BRIEF

Reform Proposals for Canada’s Inland Refugee Determination System and Other Aspects of the Immigration System

July 2016

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Overview

Since the establishment of the Immigration and Refugee Board in 1989, Canada has enjoyed a reputation as a country that supported the UN Refugee Convention and fulfilled its legal obligations toward refugees in a fair manner in accord with the rule of law. The Inland Refugee System was not perfect; there were flaws including lengthy processing delays, unreliable decision-makers, and no appeal of negative refugee decisions.

With its election in 2006, the Conservative government brought a different approach to refugee protection. Through various pieces of legislation and regulation, the Inland Refugee System, from eligibility to removal, was changed in ways that treated refugee claimants in a harsh, unfair, and arbitrary manner. The government justified these changes with rhetoric about delays caused by refugees who were “bogus”, undocumented, dangerous, “queue jumpers.” It was a deliberate, misleading, and temporarily successful campaign to stigmatize refugees.

In the view of CARL, though some aspects of the refugee system required improvement, the Conservative government’s reform package resulted in serious damage to our refugee system. In the name of faster processing and deterrence of overseas refugees, it introduced several measures that were unfair, sometimes unconstitutional, often arbitrary, and frequently cruel. The final result was a system that was nominally faster, profoundly unfair, and often inefficient. It was a system that inevitably bogged down in the courts, leading to more delays and greater inefficiency.

We recognize the inherent challenges in deciding a high volume of refugee claims of exceptionally vulnerable people within the framework of the rule of law and administrative efficiency. This brief is an attempt to identify the most egregious flaws in the Inland Refugee System and to recommend practical, reasonable solutions that are both fair and efficient. We have not proposed an entire new refugee system. There are core elements of Canada’s system that should be preserved, for example: a full quasi-judicial refugee hearing, a RAD appeal, and the right to apply for permanent residence when accepted as a protected person. We have proposed a series of coordinated recommendations that will correct many of the worst errors of the former government and assure a fast, fair, and efficient system.

The Conservative government did not limit its extensive amendments to the Inland Refugee system. Part Two of the brief considers other elements of the immigration system that require reform. These elements, such as inadmissibility, immigration detention, removals, oversight, and citizenship, impact refugees but are not exclusively refugee issues. They also require coordination between the IRCC and the CBSA. Some of the more problematic issues predate the previous government. CARL recommends that the government take this opportunity to
rethink longstanding weaknesses that detract from the immigration system's efficiency and fairness.

This brief concludes with a summary of recommendations.

**The Canadian Association of Refugee Lawyers**

The Canadian Association of Refugee Lawyers is the national advocacy organization of refugee lawyers and academics in Canada. Our members are deeply embedded and invested in the Canadian immigration system and, as such, are uniquely situated to put forward reform proposals that are at once practical, and necessary for the realignment of Canada's refugee system with fundamental principles of justice and fairness. This brief was prepared by the CARL executive and designated members for the purpose of communicating the core concerns and recommendations of our members to the policy and law-makers engaged in refugee reform.

**PART 1: CANADA'S INLAND REFUGEE DETERMINATION SYSTEM**

**Access to Canada’s Inland Refugee System**

CARL starts from the basic principle that all refugee claimants should be treated equally and fairly. Under the current system many claimants are denied complete or partial access to refugee protection system. Access to the refugee determination system is a key issue that requires reform. Partial access includes shorter time limits to prove a claim, denial of a right of appeal, arbitrary detention, and accelerated removal from Canada. Complete denial of access means no refugee hearing, access to a paper-based risk review in limited circumstances or a long-shot effort to defer removal.

Claimants can be denied access in three ways: i) they have been designated because of their mode of travel (designated foreign national) or because of the country from which they have fled (designated country of origin) as being subject to inferior procedural rights, ii) they have transited through the United States at a land border, or iii) their claim has been found ineligible because of a previous claim or criminality in Canada or abroad. Amendments are required to address unfairness resulting from the Designated Country of Origin regime, the Designated Foreign National regime, the Canada-U.S. Safe Third Country Agreement and the broadening of the ineligibility provisions.
1. The Designated Country of Origin Regime

The 2010 amendments to the *Immigration and Refugee Protection Act* (IRPA) created a “safe country” list. This move represented a major shift in Canada’s refugee protection system. For the first time, claimants were (and remain) subject to different procedural rights depending on their country of origin. The designation process has been widely criticized for its lack of clear and precise criteria for designation. Either past acceptance levels or the Minister’s own assessment of the country in question triggers possible designation\(^1\), allowing the Minister to employ factors unrelated to the issue of persecution. The previous government issued four orders designating 42 countries, explicitly tying the designations to the goal of discouraging “bogus claimants” from those countries. Those designations remain in force at this time.

Canada has international legal obligations to assess refugee claims on an individual basis. Although all DCO claimants are given hearings, the designated country scheme prejudges claims according to set criteria that can never be individualized and then casts those claimants into an inferior process. A significant number of countries that have been designated fail to respect human rights of minority groups, including Lesbian, Gay, Bisexual, Trans or Queer (LGBTQ) individuals, women facing gender-based violence, and some ethnic communities.

DCO claimants face inferior procedural safeguards, as compared to other refugee claimants. In the original scheme, DCO claimants were denied access to the Refugee Appeal Division (RAD). While that bar was struck down in the courts,\(^2\) the following differences remain:

i) An excessively fast time limit (30 days instead of 60) for scheduling the RPD hearing;\(^3\)

ii) No statutory stay of removal pending judicial review of their RAD decision in Federal Court;\(^4\)

iii) Much longer period of time before DCO claimants can access the Pre-Removal Risk Assessment (PRRA) process – 36 months instead of the 12-month period for all other claimants;\(^5\) and

iv) No possibility of a work permit until a DCO claimant has been in the country for 180 days.\(^6\)

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\(^1\) IRPA s.109.1.
\(^2\) See note 8 below.
\(^3\) Section 159.9(1) IRPR.
\(^4\) Section 231 IRPR.
\(^5\) Sections 112(2)(b.1)(c), 111.1(2) and 161(1.1) IRPA.
\(^6\) Section 206(2) IRPR.
The law lacks a “de-designation” process and the policy in place is ineffective. For example, the 2015 acceptance rates for two DCO countries (Hungary: 78.2%, Slovakia: 80.4%) unequivocally reveal that they are producing significant numbers of genuine refugees. Nevertheless, these countries have not been de-listed, since there is no requirement for the Minister to do so. Once on the list, there is no express provision for the removal of refugee producing countries.

CARL has been either an applicant or an intervener in three different legal challenges to the DCO scheme. In two of the challenges the Federal Court found the differential treatment experienced by DCO claimants violates equality guarantees under section 15 of the Charter: In one case, *Canadian Doctors*\(^7\), the Federal Court found restrictions on access to health care for DCO claimants violated s. 15 of the Charter. In the second case, *Y.Z* the Court determined the denial of access to RAD was a violation of the equality guarantee.\(^8\) The Government has withdrawn its appeals of both decisions. The third legal challenge targets the 36-month bar on a PRRA for DCO claimants, as compared to the 12-month bar for other claimants. Leave has also been granted in two other Charter challenges \(^9\) to this distinction and no hearing date has been set. In the meantime, those subject to this provision continue to face deportation without a timely risk assessment, based solely on the constitutionally protected ground of nationality.

Based on the two Federal Court decisions, the remaining procedural disadvantages imposed on DCO claimants are likely to be found in violation of s.15 of the Charter. Justice Boswell in *Y.Z* found the distinction between DCO claimants and non-DCO claimants was not only discriminatory on its face but also:

> “serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries which are generally considered safe and “non-refugee producing”. The DCO scheme also “perpetuates a stereotype that refugee claimants from DCO countries are somehow queue-jumpers or “bogus” claimants who only come here to take advantage of Canada’s refugee system and its generosity.”\(^10\)

It is CARL’s position that if the DCO regime is kept in place, it is likely that further litigation will ensue targeting the remaining elements of the inferior procedural safeguards experienced by DCO claimants. While the Prime Minister’s mandate letter refers to the establishment of an expert human rights committee to make recommendations with respect to designations, it is CARL’s position that such advice cannot cure what is, at root, a discriminatory regime, introduced into the legislation for discriminatory purposes.

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\(^7\) *Canadian Doctors for Refugee Care v. Canada (AG)*, 2014 FC 651

\(^8\) *Y.Z. v. Canada (Citizenship and Immigration)*, 2015 FC 892. The Federal Court found s.110(2)(d.1) to be invalid. DCO claimants now have access to the RAD and along with that, an automatic stay of removal pending the outcome of the appeal.

\(^9\) *Feher v. Canada (MPSEP)*, Docket IMM-3838-15; *Sebok v. Canada (MPSEP)*, Docket IMM- 591-16.

\(^10\) *Y.Z. v. Canada* at para. 124
Moreover, on a practical level there is no evidence, four years on, that the DCO regime has achieved what is assumed to be the underlying rationale of its creation – to speed up the processing for claimants from so-called safe countries and to reduce the number of claims generally. In the IRCC’s recent evaluation of refugee reform (April 2016) a key finding was that “DCO claimants were not processed faster than non-DCO claimants.” There is also evidence that the number of claims dropped significantly not because of the creation of the DCO regime but in advance of it: claims from Hungary dropped significantly in advance of Hungary’s designation and claims from Mexico dropped as a result of the imposition of the visa. Claims did not drop from DCO countries because these claimants nominally faced a bit of a faster timeline than other claimants – all claimants after refugee reform faced significantly faster timelines compared to the 4.5 average processing time of the previous determination system.

Further, if the DCO regime is not repealed but instead an expert panel is put in place to designate “safe” countries, Canada may be put in the uncomfortable position of explaining to a friend why it has been removed from the list, and therefore deemed to be “unsafe” by the Canadian government.

**Recommendations**

- Eliminate the DCO scheme
- In advance of the legislative changes required to repeal the DCO regime, the Minister should immediately rescind the four designation orders issued by the Conservative government.

2. **The Designated Foreign National Regime**

The Designated Foreign National (“DFN”) regime introduced in 2012, also represented a significant shift in refugee policy, giving the Minister the discretion to designate groups of individuals, based on their mode of arrival in Canada. The Minister’s power is arbitrary with no temporal or quantitative limitations, allowing the designation of 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 RAD.

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11 See Finding #8 in the IRCC *Evaluation of the In-Canada Asylum System Reforms*, April 2016
• 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 spouses and children for more than five years
when claim and processing times are taken into account.

The constitutional validity of the extended mandatory detention with limited review is highly
questionable. Detention is imposed on refugee claimants merely because of their mode of
arrival in Canada, without consideration of whether they require detention because they pose a
risk to the public, or a security risk, whether they are a flight risk, their age, gender, health,
family circumstances or whether they have faced persecution. These claimants are sent to
provincial medium security prisons and placed with the general criminal population regardless
of their level of risk, their language comprehension, the merits of their claim, or their
psychological condition. Further, they have to prove their refugee claim while in prison, with
limited access to legal counsel, interpreters, and community support. The punitive nature of the
DFN regime represents a clear breach of the UN Refugee Convention. It is imperative that this
government immediately take measures to remedy this breach.

Recommendation

• Immediately repeal the Designated Foreign National regime.

3. The Canada-U.S. Safe Third Country Agreement

The Canada-U.S Safe Third Country Agreement (STCA) came into effect in 2004. Under this
Agreement, Canada and the US recognize each other as “safe” for refugee claimants. The
Agreement prohibits asylum seekers from making refugee claims at land-based ports of entry
between the US and Canada. Those who try to enter Canada through the US to make a claim at
the border, are returned to the US regardless of whether they will or already have had access to
asylum in the US.

The Agreement allows for some limited exceptions, the most significant being for those who
have a family member in Canada with status. These individuals are permitted to enter and
make a claim. Prior to 2009, there was also an exception for nationals of countries which
Canada had imposed a temporary suspension of removals (“moratorium countries”). In July
2009 that exception was removed through a regulatory amendment,\textsuperscript{13} exposing nationals of
these countries to the possibility of the US returning them to a country where they would be at
risk, contrary to the guarantee on “non-refoulement”.

\textsuperscript{13} SOR/2009-210, s. 1
The experience of individuals making claims at Canada-US ports of entry has shown that the strict and narrow application of the terms of the STCA can cause extraordinary hardship, and even place individuals at risk. In some instances, claimants are being detained and deported to their home country without benefit of an asylum hearing. While the Minister retains discretion under s. 25.1 of IRPA to act on his or her own initiative to exempt a claimant from the operation of the STCA, port of entry officers lack legislated authority to exercise that discretion, and port of entry claimants may suffer as a result.

Those claimants who qualify for an exemption to the STCA, are permitted to proceed with a claim before the RPD. However, the legislation provides that they are barred from appealing a negative decision to the RAD.\textsuperscript{14} The appeal bar bears no connection to the merits of the refugee claim, as it is tied solely to the fact that the claimant made their claim at a land border with the US.

**Recommendations**

- Rescind the bar on appeals by STCA exempt refugee claimants.
- Reinstate s. 159.6(c) of the Regulations, which exempted nationals of countries in respect of which Canada had imposed a temporary suspension of removals from the application of the STCA.
- Introduce an exemption for persons who do not have access to a risk assessment in the US equivalent to that available at the RPD.
- Introduce, by regulation, a specific authorization to exercise Humanitarian & Compassionate (H&C) discretion to refer a claimant to the RPD notwithstanding strict ineligibility under the STCA.

4. **Eligibility to Make a Refugee Claim**

Certain claimants are ineligible to make a refugee claim, including those whose previous claims were found to be ineligible, were abandoned or withdrawn, and claimants determined to be criminally inadmissible. If found ineligible, these claimants do not have access to an oral hearing before the RPD. They can only make a Pre-Removal Risk Assessment (PRRA) application to an immigration official.

\textsuperscript{14} s.110(2)(d) of IRPA
a. Previously abandoned or withdrawn claims

Any person who withdrew a claim or had it deemed abandoned, is permanently barred from having a claim considered by the RPD. This includes persons who were minors at the time the claim was withdrawn or abandoned and are now adults and have a different risk profile, persons who discontinued their case because of a change of circumstances in their country of nationality that proved short-lived, and who therefore had to flee again. It also includes persons who withdraw or abandon their claim because of an alternative route to status, such as a spousal sponsorship that subsequently fails. This could happen because the sponsoring spouse divorces the claimant or dies before status has been granted.

Moreover, these individuals are also subject to the PRRA bars under s. 112(2)(b.1), meaning that even though their risk has never been assessed by the RPD, they are also ineligible to have it assessed by a PRRA officer within the period of the bar (36 months from withdrawal/abandonment for nationals of DCOs, 12 months for everyone else).

b. Criminal inadmissibility

At international law, refugee claimants may be excluded from refugee protection if they have committed a serious non-political crime, pursuant to Article 1 F (b) of the Convention Relating to the Status of Refugees. Assessment of serious criminality is complex and takes into account a variety of factors including the actual sentence that would likely be imposed in Canada on the particular facts of the case, and other aggravating and mitigating factors. Over the past several decades, Canadian immigration and refugee legislation has incrementally narrowed access to a refugee hearing at the Refugee Protection Division (RPD), by expanding criminal ineligibility.

In the 1985 Immigration Act, the predecessor legislation to the IRPA, refugee claimants were ineligible if a person was criminally inadmissible and the Minister was of the opinion that the person constituted a danger to the public in Canada. The 2001 IRPA broadened ineligibility on the basis of serious criminality, and barred some persons from a refugee hearing who could not have been excluded under Article 1F(b) of the Convention. Persons convicted in Canada of an offence that fell within the definition of serious criminality were ineligible to make a refugee claim, if a sentence of at least two years had been imposed. Persons convicted of an offence outside Canada

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16 Immigration Act, s. 46.01(1)(e)
remained ineligible only if the Minister was of the opinion the person was a danger to the public in Canada.  

In the 2012 amendments to the IRPA, subsequent to the passing of Bill C-31, anyone who falls within the definition of serious criminality (for having been convicted in or outside of Canada of an offence punishable in Canada by a maximum term of imprisonment of at least 10 years) can be barred from access to the RPD. Bill C-31 removed the requirement for a sentence of at least two years for in-Canada convictions, or a danger opinion for convictions outside Canada. These changes dramatically increased the number of claimants who were denied access to the RPD as ineligible, but who could never be excluded under Article 1F (b). Canada’s current legislation is unequivocally out of step with international refugee law.

There are many offences in the Criminal Code that carry a maximum term of imprisonment of 10 years, but which result in sentences of less than two years or even no imprisonment. Judges impose a range of sentences tailored to the seriousness of the person’s actions. Just because a maximum term of imprisonment is available to a judge does not signify that the underlying conviction approaches the level of genuine seriousness that would render a person excludable from refugee protection at international law. Harsh and unreasonable criminal ineligibility provisions deny the opportunity of protection to people with genuine fears of persecution, and do nothing to protect Canadians from dangerous individuals.

Recommendations

- Establish and guarantee access to a refugee hearing at the RPD in accordance with our obligations under international refugee law and the principles underlying the Singh decision of the Supreme Court of Canada. In particular, ensure that (a) everyone asserting a real risk of harm under s. 96 or 97(1) has the opportunity for an oral hearing before the RPD, including those whose RPD claims were previously deemed abandoned or withdrawn prior to a hearing; and (b) that Canada’s eligibility provisions regarding criminality are not broader than the Article 1F(b) exclusion.

- Return to the language of the 1985 Immigration Act stipulating that persons are ineligible only if they are both inadmissible for serious criminality and the Minister is of the opinion they pose a danger to the Canadian public.

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17 (2001 IRPA, s. 101(2))
18 Singh v Canada (MEI), [1985] 1 SCR 177
Refugee Determination Proceedings

1. Time limits for Refugee Protection Division Hearings

The current timelines for filing the Basis of Claim (15 days) and setting dates for refugee claims (60 days for regular claims, 30 days for DCO) are too short. They do not give claimants enough time to find and retain reliable counsel, prepare the Basis of Claim form, seek psychological support when needed, or obtain all the corroborating evidence necessary to adequately prove their claim.

While adjournments could theoretically mitigate the impact of these challenges, in reality, the criteria for granting adjournments impose a high burden on claimants to show exceptional circumstances, and adjournments are frequently denied. At the same time, the RPD imposes a different adjournment standard on itself and CBSA. Adjournments frequently occur, often at the last minute, due to the failure of the CBSA to provide a security clearance, or the unavailability of members or interpreters.

Psychological reports present exceptional challenges. Medical experts are rarely available to assess and treat claimants within the time limit, let alone produce reliable reports. Psychological reports are necessary for a member to reliably assess the capacity of traumatized claimants to testify, yet hearings proceed without benefit of the reports. Notwithstanding the challenges for claimants to obtain evidence from war torn and authoritarian countries within the short limits, the RPD will often draw an adverse inference from their failure to provide evidence to corroborate their stories.

Reasonable time limits are not only fair, they are more efficient. A hastily prepared BOC wastes time in the hearing room distinguishing inadvertent errors from false information. RPD members are more efficient and claims are decided more reliably when all the evidence is available in advance. Short time limits and scheduling by IRCC and CBSA do not allow the RPD to organize its hearing schedule in an efficient manner, assigning cases that are well prepared to members with the appropriate country expertise to decide them.

The purpose of the hearing is to allow claimants a reasonable and fair opportunity to prove their refugee claim. A modest increase in the time limits would allow all claimants the opportunity to retain counsel and gather the evidence necessary to prove the claim, without unnecessarily delaying the overall refugee claim process. It would also allow the RPD to decide claims more efficiently. Premature hearings without adequately prepared evidence, lead to inefficiency or injustice. The claim is adjourned for more evidence or the claim is unjustly decided. The claimant is either unjustly deported to persecution or the decision is overturned on appeal and returned for another hearing, a gross inefficiency. The current RAD rejection
rate exceeds twenty per cent; it should be less than ten. As stated, short time lines lead to unfairness and inefficiency.

**Recommendations**

- Apply the same timelines to all claimants with no differentiation for DCO or DFN categories.

- The same timelines and process should apply whether the claimant files their claim inland or at a port of entry.

- Amend the timelines as follows:
  - The Basis of Claim form should be due 30 days after the claim is filed.
  - The hearing of the claim should be set 90 days after the due date for the Basis of Claim form or as soon thereafter as reasonably practicable.
  - The criteria for granting postponements and adjournments should be broadened to allow the Board member more flexibility to grant adjournments in appropriate cases.

**2. Residual Protection Powers**

CARL recommends that protection grounds be expanded to give the RPD and/or RAD the power to grant protection on grounds beyond those enumerated in section 96 and 97 of IRPA. This power may be considered as a form of “residual protection”.

The grounds for protection that the RPD/RAD may consider reflect the parameters of the 1951 Convention relating to the Status of Refugees and the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, these conventions exclude whole categories of serious human rights violations and thus fall short of evolving international and Canadian human rights norms. For example, claimants fleeing indiscriminate violence, large scale human rights crises, or general insecurity in their country would be denied protection under s. 96 and 97, as would those fleeing environmental disaster, life-threatening medical conditions for which treatment is unavailable in their country, those who are stateless and have no access to national protection, and family members of successful co-claimants who cannot establish that they face a personalized risk.

Currently, such claimants first try and frame their claim within the S. 96 or S.97 definitions, and then if unsuccessful, try to remain in Canada long enough to be eligible to apply for permanent
residence on humanitarian and compassionate grounds under s. 25 of the *IRPA*. This may involve not just an unsuccessful RPD claim, but also a RAD appeal, JR, APR, deferral request and a stay motion. Expanding the jurisdiction of the RPD and RAD at the front end, could mean resources would not need to be expended at the back end, on these additional procedures.

Several European models are instructive, for instance, until recently Finland had a consolidated, front-end protection model whereby residence permits could be based on international protection (refugee status), subsidiary protection (capital punishment, torture, cruel and unusual treatment), humanitarian protection (environmental disaster, armed conflict, insecurity, troubled human rights situation) or protection on other grounds (health, ties to Finland or other humane reasons). In the Netherlands, a model was considered whereby asylum could be granted on the basis of the Refugee Convention, article 3 of the ECHR, humanitarian grounds related to conditions in the country of origin, indiscriminate violence or large scale human rights crises or family unity.

Some might worry that expanding the protection grounds to include residual protection concerns could lengthen and complicate RPD and RAD proceedings. However, this can be avoided by limiting residual protection grounds to situations such as indiscriminate violence, large scale human rights crises, general insecurity, and environmental disaster, lack of treatment for serious medical conditions, statelessness, and family unity which arise from refugee like situations.

**Recommendation**

- Amend the *IRPA* to provide RPD members with a residual protection discretion in relation to specific grounds which arise from refugee like situations, such as: statelessness, family unity, large scale human rights crises, indiscriminate violence, general insecurity, and environmental disaster.

3. **Refugee Protection Division Reopening Jurisdiction**

The RPD has long had jurisdiction to reopen a refugee claim where “it is established that there was a failure to observe a principle of natural justice.” However, the *Protecting Canada’s Immigration System Act (PCISA)* removed the RPD’s jurisdiction to re-open a claim if the RPD’s decision has subsequently been the subject of a final decision by the RAD or the Federal Court. This limitation applies even if it is demonstrated there was a breach of natural justice at the RPD, and even if that breach was not known or raised before the RAD or Federal Court. By their very nature, breaches of natural justice go to the heart of a fair refugee procedure. They

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19 RPD Rule 62
20 *IRPA*, s. 170.2
are sometimes undisclosed until later in the process, particularly where there has been a serious default by legal counsel or an inadvertent failure in communication between the IRB and the claimant.

**Recommendation**

- Rescind s. 170.2 of the *IRPA* (and make the consequential amendment to s. 62 of the RPD Rules).

4. **Exclusion under Article 1F(b) of the Refugee Convention**

The *IRPA* incorporates provisions of the United Nations Convention Relating to the Status of Refugees, which exclude from protection individuals who might otherwise be eligible. In 2014, the Supreme Court of Canada issued its decision in *Febles v. Canada*, 2014 SCC 68 on the issue of exclusion from refugee status for serious non-political crimes. The decision resolved certain legal issues, however the *IRPA* should be modified to reflect the Court’s ruling. In particular, the assessment of the seriousness of excludable offences, and the relevance of rehabilitation in the exclusion analysis under Article 1F (b) of the Convention, dealing with the commission of a serious non-political crime prior to coming to Canada, should be clarified to bring it into conformity with the Court’s ruling.

**Recommendations**

- The definition of ‘serious crime’ should be narrowed in the *IRPA*. Current practice of looking at the 10 year maximum does not consider the punishment that would likely be imposed in a Canadian criminal court. A more holistic and comprehensive assessment looking at sentencing range and mitigating factors of the offence must be instituted.

- Expiation or rehabilitation must be considered as a second, separate step. A serious crime 30 years ago should not automatically bar an individual fleeing present day persecution or a risk to life, from access to protection.

5. **Complaints about RPD members:**

Members of the Refugee Protection Division are appointed under the Public Service Employment Act, and their employment is governed by that Act, a collective agreement, and other related Acts and policies.

All members of the IRB (regardless of Division or whether they are GIC or public service appointees) are subject to the Protocol Addressing Member Conduct Issues, effective
December 2012. The Protocol applies only to members in their role as decision-makers, and does not apply to the adjudicative decisions or exercise of discretion by members.

**a. Concerns and informal resolutions**

The protocol is designed to handle expressions of concern about member conduct informally whenever possible. Expression of concern must be made in writing at the first reasonable opportunity and is referred to the member manager. If the member manager is of the view that further action is required, and that the conduct may threaten the integrity of the IRB, the complaint will be forwarded to the Chair. The Chair will review the matter to see if it should be dealt with under the Protocol, and if not, the Chair will decide on appropriate steps. If the matter should be dealt with under the Protocol, the member manager will send a copy of the concern to the member in question. In most cases, the member manager will delay dealing with the matter until after the case at hand is completed, and a decision has been rendered. If there is to be a delay in addressing the concern, the person who expressed concern is to be advised.

The member manager may gather further information, by conducting informal inquiries, and meet with the person expressing the concern and the member, individually or together. The member manager may attempt to resolve the concern informally or may resolve a concern unilaterally, in writing, by deciding it is not serious or is without substance. In that case, the person expressing the concern may request the Division Head to review the decision of the member manager. Where the person expressing the concern and the member are satisfied with an informal resolution, the member manager will document and may write to them both confirming the resolution.

**b. Complaints and formal inquiries**

If the member manager has not dismissed the concern or achieved an informal resolution acceptable to the person expressing concern and the member, the person expressing concern may file a written complaint with the Division Head. The complainant can also register a formal complaint during or without efforts at informal resolution where the member manager considers it to be in the public interest. Inquiries are conducted by a person designated by the Division Head. The Division Head may ask that person to conduct further inquiries and report back in writing. After an inquiry, the Division Head will then make a formal recommendation to the Chair regarding the disposition of the complaint. The Chair will write to the complainant and the member advising them of the decision, including whether remedial measures are required. The Chair’s decision is final and not subject to review or appeal within the IRB.

The IRB is to make an annual report available to the public, accounting for the disposition of complaints over the previous year.
c. Shortcomings with the Process

There appears to be a problem with the implementation of the Protocol. A review of the IRB website reveals no annual reports of complaints, nor any publicly available reports of individual complaints.

The complaints process for RPD members falls well short of recognized best practices for effective complaints mechanisms. In its Guide to "Complaint Handling", the Commonwealth Ombudsman highlights the following key principles of effective complaints mechanisms:

- fairness: impartiality, confidentiality, transparency
- accessibility: awareness, access through a number of contact points,
- responsiveness: to the particular needs of clients
- efficiency; and
- Integration (within the organization).

The Commonwealth Ombudsman lays out the following model process:

- acknowledgment of complaints;
- assessment of priority;
- plan for the investigation;
- investigation;
- response to the complainant with a clear decision;
- follow up and consider any systemic issues

The IRB Protocol is deficient in several areas. The procedure does not guarantee impartiality of the process, since the member manager is the first line, and the Division Head can appoint whomever he or she chooses. There are no provisions for the protection of the identity of a complainant who is often vulnerable, and dependent on the member’s decision. Most counsel appear frequently before the Board and are hesitant to file a complaint, lest they be subject to member bias in future cases.

The Protocol is not easily accessible and is difficult to locate on the website. No clear steps are set out to make a complaint, and contact information needed to file a complaint is missing. There is no mention in the policy of the special needs of any complainant, or a process to
protect the identity of complainants in appropriate circumstances, nor is there any indication of how complaints and their outcomes feed into the broader functioning of the Board.

**Recommendation**

- **Improve the Protocol by requiring:**
  - clear and accessible communication about the complaints mechanism, and the various ways to access it;
  - prompt acknowledgment of complaints;
  - clear means to protect the identity of complainants when required;
  - accommodations for the particular needs of vulnerable complainants;
  - public information about complaints, their investigation, and their outcomes;
  - thorough investigation of complaints by an impartial individual;
  - clear consequences for breaches of the Code of Conduct, including escalating consequences for multiple breaches and significant consequences for significant breaches;
  - consideration of any systemic issues in every complaint;
  - a clear and regular process for incorporating the feedback from complaints, including systemic issues, into the operations of the Board; and
  - adherence with the annual reporting function in the Protocol

**The Refugee Appeals Process**

An effective, merit-based appeal process is an essential component of any comprehensive refugee determination system. Refugee determination is an inherently difficult and error-prone task and the consequences of errors are acute, as they expose refugee claimants to potentially life-threatening human rights abuses.

When the *IRPA* was passed in 2002, it included a Refugee Appeal Division (“RAD”) of the IRB. The RAD was not implemented, however, until 2012. Unfortunately, its success as a review mechanism has been undermined by significant jurisdictional, evidentiary and procedural limitations.
1. Jurisdictional Limits

Pursuant to section 110(2) of the *IRPA*, six classes of claimants are barred from appealing decisions to the RAD, including claimants who came from a Safe Third Country, those with abandoned or withdrawn claims, claims decided on cessation or vacation applications and claims found to be manifestly unfounded or with no credible basis. Prior to the Federal Court decision in *YZ* claims from DCO countries were also barred.

There is no data however, to suggest that the claims of these individuals are either less likely to be decided on the basis of error, or that the consequences of such errors are less grave than for other claimants.\(^{21}\) Indeed, there is every reason to believe these jurisdictional limits place claimants at risk, as the new RAD has proven to be more effective at correcting RPD errors than the Judicial Review process.\(^{22}\)

In the past, the United Nations High Commission for Refugees (UNHCR) has commented that Canada should “afford a clear opportunity for the review of decisions on their merits in the post-claim review process”\(^{23}\), and the Inter-American Commission on Human Rights rightly criticized Canada for the lack of a merit-based appeal prior to the introduction of the RAD. They commented “given that even the best decision-makers may err in passing judgment, and given the potential risk to life which may result from such an error, an appeal on the merits of a negative determination constitutes a necessary element of international protection”\(^{24}\) (emphasis added).

Those claimants who are barred from appealing to the RAD, are denied an effective review of their RPD decision, placing them at risk. The situation is particularly urgent, as it appears the majority of claimants denied access are those covered by the Safe Third Country Agreement. The sheer number of claimants denied access to an appeal this way, 2,253 in 2013 or 23.1% of claims referred, and the arbitrary nature of the denial are particularly striking.\(^{25}\) As Professor Rehaag and Angus Grant comment,

“In our view, then, if there is, as a general matter, merit in having an appeal mechanism to ensure the correctness of refugee decisions with life and death consequences, then there is equal merit in extending this appeal to those who have initiated refugee claims in Canada after transiting via the US. The lack of justification for the RAD STCA bar, combined with its application to a large number of claimants (most of whom are simply


\(^{22}\) Rehaag & Grant at p. 13.

\(^{23}\) Dessalegen Chefeke, Representative in Canada of the UNHCRE, Statement to the House of Commons, Legislative Committee on Bill C-86 (11 August, 1992)


\(^{25}\) Rehaag & Grant at pp. 19-20.
exercising their right to family reunification), makes it imperative, in our view, to reconsider this bar.”

One such limitation, the bar on appeals for those from “Designated Countries of Origin”, has already been found by the courts to violate the Charter and other litigation is pending. While some of CARL’s recommendations under other headings in this brief would resolve some of these RAD bars (for example, those on the STCA and on the DFN regime), the full range of RAD bars that need to be removed are set out below.

**Recommendations**

- The bars on appeals to the RAD should be repealed, namely:
  - Appeals of “Designated Foreign Nationals”. [Section 20.1 & 110(2)(a)]
  - Appeals of claims from “Designated Countries of Origin”. [Section 107(2), 107.1 & 110(2)(d.1)] (declared to be of no force and effect in the YZ case and is therefore inoperable, but remains to be removed from the legislation)
  - Appeals of the claims of individuals whose cases proceeded on the basis of an exception to the Safe Third Country Agreement. [Section 101(1)(e), 102 & 110(2)(d) and IRPA reg. 159.1-159.7]
  - Appeals of determinations that a refugee claim has been withdrawn or abandoned. [Section 110(2)(b)]
  - Appeals of RPD determinations that a claim has no credible basis or is manifestly unfounded. [Section110(2)(c)]
  - Appeals of RPD decisions with respect to cessation and vacation of refugee status. [Sections 108, 109, 110(2)(e) & 110(2)(f)]

2. **Evidentiary Limits**

By virtue of section 110(4) of the IRPA, refugee claimants are only permitted to adduce “new” evidence in support of their appeals. This limitation is inconsistent with the basic premise of an appeals process that can evaluate the true merits of a claim. It has proven cumbersome to implement and it compounds the difficulties claimants face in evidence gathering, associated with the compressed timelines for proceedings before RPD discussed earlier in the brief.

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26 Rehaag & Grant

The Federal Court of Appeal in the recent *Singh* decision affirmed that its hands are tied given how the statute has been written with respect to the limits on new evidence at the RAD.\(^\text{28}\) These limits are overly stringent, not allowing RAD members get to the heart of the issue that is before them, which is whether the person is in need of protection.

**Recommendation**

- The limitations on adducing evidence should be removed, bringing refugee appeals in-line with immigration appeals before the Immigration Appeal Division

3. **Procedural Limitations**

   a. **Procedural Inequity**

   The provisions creating and regulating the RAD are asymmetrical in the procedural rights they afford to refugee claimants, as compared with the Minister. For example, the Minister is not bound by the rules requiring that evidence be “new”, as described above and, unlike refugee claimants, the Minister may file other documents or submissions at any time before the RAD decides an appeal. The preferential treatment afforded to the Minister in the appeal process is unjustified and should be eliminated.

   b. **Timelines**

   Refused claimants require time to obtain legal advice prior to filing a notice of appeal. In some instances, where inadequate legal representation has contributed to a negative decision, they must find and retain new counsel. CARL members have found that their ability to assemble a thorough and effective appellate record is compromised by the excessively tight timelines set out in the legislation.

**Recommendation**

- The timelines should be amended to provide 15 days to file the appeal and a further 30 days to perfect the record, as is the case with applications for judicial review before the Federal Court.

4. **Clarifying the RAD’s Appellate Role**

   The text of s. 110 of the *IRPA*, providing for RAD appeals, has given rise to considerable confusion and litigation as to whether, and to what extent, RAD appeals are full appeals on the merits of a claim, or whether the RAD merely corrects legal errors.

\(^{28}\) *Canada v. Singh*, 2016 FCA 96
Recommendation

- Amend IRPA to affirm the merit-based nature of appeals to the RAD in accordance with the Federal Court of Appeal’s decision in Huruglica.

5. Ensuring Quality in Decision-Making

The current process for the appointment of RAD members is through an order of the Governor-in-Council, a process which has proven secretive and ineffective, resulting in an unacceptably high level of inconsistent decision-making at both the RAD and, formerly, the RPD. Former members of the RPD with notorious and inexplicably low acceptance rates have been appointed to the RAD, without explanation or accountability.

a. Merit

The RAD reviews decisions of the RPD on their merits and intervenes when these are wrong in law, in fact, or in fact and law. In addition to remedying errors, the RAD is intended to ensure consistency in refugee decision-making by developing coherent national refugee law jurisprudence. These are appellate functions that require well-developed legal skills. It is crucial that RAD members have legal training and experience. The IRPA should require that RAD members be members of a provincial bar or graduates of a Canadian law school. They should also have experience and expertise in refugee law.

b. Appointment and reappointment processes

Candidates for appointment to the RAD should be selected by an independent committee based solely on merit and on the operational needs of the Division. The Committee should consult the Board on the competencies required to perform the work of a RAD member. The Board should also assist the Committee to assess the competence of individual candidates. The Committee will then recommend the one best candidate for each position, with the government’s discretion limited to three options: appointing that candidate, asking the committee to reconsider its recommendation, or declining to accept that recommendation; with the obligation in the latter two cases to give the appointments committee reasons for its decision. Members should be considered for reappointment for a maximum of three terms by the Committee, after consideration of performance evaluations conducted by the Board.

Recommendations

- The Governor-In-Council appointment process should be amended to ensure transparent, merit-based appointments to the RAD, where judicial and legal expertise is fully recognized.

- In consultation with the IRB, a fully independent Selection Committee should make recommendations to the Governor-in-Council for the appointment and re-appointment of
RAD members for set terms. The Governor-in-Council may accept the recommendation or decline it with reasons.

**Legacy Claims**

In December, 2012, with implementation of Bill C-31, the Government introduced a new refugee claim process with much faster processing times and a right of appeal. In order to meet the new time standards, pending refugee claims were set aside giving preference to the new claims. These so-called “Legacy cases” would now be decided on a supplementary basis as Board resources permitted. Moreover, legacy claimants would not have a right of appeal if refused.

In 2016, more than 5000 legacy claimants still await a decision. These claimants have remained in Canada for more than three years on temporary status with no assurance of receiving Canada’s protection, and no means of getting on with their lives, while thousands of more recent arrivals have had their claims decided, been accepted and granted permanent residence.

The delays have caused considerable harm to claimants. With temporary work permits, they are trapped in low end employment, their children cannot afford post-secondary education, and most seriously, family members remain at risk in the home country or languish in refugee camps for years on end.

The Board’s current resources indicate that Legacy cases may not be decided for another four to five years. These delays may be longer as the Board’s annual claim load continues to increase. These delays are unconscionable and inconsistent with Canada’s protection standards. Given resource restraints, a practical and simple solution is required.

**Recommendation**

- As per the Canadian Council of Refugees recommendation, create a class for legacy claimants who are able to apply for permanent residence based on humanitarian and compassionate grounds.

**Pre-Removal Risk Assessments**

Until the coming into force of the Protecting Canada’s Immigration System Act (PCISA) in December 2012, the Pre-Removal Risk Assessment (PRRA) provided access to a timely risk assessment prior to removal from Canada. However, under the new s. 112(2)(b.1) there is a statutory 12-month bar to access this critical human rights protection. For nationals of DCOs,
the bar is 2 years longer, 36 months in total. The effect is that many individuals do not enjoy the benefit of a final risk assessment before they are removed.

Once the PRRA bar was implemented, refugees who were in possession of new evidence of risk, but were precluded by the bar from having that evidence considered, developed an *ad hoc* mechanism to have the risk considered. They present the evidence of risk to a removals officer and ask for a deferral of removal until the new evidence can be assessed by a PRRA officer. If the removals officer refuses to defer, the person challenges the refusal in the Federal Court and seeks a stay of removal.

Unfortunately, this process is not an adequate or appropriate substitute for a risk review by a competent, properly-trained and statutorily mandated decision-maker. Removals officers have no specialized training that would equip them to assess the evidence and they are not independent because they are situated in the same office as the officers charged with effecting the removal. This process is costly and inefficient and there needs to be a mandated mechanism to raise new risk prior to removal.

Section 113(1) of the *IRPA* only permits PRRA applicants to submit new evidence that arose after their claim was refused by the RPD or that was not reasonably available, or that the applicant could not reasonably have been expected to have presented to the RPD. Section 113(1) is frequently the basis for the refusal to consider evidence which, if considered, *would lead to the conclusion that the individual in fact faces a serious risk of persecution, torture or death*. Claimants who are facing very real risks, have their PRRAs denied, and may be removed, contrary to Canada’s obligations under international human rights and refugee law.

In addition, pursuant to s. 114(1)(b), some PRRA applicants who establish that they are at risk of death, torture, or other cruel and unusual treatment or punishment are barred from refugee protection and are granted only a temporary stay of removal. Though not removable to their country of origin, these individuals are relegated to a kind of legal limbo, in which their rights to participate in society are severely curtailed, including not just the franchise, but also educational, mobility, family unity and other rights. Such persons may remain in limbo in Canada for many years or, indeed, the rest of their lives, not removable, but excluded from Canadian society and unable to reunite with family members.

**Recommendations**

- Remove the PRRA bar
- As a right’s-respecting alternative, allow persons to apply to a PRRA Officer for a waiver of the PRRA bar. This process would ensure the person has a right to have the evidence
reviewed by a person competent to do so in a timely fashion. The process would involve the following:

i. At any time after a failed refugee claim by the RPD or a PRRA officer, and when the PRRA bar is in effect, a person may apply to a PRRA officer for an order waiving the PRRA bar.

ii. Application must be made in writing supported by evidence and explanation of how the evidence justifies a further risk assessment. Applicants must provide all of the evidence relied on in support of the application.

iii. If the person makes the application within 15 days of being notified by CBSA that a removal order is in force and that the removal will be effected, then the person’s removal will be stayed until such time as a PRRA officer decides on the application for a waiver.

iv. PRRA Officers will be required to render decisions on the request for waiver within 30 days of submission of the request.

v. The PRRA Officer must grant the waiver if there is any evidence adduced by the person that might give rise to a positive determination in the PRRA. The threshold for the waiver is intended to be low but will allow PRRA officers to reject frivolous cases.

- Rescind s. 113(a), the PRRA new evidence requirement.

- Transfer responsibility for PRRA decision making to the RPD.

- Rewrite s. 114 to ensure that all successful PRRA applicants obtain refugee protection and have access to permanent residence.

**Humanitarian and Compassionate Relief**

The availability of equitable, humanitarian and compassionate relief to mitigate the rigidity of the law in an appropriate case, has been a defining characteristic of Canadian immigration law for decades. As the Supreme Court explained in the recent Kanthasamy judgement, citing a 1975 case called Chirwa, the provision exists to address “those facts, established by the
evidence, which would excite in a reasonable man [sic] in a civilized community a desire to relieve the misfortunes of another.”

While s. 25 of IRPA, the Humanitarian and Compassionate (“H&C”) provision, remains an important provision, its reach has been drastically curtailed by the Balanced Refugee Reform Act (BRRA), the Protecting Canada’s Immigration System Act (PCISA) and the Faster Removal of Foreign Criminals Act (FRFCA) resulting in numerous categories of vulnerable persons and communities being denied access to equitable relief. Specifically, the following barriers were introduced between 2010 and 2014:

- bar on submitting H&C applications concurrently with refugee claims (25(1.2)(b))
- bar on submitting H&C applications for permanent residence until one year after the refugee claim has been rejected (25(1.2)(c))
- bar on making an application for a Temporary Resident Permit (TRP) until one year after refugee claim has been rejected (24(4))
- bar on considering s. 96 and 97 risk factors in H&C applications (25(1.3))
- bar on H&C applications by persons who have been found inadmissible under s. 34, 35 or 37 (25(1))
- restriction of H&C discretion to persons who have applied for permanent residence (25(1))

Restricting access to equitable relief is anathema to basic norms of justice and the very structure of the IRPA. It also calls into question the constitutionality of other immigration provisions (for instance, broad-based inadmissibility criteria) that have historically been justified by the availability of H&C relief for exceptional cases. With the change of government, the only available remedy for many has been to seek the personal intervention of their MP or to make a direct appeal to the Minister of Immigration, Refugees and Citizenship. This uneven and discretionary remedy is not a viable systemic answer to the numerous equitable bars to relief implemented by the previous government.

**Recommendation**

- Eliminate the barriers to H&C relief

**Cessation**

Under the United Nations Convention Relating to the Status of Refugees, there are certain circumstances under which a Refugee may cease to be recognized as a Convention Refugee

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29 *Kanthasamy v. Canada*, 2015 SCC 61
through a cessation process. In line with the Refugee Convention, s. 108 of the *IRPA* sets out the various circumstances by which a refugee or protected person can cease to be a refugee or protected person. Typical circumstances include where the person voluntarily re-establishes themselves in their previous country of nationality, becomes a national of another country where they do not fear persecution, or “re-avails themselves of the protection of their former country”, which could include applying for a passport or temporarily returning to the home country.

Cessation has historically been far more important in countries where refugees only received temporary protection and the host country was eager to remove those who no longer feared persecution. In Canada, prior to recent changes in immigration and refugee law, a protected person normally received permanent residence, and their right to remain in Canada then rested on their permanent residence status, even if they subsequently ceased to be a refugee. Cessation did not terminate a protected person’s permanent residence status.

Canada chose to promote integration and settlement through this policy, by offering permanent residence to protected persons. The policy was both practical and compassionate. Once a protected person became a permanent resident, they were allowed to get on with their lives without fear of being returned to their country of nationality. They could go to school, buy a house, begin a career, or invest in a business. They still had to meet all the other requirements of permanent residence, such as not committing serious crimes and maintaining minimum residency requirements, but they could now confidently call Canada home.

An exception occurred where the protected person became a danger to the public. Then Canada could invoke danger opinion proceedings to cancel protected person status in order to remove the person from Canada, after also removing their permanent residence due to serious criminality.

The law on cessation changed dramatically with the passage of the *Protecting Canada’s Immigration System Act* (“*PCISA*”) in 2012. Now, a finding of cessation removes both protected person status and permanent residence status in one fell swoop, pursuant to s.40.1 (2) and s.46(1)(c.1) of *IRPA*.

The law is unfair and founded on a false premise, it assumes any form of cessation-type activity is evidence of a fraudulent claim. Many forms of refugee conduct which could underlie a cessation application, do not mean the refugee claim was fraudulent, or that the person is no longer at risk of persecution. Refugees do return temporarily to their former country, often at great risk, for compelling reasons related to family illness, death, and family members at risk. For refugees who fear a non-state persecutor, it could be reasonably safe to return temporarily to certain parts of the country. Similarly, such refugees could apply for a passport since the
state is not the persecutor. These activities are not evidence that the refugee is safe in the home country or that the original claim was fraudulent.

In other instances, the refugee may no longer be at risk due to a change of country conditions, long after the person was accepted as a refugee. A temporary return to the home country is not evidence that the original claim was fraudulent, and there is no reasonable basis for removing the person’s permanent residence status. To do so, directly contradicts Canada’s core policy intention to allow refugees to integrate into Canadian society as soon as possible.

Following a cessation decision, the person loses both protected person status and permanent residence, with no right of appeal. Their only recourse is a leave application for judicial review but there is no statutory stay of removal triggered by an application for judicial review, and they are immediately removable from Canada.

Moreover, the loss of permanent residence is based solely on cessation factors. The length of time living in Canada, having a Canadian family, the best interests of a child and having a materially and socially successful life in Canada are all irrelevant to the cessation decision. A person could have lived ten years in Canada, have a spouse and children who are Canadian citizens, and be a model resident. Under the current law, all of those facts are irrelevant to the loss of permanent residence.

Finally, the application of the law is retroactive. The law came into force in December, 2012, but any prior conduct can result in loss of protected status. If a protected person returned to their country of origin in 2002, for example, for whatever reason, they are still vulnerable to a cessation proceeding, although there were no legal consequences for returning to their county at the time.

Where there is a legitimate concern that a particular claim was fraudulent, the law already contains a remedy. It was always possible for a protected person to lose their refugee status through “vacation” proceedings under s.109 of IRPA if their refugee status was obtained as a result of directly or indirectly misrepresenting or withholding material facts. “Vacation” of protected person status leads to an automatic loss of permanent resident status as well. This was not changed under the new provisions, and vacation continues to be the appropriate mechanism to deal with system integrity issues.

From 2007 to 2011, there were 106 cessation applications made by the Minister. In Operational Bulletin PRG-2013-59, dated September 19, 2013, the Minister of Public Safety set a target of 875 applications per year, and cessation prosecutions increased exponentially as a result. This has been done at great cost to the taxpayer, serving little or no purpose, and brutally disrupting the lives and futures of well-established residents of Canada who were, and often still are, genuine refugees.
Cessation applications are primarily being brought against Permanent Residents who, it is alleged, have “re-availed” themselves of the protection of their country by traveling back to their countries, often many years after their claims for protection have been decided. In many cases the individuals traveled before the law changed, at a time when there was no restriction on returning to their country. In other words, they could not have known they were putting their permanent resident status at risk.

Cessation applications are even being brought against permanent residents who came to Canada as government sponsored refugees. These permanent residents are, for the most part, fully integrated into Canada. Many have Canadian born children and have deeply integrated into Canadian communities. The Minister has argued in court that humanitarian factors not only need not be considered, but cannot be considered by officers in deciding whether to strip a refugee of their permanent residence status through cessation. This issue is currently being litigated by the Minister before the Federal Court of Appeal.

Cessation applications are often triggered when a person applies for citizenship and these proceedings are arbitrarily suspended in deference to the cessation proceedings. Many protected persons are being warned not to apply for citizenship, permanent resident cards or travel documents for fear of triggering a cessation prosecution based on past travels. This has created a great deal of fear and uncertainty in refugee communities. Moreover, with the decision of Bermudez, the Federal Court of Appeal has held that officers have very little discretion to not file an application to bring a cessation processing once they learn there are grounds for cessation.  

As an example, Ms. Esfand, a permanent resident, came to Canada with her husband and their daughter as government sponsored refugees from Iran in 2006. In 2007, their second daughter was born in Canada. They are now a well-established self-supporting family of four who have called Canada home for nearly ten years. Her husband and her two daughters are Canadian citizens yet her citizenship application is on hold while she defends a third court proceeding in which her removal from Canada is sought. Ms. Esfand never claimed a risk of persecution in Iran, it was her husband who was at risk, but the government’s refugee resettlement process included her and her first daughter as refugees to keep them together with their husband/father. Because she was given derivative refugee status as the spouse of a refugee, a visit to Iran to see her family triggered cessation proceedings and her potential removal from Canada.

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30 Canada v. Bermudez, 2016 FCA 131
Recommendations

- Repeal ss 40.1(2) and 46(1)(c.1) of IRPA so that permanent residence is not automatically stripped upon cessation under s. 108.

- Permit permanent residents who lost their status through cessation after December 15, 2012 to re-acquire their status with minimal qualifying criteria.

- Entitle persons who are found to have ceased to be refugees to a PRRA prior to removal. Currently, there is a one year bar on such applications following a cessation decision (per section 112(b.1) of IRPA); this change was also part of the PCISA.

- Stop all cessation applications against permanent residents; withdraw all pending cessation applications against permanent residents.

- Require the Minister to consider humanitarian and compassionate factors prior to bringing cessation applications. The Minister should consider whether a person traveled before the law changed, the person's ties to Canada, the impact removal would have on person and family, the best interests of any child affected, the person's reasons for travel, on-going risk in country of nationality, etc. Cessation should only be brought in rare circumstances reflecting real concerns regarding the integrity of the refugee protection system.

- Stop bringing cessation applications against Government Assisted Refugees.

- Stop bringing cessation applications against family members of overseas protected persons who themselves did not have an independent claim for protection.

PART 2: OTHER ASPECTS OF THE IMMIGRATION SYSTEM IN NEED OF REFORM

Citizenship

The recent amendments to the Citizenship Act, reversing changes which made citizenship more difficult to obtain and more precarious, are welcome and important. However more needs to be done to enhance the fairness of the process.

The bar to obtaining citizenship after revocation should be reduced to five years, as it was previously. While some consequences should flow from misrepresentations, five years is a
sufficient time. It should be noted that if this is done, a person will only be eligible to apply again after five years.

The revocation procedures for misrepresentation should also be amended to accord with the principles of procedural fairness. A Canadian citizen can have his or her citizenship revoked by an official without a hearing and without any right to full disclosure of the case against them. Contrast this with a permanent resident subject to deportation for misrepresentation, who has a right to both a hearing and an equitable appeal to the Immigration Appeal Division (IAD) of the IRB. This means a citizen whose citizenship is revoked has fewer procedural rights than a permanent resident who is ordered deported for misrepresentation.

Moreover, if the misrepresentation occurred in the context of the person’s permanent residence application, a person who loses citizenship for misrepresentation is denied the right to an equitable review before the IAD. A permanent resident, by contrast, brought to a misrepresentation hearing at the Immigration Division, is entitled to equitable relief at the IAD. This leads to the perverse situation where permanent resident status is more secure than that of the citizen.

The procedure for citizens should mirror the procedure for permanent residents who are subject to deportation on grounds of misrepresentation: a report by an officer, referred to the Immigration Division with a right of appeal to the IAD. This model would have the required procedural protections but not the costs associated with the previous model, which involved the Federal Court. In the alternative, cases could be referred directly to the IAD. The Appeal Division has expertise in considering misrepresentation cases. The only additional cost would be the appointment of new members and new minister’s counsel. The citizenship revocation provisions are currently subject to a legal challenge in the Federal Court as being inconsistent with the Charter.

In addition, the provisions that allow for denial of citizenship to persons who are charged or convicted of offenses outside of Canada, should be amended so that charges or convictions in undemocratic regimes cannot be a basis for denying citizenship.

Finally, the Citizenship Act should be amended to ensure that statelessness is clearly defined as encompassing both de jure and de facto statelessness, to ensure that no revocation decision can lead to a person being rendered stateless. The harm arising from an overly narrow definition limited to legal (de jure) statelessness is that it leaves unprotected persons who, though they cannot establish they are stateless in law, nevertheless have no state that is willing and able to treat them as their national. They therefore face the same lack of legal status and human rights protection as the de jure stateless.
**Recommendations**

- Reduce the bar for obtaining citizenship after revocation to five years, as it was previously.
- Amend the revocation procedures for misrepresentation to allow for a fair hearing and an equitable appeal.
- For those denied citizenship for foreign criminal convictions or charges, expressly exclude convictions in undemocratic regimes.
- Include a definition of statelessness in the Citizenship Act that encompasses both de jure and de facto statelessness.

**Immigration, Refugee and Citizenship Canada Oversight**

Currently, individuals who are having trouble dealing with Immigration Refugee and Citizenship Canada (IRCC), or who have complaints about their operations, approach their Members of Parliament. MPs receive an enormous number of calls every year about immigration matters. An IRCC ombudsman or independent complaints mechanism would regularize and streamline this process and relieve the strain on MP resources and staff. While IRCC requires oversight, and an independent complaints mechanism, it lacks the coercive powers of CBSA, and so the IRCC’s oversight needs are different from the CBSA’s. Two separate oversight bodies are needed.

**Recommendations**

- An IRCC Ombudsman Body should be mandated and empowered to:
  - receive and investigate complaints from the public about IRCC conduct or policies.
  - provide an internal review mechanism for cases in which the complainant is not satisfied with the response to a complaint
- The Ombudsman body should be:
  - fair, open, and transparent in handling complaints;
  - be accountable to the public and complainants by responding to complainants, and reporting on the handling of complaints and investigations.
• cooperate with a CBSA oversight mechanism, described in detail below, when the circumstances require it.

**Inadmissibility**

The *IRPA* sets out various circumstances under which an individual who may otherwise be eligible to obtain status in Canada is nonetheless “inadmissible”. A finding of inadmissibility is very serious as an individual who is inadmissible is barred from entering, or remaining in, Canada.

1. **Inadmissibility for Membership in a Group**

Inadmissibility for membership in an organization under s. 34(1)(f) of *IRPA* should be brought in line with the reasoning of the Supreme Court in *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40.

With respect to refugee exclusion under Article 1F(a) of the United Nations Convention Relating to the Status of Refugees, the Supreme Court in *Ezokola* eschewed guilt by association and held “at a minimum, complicity under international criminal law requires an individual to knowingly (or, at the very least, recklessly) contribute in a significant way to the crime or criminal purpose of a group.” [para. 68] The same standard does not yet apply to inadmissibility for membership in an organization, under s. 34(1)(f) of *IRPA*. Currently, no showing of complicity or even temporal link is required for an individual to be found inadmissible under *IRPA*.

An example of the problems arising from the legal test as it stands, is that of the Kurdish Democratic Party of Iran (KDPI). In 1996, the KDPI made a public choice to pursue autonomy by peaceful means and there have been no documented military engagements since that time. Currently, the KDPI is recognized as a peaceful organization promoting a worthy goal of self-determination for the Kurdish people. It is an organization that Canada and the U.S. have worked with most recently in combating extremism in the region.

Yet, those who at any time were or are members of the KDPI well after any violent actions were disavowed and ceased, are still impugned for being a member of an organization that sometime in the past, in some iteration or branch thereof, engaged in “subversion by force of any government.” This includes individuals who were not even born when the last violent action occurred two decades ago. It also includes those who joined the organization because they believe in their current non-violent approach, and limited their own involvement to distributing informational pamphlets advocating for the recognition of Kurdish rights. As it stands, any such individual is equally inadmissible to Canada. The law makes no distinction between such
laudable nonviolent individuals, and those who themselves have participated in or assisted violent actions. The lack of distinction is illogical and unreasonable.

While the IRPA does provide a Ministerial relief mechanism under s. 42.1, which could, in theory, address the overbroad inadmissibility definitions, that section is not governed by any set policy, procedure or direction. Applications are held in virtual abeyance for indefinite periods, often a matter of years.

Recommendations

- Amend s. 34(1)(f) of the IRPA such that it may only result in inadmissibility where an individual is complicit in proscribed acts, consistent with decision of the Supreme Court of Canada in Ezokola

- Transfer Ministerial relief decision-making to an independent body that is accessible and capable of making timely decisions.

2. Criminal Removal and Access to Appeal Rights – IRPA ss. 36 and 64

Canada’s system of deportation for criminality, and access to a humanitarian appeal, must be brought in line with modern international norms and an evolved understanding of such removals.

This is especially so with respect to long-term permanent residents with decades of good behavior prior to a criminal offence. There is a fundamental difference between an individual who commits a first offence after 20 years of being a productive resident, and an individual who engages in criminality shortly after landing. Currently, the law does not distinguish between the two. Both are equally inadmissible and subject to removal without consideration of humanitarian factors if the 6 month ‘serious’ criminality threshold under IRPA s. 36 is triggered.

Such removals breach Canada’s obligations as a signatory of international treaties and a member of the international community. The presumption of conformity with international law must be closely adhered to in immigration law which has considerable international implications. Given that immigration law is rooted in international legal norms, it must similarly change alongside these norms. This argument has been espoused in the U.S. where courts have found: “immigration statutes must be woven into the seamless web of our national and international law.”

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Likewise, the Supreme Court of Canada has recently found it necessary to “rearticulate” Canadian immigration policy to “bring it in line” with the Refugee Convention and international law.  

Specifically, Canada has ratified and is thus bound by the International Covenant on Civil and Political Rights (“ICCPR”). Removal of long-term permanent residents conflicts with provisions of the ICCPR which protect against arbitrary deprivation of the right to enter one’s own country, and the right to be free from arbitrary interference with one’s family.

a. Deprivation of Right to Enter Own Country

Article 12, paragraph 4 of the ICCPR holds: “No one shall be arbitrarily deprived of the right to enter his own country.”

In its General Comment No. 27 on freedom of movement, the United Nation Human Rights Committee (UNHRC) has held the term “his own country” is broader than the concept “country of his nationality”. It is not limited to nationality in a formal sense (i.e. nationality acquired at birth or by conferral). Rather, it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. As the Committee has eloquently and succinctly held:

[T]here are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality.

The words “his own country” invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.

There are many who were first brought to Canada as young children and have remained permanent residents their whole lives. These individuals may suddenly find themselves subject to removal after an isolated, out of character offence. Many are shocked to learn of the drastic consequences, as they have always considered themselves fully Canadian since childhood. For all intents, they have established Canada as their “own country” within every meaningful sense.

32 Ezokola v Canada (Citizenship and Immigration), 2013 SCC 40
33 General Comment No. 27 on freedom of movement, CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 20. (The Human Rights Committee’s General Comments and decisions in individual cases are recognized as a major source for interpretation of the ICCPR, see Gerald L. Neuman, The Global Dimension of RFRA, 14 Const. Comment 33, 44 n. 63 (1997)).
34 Jama Warsame v. Canada, CCPR/C/102/D/1959/2010, UN Human Rights Committee at para. 8.4 [emphasis added]
of the term, they are a product of Canadian society regardless of their official status. To permanently remove them is a punishment not reflective of, or proportional to the crime they committed and their circumstances.

Regarding the “arbitrariness” of deportation, UN HRC General Comment No. 27 provides that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should, in any event, be reasonable in the particular circumstances.

Further, “[t]he Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.”35

In the vast majority of removals, return to Canada is de facto impossible due to Canadian immigration regulations. As such, exiling long-term permanent residents from ever returning to their own country would be disproportionate to the legitimate aim of preventing the commission of further crimes, and thereby arbitrary. On these grounds, removal of long-term residents constitutes a violation of article 12, paragraph 4, of the ICCPR.

b. Interference and Deprivation of Right to Family

The ICCPR is particularly forceful in defense of the rights to privacy and family integrity. Article 23(1) of the ICCPR provides that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Implicit in this right is the right of family members to live together.36

To protect the fundamental right of families to live together, the ICCPR provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his ... family...." ICCPR, art. 17. Applying this requirement in the context of deportation laws, the United Nations Human Rights Committee has explicitly recognized that deportation from a country in which close family members reside can constitute an interference with family life.37

35 General Comment No. 27 on freedom of movement, CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 21.
The ICCPR and other tenets of international law have been applied numerously across jurisdictions to override the deportation and removal of those convicted of criminal offences from their country of long-term residence.\(^{38}\)

The Canadian case of *Jama Warsame v. Canada*, CCPR/C/102/D/1959/2010, UN Human Rights Committee (HRC), 1 September 2011, is of particular note. Mr. Warsame came to Canada at the age of four and was granted permanent resident status as a dependent of his mother under the Refugee Claims Backlog Regulations. Many years later, he was convicted of two offences (robbery and possession for the purpose of trafficking). He received an order of deportation for serious criminality in 2006.

The UN HRC held against Mr. Warsame’s deportation based on the fact he had never lived in Somalia, did not speak the language, had limited clan support or family in Puntland and would face a real risk of harm under articles 6, paragraph 1 and 7, of the ICCPR.

Moreover, the UN HRC held that Mr. Warsame had established that Canada was his own country within the meaning of article 12, paragraph 4, of the ICCPR, in the light of the strong ties connecting him to Canada, the presence of his family in Canada, the language he speaks most fluently, the duration of his stay in the country and the lack of any other ties other than at best, formal nationality with Somalia.\(^{39}\)

c. **“Homegrown Criminals”**

Further to the foregoing principles, is the concept of a ‘homegrown criminal’, which must be given greater recognition in our immigration system.

The idea is that an individual raised within this society, whose habits arose and were picked up in this society, is a part of this society for better or for worse. A young child does not come here a criminal; what becomes of him is the responsibility of the country which fostered him and in which he was raised. This is not to say that he or she should not answer for his actions under the criminal justice system of Canada; but that he or she should be treated the same as any offender who was born here or who obtained citizenship. His connection to this nation is no more or less, his culpability for his actions is no more or less, and the penalty prescribed should be no more or less drastically disproportionate.


The history of Canadian immigration law pre-1976, and recent jurisprudence from the UN Human Rights Committee, support the proposition that where a permanent resident has lived in Canada for an extended period, and especially during the formative years of his/her life, that individual should not be deportable. That individual is, for all intents and purposes, a member of Canadian society and a product of Canada. It is unjust to expel him from what is, in functional terms, his or her only home.\(^{40}\)

**Recommendations**

- Do not issue deportation orders against permanent residents who arrived in Canada before the age of 18, and who have not committed a serious crime, as defined by s. 36(1) of *IRPA*, for the first 10 years since landing.

- Do not issue deportation orders against permanent residents who have lived in Canada for an extended period, and especially during the formative years of his/her life.

- For all others, provide access to the Immigration Appeals Division’s equitable jurisdiction to permanent residents who have lived in Canada in excess of 20 years and who face loss of status and removal on grounds of serious criminality.

- Restore access to the Immigration Appeals Division’s equitable jurisdiction to the standards prior to the ‘*Faster Removal of Foreign Criminals Act.*’ Specifically, appeal rights should be afforded for all non-penitentiary sentences (i.e. two years less a day).

- In the alternative, conditional sentence orders (CSOs) should be excluded from the definition of a sentence of imprisonment for the 6-month threshold. The Federal Court of Appeal (FCA) has already underscored: “the inconsistent consequences and even absurdity when one considers that the IRPA treats a conditional sentence of imprisonment of seven months more severely than a five months jail term.”\(^{41}\)

**d. Deeming Provision**

In *Ahmed* decision, the Federal Court held that for the purposes of criminal prohibition under the *Citizenship Act*, the election of the Crown whether to proceed summarily or by indictment is determinative of whether the offence is classified as indictable.\(^{42}\) This reflects the fact that many minor offences are hybrid offences, which may be pursued by indictment but are most

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\(^{40}\) *Ibid; BK Ghana* [2010] UKUT 328 (IAC)

\(^{41}\) *Tran*, 2015 FCA 237 at para. 81.

\(^{42}\) *Ahmed v. Canada*, 2009 FC 672
often proceeded with summarily given the nature of the offence. It is reasonable that such summary offences are not treated as “indictable” for the purposes the *Citizenship Act*.

However, this reasonable approach is foreclosed in proceedings under the *IRPA* because of the “deeming provision” under s. 36(3)(a). The provision holds that any hybrid offence is “deemed indictable” for the purposes of inadmissibility to Canada and loss of status, regardless of the Crown’s election and the ultimate conviction. Therefore many summary convictions, which the Crown would not have considered pursuing by indictment, are treated as indictable under *IRPA*. This is a critical issue as a vast majority of offences under the *Criminal Code* are now hybrid offences. For purposes of the *IRPA*, however, the result is that minor summary offences are treated the same as indictable offences, with severe consequences for the admissibility of individuals. This results in very serious consequences for reasonably blameless individuals, their Canadian families and Canadian employers.

**Recommendation**

- Repeal the deeming provision under *IRPA* s. 36(3)(a), such that the nature of the ultimate conviction is dispositive of its treatment under immigration law. This would accord with the approach that is taken under the *Citizenship Act*.

**3. Inadmissibility for Misrepresentation**

Currently, pursuant to s. 40 of *IRPA*, a minor inaccuracy in any information provided constitutes grounds for a finding of misrepresentation. It may not matter if the misrepresentation was unintentional, or essentially clerical in nature. In other words, unlike the situation of fraud in the criminal context, a finding of misrepresentation does not require an element of *mens rea* or intentionality. With respect to misrepresentations under the *Citizenship Act*, the Federal Court has found an element of *mens rea* is required. The same should be true for immigration, where the risk of inaccuracy is high as people work through translators. Instead, a minor, inadvertent inaccuracy in an immigration application, could lead to severe consequences, including a five year bar on re-application.

**Recommendation**

- S. 40 of *IRPA* should include elements of both materiality and intentionality.

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43 See for example, *Savic*, 2014 FC 523
4. **Ministerial Relief**

The Ministerial relief procedure was introduced into the *IRPA* to provide relief from the often harsh consequences of an inadmissibility finding. It is generally recognized that the current language of the inadmissibility provisions is broad and includes people who present no threat to Canada’s national security, and who have not committed any violent acts directly or through complicity. Even the late honorary Canadian Citizen and Nobel Laureate Nelson Mandela was inadmissible under these provisions.

The Federal Court has determined that the national security provisions must be given a broad and unrestricted interpretation. A person can currently be found to be inadmissible for membership in a terrorist group even if he or she joined the group after it ceased committing terrorist acts or left before any such acts were committed. A person can be found inadmissible even if his or her membership occurred years ago and even if the person never engaged personally in any illegal acts.

Moreover, a finding that a person is a member in a terrorist group does not currently depend on whether or not the person actually joined the organization but rather on an assessment by an officer or tribunal of the person’s degree of involvement in the organization. A person can be found to be a member if the officer or tribunal determines that he or she was committed to the organization objectives and contributed in some way to it.

The current Ministerial relief procedure has several defects, including:

- The process takes far too long. Some applications have been awaiting a decision for more than five years;
- The officials who prepare the ministerial briefs have systematically taken a very narrow view of “national interest”. They almost always recommend against the granting of relief even if persons have lived for many years in Canada without incident as law abiding citizens;
- The briefs routinely fail to adequately consider the impact of decisions on family members and emphasize past membership, to the exclusion of all other considerations.

The failure of the ministerial relief procedure to provide an adequate remedy to hundreds of persons who have lived in Canada for many years has caused great hardship to many vulnerable people in Canada and abroad.

**Recommendations**

- In addition to the urgent need to narrow the scope of currently overbroad inadmissibility provisions (see above), the Ministers should review the Ministerial relief process and
guidelines to ensure that it provides necessary relief against the sometimes overbroad reach of the inadmissibility provisions.

- Repeal recent changes to IRPA limiting the considerations on ministerial relief to national security and public safety considerations. The Minister should be able to consider a broad range of factors including for example the best interests of the child when rendering a decision, and most importantly whether the person at issue actually presents a security threat.

Detention

1. Children in Detention

Immigration detention has significant impacts on children. Children are sometimes themselves detained; they are sometimes in detention with their parents, as “guests” of the detention centre; and they are sometimes separated from detained parents. Children are traumatized by the prison-like environment at the Immigration Holding Centre and the aggressive and disrespectful treatment of their parents by Canada Border Services Agency (CBSA) officers.

Regardless of whether they are detained in law, in fact, or separated from parents because the parents are detained, detention has troubling traumatic impacts on children. However, CBSA and the Immigration Division of the IRB only take into account the best interests of the child, when the child is subject to a detention order. Parents are even threatened that the Children’s Aid Society (CAS) will be called if they do not cooperate, and CBSA has called CAS to apprehend children when parents are detained. CBSA (and the Immigration Division) refuse to consider the best interests of children who are in detention centres with their parents, or who are separated from their parents (staying with family, friends or in the care of the Children’s Aid Society) when making detention decisions.

Among the many examples is BB, a 9-year old Canadian citizen, who was in a detention centre with her mother for over 12 months. Her mother was detained on the ground that she was a flight risk. The situation could have continued indefinitely were it not for the Minister’s issuance of a Temporary Resident Permit. Minister’s Counsel consistently argued, and the Immigration Division consistently held, that BB’s best interests were irrelevant to the question of whether her mother should continue to be detained. The adjudicator refused to consider a mental health assessment of BB that was submitted to the adjudicator, or the fact that she had

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been out of school for a prolonged period. Although mother and daughter are no longer in detention, BB continues to experience psychological consequences from her year of incarceration. The issue of the Immigration Division’s jurisdiction is currently before the Federal Court.

CBSA should adopt the following twin principles: children should not reside in detention centres, and children should not be separated from their parents.45 While there will always be exceptions where the law may allow for the detention of children as a matter of last resort for brief, time-limited periods46, or the separation of children from their parents in certain circumstances,47 these twin principles should infuse decision-making around immigration detention and departure from them should require justification. The Convention on the Rights of the Child requires States Parties to consider the best interests of the child as a primary consideration in all actions concerning children.48 Canada currently falls far short of these important goals.

**Recommendations**

- Cease detaining families / children / parents except when it is truly a matter of last resort (i.e. danger to the public, removal imminent – within a few days);
- Undertake a best interests of the child assessment when any immigration related detention will impact a child;
- Acknowledge that a child’s best interests is a relevant consideration at detention reviews, regardless of whether the child is subject to a detention order;
- Cease detaining adolescent children in segregation at the Immigration Holding Centre;
- Treat all immigrants and refugees with respect, including when they are detained, and especially when there is a child present;
- Record and promptly report all statistics regarding children in detention centres, including those who are “guests” of the facilities;
- Provide an explanation for the security protocols currently in place at the IHCs, given that the IHC is meant for administrative detention only;

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45 IHRP briefs, Annex A
46 For example within 48 hours of removal
47 For example when a parent is detained on the basis of danger to the public
• Amend section 248 of the Immigration and Refugee Protection Regulations to include the best interests of any child affected as a relevant factor in detention decisions.

2. Detention of the Mentally Ill

Studies show that detention has short and long-term mental health impacts on detainees and exacerbates pre-existing symptoms and conditions. Refugees seeking protection in Canada have often experienced trauma and live with Post Traumatic Stress Disorder and/or depression. As in the general Canadian population, some immigrants and refugees live with major mental illnesses such as schizophrenia and bi-polar disorder or express suicidal ideation.

Instead of interacting with a compassionate and respectful immigration enforcement system, mentally ill individuals are sometimes subject to harsher immigration detention conditions, including detention in segregation, and detention or transfer to provincial correctional facilities.

An example is the case of KMC, who was suffering from major depression and suicidality. She was detained at a provincial correctional facility, despite having no criminal record. She had previously been under the care of a team of mental health professionals, yet her mental health was considered an irrelevant factor during detention reviews. The Immigration Division’s narrow interpretation of its jurisdiction is currently subject to challenge in the Federal Court.

In another case, a young adult refugee claimant was transferred from the Immigration Holding Centre to a provincial prison one day after being detained. The transfer was recommended by an English-speaking psychiatrist at the IHC who had interviewed the French-speaking detainee with translation provided by a private security guard working at the IHC. The psychiatrist believed the detainee had expressed suicidal ideation and wrote a short email to the IHC manager recommending immediate transfer to a prison. The manager ordered the transfer almost immediately without any review of the psychiatric assessment or the psychiatrist’s interview notes. The man was assessed not to be a suicide risk by the intake authorities at the provincial prison. Nonetheless, he was not immediately returned to the IHC. Instead, he was transferred back when legal aid counsel intervened to demand his return.

Suicide is the leading cause of unnatural death among federal inmates, accounting for about 20% of all deaths in custody in any given year. In March, a second immigration detainee died in prison in less than a week while in the care of CBSA, bringing the total number of deaths of immigrant detainees since 2000 to 14.

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Without appropriate policies and procedures, including a reduction in the use of administrative detention for persons living with mental illness, immigration detention will continue to have lasting and sometimes grave consequences. The harsh treatment of persons living with mental illnesses has no place in Canada’s legal system.

Treating immigrant detainees in this manner violates the Charter’s guarantee against “cruel and unusual” treatment and is also contrary to the goals and principles outlined in the 2006 United Nations Convention on the Rights of Persons with Disabilities in particular to, “ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability,” which would also extend to individuals within the care/custody of correctional systems (a.4, s.1). Canada ratified this treaty in 2010.

**Recommendations**

- Detain persons with mental illness, and particularly with major mental illnesses, only as a last resort, and only in an appropriate facility – not a correctional facility.

- Develop in consultation, a policy and review mechanism regarding detainee transfers between the IHC and the provincial correctional centres;

- Increase the use of alternatives to detention for persons with mental illness;

- Acknowledge the relevance of mental health in detention and review of detention;

- Develop guidelines regarding interaction with persons with mental illness, including screening for mental health symptoms, access to appropriate mental health treatment and consistent use of qualified interpreters;

- Amend section 248 of the Immigration and Refugee Protection Regulations to include mental illness as a relevant factor in detention decisions.

**CBSA Oversight**

CBSA officers have extensive powers of arrest, detention, search and seizure. Deaths in detention and CBSA care, including Lucia Vega Jimenez in Vancouver, and two recent deaths in Toronto, highlight the need for appropriate oversight mechanisms. Yet CBSA is not currently subject to any form of oversight or review, and there is no independent body empowered to receive or investigate complaints about the conduct of CBSA officers. There is a need for a robust independent body which can provide the type of oversight to which other law
enforcement agencies are subject, including allowing individuals and organizations to make complaints about the conduct of CBSA officers.

At the same time, the oversight body cannot be driven solely by complaints: CBSA deals with vulnerable people who may be making refugee claims in Canada, or whose status in Canada is otherwise uncertain. These people are often reluctant or unable to file complaints because they are making claims to the Canadian government. In other cases, individuals who may otherwise complain are already deported. Moreover, many of the national security activities of CBSA take place in secret, and are therefore not susceptible to complaint.

Given that CBSA and IRCC operate interdependently and are often intertwined, it may be difficult or impossible in certain circumstances to exercise meaningful oversight over CBSA, unless the oversight body has full jurisdiction over cases involving both bodies. Any CBSA oversight mechanism must have jurisdiction to conduct full investigations, including investigating and making findings respecting the work of the IRCC when the case requires it.

The Standing Senate Committee on National Security and Defence in its June 2015 report\(^{50}\) and the jury in the Coroner’s Inquest into the death of Lucia Vega Jiminez\(^{51}\) both recommended some form of oversight body for CBSA.

In the US, the Citizenship and Immigration Services (CIS) already has an Ombudsman whose mandate is to ‘improv[e] the quality of citizenship and immigration services delivered to the public by providing individual case assistance, as well as making recommendations to improve the administration of immigration benefits by U.S. Citizenship and Immigration Services (USCIS).’\(^{52}\)

**Recommendations**

- **Create a CBSA Oversight Body.** While there are numerous potential models for CBSA oversight bodies, any such body or combination of bodies must be mandated and empowered to:
  - receive and investigate public complaints about CBSA conduct or policies, including third-party complaints from individuals or organizations.

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\(^{50}\) See recommendations 1, 2, 3 of the report: [http://www.parl.gc.ca/Content/SEN/Committee/412/secd/rep/rep16jun15a-e.pdf](http://www.parl.gc.ca/Content/SEN/Committee/412/secd/rep/rep16jun15a-e.pdf)


\(^{52}\) [https://www.dhs.gov/topic/cis-ombudsman](https://www.dhs.gov/topic/cis-ombudsman)
• initiate its own reviews and investigations about CBSA conduct or policies even where there is no complaint, including conducting inquiries or hearings into systemic issues.

• order independent civilian investigation of serious incidents (harm, death) involving CBSA officers.

• conduct searches of CBSA and IRCC property, and compel the testimony of CBSA and IRCC witnesses in carrying out its investigations.

• coordinate with law enforcement where criminal charges are or could be laid.

• make findings that have binding legal consequences, including discipline of personnel, and changes to operational policies and procedures.

• be fair, open and transparent in handling complaints.

• be accountable to the public and to complainants by responding to complainants, and reporting on the handling of all complaints and investigations.

• be staffed by individuals with expertise in law enforcement oversight, and the prosecution of wrong-doing in those contexts.

• have a role in the supervision and monitoring of CBSA policies intended to promote responsible conduct and avoid harmful practices.

• take jurisdiction over complaints, incidents, or systemic issues involving both CBSA and IRCC.

Senator Wilfred Moore has proposed in Bill S-205 amendments to the CBSA Act that will create an Inspector General of the CBSA. This Bill is a good start but the following short-comings should be addressed:

• The Bill does not allow for complaints from organizations or allow the Inspector General to initiate his or her own reviews of conduct.

• The Bill requires the Inspector General to consult before making reports public. While the Inspector General must protect confidential information, and give individuals a chance to be heard before making an adverse finding against them, the final say on what should be made public must rest with the independent complaints body.
• The Bill should allow the Inspector General to convene a public hearing in cases where the public interest requires it.

Removals

When the *IRPA* was first enacted, the scheduling and execution of removals was seen as a largely administrative function. The primary role of CBSA was to obtain travel documents and to book transportation arrangements. Over the past nearly 15 years, however, amendments to the *IRPA* have fundamentally changed the role of removals officers in the immigration system.

One important change has been the imposition of the 12 and 36 month PRRA bars, discussed above. These bars have meant that specially trained decision-makers in IRCC no longer have the ability to assess whether new evidence that has arisen since the refusal of an individual’s refugee claim now warrants her/him receiving Canada’s protection. Likewise, the imposition of the H&C bar, discussed above, has meant that IRCC often no longer has the ability to assess whether humanitarian factors warrant an unsuccessful refugee claimant being allowed to remain in Canada prior to her/his removal taking place. Instead, the only mechanism in which these critical questions can be raised and addressed is in a ‘request to defer removal’. Such a request must be made directly to CBSA. In this manner, many of the most important protection and humanitarian assessments which were previously made by IRCC have now been functionally transferred to CBSA.

There are serious concerns with protection and humanitarian-related matters being decided by an agency whose statutory mandate is to ensure the execution of removal orders. The institutional and operational focus of CBSA on removing individuals from Canada may render its employees inappropriate to simultaneously decide who should be exempted from that process. This is why decision-making about such questions was previously reserved to IRCC.

Moreover, CBSA’s deferral process has not evolved to meet the exceptionally important issues now entrusted to it. The *IRPA* still contains no statutory guidance on when a deferral will be warranted. Moreover, deferral requests will only be considered by CBSA after a removal date has been scheduled. The often very short period between when a removal date is scheduled and when it is executed, sometime a matter of days, means individuals have little time to prepare proper deferral requests, and CBSA has even less time to render thoughtful decisions that reflect the important interests at stake. Moreover, CBSA officers who decide deferral requests receive considerably different training from IRCC Senior Immigration Officers who decide similar questions in PRRA and H&C applications.
**Recommendations**

- Develop, in consultation, a minimum written notice period of any scheduled removal date in order to permit sufficient time to prepare and submit a deferral request. Individuals seeking an expedited removal should be able to waive this notice period, as should CBSA where exigent operational requirements justify doing so.

- Affirm that the primary responsibility for assessing protection-related matters rests with IRCC. CBSA should defer removal to permit an assessment of risk by IRCC where unassessed evidence is now disclosed that could lead to a positive application for protection.

- Confirm that damage to the long and short-term best interests of children affected by a removal should be a primary consideration in deciding whether to defer a removal.

- In conjunction with the recommended elimination of H&C bars, stop initiating removals until 60 days from a final determination of a person’s refugee claim. In other words, CBSA should not send a pre-removals interview call in notices within that 60 day grace period.

- Administratively defer removal if an H&C application has been timely-filed. “Timely-filed” should be defined as “prior to receipt of the CBSA call-in notice.”
SUMMARY OF RECOMMENDATIONS

PART 1: CANADA’S INLAND REFUGEE DETERMINATION SYSTEM

Access to Canada’s Inland Refugee System

1. The Designated Country of Origin Regime
   • Eliminate the DCO scheme
   • In advance of the legislative changes required to repeal the DCO regime, the Minister should immediately rescind the four designation orders issued by the Conservative government.

2. The Designated Foreign National Regime
   • Immediately repeal the Designated Foreign National regime.

3. The Canada-U.S. Safe Third Country Agreement
   • Rescind the bar on appeals by STCA exempt refugee claimants.
   • Reinstate s. 159.6(c) of the Regulations, which exempted nationals of countries in respect of which Canada had imposed a temporary suspension of removals from the application of the STCA.
   • Introduce an exemption for persons who do not have access to a risk assessment in the US equivalent to that available at the RPD.
   • Introduce, by regulation, a specific authorization to exercise Humanitarian & Compassionate (H&C) discretion to refer a claimant to the RPD notwithstanding strict ineligibility under the STCA.

4. Eligibility to Make a Refugee Claim
   • Establish and guarantee access to a refugee hearing at the RPD in accordance with our obligations under international refugee law and the principles underlying the Singh decision of the Supreme Court of Canada. In particular, ensure that (a) everyone asserting a real risk of harm under s. 96 or 97(1) has the opportunity for an oral hearing before the RPD, including those whose RPD claims were previously deemed abandoned or withdrawn prior to a hearing; and (b) that Canada’s eligibility provisions regarding criminality are not broader than the Article 1F(b) exclusion.
   • Return to the language of the 1985 Immigration Act stipulating that persons are ineligible only if they are both inadmissible for serious criminality and the Minister is of the opinion they pose a danger to the Canadian public.

Refugee Determination Proceedings

1. Time limits for Refugee Protection Division Hearings
   • Apply the same timelines to all claimants with no differentiation for DCO or DFN categories.
• The same timelines and process should apply whether the claimant files their claim inland or at a port of entry.

• Amend the timelines as follows:
  • The Basis of Claim form should be due 30 days after the claim is filed.
  • The hearing of the claim should be set 90 days after the due date for the Basis of Claim form or as soon thereafter as reasonably practicable.
  • The criteria for granting postponements and adjournments should be broadened to allow the Board member more flexibility to grant adjournments in appropriate cases.

2. Residual Protection Powers

• Amend the *IRPA* to provide RPD members with a residual protection discretion in relation to specific grounds which arise from refugee like situations, such as: statelessness, family unity, large scale human rights crises, indiscriminate violence, general insecurity, and environmental disaster.

3. Refugee Protection Division Reopening Jurisdiction

• Rescind s. 170.2 of the *IRPA* (and make the consequential amendment to s. 62 of the RPD Rules).

4. Exclusion under Article 1F(b) of the Refugee Convention

• The definition of ‘serious crime’ should be narrowed in the *IRPA*. Current practice of looking at the 10 year maximum does not consider the punishment that would likely be imposed in a Canadian criminal court. A more holistic and comprehensive assessment looking at sentencing range and mitigating factors of the offence must be instituted.

• Expiation or rehabilitation must be considered as a second, separate step. A serious crime 30 years ago should not automatically bar an individual fleeing present day persecution or a risk to life, from access to protection.

5. Complaints about RPD members:

• Improve the Protocol by requiring:
  • clear and accessible communication about the complaints mechanism, and the various ways to access it;
  • prompt acknowledgment of complaints;
  • clear means to protect the identity of complainants when required;
  • accommodations for the particular needs of vulnerable complainants;
  • public information about complaints, their investigation, and their outcomes;
  • thorough investigation of complaints by an impartial individual;
clear consequences for breaches of the Code of Conduct, including escalating consequences for multiple breaches and significant consequences for significant breaches;
consideration of any systemic issues in every complaint;
a clear and regular process for incorporating the feedback from complaints, including systemic issues, into the operations of the Board; and
adherence with the annual reporting function in the Protocol

The Refugee Appeals Process

1. Jurisdictional Limits
   - The bars on appeals to the RAD should be repealed, namely:
     - Appeals of “Designated Foreign Nationals”. [Section 20.1 & 110(2)(a)]
     - Appeals of claims from “Designated Countries of Origin”. [Section 107(2), 107.1 & 110(2)(d.1)] (declared to be of no force and effect in the YZ case and is therefore inoperable, but remains to be removed from the legislation)
     - Appeals of the claims of individuals whose cases proceeded on the basis of an exception to the Safe Third Country Agreement. [Section 101(1)(e), 102 & 110(2)(d) and IRPA reg. 159.1-159.7]
     - Appeals of determinations that a refugee claim has been withdrawn or abandoned. [Section 110(2)(b)]
     - Appeals of RPD determinations that a claim has no credible basis or is manifestly unfounded. [Section 110(2)(c)]
     - Appeals of RPD decisions with respect to cessation and vacation of refugee status. [Sections 108, 109, 110(2)(e) & 110(2)(f)]

2. Evidentiary Limits
   - The limitations on adducing evidence should be removed, bringing refugee appeals in-line with immigration appeals before the Immigration Appeal Division

3. Procedural Limitations
   - The timelines should be amended to provide 15 days to file the appeal and a further 30 days to perfect the record, as is the case with applications for judicial review before the Federal Court.

4. Clarifying the RAD’s Appellate Role
   - Amend IRPA to affirm the merit-based nature of appeals to the RAD in accordance with the Federal Court of Appeal’s decision in Huruglica.
5. Ensuring Quality in Decision-Making

- The Governor-In-Council appointment process should be amended to ensure transparent, merit-based appointments to the RAD, where judicial and legal expertise is fully recognized.

- In consultation with the IRB, a fully independent Selection Committee should make recommendations to the Governor-in-Council for the appointment and re-appointment of RAD members for set terms. The Governor-in-Council may accept the recommendation or decline it with reasons.

Legacy Claims

- As per the Canadian Council of Refugees recommendation, create a class for legacy claimants who are able to apply for permanent residence based on humanitarian and compassionate grounds.

Pre-Removal Risk Assessments

- Remove the PRRA bar

- As a right’s-respecting alternative, allow persons to apply to a PRRA Officer for a waiver of the PRRA bar. This process would ensure the person has a right to have the evidence reviewed by a person competent to do so in a timely fashion. The process would involve the following:
  i. At any time after a failed refugee claim by the RPD or a PRRA officer, and when the PRRA bar is in effect, a person may apply to a PRRA officer for an order waiving the PRRA bar.
  ii. Application must be made in writing supported by evidence and explanation of how the evidence justifies a further risk assessment. Applicants must provide all of the evidence relied on in support of the application.
  iii. If the person makes the application within 15 days of being notified by CBSA that a removal order is in force and that the removal will be effected, then the person’s removal will be stayed until such time as a PRRA officer decides on the application for a waiver.
  iv. PRRA Officers will be required to render decisions on the request for waiver within 30 days of submission of the request.
  v. The PRRA Officer must grant the waiver if there is any evidence adduced by the person that might give rise to a positive determination in the PRRA. The threshold for the waiver is intended to be low but will allow PRRA officers to reject frivolous cases.

- Rescind s. 113(a), the PRRA new evidence requirement.
- Transfer responsibility for PRRA decision making to the RPD.
- Rewrite s. 114 to ensure that all successful PRRA applicants obtain refugee protection and have access to permanent residence.
Humanitarian and Compassionate Relief

- Eliminate the barriers to H&C relief

Cessation

- Repeal ss 40.1(2) and 46(1)(c.1) of IRPA so that permanent residence is not automatically stripped upon cessation under s. 108.
- Permit permanent residents who lost their status through cessation after December 15, 2012 to re-acquire their status with minimal qualifying criteria.
- Entitle persons who are found to have ceased to be refugees to a PRRA prior to removal. Currently, there is a one year bar on such applications following a cessation decision (per section 112(b.1) of IRPA); this change was also part of the PCISA.
- Stop all cessation applications against permanent residents; withdraw all pending cessation applications against permanent residents.
- Require the Minister to consider humanitarian and compassionate factors prior to bringing cessation applications. The Minister should consider whether a person traveled before the law changed, the person’s ties to Canada, the impact removal would have on person and family, the best interests of any child affected, the person’s reasons for travel, on-going risk in country of nationality, etc. Cessation should only be brought in rare circumstances reflecting real concerns regarding the integrity of the refugee protection system.
- Stop bringing cessation applications against Government Assisted Refugees.
- Stop bringing cessation applications against family members of overseas protected persons who themselves did not have an independent claim for protection.

PART 2: OTHER ASPECTS OF THE IMMIGRATION SYSTEM IN NEED OF REFORM

Citizenship

- Reduce the bar for obtaining citizenship after revocation to five years, as it was previously.
- Amend the revocation procedures for misrepresentation to allow for a fair hearing and an equitable appeal.
- For those denied citizenship for foreign criminal convictions or charges, expressly exclude convictions in undemocratic regimes.
- Include a definition of statelessness in the Citizenship Act that encompasses both de jure and de facto statelessness.

Immigration, Refugee and Citizenship Canada Oversight

- An IRCC Ombudsman Body should be mandated and empowered to:
  - receive and investigate complaints from the public about IRCC conduct or policies.
• provide an internal review mechanism for cases in which the complainant is not satisfied with the response to a complaint

• The Ombudsman body should be:
  • fair, open, and transparent in handling complaints;
  • be accountable to the public and complainants by responding to complainants, and reporting on the handling of complaints and investigations.
  • cooperate with a CBSA oversight mechanism, described in detail below, when the circumstances require it.

Inadmissibility

1. Inadmissibility for Membership in a Group
   • Amend s. 34(1)(f) of the IRPA such that it may only result in inadmissibility where an individual is complicit in proscribed acts, consistent with decision of the Supreme Court of Canada in Ezokola
   • Transfer Ministerial relief decision-making to an independent body that is accessible and capable of making timely decisions.

2. Criminal Removal and Access to Appeal Rights – IRPA ss. 36 and 64
   • Do not issue deportation orders against permanent residents who arrived in Canada before the age of 18, and who have not committed a serious crime, as defined by s. 36(1) of IRPA, for the first 10 years since landing.
   • Do not issue deportation orders against permanent residents who have lived in Canada for an extended period, and especially during the formative years of his/her life.
   • For all others, provide access to the Immigration Appeals Division’s equitable jurisdiction to permanent residents who have lived in Canada in excess of 20 years and who face loss of status and removal on grounds of serious criminality.
   • Restore access to the Immigration Appeals Division’s equitable jurisdiction to the standards prior to the ‘Faster Removal of Foreign Criminals Act.’ Specifically, appeal rights should be afforded for all non-penitentiary sentences (i.e. two years less a day).
   • In the alternative, conditional sentence orders (CSOs) should be excluded from the definition of a sentence of imprisonment for the 6month threshold. The Federal Court of Appeal (FCA) has already underscored: “the inconsistent consequences and even absurdity when one considers that the IRPA treats a conditional sentence of imprisonment of seven months more severely than a five months jail term.”
   • Repeal the deeming provision under IRPA s. 36(3)(a), such that the nature of the ultimate conviction is dispositive of its treatment under immigration law. This would accord with the approach that is taken under the Citizenship Act.
3. Inadmissibility for Misrepresentation
   - S. 40 of IRPA should include elements of both materiality and intentionality.

4. Ministerial Relief
   - In addition to the urgent need to narrow the scope of currently overbroad inadmissibility provisions (see above), the Ministers should review the Ministerial relief process and guidelines to ensure that it provides necessary relief against the sometimes overbroad reach of the inadmissibility provisions.
   - Repeal recent changes to IRPA limiting the considerations on ministerial relief to national security and public safety considerations. The Minister should be able to consider a broad range of factors including for example the best interests of the child when rendering a decision, and most importantly whether the person at issue actually presents a security threat.

Detention

1. Children in Detention
   - Cease detaining families / children / parents except when it is truly a matter of last resort (i.e. danger to the public, removal imminent – within a few days);
   - Undertake a best interests of the child assessment when any immigration related detention will impact a child;
   - Acknowledge that a child’s best interests is a relevant consideration at detention reviews, regardless of whether the child is subject to a detention order;
   - Cease detaining adolescent children in segregation at the Immigration Holding Centre;
   - Treat all immigrants and refugees with respect, including when they are detained, and especially when there is a child present;
   - Record and promptly report all statistics regarding children in detention centres, including those who are “guests” of the facilities;
   - Provide an explanation for the security protocols currently in place at the IHCs, given that the IHC is meant for administrative detention only;
   - Amend section 248 of the Immigration and Refugee Protection Regulations to include the best interests of any child affected as a relevant factor in detention decisions.

2. Detention of the Mentally Ill
   - Detain persons with mental illness, and particularly with major mental illnesses, only as a last resort, and only in an appropriate facility – not a correctional facility.
   - Develop in consultation, a policy and review mechanism regarding detainee transfers between the IHC and the provincial correctional centres;
   - Increase the use of alternatives to detention for persons with mental illness;
• Acknowledge the relevance of mental health in detention and review of detention;
• Develop guidelines regarding interaction with persons with mental illness, including screening for mental health symptoms, access to appropriate mental health treatment and consistent use of qualified interpreters;
• Amend section 248 of the Immigration and Refugee Protection Regulations to include mental illness as a relevant factor in detention decisions.

**CBSA Oversight**

• Create a CBSA Oversight Body. While there are numerous potential models for CBSA oversight bodies, any such body or combination of bodies must be mandated and empowered to:
  • receive and investigate public complaints about CBSA conduct or policies, including third-party complaints from individuals or organizations.
  • initiate its own reviews and investigations about CBSA conduct or policies even where there is no complaint, including conducting inquiries or hearings into systemic issues.
  • order independent civilian investigation of serious incidents (harm, death) involving CBSA officers.
  • conduct searches of CBSA and IRCC property, and compel the testimony of CBSA and IRCC witnesses in carrying out its investigations.
  • coordinate with law enforcement where criminal charges are or could be laid.
  • make findings that have binding legal consequences, including discipline of personnel, and changes to operational policies and procedures.
  • be fair, open and transparent in handling complaints.
  • be accountable to the public and to complainants by responding to complainants, and reporting on the handling of all complaints and investigations.
  • be staffed by individuals with expertise in law enforcement oversight, and the prosecution of wrong-doing in those contexts.
  • have a role in the supervision and monitoring of CBSA policies intended to promote responsible conduct and avoid harmful practices.
  • take jurisdiction over complaints, incidents, or systemic issues involving both CBSA and IRCC.
Removals

- Develop, in consultation, a minimum written notice period of any scheduled removal date in order to permit sufficient time to prepare and submit a deferral request. Individuals seeking an expedited removal should be able to waive this notice period, as should CBSA where exigent operational requirements justify doing so.

- Affirm that the primary responsibility for assessing protection-related matters rests with IRCC. CBSA should defer removal to permit an assessment of risk by IRCC where unassessed evidence is now disclosed that could lead to a positive application for protection.

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