Unbalanced Reforms:

Recommendations with respect to Bill C-31

Amnesty International Canada and Amnistie internationale Canada francophone
Brief to the House of Commons
Standing Committee on Citizenship and Immigration

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INTRODUCTION

Canada's *Immigration and Refugee Protection Act* (*IRPA*) includes the fulfillment of Canada's international legal obligations with respect to refugees as one of its objectives.[1] Amnesty International is concerned that Bill C-31, the *Protecting Canada's Immigration System Act*, which was tabled in the House of Commons on February 16, 2012, runs counter to this central objective of the Act, and would likely result, if it were to be implemented in its current form, in serious violations of international refugee law, international human rights law and the Canadian Charter of Rights and Freedoms. What follows are Amnesty International's key concerns regarding Bill C-31.

I. ANTI-SMUGGLING PROVISIONS

Bill C-31authorizes the Minister of Public Safety to "designate as an irregular arrival the arrival in Canada of a group of persons if he or she "has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a contravention of subsection 117(1) [*IRPA*'s human smuggling provisions]."[2] The Bill then subjects those who are so designated, including possible survivors of torture and children, to a range of discriminatory sanctions, the most distressing of which are discussed below.

A) Arbitrary Detention

Bill C-31 mandates the detention of "designated foreign nationals" for a minimum period of one year without requiring the detention to be individually justified on any of the typical grounds for immigration detention such as preventing flight, facilitating impending removal, protecting the public or national security, ascertaining identity, or completing an ongoing examination in respect of a specific individual.[3] It allows for release only where the person's application for protection is accepted or where the Minister decides that there are "exceptional circumstances" warranting an earlier release.[4] There is no definition in the Bill as to what constitutes "exceptional circumstances".

In Amnesty International's view, this proposed policy of indiscriminate, mandatory and unreviewable detention, based solely on an asylum seeker's manner of arrival in Canada, is unjustified and contrary to the central principles of international refugee law.

i) Automatic Detention Based on Manner of Arrival

Refugee claimants are not criminals. On the contrary, in seeking asylum they are exercising a fundamental human right. How a refugee claimant travels to Canada does not necessarily reflect on the genuineness of the asylum claim, nor is it automatically relevant to the claimant's need for protection. As such, the government's objective to deter large-scale human smuggling operations, however valid as it may be, does not and ought not to justify the automatic detention of asylum seekers who, out of desperation, may have to resort to risky methods of escaping persecution.

1 *IRPA*, s. 3(2)(b).
2 Clause 10.
3 Clause 23.
4 Clause 27.

Article 31(1) of the *Refugee* Convention provides that refugee claimants should not be penalized for the manner in which they try to enter countries of asylum. Accordingly, the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, provide that the detention of asylum seekers is "inherently undesirable" and "should only be resorted to in cases of necessity" [5] and "not be automatic, or unduly prolonged."[6]

In this regard, the UN Committee against Torture has called for "mandatory detention of those entering irregularly the State's territory" to be abolished, and recommended that "non-custodial measures and alternatives to detention" be made available to persons in immigration detention.[7]

In February 20112, the UN Committee on the Elimination of Racial Discrimination expressed its concern to Canada that "any migrant and asylum seeker designated as an "irregular arrival" would be subject to mandatory detention for a minimum of one year or until the asylum- seekers' status is established" and recommended in its concluding observations that Canada "repeal the provision on the mandatory detention."[8]

ii) Denial of Prompt Review

The arbitrariness inherent in Bill C-31's policy of indiscriminate mandatory detention is further laid bare by the fact that it is applied in the absence of a case-by-case review of the necessity, proportionality and appropriateness of the detention.

Article 9 of the *International Covenant on Civil and Political Rights* establishes that "[e]veryone has the right to liberty and security of person" and "[n]o one shall be subjected to arbitrary arrest or detention." The same article stipulates that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is now lawful."[9] [emphasis added]

In this regard, the UNHCR Guidelines on Detention outline the procedural safeguards applicable to detained claimants, including the right "to have the [detention] decision subjected to automatic independent review", followed by "regular periodic reviews of the necessity for the continuance of detention".[10] No such safeguards are found in Bill C-31.

Bill C-31 deprives designated foreign nationals of the right to have their detention reviewed for one year and thereafter entitles them only to semi-annual reviews. The arbitrary nature of this lengthy denial of review becomes apparent when compared against the entitlement of non-

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5 UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, Introduction, paragraph 1, available at: http://www.unhcr.org/refworld/docid/3c2b3f844.html.

6 UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, Introduction, paragraph 1, available at: http://www.unhcr.org/refworld/docid/3c2b3f844.html.

7 Committee Against Torture (CAT), *Concluding observations of the Committee against Torture : Australia*, 22 May 2008, CAT/C/AUS/CO/3 at para. 11, available at: http://www.unhcr.org/refworld/docid/4885cf7f0.html.

8 Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations: Canada*, 9 March 2012, CERD/CCAN/CO/19-20 at para. 15, available at: http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.CAN.CO.19-20.pdf.

9 Emphasis added.

10 UNHCR, Guidelines on Detention, Guideline 5 (iii).

designated foreign nationals to have their detention reviewed within 48 hours after they are taken into detention, followed by a review within seven days and then every 30 days from the previous review.[11]

iii) Detention of Children

Of particular concern to Amnesty International is the failure of the proposed detention provisions to distinguish between adult claimants and minors. They require children as young as 16 years old who arrive as part of a designated group to be detained without recourse to an independent detention review for a period of twelve months. They also give the Minister of Public Safety a discretionary power to detain children under the age of 16 or to forcibly separate them from accompanying parents for one year.

Minister of Citizenship and Immigration Jason Kenney has noted:

> Children under the age of 16 who were accompanied by parents could be released into the custody of the relevant provincial child welfare agency that would determine whether to place them with a guardian, relatives, or other care. However, if their parents chose to, they could live in the family detention centre, where the conditions are entirely appropriate for families.[12]

Amnesty International does not agree that a locked facility (with security guards and surveillance cameras everywhere, no freedom to circulate even inside the facility, no access to normal schooling, and fathers separated from mothers and children) is an environment "entirely appropriate for families." That is why international human rights law establishes that the detention of minors should be exceptional and only when strictly necessary.

The *Convention on the Rights of the Child* provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" and that "a child shall not be separated from his or her parents against their will."[13] The UN Committee on the Rights of the Child has further stated that "states should ensure that children are not criminalized solely for reasons of illegal entry or presence in the country".[14] Bill C-31 proposes that Canada do the opposite.

B) Denial of Appeals

For years, Amnesty International has maintained that a meaningful appeal on the merits by an independent and impartial body is a necessary element in any fair refugee determination system and that the lack of an appeal constituted a serious shortcoming in the Canadian refugee determination system. Amnesty International, therefore, welcomed the provisions in the 2011 *Balanced Refugee Reform Act (BRRA)* that establish a Refugee Appeal Division (RAD) that would be able to review decisions of the Refugee Protection Division (RPD) on questions of law, fact and mixed law and fact, and accept evidence that was not reasonably available at the initial

11 IRPA, Art. 57.
12 http://openparliament.ca/debates/2012/3/15/jason-kenney-10/.
13 Articles 3 and 9.
14 Committee on the Rights of the Child, General Comment No. 6 (2005): "Treatment of Unaccompanied and Separated Children Outside their Country of Origin", paragraph 62.

hearing. Amnesty International is concerned that this positive development is being now undermined by proposals in Bill C-31 to remove the right of appeal for "designated foreign nationals".[15]

The UNHCR has consistently maintained that an appeal procedure "[is] a fundamental, necessary part of any refugee status determination process. It allows errors to be corrected, and can also help to ensure consistency in decision-making."[16]

Denying "designated foreign nationals" access to an appeal is inconsistent with the rationale underlying the RAD, and is contrary to well-established international law, including the *Refugee Convention* which obliges states to refrain from imposing penalties on refugee claimants based on their manner of arrival.[17] A claimant's method of arrival bears no rational and valid connection to the necessity to correct the mistakes that may occur in the determination of his or her refugee claim. Neither is it relevant to the claimant's need for protection or the genuineness of his or her claim.

In the absence of an appeal, judicial review by "leave" from the Federal Court becomes the only available remedy for refused refugee claimants. The Federal Court does not, however, review the merits of the rejected claim and does not reassess the credibility of the claimant. There is no re-examination of the country information the RPD relied upon, no possibility to adduce new evidence, and no personal appearance by the claimant.[18] Furthermore, a claimant's chances of accessing this inadequate remedy are quite remote as the great majority of refugee claimants are denied leave.[19] Under the provisions of Bill C-31, a judicial review application is rendered near meaningless as an individual can be deported from Canada even while the leave application is pending unless a stay of removal is sought and granted.[20]

Bill C-31, by proposing to deny "designated foreign nationals" the right to appeal while at the same time removing the automatic stay of their removal while they await the outcome of their application for judicial review, undermines the non-*refoulement* and other fundamental obligations of Canada toward refugees.

C) Denial of Access to Permanent Resident Status

Bill C-31 further discriminates against and penalizes refugees based on their method of arrival by blocking them from applying for permanent residence status, and therefore family reunification, for a period of five years after they are determined to be a Convention Refugee.[21]

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15 Clause 36(1), amendment to s.110 (2)(a) of the *IRPA*.
16 UNHCR letter to then Minister of Citizenship and Immigration Denis Coderr on non-implementation of the RAD (May 9, 2002), available at: http://ccrweb.ca/unhcrRAD.html.
17 *Refugee Convention*, Art. 31(1).
18 Less than 1 percent of RPD decisions are overturned by the Federal Court: see Canadian Council for Refugees, *Protecting Refugees: Where Canada's refugee system falls down* (May 2007), available at: http://ccrweb.ca/files/flaws_0.pdf:
19 Leave is only given in 7.5 percent of cases and the Court does not have to provide a reason when it denies leave: see Sean Rehaag, "The Luck of the Draw? Judicial Review of Refugee Determinations in the Federal Court of Canada (2005-2010)" (2012) 8(3) *Osgoode CLPE Research Paper Series*, available at: http://ssrn.com/abstract=2027517.
20 Citizenship and Immigration Canada, *Backgrounder – Summary of Changes to Canada's Refugee System in the Protecting Canada's Immigration Act* (February 16, 2012), available at: http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16f.asp.
21 Clause 10, proposed additional s. 20.2 to the Immigration and Refugee Protection Act

Amnesty International is deeply concerned about the significant barrier and delay that this proposal creates to the integration of refugees into Canadian society and their eventual application for citizenship. Under the *Refugee Convention*, Canada is obliged to "facilitate the assimilation and naturalization of refugees," and "in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."[22]

On a purely human level, denying an individual any chance of being promptly reunited with family is a harsh and cruel measure, particularly in the case of a person who has found to be in need of protection. The effect of delays on children is particularly profound as they may feel that they have been abandoned by their parents, therefore feeling hurt, resentful and demoralized. In the case of refugee families, the damage is compounded because family members abroad may themselves be at risk of persecution, violence, exploitation and ill-health.

Processing of applications for family reunification is already very slow, especially in certain parts of the world.[23] This problem is chronic. In 1995, the UN Committee on the Rights of the Child criticized Canada on this matter and recommended "that every feasible measure be taken to facilitate and speed up the reunification of the family in cases where one or more members of the family have been considered eligible for refugee status in Canada."[24]In its subsequent report in October 2003, the Committee noted that its concerns in this regard "have not been adequately addressed" and recommended that Canada "ensure that family reunification is dealt with in an expeditious manner."[25] In proposing Bill C-31, the government has failed to comply with these recommendations and the human rights principles underlying them.

Irregular entry into the country is a common and often necessary step for asylum seekers, who may have limited alternative options for reaching safe countries, because of passport and visa restrictions or for other reasons. Anti-smuggling measures should not victimize refugees who have been already victimized two times, first by their persecutors and then by smugglers.

II. DESIGNATED COUNTRIES OF ORIGIN

Bill C-31 authorizes the Minister of Citizenship and Immigration to designate a country as a "safe" country of origin and then impose discriminatory and unfair limitations on the rights of refugee claimants originating from that country: Claimants from DCO's will have only 30 or 45 days to prepare for their hearings depending on where they make an inland or port of entry claim;[26] they will be barred from appealing a negative decision to RAD;[27] and their removal from Canada will not be stayed pending judicial review of a negative refugee decision.[28]

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22 *Refugee Convention*, Art. 34.
23 For statistics, see Canadian Council for Refugees, "Impacts on children of the Immigration and Refugee Protection Act" (November 2004) at 15-18, available at: http://ccrweb.ca/children.pdf.
24 UN Committee on the Rights of the Child. *Concluding observations of the Committee on the Rights of the Child: Canada*, 20/06/95. CRC/C/15/Add.37, para. 21.
25 UN Committee on the Rights of the Child. Concluding observations: Canada. 27/10/2003. CRC/C/15/Add.215, para. 46.
26 *Ibid.*
27 *Ibid.*
28 *Ibid.*

Amnesty International is concerned that the establishment of DCO's and the associated restrictions on fairness and appeal rights will inevitably increase the risk of the forced return of some refugees to a risk of persecution, in violation of Canada's *non-refoulement* obligations under the *Refugee Convention*.

A) Criteria for Designation of Countries of Origin

Under Bill C-31, the Minister may designate a country if during a certain period identified by the Minister, the rejection rate or abandonment and withdrawal rate of the refugee claims of the nationals of the country in question is equal to or greater than a threshold percentage set out in a ministerial order.[29] The Minister may also designate a country if the number of refugee claimants from the country in question is lower than a threshold number once again provided for by order of the Minister *and* "the Minister is of the opinion that in the country in question, (i) there is an independent judicial system, (ii) basic democratic rights and freedoms are recognized and mechanisms for redress are available if those rights or freedom are infringed, and (iii) civil society organizations exist."[30] In Amnesty International's view, such criteria for designating countries are unworkable, unreliable, and not in keeping with the realities of human rights abuse.

i. The criteria contravene the fundamental principles of refugee determination.

The quantitative thresholds proposed by Bill-31 reflect a group-based approach to assessing the genuineness of the need for protection. This approach is in contravention of the fundamental principle of international refugee protection, highlighted repeatedly by the UNHCR, that refugee claims must be treated not as a group but on the basis of their individual merits.[31]

The question at stake in a refugee hearing is not whether a significant majority or minority of Mexicans, Sudanese, or any other nationality, have a well-founded fear of persecution and thus should be recognized as genuine Convention refugees. The question is rather whether this individual Mexican or this individual Sudanese, given his or her individual background and experiences, has a well-founded fear of persecution. This analysis carries with it a careful assessment of the individual's personal circumstances and state of mind as well as an assessment of the prevailing human rights conditions relevant to his or her situation. Whether or not the acceptance rate of the nationals of the claimant' country meets an arbitrary percentage, defined by the Minister, adds little to this assessment; it neither reflects on the genuineness of the individual asylum claim nor supports a presumption that he or she is less in need of or deserving of access to an appeal than claimants from other countries.

Furthermore, it is important to note that an acceptance rate of 25 percent for nationals of a designated country means that a large number of persons in the country in question are still in need of protection from persecution, considering that the overall rate of acceptance at the Immigration and Refugee Board is generally in the range of 30 to 40 percent.[32]

ii. There is no reliable objective means for distinguishing between "safe" and

29 Clause 58, proposed additional s. 109.1(2)(a) to the *Balanced Refugee Reform Act*.
30 Clause 58, proposed additional s. 109.1(2)(b) to the *Balanced Refugee Reform Act*.
31 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.
32 *Database: Refugee acceptance rates by country*, CBC News (September 29, 2010) at http://www.cbc.ca/news/canada/story/2010/09/23/f-immigration-board-refugee-acceptance.html.

"unsafe" countries when it comes to refugee protection.

The fallacy that countries are "safe" for refugee protection purposes simply because they are democratic is borne out by extensive reporting from Amnesty International documenting serious human rights concerns in a range of countries that supposedly recognize basic democratic rights and freedom and have within them civil society organizations.

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. 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. 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.

Furthermore, 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?

Given the lack of an objective means of measuring a country's human rights record, Amnesty International is concerned that subjective, politicized factors would enter into the decision to designate a country. Bill C-31 substantially increases such risks of politicization by eliminating a panel of independent experts who were to advise the Minister on designation decisions.

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

Article 3 of the *Refugee Convention* provides that "[c]ontracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin. Numerous other international human rights treaties also enshrine guarantees of equality and non-discrimination.[33] This is certainly the case when it comes to fundamental rights of access to the courts and equal treatment before the law.

The UNHCR has cautioned against the use of safe country of origin list noting 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."[34]

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

33 See, for instance, Article 2(1) of the *International Covenant on Civil and Political Rights:* "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;" and Article 3 of the *Refugee Convention*, "Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

[34] UN High Commissioner for Refugees, *Background Note on the Safe Country Concept and Refugee Status*, 26 July 1991, EC/SCP/68, at para.10, available at: http://www.unhcr.org/refworld/docid/3ae68ccec.html.

all claimants, regardless of their country of origin.

III. UNFAIR TIMELINES

The guiding principle of Canada's refugee determination system, enshrined in *IRPA*, is that the "refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted."[35] This principle must guide 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 only objective of any proposed alterations to the process. The changes must also be fair. Amnesty International considers the proposed timeframes to be grossly unfair toward refugee claimants.

i. Fifteen days for Submitting a Basis of Claim Document

Under Bill C-31, a claimant is given 15 days from the time of the referral of his or her claim to the Immigration and Refugee Board to submit a Basis of Claim document, setting out the details of their claim. In Amnesty International's view, this fifteen-day target is unfair and unreasonable. At the fifteen day point after having their claim determined eligible – which in many cases will be fifteen days after their arrival in Canada – many claimants will be disoriented and unaware of how to find legal advice. Moreover, reliable and competent counsel may not be available to act for an individual within such a tight timeline.

Survivors of torture, sexual violence and extreme trauma will be severely disadvantaged by this reduction in the timeline as they will make mistakes or withhold information out of fear, leading to incorrect conclusions that they lack credibility.

ii. Hearing in Thirty, Forty Five and Sixty Days

The timeframes proposed in Bill C-31 also fail to provide refugee claimants with sufficient time to properly prepare for their refugee hearing. This will make it extremely difficult, if not impossible, for claimants to gather supporting documentation, as obtaining psychiatric reports, expert country condition reports or affidavits from family members abroad are time-consuming processes often beyond the immediate control of the claimant and their counsel. In some cases, the proposed timeline will not allow refugee claimants 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. This will be particularly the case for survivors of gender-based violence[36] or persecution on account of sexual orientation.

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. Wrong decisions made before the claimant is able to testify freely will provoke a greater number of

[35] IRPA, s. 3(2)(a).
[36] Human Rights Watch, *Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK*. At the section entitled "I. Summary" (2010), available at: www.hrw.org/node/88671.

appeals, clogging the system at the back end and leading to needless delays. Amnesty International submits that a better option is to implement more reasonable timelines to ensure a greater number of correct initial decisions.

iii. Appeal in Fifteen Working Days

Amnesty International also has serious concerns regarding the extremely short timeline within which to perfect an appeal – fifteen working days. Currently, refused claimants have forty-five days from the date the decision is received to perfect an application for leave and judicial review in the Federal Court. In our submission, requiring claimants (and their counsel) to review the negative decision, research the applicable law, listen to the recording of the RPD hearing (if applicable) and draft submissions in such a short time-span threatens to render the long-awaited Refugee Appeal Division meaningless.

IV. HUMANITARIAN AND COMPASSIONATE APPLICATIONS

Currently, subsection 25(1) of the *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.[37] Bill C-31 proposes to change the H&C process in fundamental ways.

A) An Impossible Choice

The H&C provisions of Bill C-31, if enacted, will effectively force 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.[38] 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.

Amnesty International is concerned that this proposed arrangement will prevent a complete assessment of all relevant circumstances of a foreign national, whose removal from Canada may engage both section 96 and 97 factors relating to persecution and risk to life and H&C factors relating to unusual and undeserved or disproportionate hardship. Take, for example, the case of a young man 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 in the context of a full oral hearing but the existence of family members in Canada and/or the support network will be irrelevant to the claim. An H&C claim will allow for an individualized assessment of his particular situation but the risk factors contained in sections 96 and 97 of the *IRPA* will have to be omitted from his application pursuant to the *Balanced*

37 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as amended, s. 25 (1).
38 Clause 13(3), proposed amendment to s. 25(1.2) of the Act.

Refugee Reform Act. The difficulties inherent in this situation are compounded by the tight time-lines proposed in Bill C-31 which will effectively compel many foreign nationals to make a challenging choice between two complex immigration assessment processes often involving life-and-death decision making, without the benefit of legal advice. In the view of Amnesty International, this increases the likelihood that persons facing serious harm will be removed from Canada without being afforded with an adequate opportunity to present a complete picture of their situation.

Amnesty International recommends that all refused refugee claimants be given the right to make an H&C application from within Canada so as to ensure that all factors relating to risk *and* hardship are considered while they are here.

B) Mootness and Stay of Removal

However, if individuals are made to choose between a protection claim and an H&C application, then at a minimum the same protections against removal pending final determination should apply to both streams.[39] The prospect of removal before a final determination of a Humanitarian and Compassionate application will otherwise place many persons whose circumstances warrant H&C consideration in a highly disadvantaged situation where every course of action could be self-defeating. If they make an H&C application, they will be able to address the humanitarian and compassionate factors that do not fit under sections 96 and 97 of the Act but they risk being removed to face serious harms before a final determination of their application. By contrast, if they make a protection claim, they will benefit from an automatic stay of removal, but will probably lose the opportunity to have their circumstances considered on humanitarian and compassionate grounds following a negative refugee decision as they will be removed in less than 12 months. Amnesty International, therefore, recommends that the Regulations be amended to "even the playing field" and ensure that H&C applicants are not subject to removal pending a decision on "stage one" of their application.

C) Exclusion of Designated Foreign Nationals

Bill C-31 restricts access to humanitarian and compassionate applications by removing the right of all designated foreign nationals, including children, to apply for permanent residence on humanitarian and compassionate grounds "until five years after the day on which they become a designated foreign national."[40] It further allows the Minister to refuse to consider an H&C application for 12 months after the end of this five year period.[41] These lengthy bars effectively exclude designated foreign nationals from the scope of H&C applications (unless they are not removed from Canada for five whole years, which is highly unlikely). They also facilitate the deportation of some children from Canada without adequate consideration of their best interests, in violation of the *Convention on the Rights of the Child*.[42]

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39 Currently under the *IRPA Regulations*, the removal of H&C applicants is stayed only following "stage one" approval, until a decision is made to grant or not grant permanent residence to the applicant. See *Immigration and Refugee Protection Regulations*, s. 233.

40 Clause 13(1), proposed additional s. 25(1.01).

41 Clause 13(1), proposed additional s. 25(1.03)(b).

42 Article 3(1) of this Convention requires that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Amnesty International has repeatedly underscored in this brief that all persons seeking protection and humanitarian and compassionate treatment in Canada should be treated equally with respect to access to justice. That means that *all* persons whose circumstances warrant H&C consideration should be able to apply for permanent residence on H&C grounds, regardless of their mode of arrival in Canada.

CONCLUSION

Amnesty International rarely calls for proposed legislation to be withdrawn in its entirety. In the case of Bill C-31 however, the human rights violations at issue are so fundamental, numerous and inter-related that Amnesty International is calling for it to be withdrawn and for the government to proceed with law reform dealing with human smuggling and refugee protection in a manner that conforms fully to Canada's international human rights obligations. If the Bill is not withdrawn, at a minimum Amnesty International recommends the following amendments:

1. Repeal the provisions on mandatory detention of designated foreign nationals.

2. Afford all immigration detainees, including designated foreign nationals, an effective right to challenge, without delay, the lawfulness of their detention.

3. Entitle all refused refugee claimants to a meaningful appeal on the merits by the Refugee Appeal Division, without discrimination as to national origin or method of arrival.

4. Ensure that refugees and protected persons are reunited with their family members in an expeditious manner by affording them, among other things, the right to apply for permanent residence status immediately after they are granted refugee status.

5. Delete section 109.1 of the *Balanced Refugee Reform Act* and the proposed amendments in Clause 58 of Bill C-31 for the designation of countries of origin.

6. Maintain the existing time-frame for the submission of a written narrative providing the basis of the refugee claim, and schedule refugee hearings according to when they are ready to proceed and normally within 6 months of referral to the IRB. The timeline for an appeal to the Refugee Appeal Division should be no less than the timelines for making an application for leave to the Federal Court.

7. Allow all refused refugee claimants to make an application for permanent residence on H&C grounds from within Canada without having to wait for one year

8. Amend the Regulations to protect H&C applicants against removal pending a final decision on "stage one" of their applications.

9. Afford all persons whose circumstances warrant H&C consideration, including children, equal access to H&C applications without discrimination as to mode of arrival.