
The Humane and Just Alternative for Canada

By James Hathaway

The essence of C-55 ignores the admonition of the Standing Committee that we must be “knowledgeable and sensitive to human rights issues rather than immigration issues. The determination decision is not an immigration matter but instead a decision as to who are Convention refugees in need of Canada’s protection.” In stark contrast, immigration authorities have spoken of the importance of refugee law reform as a means of “enabling us to continue our strategy of controlled growth in immigration to Canada.” By speaking of refugees in the same breath as immigration policy, the department has effectively confused the privilege of immigration with the duty it owes to persons who have a well-founded fear of persecution. C-55 is a departmental bill that flagrantly ignores the will of Parliament. I urge members in the strongest terms to resist this bureaucratic intervention in the democratic process, and to reconsider the recommendations of the Standing Committee, as well as the constructive model proposed this week by the Committee for an Alternative Refugee Determination Process. As a member of that Committee, I would be pleased to answer any questions you may have in regard to the alternative proposal.

While there are numerous aspects of Bill C-55 that are flawed, I would like to focus my remarks this morning on what I think virtually all experts agree are the most distressing aspects of the proposed legislation: the “safe country” and “credible basis” access tests. I do so not because I think that the amendment of these aspects will make the bill good law — it will not be enough — but because it is my sincere hope that if there is not a willingness to make the kind of fundamental changes truly required, then at least the most flagrantly dangerous parts of the bill can be revised.

There are some basic problems inherent in the notion of access tests. The first is that pre-screening is a waste of time. If there is to be careful analysis and conscientious application of the refugee definition, then the time taken for the access hearing will not be any less than what would be required to hear the claim in its entirety. One may as well proceed directly to a hearing, which would result in a more expeditious procedure for genuine refugees.

If, on the other hand, pre-screening is not to involve careful analysis of the claim, then it is likely to violate international and/or domestic legal standards. This is the route chosen by the drafters of Bill C-55.

Let me deal first with the exclusion of claims made by persons arriving from “safe countries.” Because the determination of “safeness” will not be made on the basis of an assessment of the particular circumstances of the claimant, but rather will involve the mechanistic application of a list established by Cabinet, the decision maker is effectively deprived of the discretion to examine the merits of the claim. That is, the proposed legislation, by virtue of its rigid, categorical character, may place particular refugee claimants at significant risk, notwithstanding the relative “safeness” of their country of origin for most other citizens. Too, the “list approach” may result in the rejection of claims during times of rapid and uncertain transitions of power within previously “safe” countries. For example, is Turkey a “safe” country? As a political ally, one might assume “yes.” But what of Turkey’s policy of removing Iranians to Iran? Would Cabinet be prepared to declare a strategic ally not safe vis à vis Iranians? And if Turkey’s policy of removing Iranians were not already in existence, could Cabinet move sufficiently quickly to amend the regulations if that policy were to be implemented tomorrow? Or would the initial numbers in flight from Turkey be deported back to Iran because the pre-screening authority in Canada was bound to apply a list?

In short, the “safe country” principle injects an unnecessary and totally unhelpful political element into the refugee determination process. Either we risk offending other nations by declaring them to be unsafe, or we play politics and turn a blind eye to the real risks faced by refugee claimants in the interest of diplomatic harmony.

Moreover, this kind of rigid, categorical exclusion puts Canada in the position of being unable to guarantee compliance with its international obligation to avert the refoulement of refugees, as there is no means by which the Canadian authorities can ensure that the life or liberty of any particular claimant is not at risk. The Executive Com-

mittee of the UNHCR, of which Canada is an active leader, and with which the Refugee Convention obligates us to collaborate, has emphasized that decisions as to the safety of return can only be made on the basis of a careful and individualized assessment of the pertinent facts [see: e.g. Conclusion 30(e)(i) of UNHCREXCOM, 1983].

One final point on the safe country principle: it will not work. As the remarks of Netherlands authorities after the Nova Scotia landing indicate, many “safe countries” are not willing to take back the persons that this bill seeks to exclude. Section 48.1(1)(b) is drafted far too widely, and will result in refugees either being thrown into orbit, or potentially being sent back to the country that has persecuted them, because no one else will admit them. If there is to be a safe country exclusion, it must apply only to persons who have some real attachment to another “safe” state, in the sense that the country will both receive them and allow them to remain. The bill as currently drafted fails to meet this fairly obvious requirement.

On the issue of the “credible basis” exclusion, I would like to make it clear that I support a tough approach to refugee claims that are abusive or fraudulent. As drafted, however, the bill presents two significant problems.

First, it is extremely unclear that the bill affords the claimant any opportunity to adduce evidence of his or her own circumstances at the access hearing. What is very clear, however, is that the adjudicator and Refugee Division member must consider the human rights record of the country from which the applicant fled, and the disposition of refugee claims made by others from that same country. The implication is that the case will not be considered credible if the claimant’s country of origin is not a recognized human rights abuser, or if few refugee claims from that country have been recognized to date.

The problem here is similar to that created by the safe country exclusion. Refugee claims *can* legitimately be made in respect of persons from countries that have

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otherwise good human rights records. Moreover, the mere fact that others to date have been unsuccessful cannot legitimately be considered as leading inevitably to the conclusion that any particular case is lacking in credibility. What matters is whether the facts coming forward from the particular claimant are abusive or fraudulent. If they are, then the integrity of the refugee determination system requires that they be fairly but expeditiously removed from Canada.

In 1983, the UNHCR Executive Committee recognized the need to deal expeditiously with manifestly unfounded claims to refugee status. The Committee — including Canada — endorsed the propriety of an expedited procedure for disposing of bogus claims, but emphasized too “the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees.” The specific guarantees agreed to include a right of review before removal — a right which is not guaranteed in this bill.

Moreover, a specific definition of a manifestly unfounded claim was established. This includes claims that are either clearly fraudulent, or which are not related to the criteria for the granting of refugee status set out in the Convention. This standard is clear, logical, and is a legally responsible limitation on the right to full procedural protections.

This bill, though, completely ignores this important international standard that Canada helped to create. A new, totally meaningless phrase — “credible basis” — is introduced rather than adhering to the “manifestly unfounded” standard that has a clear meaning in international law. It is a rather bald attempt to exclude the fundamental principle of case by case determination in favor of largely unbridled administrative discretion. The abusers can and should be removed — but this can be done in a legally and morally responsible way.

The above text and proposed amendments were presented to the Legislative Committee on Bill C-55, September 4, 1987.

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Alternative to Section 48.1
Proposed by Professor James C. Hathaway

48.1 (1) A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if

(a) the claimant has been recognized by any country, other than Canada, as a Convention refugee and has been issued a valid and subsisting travel document by that country pursuant to Article 28 of the Convention;

(b) *the claimant has enjoyed the protection of a third country that is a party to the Convention, and would be allowed to return to and remain in that country if removed from Canada;*

(c) the claimant has, since last coming into Canada, been determined

(i) by the Refugee Division, the Federal Court of Appeal or the Supreme Court of Canada not to be a Convention refugee or to have abandoned the claim, or

(ii) by an adjudicator and a member of the Refugee Division as not being eligible to have the claim determined by that Division *because it is manifestly unfounded;*

(d) the claimant has been finally determined under this Act, or determined under the regulations, to be a Convention refugee; or

(e) in the case of a claimant to whom a departure notice has been issued, the claimant has not left Canada or, having left Canada pursuant to that notice, has not been granted lawful permission to be in any other country.

(2) Notwithstanding paragraphs (1)(a) and (b), a person is eligible to have a claim determined by the Refugee Division if *the person claims to have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion in the country that recognized the person as a Convention refugee or in which the person enjoyed protection, and in the opinion of the adjudicator and the member of the Refugee Division considering the claim, the claim is not manifestly unfounded.*

(3) A claimant who goes to another country and returns to Canada within ninety days shall not, for the purposes of paragraph (1)(c), be considered as coming into Canada on that return.

(3.1) *Notwithstanding paragraphs (1)(c), (1)(3) and (3), a person is eligible to have a claim determined by the Refugee Division if the claim is based on facts that arose since the claimant's most recent departure from Canada, and in the opinion of the adjudicator and the member of the Refugee Division considering the claim, the claim is not manifestly unfounded.*

(4) In determining whether a claim to be a Convention refugee is manifestly unfounded, the adjudicator and the member of the Refugee Division shall consider *whether the claim is*

(a) *clearly fraudulent; or*

(b) *not related to the criteria for the granting of refugee status in the Convention.*

LETTER TO THE EDITOR

I would like to express our appreciation for the May 1987 issue of *REFUGE* which focused on refugees in the Horn of Africa. The articles by Woodward and Dines make an important contribution to the understanding of the refugee assistance community in Canada. During the past three years there has been a rising number of requests to sponsor refugees currently in the Sudan, Somalia and Djibouti. Most potential private sponsoring groups have very little understanding of the region and the causes for refugee flows. These short articles provide a good summary.

Within MCC [Mennonite Central Committee, Canada. Ed.] we have been rather slow and selective in responding to privately initiated resettlement requests from refugees in this region. However, we recognize that selected groups have no other option. Unfortunately due to the difficulties of resettlement processing in Somalia, this remains a very modest program. Perhaps more significant in the long term has been the work we have been involved in within the Sudan and Somalia on voluntary repatriation and in providing services to resident refugee populations. In all of this work we have become acutely aware of the devastating effects of the various conflicts in the region on the lives of many of these refugees. I hope that Peter Woodward's article will contribute to a broader understanding amongst Canadians of the role of conflict in the Horn of Africa.

You may be interested to know that there is a project at the Institute of Peace and Conflict Studies, Conrad Grebel College, University of Waterloo called the Horn of Africa Project which focuses specifically on conflicts in this region. This project, which was initially sponsored by the MCC, has as its mandate the promotion of dialogue between the various warring groups. As a secondary objective they are also concerned with helping Canadians understand the conflicts in the region. I am, by copy of this memo, making them aware of the recent edition of *REFUGE*.

Thank you for your continuing good work in putting out *REFUGE* magazine. This is an important source of information for Canadians, particularly at a time when there is little mass media coverage of many of these refugee situations.

Yours sincerely,
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Canada

[Dated July 2, 1987]