

**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION'S POSITION
ON BILL C-49: PREVENTING HUMAN SMUGGLERS
FROM ABUSING CANADA'S IMMIGRATION SYSTEM ACT**

A. INTRODUCTION

In August 2010, the *MV Sun Sea* arrived on the coast of British Columbia. The boat carried about 490 Tamil asylum seekers from Sri Lanka. In October 2010, the Government introduced Bill C-49: *Preventing Human Smugglers from Abusing Canada's Immigration System Act*.

By ratifying the UN *Convention Relating to the Status of Refugees, 1951* and its *Optional Protocol, 1967* (the "Refugee Convention") Canada undertook a legal and also moral obligation to provide refuge to persons fleeing persecution. This country has a proud history of providing protection to refugees. Although Canada receives only a comparatively small number of refugees per year – of the 922,000 individual claims for asylum or refugee status registered worldwide in 2009, Canada received about 33,000 (3.5%)¹ with South Africa, who has a per capita gross domestic product about 1/6th that of Canada, receiving the majority of over 220,000 (25%) such claims² – it is regarded by many as a model of the high standard of protection that should be afforded to refugees.

If passed, Bill C-49 will greatly undermine Canada's historical standing as a bastion of human rights protection and humanitarianism. It will also dramatically weaken the protection afforded to refugees and other foreigners by this country, in contravention of Canada's explicit obligations under international law. Despite its name, Bill C-49's provisions will almost certainly not deter exploitative human smuggling operations to Canada. Nor will it effectively punish the kingpins behind such operations, most of who will never even enter this country to be prosecuted. Instead, Bill C-49 will punish refugees.

It is the BCCLA's position that Bill C-49's proposed amendments to the *Immigration and Refugee Protection Act* ("IRPA") will:

- (a) breach sections 7, 9 and 10 of the Canadian *Charter of Rights and Freedoms* (the "*Charter*")³ by imposing on certain asylum applicants, including children, a mandatory minimum detention period of 12 months ;

¹ Citizenship and Immigration Canada, Facts and figures 2009 – Immigration Overview: Permanent and Temporary residents

² UNHCR's Annual 2009 Global Trends Report, p.3. World bank figures for 2009 indicate Canada's per capita GDP at \$39,599 and South Africa's at \$5,786.00.

³ Sections 7, 9 and 10 of the *Charter* provides the following:

- 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
- 9. Everyone has the right not to be arbitrarily detained or imprisoned.
- 10. Everyone has the right on arrest or detention
 - a) to be informed promptly of the reasons therefore;
 - b) to retain and instruct counsel without delay and to be informed of that right;
 - c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."

- (b) violate international law by, amongst other things, prescribing the prolonged and arbitrary deprivation of the freedom of children, and also prohibiting refugee children from being united with their family members for at least five years; and
- (c) impose an unnecessary financial burden on the Canadian taxpayer.

The BCCLA calls on the Government to withdraw Bill C-49 and instead focus on combating abusive and exploitative human smuggling operations through positive and rights-based measures, including taking the political lead towards establishing a fair international framework for refugee burden sharing; providing reasonable access to the Canadian asylum system at visa offices abroad and increasing refugee resettlement to Canada.

B. RELEVANT PROVISIONS

1. “Designated Foreign Nationals”

Bill C-49 will provide the Minister with the discretion to declare certain foreigners “designated foreign nationals”. These are foreign nationals forming part of a group of persons whose arrival in Canada the Minister designates as an “irregular arrival”. Section 20.1(1) provides:

20.1(1) The Minister may, by order, having regard to the public interest, designate as an irregular arrival the arrival in Canada of a group of persons if he or she

(a) is of the opinion that examinations of the persons in the group, particularly for the purpose of establishing identity or determining admissibility – and any investigations concerning persons in the group – cannot be conducted in a timely manner; or

(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.

Although Bill C-49 was tabled in Parliament in response to the arrival of the *MV Sun Sea*, the Bill’s proposed provisions are broad enough to include any group of two or more refugee claimants arriving in Canada, be it by boat, airplane, bus or otherwise. A group is also not defined in the Bill, so it can be a family of two or more persons who, for example, cannot provide Canadian authorities with satisfactory documentary proof of their identity upon arrival at an airport.

Being declared a “designated foreign national” carries serious consequences for a person, amongst other things:

- (a) mandatory detention for a minimum period of 12 months, without independent review of such detention during this period;
- (b) denial of the right to apply for permanent residence status, family reunification and a refugee travel document for a period of at least 5 years after becoming a recognized refugee or protected person; and

- (c) denial of the right to appeal the rejection of a refugee claim to an independent tribunal.

These consequences are further discussed in turn below. At the outset, it should be noted that the substance of the proposed legislation – creating a separate class of refugee or asylum claimant and imposing penalties on such persons based on their actual or perceived illegal manner of entry into Canada – violates a core principle of international refugee protection as established by the *Refugee Convention*. Article 31 of the *Convention* provides:

(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

(2) The Contracting States shall not apply to the movements of such refugee's restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

2. Mandatory Detention: Breach of Sections 9 and 10 of the *Charter* and International Law

Upon the Minister declaring a group “designated foreign nationals”, every person in that group, including children, must be taken into custody and detained. No independent review of such detention will be undertaken before the expiry of a period of 12 months. A “designated foreign national” can only be released before expiry of the 12 month period if a final determination on his or her refugee or protection claim is made or if the Minister is of the opinion that “exceptional circumstances” exist to do so.⁴ Likely, most “designated foreign nationals” will be detained for at least 12 months.

⁴ Sections 56, 57 and 58 provide:

56(2) Despite subsection (1) a designated foreign national who is detained under this Division must be detained until:

- (a) a final determination is made to allow their claim for refugee protection or application for protection;
- (b) they are released as a result of the immigration division ordering their release under Section 58; or
- (c) they are released as a result of the Minister ordering their release under Section 58.1.

57.1(1) Despite subsections 57(1) and (2) in the case of a designated foreign national who is in detention, the Immigration Division must review the reasons for their continued detention on the expiry of 12 months after the day on which that person is taken into detention and may not do so before the expiry of that period.

57.1(2) Despite subsections 57(2) in the case of a designated foreign national who is in detention, the Immigration Division must review again the reasons for their continued detention on the expiry of six months of the day on which the previous review was conducted – under this subsection or subsection (1) – and may not do so before the expiry of that period.

If enacted, the mandatory detention provisions of Bill C-49 will violate sections 9 and 10 of the *Charter*. In respect of the denial of detention review for a period of 120 days, the Supreme Court of Canada recently stated in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 that "... The lack of timely review of the detention of foreign nationals violates s. 9 and s. 10(c) and cannot be saved by s. 1."⁵

Moreover, the mandatory detention provisions of Bill C-49 will also violate various provisions of international law. Article 37(b) of the *Convention on the Rights of the Child* ("CRC"), which Canada has ratified, prohibits the arbitrary deprivation of the freedom of children. The CRC also provides that children should also only be detained as a measure of last resort and only for the shortest period of time possible.⁶ Article 9(4) of the *International Covenant on Civil and Political Rights* ("ICCPR"), which Canada has ratified, also grants detained individuals the right, without delay, to a court hearing to determine the lawfulness of their detention.⁷

3. Penalties Imposed on Refugees Contrary to International Law

As mentioned, imposing penalties on asylum seekers and refugees on the basis of their actual or perceived illegal entry into Canada, will violate Article 31 of the *Refugee Convention*. In addition to prescribing the detention for 12 months of refugee claimants who are declared "designated foreign nationals", Bill C-49 will also impose a number of other penalties on such persons.

For example, the *IRPA* as recently amended by the *Balanced Refugee Reform Act* provides all claimants whose refugee claims are denied with the right to appeal the negative decision to the Refugee Appeal Division. Bill C-49 will deny claimants who were declared "designated foreign nationals" that right⁸.

57.1(3) In a review under subsections (1) or (2), the officer must bring the designated foreign national before the Immigration Division or to a place specified by it.

58.1 The Minister may, on request of a designated foreign national, order the release from detention if, in the Minister's opinion, exceptional circumstances exist that warrant the release. The Minister may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that he or she considers necessary.

(Emphasis added)

⁵ At paragraph 94.

⁶ Article 37(b) reads as follows:

"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 Article 9 of the ICCPR provides, amongst other things:

"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.

⁸ Section 110(2) provides as follows:

(2) Despite subsection (1), no appeal may be made in respect of the following:

Moreover, the Bill provides that for purposes of Article 28 of the *Refugee Convention*⁹, refugees who were declared “designated foreign nationals” will only be lawfully staying in Canada if they become permanent residents or are issued with a temporary resident permit.¹⁰ Since the Bill stipulates that a “designated foreign national” can only apply for permanent residence or a temporary residence permit 5 years after becoming a recognised refugee or protected person^{11,12}, in essence, successful refugee claimants who were declared “designated foreign nationals”, including children, will not for at least 5 years after obtaining refugee or protected status be able to obtain travel documents to visit family members outside Canada. Nor will they during that period be able to reunite with family members in Canada by sponsoring them through a permanent residency application. Refugee claimants who were not declared “designated foreign nationals”, however, will not be subject to this prohibition.

(a) a decision of the Refugee Protection Division allowing or rejecting the claim for refugee protection of a “designated foreign national”.

⁹ Article 28 of the *Refugee Convention* provides:

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, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

¹⁰ Section 31.1 reads:

31.1 For the purposes of Article 28 of the Refugee Convention, a designated foreign national whose claim for refugee protection or application for protection is accepted is lawfully staying in Canada only if they become a permanent resident or are issued a temporary resident permit under Section 24.

¹¹ Section 24(5) provides:

(5) A designated foreign national may not request a temporary resident permit

(a) if they have made a claim for refugee protection but have not made an application for protection, until five years after the day on which a final determination in respect of the claim is made;

(b) if they have made an application for protection, until five years after the day on which a final determination in respect of the application is made; or

(c) in any other case, until five years after the day on which the foreign national becomes a designated foreign national.

Section 25(1.01) states:

(1.01) A designated foreign national may not make a request under subsection (1)

(a) if they have made a claim for refugee protection but have not made an application for protection, until five years after the day on which a final determination in respect of the application is made; or

(c) in any other case, until five years after the day on which they become a designated foreign national.

¹² Section 20.2(1) provides:

20.2(1) A designated foreign national may not apply to become a permanent resident:

(a) if they made a claim for refugee protection but have not made an application for protection, until 5 years after the day on which a final determination in respect of the claim is made;

(b) if they have made an application for protection until 5 years after the day on which a final determination in respect of the application is made; or

(c) in any other case, until 5 years after the day in which they become the designated foreign national.

Preventing refugees, particularly children, from reuniting with family members in Canada, or to travel outside of Canada to visit family members for at least five years will breach Article 10 of the *Convention on the Rights of the Child*, which imposes on Canada an obligation to facilitate family reunification for children¹³. It will also violate Article 23 of the *International Covenant on Civil and Political Rights* which recognises that the family is a natural and fundamental group unit of society which is entitled to protection by society and the State. Furthermore, it will offend Article 28 of the *Refugee Convention*, which imposes on Canada an obligation to issue refugees with travel documents.

4 Discrimination Between Refugee Groups: Breach of Sections 7 and 15 of the Charter

Apart from the fact that the Bill will punish refugees in violation of Article 31 of the *Refugee Convention*, it is also clear that it will create two classes of refugees with one class being treated worse than the other. The overall discriminatory nature of the Bill, together with the prolonged unreviewed detention of “designated foreign nationals”, do not conform to the principles of fundamental justice and will therefore probably also be in violation of sections 7 and 15 of the *Charter*.

5. Cost of Mandatory Detention

Bill C-49's proposed long period of mandatory detention of possibly large numbers of people, will also be a massive waste of the Canadian taxpayer's money. Currently, the cost of detaining a person is approximately \$200 per day or \$73,000 per person per year.¹⁴ Some estimates suggest the detention costs for all of the Sun Sea occupants alone would be over \$21.5 million per year.¹⁵

6. Conclusion

Often, the only way persecuted persons can escape their persecutors is to use human smugglers to flee to Canada or other safe countries. Canada's strict visa requirements for citizens of most developing and strife torn countries and also other interdiction measures used, coupled with extremely limited access being provided to its asylum system at Canadian consulates abroad, have made it near impossible for many legitimate refugees to enter this country by legal means to apply for asylum. This creates a market for abusive human smuggling operators.

Further, there are presently about 15.2 million refugees worldwide.¹⁶ Of these, 80% are hosted by developing countries, with the developed world, including Canada, hosting only about 20%.¹⁷ Refugees often face desperate circumstances in refugee camps in the

¹³ Article 10(1) of the *Convention on the Rights of the Child* provides as follows:

“In accordance with the obligation of States Parties under Article 9, paragraph 1, applications by child or his or her parents to enter or leave a State Party for purpose of family reunification shall be dealt with by the State's Parties in a positive, human and expeditious manner. States party shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.”

¹⁴ <http://www.cic.gc.ca/english/departement/media/backgrounders/2010/2010-03-30c.asp>

¹⁵ <http://ccrweb.ca/en/bulletin/10/11/09>

¹⁶ *Supra*, note 1, p.3.

¹⁷ *Supra*, note 1, p.3.

developing world and are sometimes subjected to even further persecution. This situation also creates fertile markets for human smuggling operations.

To effectively combat exploitative and abusive human smuggling to Canada the Government should not look to the unconstitutional options proposed by Bill C-49. Instead, it should take positive and rights based measures, including proper implementation of speedier refugee status determination procedures proposed by the *Balanced Refugee Reform Act*; providing reasonable access to the Canadian asylum system at Canadian visa offices abroad and increased refugee resettlement to Canada. It should also further undermine the markets of exploitative human smuggling operators by taking the political lead towards establishing a fair international framework for refugee burden sharing by all signatories of the *Refugee Convention*, including Canada and other developed nations.

There is some indication in the recent media that all the opposition parties will be voting against Bill C-49. If so, the Bill will be defeated. Whether political trade offs transpire resulting in some aspects of the Bill being salvaged remains to be seen. Irrespective, it is the BCCLA's position that civil society ought to remain vigilant and firmly resist any of the style of proposed rights retrenchments proposed by Bill C-49.