



Beyond Control

The Right to Refugee Protection: A Question of Justice

Submission on Bill C-11

Brief presented to the

Standing Committee on Citizenship and Immigration

by

Le Centre justice et foi

Vivre ensemble section

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Foreword

The Centre justice et foi (CJF) is a social analysis centre founded in 1983 that takes a critical look at the sociopolitical, economic, cultural and religious structures of our day. CJF is inspired by the tradition of social Catholicism, and its objective is to participate in building a society based on justice. Advocacy for the excluded is central to its analysis. Its team promotes active citizenship, works to build a welcoming society for newcomers and speaks out against the injustices that are barriers to the process of social integration. The CJF is particularly concerned with issues relating to immigration, refugee protection and the reception and integration of newcomers into Canadian and Quebec society.

To that end, the CJF has had a section since 1985 that has developed recognized expertise over the years and that has been seen in the past in the publication of a regular newsletter (*Vivre ensemble*) and in public activities and numerous briefs, consultations and submissions to the governments of Canada and Quebec.

In association with its partners, CJF has followed the various debates and discussions relating to Canada's refugee protection system. More recently, in November 2009, the CJF brought together a number of organizations to expand our analysis of these issues. It published a working paper whose main elements are set out in this brief. In addition, the last issue of *Vivre ensemble* deals with issues relating to the right to refugee protection here and elsewhere.¹

We believe that the CJF has a specific perspective that is connected with its commitment to justice, and it is that perspective that we thought it would be useful to share with the members of the Standing Committee. The ideas that have come out of that perspective will, we hope, make a contribution to improving Bill C-11 before its final passage.

¹ "Droit d'asile en peril", *Vivre ensemble*, vol. 17, No. 58, winter/spring 2010, available on line at www.cjf.qc.ca/ve/bulletins/2010/Vol17No58/Vol_17_No_58.pdf.

Introduction

As respect for rights and democracy gains ground as a universally recognized norm, violations of those rights and the absence of democracy seem to be increasingly intolerable and warrant the provision of protection. As well, the forms of persecution reflected in the Geneva Convention on refugees have become more numerous and diverse since the Convention was adopted in 1951. The fact now is that more and more people are being forced to leave their countries of origin for the most diverse and valid reasons, to seek protection whether in bordering countries or in countries that are better able to offer them adequate protection. Those situations are not going to decline in the years to come, and the causes of injustice do not seem to be a priority for the countries of the North. No matter what measures those countries may take to exclude, intercept or remove people, individuals who need international protection will continue to flee their countries.

Reform of the Canadian immigration and refugee protection system is taking place in a global context in which the migratory paradigm is changing. The need to preserve the integrity and effectiveness of the refugee protection scheme is a major concern in the countries of the North, who have since 1980 been dealing with challenges like the diversity of migratory flows and the rise in the number of undocumented migrants and asylum seekers. This concern has prompted some countries to tighten controls on foreigners, in particular through greater international cooperation. The perception of refugee protection as an alternative route to economic migration has justified the implementation of measures to narrow the refugee protection scheme and has contributed to the deterioration of the terms on which claimants are received. As may be seen in the influence of the British model on Bill C-11, this global trend is affecting norms and policies in Canada. The recent measures are similar to those adopted by the United States and certain European Union member countries two decades ago: visa policies, expedited refugee claim hearings, sanctions imposed on carriers, criminalization of assistance for irregular migration, the growing use of deterrents such as detention and forced removal, and so on. Those measures have not been proven effective: irregular migration is rising and refugee protection claims have not declined. On the other hand, they have had particularly negative effects from the human rights perspective. Given these facts, we are entitled to question how wide it would be to align Canadian policies with the enforcement-oriented policies of Europe and the United States.

The present situation has major implications for the lives of the people concerned. Accordingly, we need to adopt a human rights-based analytical approach that takes the key issues into account. In that regard, the factors that underlie the current ill-advised moves have to be identified (for example, the position of the present Minister) and violations of the fundamental rights protected by the *Charter of Rights and Freedoms* must be stressed.

Reform of the refugee protection system is needed, to make the refugee determination process fairer and more effective. However, the main purpose of that kind of reform must be to ensure that the right to refugee protection is guaranteed. It must be said that at present, this right is limited by measures

such as interception of asylum seekers before they reach the borders and a dysfunctional refugee determination process. That dysfunction relates particularly to decisions based on suspicion without confrontation, both during the refugee determination process and at interviews conducted by immigration officers before the borders are reached; the lack of information about the system made available to claimants; inconsistencies in decisions, that result in irreparable errors because there is no appeal; and unreasonable delay in processing applications. Bill C-11 does not do a lot to provide adequate solutions to each of those problems. On the contrary: it contains new provisions that could worsen the situation in terms of access to the right to refugee protection and the effective exercise of that right by refugee claimants.

We believe profoundly in the importance of removing the public discourse and debate about immigration and protection from the criminalization model to which they have been increasingly confined in recent years.

Before stating our concerns about these provisions, we think it important to look at the political context that preceded the introduction of the bill and to point out the impact that recent decisions have had on the refugee protection system. We believe that this analysis will make it easier to identify the deeper motivations behind the reform proposal, since those decisions are part of the same model of controlling migration.

Current issues in refugee protection

The Minister of Citizenship, Immigration and Multiculturalism justifies the reform of the refugee determination system by asserting the need to “handle refugee claims in an orderly manner” and to avoid the system becoming an entrance for people who do not need international protection. The pretext asserted was unclogging the system, which was facing a significant backlog of cases awaiting hearing (60,000 claims) and excessive delay in implementing an appeal system for unsuccessful claimants. The measures taken by the Minister in the summer of 2009 met the objective of limiting the number of refugee claimants. Mexican and Czech nationals were not required to obtain a visa to visit Canada. In doing that, the government was trying to put a stop to the rise in asylum seekers coming from those countries.

Since October 2007, about 3,000 claims have been made by Czech nationals of Roma origin. The number of Mexican refugee claimants has tripled since 2005, reaching 9,400 claims, or 25% of all claims made in Canada in 2008. The Minister justifies his decision by saying that “the visa process will allow us to assess who is coming to Canada as a legitimate visitor and who might be trying to use the refugee system to jump the immigration queue”. Many independent sources report serious human rights violations in those countries. The situation is of particular concern in Mexico, where people who belong to certain social groups face a higher risk of persecution. The acceptance rates for

refugee protection claims by Roma from the Czech Republic (40%) and by Mexicans (11%) in Canada in 2008 demonstrate the need that certain nationals of those countries have for international protection.² The visa requirement prevents people who are persecuted from obtaining the international protection provided for in the *Geneva Convention on the Status of Refugees*. In addition, that measure exacerbates irregular migration: people who cannot obtain a visa often use illegal methods to circumvent the controls, such as forged travel documents, a network of smugglers, and so on.

In addition, on July 23, 2009, the government lifted the temporary moratorium on removals for nationals of Burundi, Liberia and Rwanda. On the same date, an exception set out in the *Safe Third Country Agreement* was revoked. From now on, nationals of countries covered by a temporary moratorium on removals (Afghanistan, Democratic Republic of Congo, Haiti, Iraq and Zimbabwe) are no longer permitted to cross the land border between Canada and the United States to claim refugee protection in Canada.³ The purpose of that decision is to reduce the number of refugee protection claims made at the border by Haitian nationals, who represented about 80% of all claims in 2008 (about 4,000 claims).⁴ However, revocation of the exception in the *Safe Third Country Agreement* exposes a person returned by Canada to the danger of lengthy detention in the United States and deprivation of procedural guarantees against refoulement to a destination where they are at risk of persecution.⁵

To summarize, not only is Canada toughening its political discourse regarding refugee claimants, it is also deploying concrete measures to strengthen migratory controls before the border is reached. As we will discuss later, Bill C-11 confirms that trend. The Minister is stating his intention to provide faster and more effective processing of claims. Expediting the procedure may be a laudable goal for some claimants. However, there can be no doubt that it will be done at the expense of many others, including those who are most vulnerable.

Concerns regarding Bill C-11

We do not intend to address all points in the bill in detail that might present problems or that would benefit from improvement; there are other groups who have developed that analysis and expertise, in relation either to the law or to experience on the ground in the reception and integration of immigrants and refugees, better than us. We are also members of the Canadian Council for Refugees and the Table de concertation des organismes au service des personnes réfugiées et immigrantes, and we are in contact with several groups that work in areas that complement our own work. However,

² CASTONGUAY Alec, “Visas : la décision d’Ottawa soulève une tempête”, *La Presse*, July 15, 2009.

³ CIC, “Minister Kenney announces removal of exception relating to Safe Third Country Agreement”, News Release, Ottawa, July 23, 2009.

⁴ FORTIN, Karine, “Un obstacle de plus pour les demandeurs d’asile haïtiens”, *Canadian Press*, July 24, 2009.

⁵ ANKER Deborah and Harvard Law Student Advocates for Human Rights & The International Human Rights Clinic, Human Rights Program, “Bordering on failure: the US-Canada safe third country fifteen months after implementation”, March 2006.

we would like to draw your attention to several points relating to protection that we consider to be particularly important, in our advocacy for justice.

The points on which we are mainly concerned, in relation to Bill C-11, deal with the following areas:

- Unequal treatment based on origin.
- Access to fair and equitable procedures that take into account the difficulties encountered by refugee claimants.
- Access to humanitarian and compassionate applications.

1. Designation of countries of origin

The bill provides for the creation of a list of “safe countries of origin” (169.1 [109.1–Tr.]). Nationals of those countries will have no right to appeal a negative decision by the Refugee Protection Division.

This proposal is modeled on the policies of certain European countries, including the United Kingdom, where the law sets out a list of countries of origin considered to be safe. Asylum claims by nationals of those countries are considered to be “clearly unfounded”. At the beginning of the process, they are classified as “non-suspensive appeal cases”. In addition, if the Home Secretary is satisfied that there is a country to which an asylum claimant may be sent, their claim is rejected in principle. The Minister provides an indicative list of countries (there were 54 at the beginning of 2009). A claimant who comes from one of those countries is deemed to be eligible for that procedure.

Implementation of this policy is particularly problematic. The concept of “safe third country” leads to different treatment of the refugee protection claim based on the claimants’ geographic origin. That is contrary to Article 3 of the *Geneva Convention*, which requires that states parties not discriminate on the basis of race, religion or country of origin. In fact, the British courts have condemned decisions made by the government on several occasions because of violations of the principle of non-refoulement, the right to family life or privacy. They have further stated that the Home Secretary could not rely on the mere fact that the third country has signed the *Geneva Convention* as a basis for finding it safe: he must make sure that the country is acting in good faith in compliance with its international obligations. The level of judicial review in the United Kingdom of decisions relating to claimants from “safe” countries has also been severely cut back. In addition, that policy penalizes the most vulnerable people, like victims of torture who are suffering from post-traumatic stress. The claimants affected also include women who make claims based on gender and people complaining of persecution on the ground of sexual orientation or identity. Those examples illustrate how in many countries that otherwise seem relatively peaceful and “safe”, serious problems of persecution may exist for people who belong to certain social groups. The consequence of the country of origin designation provided for in the bill will be to significantly reduce the level of protection offered to those individuals. It increases the risk of refoulement. We believe the concept of “safe third country”

creates a double-standard system, where some claimants do not have access to appeals based on their nationality. For those reasons, we believe that Canada should not follow the example of the European countries. It must not incorporate the “safe third country” concept into its legislation, since that concept leads to violations of fundamental rights, and is thus counterproductive in terms of unclogging the judicial system.

Recommendation 1: That section 109.1 relating to designated countries of origin be removed from the bill.

2. Composition of the Refugee Protection Division

Bill C-11 assigns the initial interview to officials. Under section 169.1(2) in the bill, the members of the Refugee Protection Division are appointed under the *Public Service Employment Act*. Again, this is an amendment modeled on the British system, where immigration officers conduct the initial interview, which is a crucial stage at which claims are “screened”. Those officials do not meet the requirements of independence and impartiality, and this is a source of concern in view of the government’s political objectives. In the United Kingdom, some observers have expressed their concerns regarding the qualifications and training of these officers and the broad powers they are given.

The same concerns may be raised in Canada regarding the expanded role assigned to officers in the refugee determination process. How can the independence of those officers from the government, in both its executive and political manifestations, when its goal is to reduce the number of claimants and its political discourse seeks to delegitimize refugee protection claims made in Canada? What guarantees are there that claims by claimants from “safe” countries will be considered fairly and equitably by officers of a government who operate on the presumption that there is no persecution in those countries? How will the officers be trained, to guarantee the quality of decisions by the Refugee Protection Division? How much will the training cost? These are only a few of the fundamental issues associated with the amendment in the bill. Adequate answers have to be provided before any change is made to the system.

Recommendation 2: Replace section 169.1(2) in the bill with a new subsection that will provide that the members of the Refugee Protection Division are appointed by the Chair of the IRB from a pool of highly qualified candidates, based on the recommendations of a selection committee and in accordance with the criteria provided in the Act. Specify as well that the members may be public servants.

3. Deadlines for the first interview and hearing

Bill C-11 provides that a person whose claim is referred to the Refugee Protection Division is required to attend for interview on the date fixed by the officer (section 100(4)). The deadlines for

interviews and hearings to be held are not referred to there. Those points will be specified in the regulations. It is expected that the first interview will be held within eight days following submission of the claim, and the hearing will be held within two months. These deadlines are too short to enable claimants to prepare for the interview and submit evidence in support of their claim.

Expediting these things could be laudable if there were guarantees that the procedure was fair. The case of certain European countries shows that expediting the process always occurs at the expense of fundamental rights. If we refer to the British model, where the objective is to finalize the normal consideration of an asylum claim in six months, some observers point out that shortening the time occurs at the expense of the quality of decisions. Claimants do not have sufficient time to assemble the evidence to support their claims. Procedural guarantees are reduced: asylum claimants have trouble finding a lawyer, legal aid is limited, and so on. In addition, the British system comes with a high price tag: 176 million pounds sterling for 2007 and 2008.⁶ It is plainly ineffective. Only 7% to 9% of unsuccessful claimants are removed, because of recurring difficulties like having no travel documents and the problem of escorts. The British authorities have been unable to meet their objectives of reducing asylum claims or handling them effectively. One reason for this ineffectiveness is that the courts have set aside decisions by the British government where the decisions violate fundamental rights.

In light of the British experience, the proposed amendment to the IRPA seems to us to be inappropriate. The deadlines must continue to be flexible and adapted to the needs of each claimant, who will be assessed on a case by case basis. Strict dates penalize people coming from certain countries where it is harder to obtain evidence of persecution, as compared to other countries. They disadvantage the most vulnerable claimants, like victims of torture or rape, who have trouble getting medical reports to support their claims. The *Guideline on Procedures with Respect to Vulnerable Persons Appearing before the IRB* stress the crucial importance of this kind of evidence in refugee status determinations:

8.1 A medical, psychiatric, psychological, or other expert report regarding the vulnerable person is an important piece of evidence that must be considered. Expert evidence can be of great assistance to the IRB in applying this Guideline if it addresses the person's particular difficulty in coping with the hearing process, including the person's ability to give coherent testimony.

Recommendation 3: That the references to the conduct of an interview in sections 100.(4) and 161.(1)(a) be removed.

Recommendation 4: That no reference be made in the regulations relating to deadlines for the conduct of an interview or the holding of a hearing.

⁶ About 275 million Canadian dollars.

4. Humanitarian and compassionate grounds

As a final point, the bill significantly limits refugee claimants' ability to make an application on humanitarian and compassionate (H&C) grounds. There are restrictions while the refugee protection claim is in process and for 12 months afterward. An application on humanitarian and compassionate grounds does not stay the removal order, and so there is every reason to believe that people will be removed from Canada during that time. The opportunity to argue humanitarian and compassionate grounds for remaining in Canada will thus become moot for many people. In addition, this change will affect the most vulnerable foreign nationals.

Recommendation 5: Remove section 24.(4) in the bill relating to applications on humanitarian and compassionate grounds.

The bill contains a new clause providing that the Minister is seized of a request on humanitarian and compassionate grounds only if the applicable fees have been paid (25(1.1)). We believe that this provision discriminates against the most disadvantaged applicants, such as single mothers and victims of human trafficking. It imposes a significant financial burden on these vulnerable people.

Recommendation 6: That section 25(1.1) in the bill be amended as follows: "Where the Minister is seized of a request referred to in subsection (1), the Minister may exempt the foreign national from payment of the applicable fees."

Conclusion

While it may seem legitimate to seek to use adequate controls to protect the public in relation to public health and safety, for example, it is just as important to protect, collectively, the political, legal and humanitarian achievements that are essential to Canadian society. The Canadian humanitarian tradition in relation to both migrants and refugees or displaced persons is essentially based on three fundamental principles:

- (1) the Universal Declaration of Human Rights, adopted in 1948, which states, in Article 13, that everyone has the right to freedom of movement and the right to leave their country, and in Article 14, that everyone has the right to seek and enjoy asylum from persecution in other countries;
- (2) the 1951 Geneva Convention and the 1967 Protocol, which set out the various rights guaranteed to refugees; and
- (3) the Canadian Charter of Rights, as interpreted by the Supreme Court of Canada, *inter alia* in *Singh* in 1985 and in *Ward* in 1993, which hold, in particular, that every refugee claimant must, when dealing with an agent of Canada, know what they have to prove, be

able to be heard by the person who will decide their claim, be informed of the criteria and reasons for the decision made, and, where necessary, be given protection that compensates for the inability of their country of origin to protect them.

That is the spirit in which any reform of the Canadian refugee protection system must be undertaken. It must not be done at the expense of the universal collective values expressed in the human rights to which Canada has clearly committed itself.

Summary of recommendations

We would like to briefly reiterate the main recommendations made in our brief.

Recommendation 1: That section 109.1 relating to designated countries of origin be removed from the bill.

Recommendation 2: Replace section 169.1(2) in the bill with a new subsection that will provide that the members of the Refugee Protection Division are appointed by the Chair of the IRB from a pool of highly qualified candidates, based on the recommendations of a selection committee and in accordance with the criteria provided in the Act. Specify as well that the members may be public servants.

Recommendation 3: That the references to the conduct of an interview in sections 100.(4) and 161.(1)(a) be removed.

Recommendation 4: That no reference be made in the regulations relating to deadlines for the conduct of an interview or the holding of a hearing.

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Appendix

One of our collaborators, Fernand Gauthier, who was a member of the IRB in Montreal from 1989 to 1998, in addition to various other responsibilities there, has written an article specifically addressing the concerns of refugees and their friends and family about the possible inequities in Bill C-11. We believed it useful to share his thoughts with the Standing Committee.

Questions and concerns about Bill C-11

The people at whom Bill C-11 is directed are people who live in society with us, after they and sometimes their families escaped from unfair and abusive situations in their countries of origin. Like the Minister who has introduced this proposal for reforming our Immigration and Refugee Protection Act, those people want to see a fair, speedy and effective process for having their need for protection heard and thus making up for the inability or unwillingness of their country of origin to help them.

These migrant people understand, from the people they know in their host community, that the Minister wants to protect them from mistakes that officials might make when questioning them about the reasons why they fled, and it is for that purpose that the Minister is proposing an appeal process that the Parliament of Canada had provided for in 2002.

At the same time, refugee claimants fear the risks associated with being returned to their country, for themselves or their families. They know that anything could still happen to them there. They have good reasons to be anxious when they realize everything contained in the proposed reform.

The main concerns of people who have come here in search of protection can be summarized in three points:

1. The requirement that they have a first interview within eight days of making the claim raises the following objections:

- How will the Minister be able to meet that deadline? It cannot reasonably be expected that people who are among the most vulnerable will be able to describe, precisely and in detail, all of the factors in support of their claim, within a week after fleeing a dangerous situation.
- What are the qualifications of the IRB officials who will conduct that interview, how are they appointed, and what latitude do they have?
- How will they go about determining whether the claim is admissible, if the same officials are responsible for that?
- How will the information about the claim be collected? What questions will be asked, and within what timeframe?

So as not to double the Board's workload at the hearing, it would be appropriate for these officials, who conduct the first interview, to stick to a general question, with the sole objective of determining what procedure is best suited to the claim, for example: "In general, without going into detail, why are you claiming protection outside your country?" The answer to that question would be recorded and transcribed, and a copy given to the claimant in the language they speak.

- How will the official conducting the interview be able to act as the registrar, for setting the date of a hearing before a member?
 - How will the information collected be transmitted to the member who hears the case? In what forms?
 - Will the involvement of the official who prepares the *Personal Information Form* eliminate the excuse that was used to reverse the order of examination in chief at the hearing?
 - How will the official find the interpreter they consider to be necessary for the interview?
 - Will the interview with the official require that a lawyer for the person being questioned be present if their questions metamorphose into an initial hearing on the reasons for the claim? (see *Dehghani v. Canada*, March 25, 1993)
 - If the person claiming protection comes from a country that the Minister has designated as a “safe” country, should the person have an opportunity to make their case orally, in order to make submissions regarding information that is inconsistent with their claim on which the Minister’s judgment is based?
2. The hearing before a member/official of the IRB raises questions.
- Who will be present at the hearing? What will procedure and decorum be? The principles of fundamental justice require that a person claiming refugee protection be able to make their case orally, with the assistance of counsel, before being questioned by the panel, regardless of what documents are in the file.
 - What will the roles of the persons present at the examination be?
 - What will the powers of the officials be, and what latitude will they have?
 - What questions will be considered in support of their decisions?
 - Will they be free to act on or disregard the opinions of counsel in their legal services?
 - What rules of conduct will be adopted for dealing with the Canadian case law and international conventions?
 - Will they be free to reject opinions stated by their Minister about all nationals of a country? Especially when he states opinions without hearing claims by persons seeking refugee protection?
3. Errors by decision-makers that will affect refugee claimants.
- Will these errors be similar to the errors regularly made by the officials chosen to do pre-removal risk assessments? – unfamiliarity with or rejection of documents describing the characteristics of the country of origin; unfamiliarity with or contempt for the UNHCR’s Manual or for decisions of the Supreme Court, or our Charters.

Errors may arise from the model already found in the public service: among officers who issue visas outside Canada who are often unaware of what they don’t know, credibility being determined with the same common prejudices seen in the officers who protect our borders, religious beliefs being examined solely by determining knowledge of religious doctrine, refusal to accept evidence submitted by a claimant without giving reasons, failure to consider allegations of torture, rape and inhuman detention conditions, insensitivity to manifestations of the effects of trauma, particularly in the case of women victims of violence testifying in front of men, and the use of improper interview techniques (interrupting testimony, impatience, poor use of interpreters, and so on).

These concerns, or questions, will have to be considered carefully by members of Parliament if we intend to give the people in our society who turn to our country for protection a fair hearing and the appropriate support.

Fernand Gauthier

May 18, 2010