australian government abolished their policy of giving refugees only Temporary Protection Visas (TPVs), rather than permanent status. The government explained that the policy had not achieved its intended purpose: "The evidence clearly shows, however, that TPVs did not have any deterrent effect. Indeed, there was an increase in the number of women and children making dangerous journeys to Australia."[15]

"Temporary Protection Visas" are almost exactly what is proposed in Canada's Bill C-4. Why would we want to adopt a harmful policy that has already failed elsewhere?

6. Illogical

People turn to smugglers because they are desperate – often because they are persecuted and need to escape. Their choice is usually between two evils, and the prospect of harsh and unfair treatment in Canada may therefore not be a deterrent.

In any case people fleeing persecution rarely know about the laws of the country to which they go. Research conducted in the UK has shown that refugees don't choose their destination based on the policies in place. In fact, many did not specifically choose the UK as a destination, and hardly any knew about asylum policies in the UK before they arrived.[16]

Furthermore, the bill gives the Minister such broad powers to designate groups that no one can know in advance whether their group is likely to be designated. How then are refugees supposed to be deterred from arriving as part of an undesirable group?

7. Expensive

Detention is expensive. Detaining one individual for a year costs between $43,800 and $86,900.[17] Detaining all the Sun Sea passengers for a year would cost between just under $22 million and over $43 million.

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[14] For example, Rural Australians For Refugees is an informal group of concerned citizens that describes itself as "working hard to turn this country away from an inhumane and bizarre policy." http://www.ruralaustraliansforrefugees.org/

[15] Fact Sheet 68 - Abolition of Temporary Protection visas (TPVs) and Temporary Humanitarian visa (THVs), and the Resolution of Status (subclass 851) visa, Department of Immigration and Citizenship, Canberra. Revised 9 August 2008. http://www.immi.gov.au/media/fact-sheets/68tpv_further.htm. NB the quoted text has recently been removed from the website. See the testimony of Andrew Metcalfe for recent confirmation of the non-effectiveness of TPVs as a deterrent, above, footnote 13.

[16] Crawley, H. 2010. *Chance or choice? Understanding why asylum seekers come to the UK*, London: Refugee Council, http://www.refugeecouncil.org.uk/policy/position/2010/18jan2010

[17] According to the Auditor General's 2008 report, detention costs per person per day range between $120 and $238. 2008 May Report of the Auditor General of Canada, Chapter 7—Detention and Removal of Individuals—Canada Border Services Agency, http://www.oag-bvg.gc.ca/internet/English/parl_oag_200805_07_e_30703.html

There are also significant long-term social and health costs involved in jailing traumatized people and keeping refugees separated from their families. Studies have shown that detention, especially prolonged detention, and temporary protection status lead to increased rates of trauma-related psychiatric symptoms.[18]

Canada has already tried denying accepted refugees the right to apply for permanent residence. In the 1990s, thousands of Somali and Afghan refugees were prevented from becoming permanent residents. Under the Undocumented Convention Refugee in Canada Class, they had to wait 5 years in order to become permanent residents. During that time they could not be reunited with their families, could not travel outside Canada, could not pursue post-secondary education and generally could not get on with their lives.[19] The policy was a disaster for the individuals and the communities affected. The policy was challenged in the courts on the basis that it was discriminatory, and the government eventually agreed to end the policy.[20]

8. Arbitrary power to designate – risk of politicizing

Bill C-4 gives the Minister of Public Safety the power to "designate" a group as an irregular arrival. In explaining the bill the government has repeatedly pointed to refugee claimants that arrive by boat, such as the Sri Lankan Tamils on the MV Sun Sea that arrived in British Columbia in 2010. But the bill does not say that the refugee claimants must have arrived by boat in order to be designated. A group could also be designated even if there was no smuggling involved. Since the word "group" is nowhere defined in the bill, it could presumably be as few as two persons. Once a group is designated, everyone in the group is punished. Since there are no objective criteria that need to be met for a group to be designated, there appears to be no protection against arbitrary decisions to designate a group, based on inappropriate factors.

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[18] "Our study suggests that prolonged detention exerts a long-term impact on the psychological well-being of refugees […] insecure residency and associated fears of repatriation contribute to the persistence of psychiatric symptoms and associated disabilities in refugees. […] Countries considering the adoption of temporary protection regimes therefore need to consider how such provisions may undermine the sense of security that seems to be essential for refugees to recover from trauma-related psychiatric symptoms. […] those refugees who were isolated from other family members were more likely to experience severe psychiatric symptoms." British Journal of Psychiatry, Impacts of immigration detention and temporary protection on the mental health of refugees, Zachary Steel, Derrick Silove, Robert Brooks, Shakeh Momartin, Bushra Alzuhairi, and Ina Susljik, January 2006; 188:58-64, http://bjp.rcpsych.org/content/188/1.toc.

A systematic review found that all relevant studies reported high levels of mental health problems in immigration detainees. "Anxiety, depression and post-traumatic stress disorder were commonly reported, as were self-harm and suicidal ideation. Time in detention was positively associated with severity of distress. There is evidence for an initial improvement in mental health occurring subsequent to release, although longitudinal results have shown that the negative impact of detention persists." British Journal of Psychiatry, Mental health implications of detaining asylum seekers: systematic review, Katy Robjant, Rita Hassan, and Cornelius Katona, April 2009 194:306-312, http://bjp.rcpsych.org/content/194/4.toc

[19] For more information, see Caledon Institute, *What's In A Name: Identity Documents and Convention Refugees*, 1999, http://www.caledoninst.org/Publications/PDF/whats.pdf

[20] A Charter challenge was launched by 9 Somalis in Ottawa, leading to an agreement in 2000 (an order made by Justice Hugessen of the Federal Court in December 2000 detailed the components of the agreement). The settlement was subsequently written into the 2002 Immigration and Refugee Protection Regulations, s. 178.

9. Damaging to Canada's international moral authority

If Bill C-4 is adopted, Canada will lack the moral authority to play a leadership role internationally in efforts to find solutions to the problems faced by refugees. When other countries are faced with challenges relating to refugees arriving on their territory, Canada will not credibly be able to urge those governments to comply with their legal obligations towards refugees, when here at home we are denying refugees their rights.

10. Undermining public support for refugees

Bill C-4 is being presented in a way that spreads damaging misinformation about refugees and about Canada's obligations towards refugees.

It is wrong to label refugee claimants queue-jumpers. There is no queue for refugees. International law guarantees to people fleeing persecution the right to go to another country and seek asylum – that is why we have a refugee determination system.

If your life is in danger, you run. You don't stand still and wait for help to come to you. Different rules apply to refugees because their lives are at stake.

These different rules were adopted following the Second World War when many countries, including Canada, had closed the door on Jewish refugees. Canada recently commemorated the tragic turning away of the MS St Louis, many of whose passengers were killed by the Nazis after Canada denied them entry. We do not want to go back to those days.

The arrival of almost 500 claimants by boat on the Sun Sea, certainly represents a logistical challenge, but it is not a crisis. The boat arrivals represent only 2% of the claims made in Canada last year.[21] We have laws in place to deal with such situations. The long-term detention of the passengers, including mothers with children, is not justified by the facts.

Unfortunately we are seeing in Canada a pattern of anti-refugee rhetoric, familiar to many other countries. In Australia and in Europe politicians have promoted myths and fear-mongering about refugees as a way of tapping into racist and xenophobic popular sentiments, in order to win votes. This is a short-term strategy that is destructive to society. Canada should not follow such a negative example.

Governments have a responsibility to defend our legal obligations towards refugees and promote the positive value of a welcoming refugee policy.

[21] There were 23,157 claims made in Canada in 2010, according to UNHCR, *Asylum Levels and Trends in Industrialized Countries First Half 2011*, October 2011, http://www.unhcr.org/4e9beaa19.html.

11. **Comments by clause**

Clause 5 - Designation

The Minister of Public Safety is given the power to *designate* as irregular the arrival of a group of persons. All members of the group are then subject to punitive measures (unless they have a valid visa for entering Canada).

Concerns:

- The very broad scope of the provisions gives vast discretionary power to the Minister to designate groups.

- The minimum number in the group is not defined, so the group could presumably be as few as two.

- The bill allows the Minister to designate a group on two grounds, only one of which relates to the stated purpose of the bill[22], i.e. to address people smuggling. The other ground refers to groups where the Minister believes it would be difficult to examine members in a timely manner, including for the purpose of establishing identity.[23] There is no requirement that there be even a suspicion of smuggling.

- The scope of the power is vast, and the threshold low (there are no objective criteria that must be met and the Minister only needs to hold an opinion, or have a suspicion). As a result designations could be made in an arbitrary manner. There would be minimal recourse to a court, since a court cannot in general second-guess a Minister's opinion or suspicion.

- It is fundamentally unfair and discriminatory to deprive some refugee claimants of important rights, based simply on the decision of the Minister. It may violate Charter equality rights (section 15).

- The Refugee Convention (section 31) prohibits States from imposing penalties on refugees for illegal entry or presence. Detaining some refugees and denying them permanent residence, based on their mode of arrival, violates this prohibition.

Clauses 10-15 – Mandatory detention without review

Designated claimants, including children, are mandatorily detained on arrival or on designation. There will be no review by the Immigration and Refugee Board (IRB) of their detention for 12 months. Release is only possible in the following situations:

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[22] 20.1(1)(b) "has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a contravention of subsection 117(1) for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group."

[23] 20.1(1)(a) "is of the opinion that examinations of the persons in the group, particularly for the purpose of establishing identity or determining inadmissibility — and any investigations concerning persons in the group — cannot be conducted in a timely manner."

a) The person is found to be a refugee
b) The IRB orders their release at a review after 12 months. Even after 12 months, the IRB cannot release the person if the government says that the person's identity has not been established.
c) The Minister decides there are "exceptional circumstances".

After 12 months detention, review is once every 6 months.

Concerns:

- Mandatory detention is an extreme measure, currently only provided for under the *Immigration and Refugee Protection Act* in the case of security certificates, where two Ministers make an individual determination with respect to a specific person believed to represent a threat to national security.[24] Bill C-4 would result in whole groups being subject to mandatory detention, based on the decision of a single minister, and without any national security issues necessarily being raised. There would be no opportunity for consideration of the particular circumstances of any member of the group, which might include children, seriously ill or injured individuals, pregnant women and elderly persons. Immigration officers would be required by law to detain them all.

- Detention for a year without review is a clear violation of the Canadian Charter of Rights and Freedoms. The Supreme Court has already struck down mandatory detention without review in Charkaoui, a security certificate case.[25]

- Mandatory detention without review is likely also a violation of International Covenant on Civil and Political Rights.[26]

- Mandatory detention of children without review is a violation of the Convention on the Rights of the Child, which requires that detention of children be a last resort, for the shortest appropriate time and subject to review by a court.[27] The Convention also requires that the best interests of the child be a primary consideration in any decision made concerning them.[28] The *Immigration and Refugee Protection Act* specifies (at s. 60) that detention of children shall be a measure of last resort, but the Bill C-4 detention provisions would override this protection.

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[24] IRPA s. 81.
[25] Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350.
[26] "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, art. 9 (4).
[27] Convention on the Rights of the Child, Art. 37 "(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; [...] (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."
[28] Convention on the Rights of the Child, Article 3 (1) "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

- Clauses 11 and 14 provide for the Minister to order the release of a designated person if, in the Minister's opinion, exceptional circumstances exist. Since being a child is not an "exceptional circumstance", it is not clear that this provision would be useful for detained children. Other circumstances that make detention particularly painful for refugees, such as trauma from violence and ill-health, are unfortunately not at all exceptional for refugees.

- Limiting review to once every six months, after the initial 12 months period, is extremely harsh. There might be grounds to release a person a week after the first review, but the person would have to stay in detention for nearly 6 months more. (The bill specifically prohibits a detention review being heard before the expiry of the 6 months). The normal rule in the *Immigration and Refugee Protection Act* is for detainees to receive a detention review every 30 days.

Clause 13 – Indefinite detention on the basis of identity

The criteria for release by the Immigration and Refugee Board are amended to provide for indefinite detention on the basis of identity, with no possibility of release until the Minister decides that identity is established.

Concerns:

- This provision makes the detention review after a year potentially meaningless. If the Minister says that the person's identity has not been established, the IRB will have no power to release them. An absolute unreviewable power to detain is a hallmark of arbitrary detention.

Clause 13 – Conditions on release from detention

Mandatory conditions set out in regulations will be imposed on all designated claimants released from detention.

Concerns:

- We don't know what the conditions will be imposed, but on principle mandatory conditions would be unfair, as they don't take into account the individual case (and could be very burdensome).

- The mandatory nature of the conditions, and the fact that they are not subject to individual review, would seem to be a violation of the Charter, based on the Supreme Court's ruling in Charkaoui:

> I conclude that the s. 7 principles of fundamental justice and the s. 12 guarantee of freedom from cruel and unusual treatment require that, where a person is detained or is subject to onerous conditions of release for an extended period under immigration law, the detention or the conditions must be accompanied by a meaningful process of ongoing review that takes into account the context and circumstances of the individual case. Such persons must have meaningful opportunities to challenge their continued detention or the conditions of their release. [para. 107]

Clause 16 – Reporting requirements

A designated person who has been accepted as a refugee must report to an immigration officer as required by regulations, and answer all questions.

Concerns:

- There is no limit set on the the number of times the person might be required to report, the type of questions that might be posed or the purpose of the investigation. This is another way refugees who are designated are subjected to unequal and unfair treatment.

- Until they have permanent status, refugees feel insecure. Being subject to unlimited reporting requirements will only enhance their feelings of insecurity. They may reasonably fear that their answers might be used against themselves in future cessation proceedings, or that they will be expected to inform against others.

Clause 17 – Appeal

Decisions on claims by designated persons cannot be appealed to the Refugee Appeal Division.

Concerns:

- This is unequal and unfair treatment of designated persons. The appeal mechanism exists to correct errors at the first instance – the fact that the government is unhappy with their mode of arrival is no reason to fail to correct errors in the refugee determination.

- Mistakes in refugee determination that go uncorrected can lead to the forced return of refugees to face persecution, in violation of Canada's non-refoulement obligations under the Refugee Convention and the Convention against Torture.

Clause 4 – 5 year suspension of permanent residence

A designated claimant cannot apply for permanent residence for 5 years. The 5 years start on the date of their refugee or PRRA decision. If they didn't make a refugee claim or PRRA application, the 5 years start on the date of designation. If the person fails to comply with the conditions or reporting requirements, the 5 years suspension can be extended to 6 years.

Concerns:

- For accepted refugees the worst consequence of this rule is that it delays reunification with spouse and children overseas for 5 years.[29] This is a violation of the Convention on the Rights of the Child.[30]

- Non-refugees are also affected. They cannot, for example, be sponsored by a spouse or a parent, leading to violation of family unity rights. It applies to applications from overseas as

[29] In practice, the time of separation would be much more than five years, as it would include the time before refugee determination

[30] Convention on the Rights of the Child, art. 10 (1) "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner."

well as in-Canada. For example, a child might arrive as part of a designated group, be removed from Canada (despite having a parent in Canada) and then be denied for five years the possibility of reuniting with the parent in Canada through a Family Class sponsorship.

- Without permanent residence, refugees' integration is severely restricted. For example, their employment opportunities are limited, in part because their Social Insurance Number identifies them as holders of only temporary status. For similar reasons, they cannot obtain loans and mortgages for homes, vehicles or businesses.

- The five-year delay for refugees before they can apply for permanent residence also postpones the moment at which they can apply for Canadian citizenship. One of Canada's obligations under the Refugee Convention is to facilitate access to citizenship:

  > The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings... [Article 34]

Clause 9 – Refugee travel document

Article 28 of the Refugee Convention obliges States to issue travel documents.[31] Bill C-4 proposes to interpret Article 28 so as to not apply to designated persons, until they become permanent residents (or are issued a temporary resident permit). The effect of this provision would be to deny to designated refugees the right to travel outside Canada for at least 5 years after they have been accepted as a refugee.

Concerns:

- This is a clear violation of Refugee Convention. The proposed legislative text is actually announcing the intention to violate the Convention.

- This is an offensive and improper attempt to legislate away rights established by international treaty. It is a disturbing precedent – is Parliament going to be regularly passing laws to deny treaty rights?

- Refugees may need to visit family members – with a travel document they could travel to a third country to meet family.[32] Without a travel document this is impossible.

Clause 8 – Bar on H&C applications for 5 years

Designated persons cannot make an application for permanent residence on humanitarian and compassionate grounds (or apply for a temporary resident permit – Clause 4) for 5 years. As with applications for permanent residence (Clause 4), the 5 years can be extended to 6 years for non-compliance with conditions or reporting requirements.

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[31] Convention relating to the Status of Refugees, art. 28 (1) "The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require..."

[32] It should be noted that refugee travel documents are not valid for return to the country of origin, so there is no issue of refugees going back home.

Concerns:

- Section 25 (H&C applications) is the discretionary safety net that is necessary to prevent inhumane treatment and respond to cases that don't meet the inflexible immigration rules. By denying designated persons access to this recourse, there will be more people that fall through the cracks.

- The only application to remain in Canada in which the best interests of a child are considered is an application on humanitarian and compassionate (H&C) grounds (Section 25). Barring designated persons from making H&C applications therefore means that children could be deported from Canada without any consideration of their best interests. This would violate of the Convention on the Rights of the Child, which requires States to give primary consideration to the best interests of the child in any decision taken concerning them.[33]

Clause 34 – Retroactive application

Bill C-34 allows the Minister to designate an arrival at any time, including long after the arrival. If the bill is passed, the Minister could make retroactive designations for arrivals in Canada since March 31, 2009. In other words, the passengers of the Ocean Lady and Sun Sea could be designated (they would not however be arrested and detained).

Concerns:

- It is unfair to make a punitive law apply retroactively.

OTHER CHANGES TO THE REFUGEE SYSTEM

Clause 17 – Appeal

No appeal to the Refugee Appeal Division is allowed from a cessation or vacation decision.

Concerns:

- C-11 was passed a litte over a year ago, and is not even yet in force. This is not the time to be re-opening matters so recently decided by Parliament.

- A decision on cessation (i.e. that a refugee is no longer at risk), if incorrect, may lead to a refugee being sent back to persecution, in violation of the non-refoulement obligation. An appeal is therefore necessary to avoid errors, just as an appeal is necessary for the initial refugee determination. The same applies to vacation decisions.

OTHER CHANGES TO POWERS OF DETENTION

Clause 10 – Detention on the basis of criminality

[33] Article 3.

Immigration officers will receive a new power to detain permanent residents or foreign nationals on entry into Canada on the basis of a suspicion of "serious criminality, criminality, or organized criminality."

Concerns:

- These new powers to detain are not limited to people who are part of a designated arrival, nor to people suspected of any connection to smuggling. The scope of these powers therefore go far beyond the purported purpose of the bill.

- Following this amendment, any permanent resident, international student, temporary worker and visitor could be detained on arrival in Canada simply on the basis that an immigration officer suspects that they have committed a crime. The potential of arbitrary detention is great and must be a concern to all non-citizens.

SMUGGLING

Clause 18 – Breadth of definition of smuggling

Bill C-4 broadens the offence of human smuggling. The new definition no longer requires proof that the accused knew that it was or might be against the law for the people being assisted to enter Canada.

Concerns:

- This expanded definition seems aimed at including people who have no objective intent to break the law, and could affect people who are acting from humanitarian motives to help refugees.

- Taking away the knowledge requirement may lead to absolute liability, in violation of section 7 of the Charter.

The current definition needs to be narrowed, not broadened, in order to clearly exclude people motivated only by a desire to help refugees find asylum. In 2007, smuggling charges were laid against a refugee worker from the US, Janet Hinshaw-Thomas. Although the charges were subsequently dropped, the law as it currently stands, and as amended by Bill C-4, makes it possible for people acting purely for humanitarian motives to be prosecuted.

Clause 18 – Mandatory minimum sentences

The bill will impose mandatory sentences for some categories of smugglers.

Concerns:

- IRPA already contains the most serious penalties for convicted smugglers: life imprisonment and up to a $1 million dollar fine. If the prospect of tough penalties could deter human smuggling, it already would have. Indeed, there is no persuasive evidence that mandatory minimum sentences deter others.

- After a lengthy experiment with minimum sentencing, the US is rejecting it as too costly, not effective as a deterrence and discriminatory.

- Mandatory minimum sentencing has been criticized for well over fifty years by the Canadian Sentencing Commission, several other national organizations as well as social scientists. The literature notes the following: (i) mandatory minimum sentences cannot deter people from committing crimes because most people do not even know the existence of minimum sentences; (ii) potential offenders are deterred not by mandatory minimum sentences, but rather by the probability of detection; (iii) putting people in prison for longer periods of time may make them more likely to re-offend when they get out of prison as compared to punishing them some other way in the community; (iv) negative impacts of mandatory minimum penalties include unfairness and deepening systemic inequalities, including racism; (v) states such as Michigan and the Northern Territories of Australia are retreating from mandatory minimum sentencing as a result of their negative experience with its consequences; (vi) incarceration is costly – money spent keeping an inmate unnecessarily in prison means money that cannot be spent on more effective crime control strategies.

- Judges are best positioned to tailor a sentence to fit the offender's motive and individual circumstances.

12. Conclusion

In summary, Bill C-4 would be unfair and inhumane to refugees, would be costly for Canadian taxpayers and would not even achieve the stated objectives of the bill. Several of its provisions would likely fail a Charter challenge, as well as subjecting Canada to international criticism for violation of our international obligations.

Bill C-4 must be withdrawn or defeated.