CARL
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Canadian Association of Refugee Lawyers
Association canadienne des avocats et avocates
en droit des réfugiés

Written Submissions Regarding Proposed Amendments to the *Immigration and Refugee Protection Act* in Division 38 of the *Budget Implementation Act 2024*

Overview

The Canadian Association of Refugee Lawyers ("CARL") is a not-for-profit, non-partisan organization dedicated to advocating for the legal rights of refugees and other vulnerable migrants. Our membership includes approximately 400 lawyers, academics and law students from across Canada.

CARL welcomes efforts to simplify the refugee claim process. However, CARL is concerned by proposed amendments to the *Immigration and Refugee Protection Act* ("IRPA") included in the *Budget Implementation Act, 2024, No. 1* ("BIA"), introduced in the House of Commons on May 2, 2024.[1] The BIA proposes numerous, consequential changes to the refugee claim and removals processes as well as sweeping changes to immigration detention in Canada. However, with the accelerated timeline on which the full BIA is proceeding, there is inadequate time for meaningful stakeholder consultation or proper legislative study of these sweeping changes.

CARL's primary concerns include the following:

1. The BIA lacks transparency and circumvents full consultation and study:
    a. The BIA is omnibus legislation that does not allow for proper study of the impact on refugees and migrants;
    b. The substance of many changes remains unspecified and will only be set out in Regulations that will not be promulgated until after the BIA comes into force.

2. Efforts to streamline the refugee claim and removals processes must still allow for adequate flexibility to accommodate vulnerable individuals:
    a. While a quick and efficient system is important, vulnerable refugees and migrants will be disproportionately impacted by a system that is entirely rigid and unable to accommodate individuals in challenging circumstances;

[1] Bill C-69: "An Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024." The focus of this brief is the amendments proposed in Division 38 of the BIA ("*Immigration and Refugee Protection Act* (In-Canada Asylum System)". Division 39 of the BIA addresses "Immigrant Stations," and the proposed amendments to the *Corrections and Conditional Release Act* and the IRPA that would allow for immigration detainees to be held in federal penitentiaries. CARL strongly opposes this proposal. CARL's position on this issue is detailed in a separate written brief focusing on Division 39.

b. Mandatory conditions for refugee claimants, mandatory referrals to abandonment hearings, and constraints on discretionary decision-making with respect to referrals for admissibility hearings are especially likely to impact vulnerable migrants, including those living with mental health disabilities, past trauma, and housing insecurity.

3. Any extension of the Designated Representative regime must be limited to *supportive* decision-making and exclude the possibility of *substitute* decision-making.

4. The Designated Foreign National regime should be repealed in its entirely: minor amendments to its application dos not cure unconstitutionality.

5. Provisions permitting the detention of migrants in federal penitentiaries is fundamentally at odds with Canadian values and the norms of international law.[2]

Issues

1. Including the IRPA amendments in the BIA lacks transparency, and prevents meaningful study and consultation

CARL has two preliminary concerns:

a) Consequential changes have been introduced in an omnibus budget bill, preventing full and proper study of their implications for refugees and migrants; and

b) The details of most of these changes remain as yet unknown and will not become clear until the Regulations are tabled. As a result, the process lacks the requisite transparency and Parliamentary participation expected for such important legislation.

The proposed changes are potentially substantial and consequential. The rule of law requires that they be subject to proper parliamentary scrutiny. However, the full impact of the changes remains opaque as the details and scope of the changes to the in-Canada refugee system will be made clear in regulations that have not yet been introduced.

Additionally, where the substantive content of broad rights-affecting legislation is left to regulations, initially benign intentions may be replaced by unintended regulatory consequences. It is therefore necessary that limitations be included in

[2] CARL's position on this issue is detailed in a separate written brief focusing on Division 39.

the legislation itself. This requires careful consultation and study, rather than expedited processes such as an omnibus budget bill.

Parliament is being asked to pass a bill without understanding its full impact on refugees and migrants, and civil society is prevented from meaningfully engaging in any study of this legislation, owing to both the expedited timelines and absence of the details.

The Government has already decided to ask Parliament to study and vote on capital gains tax increases separately from the Budget.[3] It would be in the public interest to do the same for proposed changes to the in-Canada refugee system.

Recommendations:

- Excise Division 38 and 39 of the Budget Implementation Act and reintroduce it in a Bill that will allow for full and proper study and consultation.

- Include draft Regulations at the same time as the legislative amendments to ensure meaningful study of the full impact of the proposed changes.

- Send Divisions 38 and 39 and anticipated regulatory changes to the House Standing Committee on Citizenship and Immigration ("CIMM") to ensure thorough and proper study.

2. Efforts to streamline the refugee claim and removals processes must still allow for adequate flexibility to accommodate vulnerable individuals

Proposed changes to the refugee claim process have the potential to disproportionately disadvantage already vulnerable migrants. New time limits, coupled with mandatory referrals for abandonment, mandatory conditions, deemed inadmissibility and automatic removal orders will result in people falling through the cracks. Without adequate flexibility, these measures could lead to arrest, detention, and removal before a refugee claim is determined.

At the core of an efficient and fair refugee claim process are sufficient timelines and access to qualified counsel. Immigration, Refugees and Citizenship Canada ("IRCC") has indicated that the changes are intended to create a simplified refugee claim initiation process, with fewer distinctions between where the refugee claim is initiated (i.e. claims made at the port of entry vs. inland). CARL agrees that, currently, the refugee claim initiation process is unnecessarily complicated, and welcomes efforts to simplify that process.

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[3] https://www.cbc.ca/news/politics/capital-gains-changes-budget-bill-1.7189775

However, the following essential components of this new process are not yet known, and CARL cautions that, without the details of the following elements, vulnerable refugee claimants may fall through the cracks of this system.

(a) Timelines

While various timelines associated with refugee claims and appeals are repealed in the BIA, section 410(5) of the BIA will require refugee claimants to provide information and documents to the Minister in accordance with timelines that will be prescribed in regulations.

It is essential that any timelines associated with making a refugee claim be sufficient to allow, for example, refugee claimants to:

- Take care of their essential needs upon arrival: find housing, register children for school, take care of any urgent medical needs;
- Secure counsel and legal aid, if eligible;
- Seek psychological support, if needed;
- Establish a relationship of trust with counsel in order to explain the basis for their refugee claim;
- Complete necessary paperwork; and
- Obtain supporting evidence.

The reliability of an individual's refugee claim assessment depends on the accuracy and completeness of information provided at the outset. Where claimants do not have access to qualified counsel, and are forced to submit information and documents without a full understanding of the process, the risk of improper refusal and return to persecution or torture increases. The cost and inefficiency to the refugee determination process is also substantial where decisions require correction through appeals.

On the other hand, the lack of any requirement for the Minister to refer refugee claims to the Refugee Protection Division ("RPD") in a timely manner raises concerns that refugee claimants will be left in limbo in between a determination that a person is eligible to make a claim and referral of that person's claim to the RPD for adjudication (s. 410 of the BIA).

The proposed amendments introduce an additional step between a determination of eligibility for a claim to be referred to the RPD and the subsequent referral to the RPD by the Minister. After a claim is determined to be eligible, "the Minister must consider it further," but there is no timeline specified for this consideration. IRCC indicates that waiting until all information, security screenings and any integrity reviews are complete *prior* to referring a claim to the RPD will reduce the backlog at the Immigration and Refugee Board ("IRB"). However, in practice, it may leave some claimants waiting in limbo for lengthy periods prior to referral. Moreover, this will prevent reunification of certain claimants with family members

who may be following to join them. While waiting for referral, a claimant cannot serve as an anchor relative for family members seeking to enter Canada from the U.S. (under the Safe Third Country Agreement, a relative must have a refugee claim that has been referred to the RPD to be able to serve as an anchor).

(b) Abandonment proceedings

Pursuant to section 412 of the BIA, the Minister must refer refugee claims to the IRB for abandonment proceedings if documents and information are not provided as required. Depending on how tight the imposed timelines are on claimants for the provision of documents and information, individuals struggling to take care of basic needs while also attempting to access legal aid and secure counsel, and who may not have understood the refugee claim requirements and timelines, may not meet those timelines.

(c) Mandatory Conditions

Proposed amendments include mandatory conditions for refugee claimants (section 389 of the BIA), and potentially different mandatory conditions for refugee claimants who are subject to inadmissibility proceedings (section 394(2) of the BIA). Similarly, for refugee claimants subject to detention, the Minister or the IRB (as the case may be) must impose mandatory conditions upon release (ss. 402 and 404(2) of the BIA).

The actual conditions are left to regulations that have not yet been made public. It is impossible to know the impact of those conditions on refugee claimants, nor to fully understand how the refugee claim process as a whole will function in practical terms, absent that information.

This absence of information raises questions that, at this time, cannot be answered. For example, it is not clear whether it will be possible to vary conditions as needed, depending on individual circumstances, nor what will occur in the event of innocent breaches of mandatory conditions. Given the potential consequences for breach of conditions, including arrest and detention, the absence of any substantive content is deeply concerning.

(d) Deemed inadmissibility and automatic removal orders

Where a refugee claim is considered abandoned or withdrawn, inadmissibility will be deemed (s. 393(1) of BIA) and a removal order is automatic (s. 396(1) of the BIA). A notice of the removal order will be provided by the tribunal / officer who determines the claim abandoned or withdrawn (s. 386(1) of the BIA). This will necessarily trigger enforcement action under the legislation.

Where refugee claimants have not fully understood the information provided to them at the outset of the process, including mandatory conditions and timelines,

they may not receive notifications of abandonment proceedings and removal orders, remaining in Canada unaware that they are subject to immigration enforcement.

Concerns

The combination of tight timelines, swift abandonment decisions, automatic removal orders and rigid enforcement of mandatory conditions may result in loss of access to the refugee claim process, arrest and detention of refugee claimants, and even refoulement to persecution and torture before any risk is assessed. This constellation of factors may be prevented or remedied where individuals have access to counsel; however, CARL is deeply concerned that tight timelines at the outset of the refugee claim process will cause barriers in access to counsel, and leave refugee claimants vulnerable to abandonment and enforcement proceedings.

Recommendations

It is critical that flexibility be built into the amended processes such that the needs of more vulnerable claimants are accommodated. Recommendations that could ensure greater flexibility include the following:

- Full and meaningful consultation with affected communities, refugee advocacy and legal organizations with respect to appropriate timelines;
- Sufficient time to provide required information and documents (of at least 90 days);
- Ensure any timelines be accompanied with a simple process to request extensions of time;
- A requirement that the Minister refer eligible claims to the RPD within 30 days of receiving documents/information from the claimant;
- Ministerial guidelines that emphasize the importance of flexibility and international obligations to ensure that refugee claimants are able to pursue their refugee claims;
- Remove mandatory nature of conditions: replace “must” with “may” in sections ss. 389, 394(2), 402 and 404(2) of the BIA, which would amend ss. 23(3), 44(6), 56(5) and 58(7) of IRPA;
- Establish a grace period before files are sent to the IRB for abandonment of at least an additional 45 days; and
- Replace mandatory abandonment referrals with discretionary referrals by replacing the word “must” to “may” in section 412 of the BIA, which would amend 102.1(1) of the IRPA.

3. Removal Orders

Sections 394(1) and 400 of the BIA contemplate that Regulations will govern the exercise of discretion in the admissibility report and referrals process. At this time, it is not clear in what way discretion will be limited, though CARL understands from IRCC that the intention is to limit CBSA's discretion to issue removal orders for refugee claimants who are inadmissibility based on their mode of entry into Canada.

Currently, the Minister retains discretion not to refer an admissibility report to a Minister's Delegate Review or to the IRB for an admissibility hearing. This discretion is often exercised for permanent residents who have been convicted of criminal offences. The discretion ensures that personal circumstances may be considered, including the length of a person's status in Canada, seriousness of the offence, whether the convictions are dated, mental health and addictions issues, rehabilitation, the best interests of any children, any hardships that the individual would face if returned to their country of origin, and access to a removal order appeal. Such discretion is necessary to mitigate otherwise harsh individual impacts on vulnerable individuals.

Concerns

CARL is concerned that if discretion under sections 394(1) and 400 of the BIA is limited in the circumstance of criminal inadmissibility, this will result in harsh impacts on vulnerable individuals.

Recommendation

Section 400 of the BIA should be amended to specify that the regulations prescribe circumstances in which removal orders may not be issued.

4. Designated Representatives – legislation must specify that the appointment of a designated representative is for supported decision-making, not substituted decision-making, especially if the proceedings could lead to removal

Sections 385 and 386 of the BIA contemplate the ability of the Ministers of Citizenship and Immigration and of Public Safety to designate a representative for an individual under the age of 18, or for someone who is not able to appreciate the nature of the proceedings. Responsibilities of designated representatives, and their full scope of authority, will be described in regulations that are not yet available, but would include "the circumstances in which a representative may make decisions on behalf of the person they represent."

There is a move from substituted decision-making to supportive decision-making amongst disability rights advocates.

The right to make one's own choices is inherent in the right to equal recognition before the law, which is enshrined in various international human rights instruments, including the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Discrimination against Women.

In its *General comment No. 1 (2014)*,[4] the Committee on the Rights of Persons with Disabilities explains the "shift from the substitute decision-making paradigm to one that is based on supported decision-making" (para 3). It states that "Support in the exercise of legal capacity must respect the rights, will and preferences of the person with disabilities and should never amount to substitute decision-making" (para 17), and "At all times, including in crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected" (para 18).

Concerns

CARL agrees that it is necessary to have a mechanism for the early appointment of designated representatives to support refugee claimants to make their claim, or other applicants to meaningfully engage in rights-granting applications.

CARL is nevertheless deeply concerned that the Minister of Public Safety will interpret the new provision as authorizing to designate representatives with substitute decision-making power in situations that could lead to expedited removal of individuals without capacity to comprehend the nature of proceedings.

For example, individuals have a right to a timely assessment of risks they may face in their home country (including risks of persecution and torture) assessed before they are removed from Canada. Once a Pre-Removal Risk Assessment "PRRA" is served on an individual, very strict timelines apply that, if not followed, may lead to removal from Canada before the risk assessment is considered.[5] Further, individuals may waive PRRA, at which time they then face removal. Delegating authority to a substitute decision-maker to accept service of a PRRA application, or even to waive PRRA, would prevent an individual from exercising their right to meaningfully participate in the PRRA, exposing them to expedited removal without a substantive assessment of risk.

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[4] Committee on the Rights of Persons with Disabilities, *General comment No. 1 (2014),* 19 May 2014.

[5] *Immigration and Refugee Protection Regulations,* ss 162-163.

Recommendations

- Add language specifying that representatives are appointed for the purpose of supporting an individual's decision-making (supported decision-making) in section 386 of the BIA by adding the following in sub-clause 6.1(3)(a)

> (a) the responsibilities of a representative, in particular their primary role to support an individual's decision-making, and the requirements that must be met to be designated as a representative;

- Remove sub-clause 6.1(3)(b) in section 386 of the BIA on substitute decision-making; and

- Add a clause that explicitly limits the scope of a designated representative's authority, and in particular, ensure no substitute decision-making for the purpose of effecting PRRA service and waivers of PRRA service in section 386 of the BIA by adding the following sub-clause in 6.1

> (4) A designated representative may not provide a substitute decision for the purpose of effecting service or waiver of a Pre-Removal Risk Assessment pursuant to section 160.

5. Designated Foreign National Regime is unconstitutional; minor amendments do not cure essential defects

The Designated Foreign National ("DFN") regime was introduced in 2012, and represented a significant shift in refugee policy. Under this regime, the Minister of Citizenship and Immigration has discretion to designate groups of individuals based on their mode of arrival to Canada. The Minister's designation power is arbitrary and with no temporal or quantitative limitations. The Minister may designate any number of different claimants entering Canada at different times. Designation under the regime imposes severe consequences, including:

- Mandatory detention for all persons aged 16 or older, with limited right of review;
- No right of appeal to the Refugee Appeal Division; and
- No access to permanent residence for a minimum of five years, even for those whose refugee claims have been accepted. This means that these refugees are unfairly deprived of family reunification with their spouses and children for more than five years.

CARL maintains that extended mandatory detention with limited review under the DFN regime is unconstitutional and contrary to Canada's obligations under international law. Detention is imposed on refugee claimants merely because of

their mode of arrival in Canada, without consideration of their age, gender, health, family circumstances or whether they have faced persecution. They face the disadvantage of proving their refugee claim while detained, with limited access to legal counsel, interpreters, and community support. The punitive nature of the DFN regime, imposed on refugees simply for arriving without documentation, represents a clear breach of the UN Refugee Convention.

Sections 401, and 402 – 405 of the BIA make minor changes to the DFN regime. Essentially, as a result of proposed amendments, individuals cannot be subject to the DFN regime's arrest or mandatory periods of detention provisions more than once.

Concerns

The DFN regime is unconstitutional. The minor proposed amendments do not cure that essential defect.

Recommendation

It is imperative that this government repeal all DFN provisions, including, and most urgently, the mandatory detention provisions with limited right of review.

6. Immigration Detention in Federal Penitentiaries

Division 39 of the BIA proposes to use federal penitentiaries as locations of immigration detention for certain profiles of immigration detainees. CARL unequivocally opposes this proposal, which has been vociferously condemned by leading human rights organizations, such as Amnesty International and Human Right Watch. CARL will be providing a separate brief on this issue.

Recommendations

CARL is recommending that all reference to immigration stations be deleted from the Act, and underscores the pressing need to pass Bill C-20 to ensure CBSA oversight.

Alternatively, as mentioned above, CARL recommends that Division 39 be removed from the BIA and be reintroduced as a separate piece of legislation, to allow for meaningful study of these provisions.