Fast and Efficient but not Fair

Recommendations with respect to Bill C-11

Amnesty International Canada's
Brief to the
House of Commons
Standing Committee on Citizenship and Immigration

May 11, 2010

INTRODUCTION

The government claims that the reforms proposed in Bill C-11 will result in a refugee determination process that is "fast, fair, and efficient". While C-11 includes some laudable initiatives, notably the implementation of the Refugee Appeal Division, its measures sacrifice a fair process for all claimants in the name of speed and efficiency. In particular, the "designated country list", the unrealistic and inappropriate timelines, and the significant changes to humanitarian and compassionate applications are cause for serious concern. If implemented, these proposed legislative changes will violate Canada's international and *Charter* obligations regarding equality before the law. More importantly, they will increase the likelihood that persons in need of Canada's protection will instead by exposed to risk.

What follows are Amnesty International's comments and recommendations with respect to Bill C-11.

1. Timelines

a) Background and Context

The guiding principle of Canada's refugee determination system is that the "refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted".[1] This principle must be borne in mind when assessing the advantages and disadvantages of any proposed changes to the way in which Canada adjudicates refugee claims. Amnesty International agrees that the system is currently too slow, and that refugee claimants wait too long to have their case determined. However, speed in itself must not be the objective of any proposed alterations. The changes must also be fair.

Any acceleration of refugee status determination that increases the likelihood of genuine refugees receiving a negative decision risks violating Canada's international obligation not to send refugees back to places where they risk further persecution. Even the most compelling case may be wrongly decided if not fairly and thoroughly considered.[2]

Under the current refugee status determination process, claimants first make their desire to seek refuge known at the port of entry or at a Citizenship and Immigration Canada ("CIC") office. Upon being determined eligible to make a claim, the majority of claimants are issued a Personal Information Form (PIF) which he or she has 28 days to complete. Frequently, it is the issuance of the Personal Information Form that causes a claimant to seek and retain legal counsel to assist him or her to complete the document and provide representation before the Board.

---

1 Immigration and Refugee Protection Act (2001, c. 27), S. 3(2)(a).

2 European Council on Refugees and Exiles. Asylum Procedures. Online: http://www.ecre.org/topics/asylum_in_EU/asylum_procedures

In the PIF, the claimant must detail his or her past work and education history, family members, places of past residence, etc. Most important is the form's question requesting the details of the individual's refugee claim. This section, referred to as the "narrative", is the claimant's opportunity to fully present all details of his or her story, explaining why he or she cannot return to his or her country of origin.

After submitting the Personal Information Form, the claimant waits for his or her refugee hearing to be scheduled by the Immigration and Refugee Board. During this period of waiting for a hearing, the claimant and his or her lawyer work together to substantiate the case. The claimant may need medical or psychological assistance as a result of torture or other trauma. Affidavits or letters may be sought from individuals in the home country who witnessed the persecution. Personal documents must be translated and country evidence collected. If insufficient evidence exists to substantiate risk on return, an expert may be sought who can provide a report or oral testimony about the persecution the claimant faces. Finally, the claimant's counsel prepares him or her to testify before the Immigration and Refugee Board.

b) Proposed Changes and Concerns

Under the proposed reform, refugee claimants would undergo an initial interview with an employee of the Immigration and Refugee Board eight days after their claim is referred to that body.[3] It is as yet unclear whether this interview would be substantive (involving questions about the persecution feared and reasons for fleeing to Canada) or information-gathering (an oral version of the background questions from the Personal Information Form). A claimant's full refugee hearing would generally take place sixty days after the interview. These timelines, both the eight and sixty days, are not written into the proposed legislation. They would appear in regulations or in the Refugee Protection Division Rules.

i) Eight-Day Interview

Of particular concern to Amnesty International is the fact that the legislative amendment merely refers to an interview but provides no purpose or parameters for the interview.

We are concerned that an interview within eight days provides refugee claimants with insufficient time to adequately prepare.[4] In particular, torture survivors, sexual violence survivors and others who have experienced severe trauma need time to gain trust in an individual such as their counsel in order to be able to tell their story to an interviewer.[5] Eight days after having their claim determined eligible – which in some cases may be eight days after their arrival in Canada - many claimants will be disoriented and unaware

---

[3] Citizenship and Immigration Canada. 2010. Backgrounder: Proposed reforms to Canada's asylum system. Online: http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010-03-30.asp

[4] Refugee Council. 2007. The New Asylum Model. Online: www.refugeecouncil.org.uk/policy/briefings/2007/nam.htm.

[5] Ibid.

of how to find legal advice. Moreover, competent counsel may not be available to act for an individual within such a tight timeline.

In addition to these concerns, AI believes that there may be significant practical challenges in meeting the eight-day target. The preparation of a PIF is time consuming and often only possible with the assistance of an interpreter. Depending on the nature of the interview, an interview within eight days could require significant time and many more interpreters than the Board currently possesses. Currently, the form takes many hours and sometimes multiple sessions to complete.

The narrative portion of the PIF is a critical step in the asylum process. The narrative provides claimants with the opportunity to set out in a non-threatening environment a detailed account of the sensitive details of traumatic persecution experienced or feared. This narrative has served not only as the basis of the claim but as an aid to alert Board Members to the key issues in the case and to help focus their questioning of the claimant. When forms akin to the PIF were discontinued in the United Kingdom, the United Nations High Commissioner for Refugees advocated their reintroduction, as use of the forms helps to focus a hearing.[6]

If the interview proves to be more than an information-gathering exercise and focuses on the substance of the case, Amnesty International fears that claimants too traumatized or afraid of persons in authority to tell their story so soon after arrival will be severely disadvantaged. Claimants will make mistakes or withhold information out of fear, leading to incorrect conclusions that they lack credibility.

ii) Hearing in Sixty Days

It is Amnesty International's position that in some cases sixty days is insufficient time for refugee claimants to properly prepare for their refugee hearing. This is particularly so for survivors of gender-based violence[7] or individuals who fled persecution on account of sexual orientation.

The proposed timeframe will make it extremely difficult, if not impossible in some cases, for claimants to gather evidence from abroad and have that information translated. An affidavit from a family member abroad entails communication between that person and legal counsel regarding the information needed; notarizing of the affidavit abroad; sending the document to Canada (which may take many weeks); and translation of the affidavit into English or French. Likewise, an expert report to support a claim involves finding the expert (often difficult with certain countries or forms of persecution); discussion with the expert about the case; and preparation of the report by its author (often a very busy academic or human rights defender). In some cases the proposed

---

[6] United Nations High Commissioner for Refugees in the United Kingdom (UNHCR UK). 2007. "Quality Initiative Project: Fourth Report to the Minister." London: UNHCR, at section 2.3.71. Online: http://www.ind.homeoffice.gov.uk/aboutus/reports/unhcr

[7] Human Rights Watch. 2010. Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK. At the section entitled "I. Summary". Online: www.hrw.org/node/88671

timeline will not allow a refugee claimant to develop sufficient rapport with and trust in their legal counsel to tell the entire story of persecution and determine the need to obtain supporting documentation. In short, we believe that sixty days is insufficient time to complete these crucial activities.

It is our view that rushing to a hearing will lead to claimants appearing before the Board unprepared and without the benefit of supporting documentation. Without adequate documentation, the quality of the hearing, and the quality of the decision, diminishes. Under the proposed model, we anticipate that many more requests for adjournments will be made by counsel and claimants because crucial evidence requested has not yet arrived in Canada. The need for inefficient adjournments is avoidable simply by providing claimants and counsel with adequate time to prepare. Wrong decisions made before the claimant is able to testify freely will provoke a greater number of appeals, clogging the system at the back end and leading to needless delays, as is the case in the United Kingdom.[8] Amnesty International submits that a better option is to implement more reasonable timelines to ensure a greater number of correct initial decisions.

c) Recommendations

Eliminate the reference to the interview in the law

Maintain a PIF or adapted version of the PIF, which provides a written narrative of the basis of the refugee claim

Refugee hearings are scheduled according to when they are ready to proceed and normally within 6 months of referral to the IRB.

2. Refugee Hearing Decision Makers

a) General Principles

Amnesty believes that the independence and expertise of decision makers determining refugee claims is of utmost importance. The decision as to who is or is not a refugee can be a life or death decision. In every claim, the stakes are extremely high. A wrong decision may mean a death sentence or severe persecution for the individual sent back to his or her country of origin.

Under the government's proposed reform, refugee hearings at the Immigration and Refugee Board would no longer be conducted by Governor-in-Council appointees. Instead, Board Members would be civil servants. Amnesty approves of the move away from political appointments. We have no objection to some Board Members being civil servants, as long as qualified candidates from outside the civil service are likewise

---

[8] BBC News. 2004. "Watchdog Criticizes Asylum Decisions.". Online: http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/politics/3831163.stm

eligible for Board Member positions. Amnesty submits that the independence and expertise of Members must be guaranteed.

b) Independence

The Immigration and Refugee Board is an independent tribunal which is meant to be isolated from political pressure or the interests of any particular politician. If civil servants make first-level refugee decisions, the government must take steps to ensure that they are not subject to pressures from the department in which they previously worked. Therefore, all decision makers must be employees of the Board itself, appointed by the Chairperson on the recommendation of an independent selection committee, for fixed terms. All Members must be chosen solely on their merit: their expertise, education, and analytical skills.

c) Expertise

Poorly trained decision makers lead to poor decisions, many of which will be appealed and overturned. Failure to invest sufficient resources in the training of decision makers is an inefficient use of resources. The government should invest in making the first decision a well-reasoned decision. Amnesty advocates on-going training for decision makers, in areas such as interview techniques, assessing evidence, decision-making, etc.[9]

Amnesty believes that applicants from outside the civil service must be equally eligible for positions as Immigration and Refugee Board decision makers, and that civil servants must not be preferred over other qualified candidates. This will permit the Board to draw on a wider range of talent and experience when choosing Board Members.

d) Recommendation

Decision makers should be hired by the Board, not originate solely from the civil service, be chosen on the basis of their merit as potential decision makers, and undergo a rigorous training program.

3. Designated Countries of Origin and Access to the Refugee Appeal Division

a) Background

It is clear that one of the driving forces behind Bill C-11 is that the government is seeking a way to ensure that the claims of large numbers of refugee claimants originating from

---

[9] Amnesty International. 13 July 2007. Council of Europe: AI observations on the Report of the Working Group on Human rights Protection in the Context of Accelerated Asylum Procedures (GT-DH-AS) 1st meeting, 6-8th December 2006. Online: http://www.amnesty.org/en/library/asset/IOR61/019/2007/en/e2fe561b-d37b-11dd-a329-2f46302a8cc6/ior610192007en.html

countries that the government considers to be safe countries without serious human rights concerns can be dealt with in an expedited fashion. In general the government considers such claims to be groundless and the claimants to be abusing the refugee determination process. The theory behind the Bill is that if those claims could be dealt with through an accelerated or restricted process such that they are resolved more quickly, other individuals from the country in question would be deterred from travelling to Canada to make similar claims.

This issue is by no means a recent one. For several decades governments have reacted to large influxes of refugees, both from countries that are seen to be obvious sources of refugees and countries that are not, by imposing restrictions that try to cut off, limit or deter access to Canada by refugee claimants from those countries. Most often that has been done by imposing a visa requirement on nationals of that country who wish to travel to Canada. In July 2009, for instance, the government of Canada imposed visa requirements on nationals of Mexico and the Czech Republic for no other reason than the fact that large numbers of refugee claims were being made by nationals of those countries. In the past there have also been some steps taken within the Immigration and Refugee Board to expedite or streamline processing when large numbers of claims have come forward from countries that officials consider to be countries with few human rights problems.

The approach proposed in Bill C-11 is to formally adopt a list of designated countries. Under section 109.1(3) of the Act, individuals from those countries would not have access to an appeal before the Refugee Appeal Division.

b) Concerns

i) There is no reliable, objective means for drawing up lists of countries that are "safe" and countries that are "not safe" when it comes to human rights protection.

Amnesty International raises concerns, below, about the fact that Bill C-11 does not establish any of the criteria to be used in designating countries of origin. It is anticipated, however, that the intention is to designate countries that are generally considered to be safe, with a strong record of human rights protection and therefore unlikely to be a source of refugees. Amnesty International is strongly of the view that this is unworkable. For a number of reasons, there is simply no reliable and objective means of distinguishing between safe and unsafe countries when it comes to human rights protection.

First, many human rights violations remain undocumented or poorly documented. They may occur in isolated areas beyond the reach of human rights groups, journalists and others. For cultural reasons victims may be reluctant or even unwilling to report the violations. That may particularly be the case for women and girls, and other groups who face deeply entrenched stereotypes and taboos which dissuade them from speaking out about violence, discrimination and other human rights concerns. For political, economic or other reasons, individuals reporting the violations might not be believed. In fact, it is

often refugee claimants who are among the first sources of information about new or intensified instances of human rights abuse in countries.

A second related concern is that patterns of human rights abuse can and do often change quickly. Conditions may, in fact, deteriorate precipitously – more quickly than a process of government designation could accommodate and respond to. The sudden surge in post-election violence and grave human rights violations in Kenya in January 2008 is just one such example.

Third, and most fundamentally, it is impossible to assign a quantifiable measurement to human rights violations, especially when comparing violations of different categories of rights. How to compare violations of the right to torture with violations of the right of access to life-saving health-care? How to compare violations of the right to freedom of expression with violations of the right to non-discriminatory access to education? While assessments of a country's human rights record can clearly be carried out with a goal to gaining a general impression of the situation in a country, it has proven impossible to do so statistically such that countries can be ranked and compared with each other.

Throughout close to fifty years of comprehensive human rights research and reporting, Amnesty International has frequently been asked to list countries in order of their human rights record, or to pronounce on the degree of human rights change in a country from one year to the next. Because it is impossible to do so objectively, Amnesty International has always declined such requests. Amnesty International's Annual Report regularly contains entries documenting human rights violations in countries such as the Democratic Republic of Congo, Iran and Myanmar (Burma) but also contains overviews highlighting serious concerns in countries such as Mexico, the Czech Republic, and others that are expected to be possible candidates for designation under Bill C-11. No comparisons are made among the countries included in the Annual Report because it is not possible to do so. Instead, the facts are left to speak for themselves. For the same reason we urge governments not to adopt provisions in their refugee determination that would involve quantifying and categorizing a country's human rights record.

Notably the UNHCR has highlighted this concern about the difficulty of formulating a list of safe countries of origin, pointing to the "inevitable imprecision of judgments about prevailing human rights situations in countries, as well the pace at which such situations can evolve."[10]

Finally, because of the lack of a reliable, objective means of measuring a country's human rights record, Amnesty International is very concerned that subjective, politicized factors would enter into the decision to designate a country. For instance, if Canada was interested in negotiating a trade agreement or boosting levels of tourism or investment with the country in question, would it be less likely to be designated? If Canada had an important military or strategic relationship with the country in question, would it be less likely to be designated? Are countries with which Canada has a close relationship more

[10] UN High Commissioner for Refugees, Background Note on the Safe Country Concept and Refugee Status, EC/SCP/68, 26 July 1991, para. 5.

likely to be designated than countries with which Canada's relationship is strained or difficult?

ii) Treating individuals differently when it comes to access to justice violates crucial international human rights guarantees with respect to equality and non-discrimination.

Numerous international human rights treaties, binding on Canada, enshrine guarantees of equality and non-discrimination. This is certainly the case when it comes to fundamental rights of access to the courts and equal treatment before the law.

For instance, the International Covenant on Civil and Political Rights, in article 2(1), provides that:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, **national or social origin**, property, birth or other status. (Emphasis added)

Article 13 of the Covenant further establishes that "[a]ll persons shall be equal before the courts and tribunals." The designated countries of origin provision in Bill C-11 would run afoul of these two provisions, in that certain groups of individuals would be "unequal" before the Immigration and Refugee Board, for no other reason than their national origin.

A guarantee of equality is also central to the UN Convention relating to the Status of Refugees, article 3 of which provides that "[c]ontracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or **country of origin**." (Emphasis added)

This provision of the Convention specifically refers to refugees and not refugee claimants and it refers to equality with respect to other rights contained in the Convention, which does not include provisions dealing with appeal procedures in refugee determination. However, Amnesty International considers it to establish an important principle of equal treatment, regardless of country of origin, which should be adhered to throughout the refugee determination process.

The UN High Commissioner for Refugees has expressed concern about the safe country of origin concept being applied in ways that lead to reduced procedural protections for certain groups of refugees, noting that:

> [i]t needs to be reiterated, however, that where it serves to block any access to a status determination procedure, or where it results in serious inroads into procedural safeguards, it is to be strongly discouraged.[11]

[11] Ibid., para. 10.

The designated countries of origin approach is discriminatory and contravenes Canada's international human rights obligation to ensure individuals are treated equally before the law. This is a further reason that the provisions should be removed from Bill C-11.

iii) Treating refugee claims as a group rather than on the basis of their individual merits contravenes a fundamental principle of refugee determination.

It is a fundamental principle that claims for refugee protection should be judged on their individual merits. This has been repeatedly highlighted by the UNHCR.[12] It has long been recognized that the definition of a refugee includes both a subjective and objective element to it. That carries with it a careful assessment of the individual's own circumstances and state of mind as well as an assessment of the prevailing human rights conditions relevant to his or her situation. A designated countries of origin list takes the individual's own circumstances completely out of the equation. The question at stake in a refugee hearing is not whether "Mexicans" or "Sudanese" or any other nationality have a well-founded fear of persecution and thus should be recognized as Convention refugees. The question is whether this individual Mexican or this individual Sudanese, given his or her individual background and experiences, has a well-founded fear of persecution.

It is true that Bill C-11 continues to afford all claimants a first level hearing, regardless of their country of origin. But the denial of access to an appeal is based on a presumption that certain nationalities are less in need of or deserving of access to an appeal than are other nationalities. It may well be, in fact, that given the contested nature of the hearings and contradictory sources of human rights documentation and analysis in claims made by individuals from countries that are likely to be designated, access to an appeal may be of particular importance. As such, it is vitally important that Bill C-11 reaffirm the commitment to ensuring that the refugee determination system will, at all levels including the appeal, continue to be based on an assessment of the individual merits of the claim and not on broad conclusions that certain nationalities are safe.

(iv) The fact that all substantive matters associated with establishing criteria for the designation of safe countries and the actual process for designation is left to regulations and not enshrined in the Act is of great concern.

The proposed new section of the Immigration and Refugee Protection Act which establishes the concept of "designated countries of origin" is section 109.1. The section itself does not establish the criteria that would lead to a "country or part of a country or a class of national of a country" to be designated. Instead, the criteria are to be established by regulations. The subsequent designation of a country pursuant to those criteria is to be by way of Ministerial order. As such, at this point in time it is not known

[12] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, para. 43.

whether the designation of countries will be on the basis of an assessment of safety, the state of democracy, a country's human rights record, levels of corruption or any other measure. It is also not known what approach would be taken to evaluating and measuring any of these criteria. These are not casual considerations. They will determine matters as fundamental as whether or not an individual will be allowed to lodge an appeal with the Refugee Appeal Division.

For reasons laid out above, Amnesty International is opposed to the use of a designated countries of origin list to determine which refugee claimants would be given access to an appeal before the Refugee Appeal Division. At a minimum Amnesty International urges that the criteria, means of measurement and procedures for designation must be enshrined in the legislation itself and not left to regulation.

c) Recommendation

Clause 12, proposing a new section 109.1 of the Immigration and Refugee Protection Act for the designation of countries of origin, should be deleted from Bill C-11

4) Applications Based on Humanitarian and Compassionate Grounds

a) Background and Proposed Changes

Currently, subsection 25 (1) of the *Immigration and Refugee Protection Act* ("*IRPA*") provides that the Minister of Citizenship and Immigration may grant foreign nationals – including those who are inadmissible to Canada – permanent residence in Canada or an exemption from any applicable provision or obligation under the Act where such actions are justified by humanitarian and compassionate ("H&C") or public policy considerations. In doing so, the Minister must take into account the best interests of any child directly affected by the decision.[13]

Neither the Act nor its Regulations define the term "humanitarian and compassionate considerations". However, the term is defined in the *Immigration Manual* as either "unusual and undeserved hardship" or "disproportionate hardship".[14]

The *Manual* instructs immigration officers that applicants "may base their requests for H&C consideration on a wide variety of factors".[15] These include, but are not limited to:

- Factors in their country of origin (this includes ***but is not limited to***: economic opportunities or climate in cases of medical conditions) [Emphasis added];
- Family violence considerations; and
- ***Any other factor they wish to have considered***. [Emphasis added][16]

---

13 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as amended, s. 25 (1).

14 Citizenship and Immigration Canada, *Immigration Manual*, Chapter IP-5, paragraph 5.6.

15 *Immigration Manual*, Chapter IP-5, paragraph 5.5.

16 *Immigration Manual*, Chapter IP-5, paragraph 5.5.

Section 66 of the *Immigration and Refugee Protection Regulations* sets out the requirements for H&C applicants. The application must be in writing and must be accompanied by the requisite form.[17] There is no time restriction on when the application may be submitted.

The amendments to the Act proposed in Bill C-11 would change the H&C process in several fundamental ways. First, pursuant to s. 4 (1.2) of the Bill, the Minister may not consider an application under s. 25 (1) of the Act if the foreign national has made a claim for refugee protection and less than 12 months have passed since that claim was either rejected or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division.[18]

Secondly, in examining H&C applications, the Minister may not consider the factors that are taken into account in determinations made under sections 96 and 97 of the Act regarding Convention refugees and persons in need of protection.[19]

Effectively, these provisions, if enacted, will require foreign nationals to make a choice – to either make a claim for refugee protection ***or*** apply to remain in Canada on humanitarian and compassionate grounds. It is only if failed claimants are still in Canada one year after their claim has been rejected that they will have an opportunity to make an H&C application. If such persons are no longer in Canada at that time, then obviously the "right" to make an application on H&C grounds will be moot.

b) <u>Concerns</u>

By their nature, humanitarian applications require individualized assessments. As the *Immigration Manual* states:

> A positive H&C assessment is an exceptional response to a particular set of circumstances. An H&C assessment is more complex and more subjective than most other immigration assessments because officers use their discretion to assess the applicant's personal circumstances.[20]

An individualized assessment of an applicant's particular situation involves a consideration of all relevant circumstances. As stated by Justice Dawson in the case of *Espino*:

> It is consistent with the legislative scheme and the exceptional nature of the relief sought that the starting point for consideration of a humanitarian and compassionate application should be an examination of *all* the circumstances concerning the foreign national applying for relief in order to see whether

---

17 *Immigration and Refugee Protection Regulations*, SOR/2002-227, as amended, s. 66

18 *Balanced Refugee Reform Act*, s. 4 (1.2) (b) (c).

19 *Balanced Refugee Reform Act*, s. 4 (1.3).

20 *Immigration Manual*, IP-5, paragraph 5.4

> sufficient humanitarian and compassionate considerations exist to warrant exempting the foreign national from the usual requirement that he or she obtain their permanent resident visa before entering Canada. This is what the manual instructs and it is consistent with [the Act]." [Emphasis added][21]

When an applicant is forced to omit risk factors from her application, in many instances the officer examining the request will not have a complete picture of the individual whose application is being assessed.

Take, for example, the case of an applicant with mental health problems, who comes from a country where such persons suffer discrimination, harassment, bullying and assaults. Where such an individual has family in Canada, or access to support services that are unavailable in the home country, he will have a difficult decision to make. A claim for protection will allow him to address the conditions in his country, but the existence of family members in Canada and/or the support network will be irrelevant to the claim. Similarly, if he decides to pursue an H&C application, according to the amendments proposed in Bill C-11, the risk factors facing him in his country of origin would also be irrelevant. An officer assessing the latter would, as a consequence, not have a full picture of the individual. This increases the likelihood that persons facing serious harm would be at risk of having their applications refused – because the officer would not be aware of all the applicant's circumstances.

Another situation which would cause concern under the proposed model is that of an individual who has been targeted for extortion and is at risk of being killed by criminal gang members if she returns to her country of origin. Even where the claimant is found to be credible, an application for protection in such circumstances would not fall under the Convention refugee definition because it is not linked to any of the five grounds at s. 96 of the Act. Similarly, it may not fit under s. 97 of the Act because the risk faced by the individual may be seen as a "risk faced generally by other individuals in or from that country".[22] At the same time, these are risk factors that, under the proposed amendments set out in Bill C-11, could not be considered in an H&C application. An individual in such circumstances would be at risk of death if returned to her country, with no effective mechanism under Canadian law to stop her removal.[23]

If applicants are forced to choose between a claim for protection and an H&C application, Amnesty International recommends that they be allowed to include all relevant humanitarian factors in their H&C application – including those related to risk.

Because the time-lines being proposed for protection claims are extremely tight (an issue addressed in another part of these submissions), and because, under the C-11 amendments applicants will be required to choose which type of application to pursue in

---

21 *Espino v. Canada (Minister of Citizenship and Immigration*, 2007 FC 74, at paragraph 32.

22 *IPRA*, s. 97 (1) (b) (ii)

23 This fact situation is taken from an actual case of claimants who, although found to be credible and at risk of extortion and death, were refused by the Refugee Protection Division pursuant to s. 97 (1) (b) (ii) of *IRPA*.

a similarly tight time-frame, it is foreseeable that some applicants will make an inappropriate decision. Because claimants will face challenges obtaining counsel (and legal aid) in such a short time frame, many will make this critical decision without the benefit of legal advice.

For these reasons, Amnesty International recommends that applicants who wish to change their decision (regarding whether to make a claim for protection or submit an H&C application) should not be penalized. That is, where a claimant withdraws a claim (perhaps within two or three months of the claim being initiated) she should be allowed to file an H&C application without having to wait 12 months.

Finally, if applicants are required to choose between a protection claim and an H&C application, the same protections against removal pending final determination should apply to both streams. Currently under the *IRP Regulations*, removal orders against claimants are stayed until final determination of a Pre-Removal Risk Assessment ("PRRA") application.[24] The removal of H&C applicants is stayed following "stage one" approval, until a decision is made to grant, or not grant permanent residence to the applicant.[25]

Unless the stay of removal applies to ***both*** claims for refugee protection ***and*** H&C applications, there will be an incentive for those whose circumstances warrant H&C consideration to make claims for protection instead. That will have the undesired consequence of potentially "clogging" the refugee stream with those more appropriately placed in the H&C stream.

Amnesty International recommends that claimants seeking protection and H&C applicants receive similar protections against removal, pending a final decision on their applications. Such protections already exist for claimants. To "even the playing field", the Regulations must be amended to ensure that H&C applicants are not subject to removal pending a decision on "stage one" of their application.

c) Recommendations

Applicants who wish to change their decision (regarding whether to make a claim for protection or submit an H&C application) should not be penalized.

All relevant humanitarian factors must be allowed in the H&C application – including those related to risk.

Amend the Regulations to ensure that H&C applicants are not subject to removal pending a decision on "stage one" of their application.

5) Refugee Appeal Division

---

[24] *Immigration and Refugee Protection Regulations*, s. 232, 162.

[25] *Immigration and Refugee Protection Regulations*, s. 233.

a) Background

Amnesty International has long maintained that the Federal Court judicial review process does not provide claimants with a meaningful appeal of a negative Refugee Protection Division ("RPD") and has called for implementation of the Refugee Appeal Division ("RAD"). As such, AI welcomes the proposals in Bill C-11 to establish a RAD that would be able to review an RPD decision on questions of law, fact and mixed law and fact and have the power to allow a claim for refugee protection (without the need to send the matter back for a re-hearing before the RPD).[26]

The new provisions would allow failed claimants to appeal a negative RPD decision unless they are nationals of designated countries of origin, or parts thereof, or belong to a designated class of individuals.[27] Those not having a right of appeal would still be able to seek leave and judicial review of a negative decision in the Federal Court.

On an appeal before the RAD, applicants may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.[28] The RAD may also consider the record of the proceedings before the RPD as well as the parties' submissions.[29]

b) Concerns

As expressed elsewhere in this brief, Amnesty International believes that all persons seeking protection in Canada should be treated equally. That means that *all* failed claimants should have access to an appeal on the merits before the RAD. The same necessity for a meaningful review of a negative decision applies to all claimants, regardless of their country of origin.

Consistent with Amnesty International's position that there be no separate class of claimant based on a designated country of origin list, Amnesty International recommends that all claimants for refugee protection whose claims have been refused by the RPD have access to an appeal before the RAD.

Amnesty International also has concerns with the limitations on the type of evidence that can be considered by the RAD. Although the proposed legislation is an improvement over the existing provision at s. 110 (3) of the Act, under which the RAD could consider only the record of the proceedings before the RPD, it is still problematic in our view.

---

26 *Balanced Refugee Reform Act*, s. 13 (1).
27 *Balanced Refugee Reform Act*, s. 12.
28 *Balanced Refugee Reform Act*, s. 13 (4).
29 *Balanced Refugee Reform Act*, s. 13 (3).

The limitation on evidence in the proposed law is similar to that which currently applies to Pre-Removal Risk Assessments.[30] This limitation on "new evidence" has led to much litigation and, in our submission, has resulted in decisions that do not protect persons at risk because evidence that is material, credible, and relevant to an applicant's risk of persecution is not considered by the PRRA officer simply because it is not "new". Moreover, if the extremely short time-lines being discussed by the government are implemented (giving claimants a very limited time to obtain documentation), it is anticipated that issues around whether evidence submitted to the RAD is "new" will negatively impact on the RAD's ability to process appeals in a timely fashion.

If the Immigration and Refugee Protection Act is truly about "refugee protection", then **all** evidence that is relevant to the risk that the claimant would be subject to in his country of origin should be taken into consideration by the RAD. This would dispense with the need for considerable time and resources – and litigation - devoted to determining whether evidence is "new" and better ensures that those at risk of persecution or other serious harm are provided with protection.

c) Recommendation

All evidence that is relevant to the risk that the claimant would be subject to in his country of origin should be taken into consideration by the RAD.

6) Pre-Removal Risk Assessment (PRRA)

a) Proposed Changes

While a refugee hearing is an oral hearing in which claimants may explain the reasons they are seeking protection, the PRRA is a documentary application available when an individual is ready for removal from Canada. It is conducted by a PRRA officer who very rarely meets or hears the applicant.

The proposed changes to the PRRA process are in keeping with the government's stated objective of fast-tracking removals following a negative refugee decision. Currently, when individuals are "removal ready", they are served with an application to apply for a PRRA. This is a final risk assessment carried out prior to the removal. It recognizes that personal and/or country conditions may have changed since the IRB's decision or that there may be new evidence to be considered.

However, under the proposed changes in Bill C-11, a refugee claimant will not receive a PRRA in the first year after their claim was denied, unless they were excluded from protection or their claim was withdrawn or abandoned.

Under s. 15 (2.1) of Bill C-11, the Minister may exempt the nationals of certain countries from this restriction on applying for PRRA, presumably to take into account a change in country conditions.

---

30 *IRPA*, s. 113 (1).

b) Concerns

Amnesty International is concerned that the proposed changes could result in the removal of an individual without an assessment of recent developments that place his or her life at risk. While the proposed exemptions set out in s. 15 (2.1) contemplate a change in country conditions, they do not provide relief to individuals whose personal circumstances have changed such that they are now at risk. For example, an individual's family members may have been killed, or an arrest warrant may have been issued in a country where detainees are routinely tortured. Under the proposed provisions, these circumstances cannot be considered either in a PRRA application or an H&C application which, as described above, precludes consideration of risk elements.

Bill C-11 provides no mechanism to address new evidence of risk that is particular to an individual in the 12 months following a negative decision. This places Canada at risk of violating the internationally recognized principle of non-refoulement, which provides that no refugee can be sent to a country where they will face persecution or torture.

(c) Recommendation

Provide a mechanism to assess new information related to risk immediately prior to removal

Summary of Recommendations

1. Eliminate the reference to the interview in the law.

2. Maintain a the PIF or adapted version of the PIF, which provides a written narrative providing the basis of the refugee claim

3. Refugee hearings are scheduled according to when they are ready to proceed and normally within 6 months of referral to the IRB.

4. Decision makers be hired by the Board, not originate solely from the civil service, be chosen on the basis of their merit as potential decision makers, and undergo a rigorous training program.

5. Delete Clause 12, proposing a new section 109.1 of the Immigration and Refugee Protection Act for the designation of countries of origin.

6. Applicants who wish to change their decision (regarding whether to make a claim for protection or submit an H&C application) should not be penalized.

7. All relevant humanitarian factors must be allowed in the H&C application – including those related to risk.

8. Amend the Regulations to ensure that H&C applicants are not subject to removal pending a decision on "stage one" of their application.

9. All evidence that is relevant to the risk that the claimant would be subject to in his country of origin should be taken into consideration by the RAD.

10. Provide a mechanism to assess new information related to risk immediately prior to removal.