BILL C-11

An Act to amend the Immigration and Refugee Protection Act

and the Federal Courts Act

(3rd Session, 40th Parliament, 59 Elizabeth II, 2010)

Brief

submitted to the

Standing Committee on Citizenship and Immigration

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BRIEF CONCERNING BILL C-11

An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act
(3rd Session, 40th Parliament, 59 Elizabeth II, 2010)

We are a group of students in the Faculty of Law at the Université de Montréal. We are submitting our comments concerning Bill C-11 – *An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act*.

We are particularly concerned about the amendments dealing with the appointment of members of the Refugee Protection Division, certain aspects of the appeal mechanism and the list of designated countries of origin.

We nonetheless believe that the bill proposes a needed reform of the refugee determination system, while ensuring a fair balance between justice and speed. Making the process of granting refugee protection more expeditious is certainly a sound goal, since Canada is currently experiencing many delays in processing claims. It is therefore important to expedite the processing of refugee protection claims and provide an appeal mechanism to make sure that justice is done fairly.

In addition to having a negative impact on the administration of the Canadian justice system, the current waiting times for refugee determinations have a devastating effect on the lives of refugee claimants. They are left waiting, in a state of complete uncertainty, for several years, while at the same time they are trying to integrate into our society to the extent they can. We are therefore glad to see the government's intention to expedite the refugee determination process. We also hope that this reform will achieve the government's objectives in a manner consistent with Canada's international obligations, and in particular those set out in the *United Nations Convention Relating to the Status of Refugees* and in the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

We therefore thought it useful to send you our brief, so we could inform you of certain comments. We sincerely hope that this will assist you on certain points that are essential for protecting the rights of refugee claimants, who are among the most vulnerable groups in our society, and will help Canada to preserve its good international reputation in relation to refugee protection.

In our opinion, the first draft of the bill raises serious concerns, and there are aspects that must be revised in order to achieve the dual objective of speed and justice. It is essential to strike a fair balance between protecting refugee claimants and having an effective and speedy system. It is just as important that Canada offer protection to people who genuinely need it. What we are suggesting is that the problems experienced in the protection scheme that exists in the United Kingdom be avoided. For several years, the United Kingdom has been working with a system similar to the one provided in the bill. It is highly relevant to consider its experiences, given the similarities between the United Kingdom and Canada in terms of their institutions and legal systems.

We are therefore submitting our concerns relating to the amendments to the appointment process for members of the Refugee Protection Division, the question of residence on humanitarian and compassionate grounds, the mechanism for appealing to the Refugee Appeal Division, and the designation of countries of origin.

COMMENTS AND RECOMMENDATIONS

Expedited process. The present refugee determination process allows some claimants to use the expedited process for processing their claims. Claimants from certain countries and certain specific types of claims are referred to a member of the RPD within 72 hours after receipt of the claim. The initial screening relating to eligibility of the claim is done for manifestly well-founded cases. Those cases are therefore heard faster. More complex cases that are determined by the officer to be eligible are also referred to the IRB, but are dealt with at a full hearing, after a lengthy period of consideration. The expedited process, which is found in the Refugee Protection Division's directives, has existed in its exact current form since 2005. It was established specifically with the goal of expediting certain refugee protection claims. However, we are still facing serious backlogs in this area today. The process that was designed for simplicity and speed does not seem to have made a real contribution to unclogging the system.

We therefore question the fact that the bill retains the same process, with a few exceptions—exceptions that in fact make the procedure less favourable to refugee claimants. For instance, the Refugee Protection Division officer responsible for making a recommendation about a case to the members is only authorized at present to decide whether the claim is eligible, and not to make a decision on granting refugee status.

Members of the Refugee Protection Division. The summary of the bill states that members of the Refugee Protection Division will be appointed "in accordance with the *Public Service Employment Act*". The amendments to the *Immigration and Refugee Protection Act* will now allow for an RPD officer to be given responsibility for cases in the first instance. On that point, we, like many other people, have serious concerns. This arrangement creates real problems in terms of the degree of independence of the decision-maker, and creates a risk that the refugee determination process will become arbitrary. Officials appointed in accordance with the *Public Service Employment Act* do

not enjoy the same guarantees of independence as the RPD members, appointed for specific terms, who are responsible at present for hearing claims at the RPD. There is therefore genuine concern regarding the potential degree of independence of these officials, before whom refugee claimants will have to prove that they are persecuted in the country they have come from. In addition, when we observe the measures adopted in other Commonwealth countries, we can conclude that when this kind of process is adopted, the costs involved in appealing decisions at first instance are substantial. The United Kingdom is currently facing this problem, since many decisions at first instance are challenged on appeal.

In fact, there is a serious risk of error when the decision to grant a claimant refugee protection is made by an official, as provided in the bill. The United Kingdom adopted that system in 2005 and the tribunal responsible for reviewing the officials' decisions (Asylum and Immigration Tribunal) has since allowed a significant number of appeals. In 2009, it allowed 28% of review applications, and in the first quarter of this year it allowed nearly 20% of applications. This clearly illustrates how many errors can occur in a system in which officials are responsible for making decisions at first instance. The process for reviewing those errors then results in significant costs and lengthens the time for processing claims.

Recommendation No. 1

We submit that it is important to prevent injustices and preserve the speed of the system. Accordingly, it is entirely necessary to implement an appeal procedure, as was provided in the 2001 Act. Implementing a Refugee Appeal Division is a particularly real and pressing concern in that the bill provides for decisions to be made by officials.

We would also wonder what qualifications will be required of officials in order for them to take on this job, which we believe calls for a degree of expertise. We submit that this new arrangement is risky and raises serious concerns that should be analyzed thoroughly before Bill C-11 is brought into force. Cases have to be processed at first instance keeping firmly in mind that the claimants' lives and safety are at stake. We therefore reiterate that the objective of expediting the refugee determination process must not be pursued at the expense of the fundamental rights of refugee protection claimants.

We are therefore concerned that the bill does not provide selection criteria for the members of the Refugee Protection Division who will have the task of deciding refugee protection claims. It seems to us to be essential that these officials, who are appointed in accordance with the *Public Service Employment Act*, be perfectly qualified. Once again, we have to avoid the high rate of errors in the initial decision that has occurred in the United Kingdom, where the decisions are made by officials.

Recommendation No. 2

We recommend that specific criteria for the qualifications of the members of the Refugee Protection Division who will make decisions that are crucial to refugee claimants be adopted.

Fixing the hearing date. However, we would like to note the fact that there will be a difference in the point at which a hearing date is fixed. Under clause 11(2) of the bill, the hearing date will be fixed at the end of the interview with the claimant, while under the present Act a letter with the date is sent to the claimant within a few weeks after the interview. We believe that while this point is a detail in the bill, this aspect will avoid having to make additional administrative arrangements. To some extent, this will move matters along faster while not doing so at the expense of claimants' rights.

Recommendation No. 3

We submit that it is very important to retain the initial interview by an official at which the hearing date is communicated to the refugee claimant (clause 11(2) of the bill, formerly subsection 100(4)). This will allow for efficient management of the claimant's case and shorten the administrative procedure, since the date for the hearing by the Refugee Protection Division is fixed at that point.

We therefore urge the government to retain the interview as set out in the bill.

Residence on humanitarian and compassionate grounds. The amendment the bill makes in relation to granting permanent residence on humanitarian and compassionate grounds, for which the criteria are relatively difficult to meet, are of concern to us. A foreign national may apply to remain in Canada and be granted permanent residence based on humanitarian and compassionate grounds specific to them, in particular considerations relating to the best interests of the child. In the existing *Immigration and Refugee Protection Act*, a refugee claimant may apply for residence on humanitarian and compassionate grounds (s. 25) immediately. The bill proposes that there instead be a 12-month period after a final decision on the refugee protection claim, outside Canada, before applying for residence:

> 4. (1) Subsection 25(1) of the Act is replaced by the following:
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> 25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.
>
> (1.1.) The Minister is seized of a request referred to in subsection (1) only if the applicable fees in respect of that request have been paid..
>
> (1.2.) The Minister may not examine the request if
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> …
>
> (c) less than 12 months have passed since the foreign national's claim for refugee protection was last rejected or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division.

We believe that adding this waiting time will result in injustices. Residence on humanitarian and compassionate grounds gives the system for protecting foreign nationals in Canada some flexibility. The Canadian media frequently report examples where residence is granted. On such case is a refugee claimant who has waited for status in Canada for years who becomes inadmissible and has to leave their family, who are settled in Canada, including children, to return to their country of origin. In that case, the best interests of the child call for residence to be granted on humanitarian and compassionate grounds. Whenever possible, we avoid separating the parent from their children and causing a major interruption in the lives of people who are settled in Canada.

The result of the proposed amendment will be to prevent a person like that from applying for residence on humanitarian and compassionate grounds for 12 months after the refugee protection claim is rejected. This would mean that a parent might be separated from their children for nearly a year, not to mention the harm such an absence would cause to their personal and work life in Canada.

In our humble opinion, this kind of time requirement is contrary to the spirit and purpose of residence on humanitarian and compassionate grounds, since residence is granted on those grounds in exceptional cases where departure by the applicant causes undue and unusual hardship.

It is also relevant, again, to consider how such applications are handled in the United Kingdom. The legislation in the United Kingdom allows the Minister to grant residence on humanitarian grounds. For example, nearly 10% of asylum claimants were allowed to remain on humanitarian grounds in 2009. This enables the United Kingdom to allow asylum claimants to remain there when they do not meet the criteria in the legislation but nonetheless are in need of that country's protection.

Once again, if Canada does not grant residence on humanitarian and compassionate grounds until 12 months after the decision on the claim, injustices might result.

There are similar considerations in relation to the prohibition in Bill C-11 on a Pre-removal Risk Assessment (PRRA) being done until 12 months after the last decision in the process. We believe that this requirement exposes a significant number of people who, while they do not meet the criteria set out in sections 96 and 97 of the existing Act, are in danger of torture or cruel and unusual treatment, to the risk of removal. The waiting period makes the PRRA procedure ineffective and pointless, and this makes the legislation incoherent.

Recommendation No. 4

Having regard to the foregoing, we submit that the proposed amendment in relation to the 12-month waiting period (clause 4(1) of the bill) should be reconsidered. Imposing a waiting period is contrary to the very purpose of residence on humanitarian and compassionate grounds, which is to allow exceptions in specific cases, particularly where the best interests of the child are at stake.

Mechanism for appealing to the Refugee Appeal Division. The current process for assessing a refugee protection claim places the fate of claimants in the hands of a single decision-maker. This process contains no mechanism for appealing on the merits of the decision of the Refugee Protection Division of the Immigration Board. The only way to correct an error by the decision-maker at first instance is to apply to the Federal Court for leave to apply for judicial review, and fewer than 10% of applications are allowed.

Refugee claimants are among the most vulnerable groups in society. We therefore submit that placing the fate of this vulnerable group in the hands of a single decision-maker simply perpetuates that situation, and means that substantive errors are never corrected. The fact that there is no effective internal review means that unsuccessful claimants have no option but to apply to international bodies such as the Office of the United Nations High Commissioner for Refugees. The present situation therefore lends itself to errors and the only way to remedy the situation is expensive and time-consuming, and illustrates the flaws in the Canadian procedure to our international partners.

Under the amendments proposed by Bill C-11, most claimants (except those from designated countries of origin) will be allowed to appeal the decision at first instance to the Refugee Appeal Division:

> **13. (1)** Subsection 110(1) of the Act is replaced by the following**:**
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> **110.** (1) Subject to subsection 109.1(3), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection, or a decision of the Refugee Protection Division rejecting an application by the Minister for a determination that refugee protection has ceased or an application by the Minister to vacate a decision to allow a claim for refugee protection.

Appeals will be heard by persons appointed by order in council, who will review the initial decision and assess fresh evidence (such as exhibits in reply to the Minister's arguments or documents that were not available at the time of the hearing).

Recommendation No. 5

We submit that it is very important that a process for appealing the decision of the Refugee Protection Division at first instance be adopted. In cases where an error has occurred in the decision at first instance, the Refugee Appeal Division is the body that is in the best position, in terms of competence and expertise, to remedy errors. We further submit that having regard to the new method of appointing decision-makers at first instance, implementing the Refugee Appeal Division is essential to ensure that a fairer and more uniform practice for applying the *Immigration and Refugee Protection Act* is developed.

We therefore strongly urge the government to bring the provisions relating to the Refugee Appeal Division, as proposed in the 2001 reform of the *Immigration Act,* into force.

Recommendation No. 6

We also believe it is important that the workplace of members of the Refugee Appeal Division be physically separated from the offices of the members of the Refugee Protection Division. To retain the independence and impartiality of the decision-makers responsible for reviewing decisions at first instance, those decision-makers should not be in daily contact with the members of the RPD. To administer the Act, the two divisions need only be housed in different buildings.

Designated countries of origin

> **Item (d), Summary of the Bill**
> (*d*) authorizes the Minister to designate, in accordance with the process and criteria established by the regulations, countries whose nationals are precluded from appealing to the Refugee Appeal Division;

Clause 12 of the bill causes particular concern, in terms of the Minister's power to exclude from the right of appeal "a country or part of a country or a class of nationals of a country if, in the Minister's opinion, they meet the criteria established by the regulations". This point is certainly problematic, since the Minister will be able to designate certain countries or classes of persons in order to preclude them from appealing decisions at first instance—decisions that, we would recall, will be made by an official appointed in accordance with the *Public Service Employment Act*. The principle of non-refoulement, which is set out in section 115 of the existing Act and in the various international conventions ratified by Canada, requires that an individual not be returned to a country where they are in danger of persecution or torture. By denying certain classes of persons the right to appeal to the Refugee Appeal Division, Canada risks violating that principle.

We also question the criteria that will be applied in implementing this kind of list of designated countries of origin. The bill does not specify whether the list to be established by the Minister will relate strictly to so-called safe countries or not. In addition, the fact that a country is considered to be safe does not guarantee that the various groups in that country are protected from persecution. We therefore have serious concerns about this change, and we believe that certain groups of persons are at risk of being systematically discriminated against.

Recommendation No. 7

Although we do not support the adoption of this kind of list of countries, we believe that if this element is retained, it is important to provide for specific criteria in the associated regulations. The criteria will have to ensure that only peaceful, safe countries that respect human rights in all respects, and whose governments are able to protect the various groups in the society, may be placed on the list. In short, the list of designated countries of origin must not operate to deny the right of appeal to refugee claimants who genuinely need Canada's protection or become a matter subject to political or diplomatic negotiation.

Conclusion

Every year, as is consistent with its long humanitarian tradition and international obligations, Canada protects thousands of refugee claimants. Bill C-11 is based on a fair idea: to change the system for refugee protection in Canada to enhance its efficiency and speed. It is entirely appropriate to protect refugee claimants while denying protection to people who do not legitimately need it. However, we would stress that these changes must not be made at the expense of a fair justice system.

The right to appeal decisions by members of the Refugee Protection Division is crucial to the existence of a fair refugee protection system in Canada. In addition, the choice to appoint the decision-makers in accordance with the *Public Service Employment Act* may create problems. It is therefore important to implement an effective right of appeal for all refugee claimants, regardless of their origin and regardless of the class of foreign nationals to which they belong. It is equally appropriate to retain the right to apply for an exemption in order to make an application for permanent residence on humanitarian and compassionate grounds, and a PRRA, without a waiting period.

We humbly hope that our comments will assist you in considering a few crucial elements of this bill.

LIST OF RECOMMENDATIONS

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