Ministerial Relief applications: Proposed Regulatory Amendments
CCR comments, May 2024

The following are the comments of the Canadian Council for Refugees (CCR) in response to the publication in the Canada Gazette, Part I, Volume 158, Number 16, on April 30, 2024, of proposed amendments to the *Immigration and Refugee Protection Regulations* with respect to Ministerial Relief applications (https://www.gazette.gc.ca/rp-pr/p1/2024/2024-04-20/html/reg1-eng.html).

For the reasons set out below, the CCR is deeply opposed to the proposed amendments. Many applicants for Ministerial Relief have already suffered grave injustice as a result of the overbreadth of the legislative provisions relating to inadmissibility and the unconscionable delays in decision-making on Ministerial Relief applications. If approved, the proposed amendments will impose further burdens on these and future applicants.

Who is affected

It is important to recognize that a wide range of people apply for Ministerial Relief after having been found inadmissible on grounds of security, organized criminality or human or international rights violations. The Regulatory Impact Analysis Statement speaks of the need to "safeguard national security and public safety". However, many of the applicants were found inadmissible solely because of deliberately overbroad definitions of inadmissibility. Our comments are focused on the many applicants who have not violated human or international rights and who do not represent, nor have ever represented, any kind of threat to national security and public safety.

Among the people caught up in these inadmissibility provisions are:

- Minors who were involved in a non-violent way in political opposition (sometimes in marginal roles such as distributing pamphlets).
- People who have engaged in legitimate struggles that Canada supported against oppressive regimes.
- Individuals who had a role, such as a judge or civil servant, in a government deemed by Canada to have violated human rights, even if they actively opposed the human rights abuses.
- People who were involved in an organization that resorted to violence after they had ceased to be members, as well as people who joined an organization long after it renounced the use of violence.

Nelson Mandela is rightly venerated in Canada and around the world – yet under our current immigration legislation, his opposition to the apartheid South African government made him, and many other opponents of the apartheid regime, inadmissible on security grounds.

Ministerial relief needs to be available in a timely manner to the many people who do not deserve to be inadmissible because they do not in any way represent a threat to national security, nor have they committed any criminal acts.

Proposed amendments will reduce access to justice

Those found to be inadmissible under IRPA sections 34, 35(1)(b) or 37(1) frequently suffer great hardship and are denied fundamental rights guaranteed in international human rights instruments to which Canada is party. These provisions are so broadly drafted that innocent persons are routinely declared inadmissible. The government has acknowledged that the provisions, particularly, 34(1)(f) ("membership" in an organization) and 35(1)(b) (prescribed senior official), throw too wide a net, but it has argued that the availability of Ministerial relief addresses the overbreadth.

Despite this acknowledgement of the overbreadth of the provisions and the essential role of Ministerial relief in exempting innocent individuals who are unfairly caught in the net, the proposed amendments have the effect of limiting the ability of individuals to make Ministerial Relief applications or to have those applications considered.

Denying people an opportunity to have a Ministerial Relief application decided, based on criteria that have little or nothing to do with whether their situation might merit Ministerial relief, will result in denial of access to justice, with ongoing pernicious effects that have no place in a free and democratic society.

Proposed amendments appear to conflict with Charter rights

The Supreme Court of Canada has found that a provision making a person inadmissible because they are a member of a "terrorist organization" does not violate the section 2 Charter rights of freedom of expression and freedom of association only because of the existence of the Ministerial relief provision. Referring to the section 19 of the Immigration Act (the legislation in force at the time, with provisions equivalent to s. 34 of the current Immigration and Refugee Protection Act), the Supreme Court ruled:

> "Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in Canada will not be detrimental to Canada,

> notwithstanding proof that the person is associated with or is a member of a terrorist organization. This permits a refugee to establish that the alleged association with the terrorist group was innocent. In such case, the Minister, exercising her discretion constitutionally, would find that the refugee does not fall within the targeted s. 19 class of persons eligible for deportation on national security grounds." (underlining added. Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, para. 110)

The Ministerial relief process must therefore ensure that it offers access to anyone whose constitutionally protected rights might be violated if relief was not granted.

That access must be available in a timely way. It is not sufficient to say that applicants may after decades of waiting be granted Ministerial relief. Those found inadmissible suffer the consequences of the inadmissibility regime while they are waiting for Ministerial relief. These harms include severe stigma, mandatory reporting on threat of detention, indefinite legal limbo, family separation and the resulting psychological suffering.

Given that the proposed amendments would erect additional barriers to applications for Ministerial relief for reasons that have nothing to do with the strength of the applications, they will inevitably deprive some people of access to a Charter-mandated remedy.

Promoting efficiency of process

The Regulatory Impact Analysis Statement states that the amendments are designed "to improve the integrity of the program and ensure the most efficient use of resources."

The proposed amendments appear to be designed to reduce the government's caseload of Ministerial relief applications by creating arbitrary new rules to bar or close applications.

We agree that the government should be seeking greater efficiency in the processing of applications: currently the government is taking years to make decisions. According to statistics released through Access to Information, Ministerial Relief applications decided between 2019 and October 2022 had been waiting an average of 12.5 years (https://twitter.com/smeurrens/status/1629967134091792384).

It is true that changing the rules to allow files to be closed before a decision is rendered is one way for the government to increase the finalization rate, but it does nothing to address the fundamental problem with the government's process.

In addition, requiring closure of application followed by re-application, is not efficient.

To achieve more efficient and timely processing, the government must review its Ministerial relief process and ensure that adequate human resources are allocated so that decisions are rendered in a timely way. Service standards would assist the government by providing clear targets.

More fundamentally, the government could achieve the greatest efficiency by clarifying the definition of "member" as it appears in section 34 and of "prescribed senior official" in paragraph 35(1)(b). This would reduce the need for Ministerial Relief applications because the provisions would no longer capture so many people who neither represent any security threat, nor bear any personal complicity in abuses.

The Supreme Court's decision in Ezokola (2013 SCC 40) provides a roadmap for definitions that, consistent with international law, are more limited in scope and depend on personal complicity. We note that Parliament has authorized the government to define the terms in the inadmissibility provisions through regulation, pursuant to IRPA s. 43. The CCR would be pleased to propose regulatory language to achieve this end.

GBA + analysis

We note that individuals subject to these inadmissibility provisions are predominantly racialized, and that determinations of risk and danger are influenced by prejudices and stereotypes rooted in racism. The rights-reducing impacts of the proposed amendments will therefore be experienced predominantly by racialized individuals.

These concerns are confirmed by the list published in the RIAS of the top countries of origin of applicants (Pakistan, Sri Lanka, Bangladesh, Iran, Eritrea, Iraq, Ethiopia, India). They are all countries with racialized populations and many with predominantly Muslim populations.

Black, brown and Muslim populations are already heavily stigmatized in Canadian society, where they are readily associated unfairly with terrorism and other security threats. This compounds the stigma experienced by a person found inadmissible on security grounds by the Canadian government. Those impacted are not only the affected individuals, but also their families and more widely their racialized communities.

We regret the government's decision not to undertake a race-based analysis.

We believe that such an analysis might uncover concerning ways that the proposed amendments have a disproportionate effect on racialized and Muslim populations.

For example, individuals who are inadmissible on security grounds from these populations are more likely to be shunned by community members who are anxious not to endanger themselves by associating with a "suspected terrorist". On the other side, the person who is inadmissible may feel that it is safer for them not to go to the mosque or associate with other Muslims, because they fear that this would make Canadian officials perceive them as more dangerous. These adaptations can contribute to the mental health toll of being inadmissible on security grounds, which in turn can increase the risk that the person is unable to comply consistently with conditions.

Subsequent applications should not be barred

We oppose the proposed amendment to bar subsequent Ministerial Relief applications until the removal order has been enforced.

We welcome the exceptions introduced in the regulatory proposals for refugees or people with a stay of removal under IRPA 114(1)(b), or if the removal order has not been enforced for reasons that are not attributable to the person.

We are concerned, however, that there may be differences of opinion about whether the person is to blame for the removal order not being enforced. We note also that even when there is no barrier to enforcement, experience shows us that a very long time can pass between a removal order becoming enforceable and it actually being enforced.

During that time, there may be many changes in circumstances, personal and other, that support a finding that a person's presence in Canada is no longer detrimental to the national interest and thus justifying relief. Or the first application may have been made by a person without (adequate) representation. Access to justice in these circumstances is denied by the proposed arbitrary bar.

Closing an application because of a breach of conditions is unfair and illogical

We oppose the proposal to allow a pending application to be closed on the basis that an applicant has violated a condition to report to the CBSA.

There may be many reasons for a person to violate a reporting condition. This includes experiences of profound mental health problems brought on by the limbo created by the security inadmissibility determination. The reporting conditions themselves, being mandatory, may be unjust in the particular situation. The reason for a breach in conditions may be irrelevant

to whether Ministerial relief is merited – or may actually be connected to reasons why Ministerial relief is merited.

We suggest that the Regulations instead be amended to remove the mandatory reporting conditions. Any conditions imposed should be based on an individual assessment.

The proposal to give applicants 90 days to repair a failure to report is at least less draconian than an automatic closure of the application. However, the timeline of 90 days is arbitrary and there may be compelling individual circumstances (for example, related to the person's health) that might need to be taken into account. If a time limit for repairing a failure is to be put into the regulations, discretion should also be built in to waive the time limit, in appropriate circumstances.

If a new ground of inadmissibility is added, the applicant should be given an opportunity to update a pending Ministerial Relief application

We oppose the proposed new rule leading to the closure of a Ministerial Relief application if an additional ground of inadmissibility is established.

We accept that there may be no point in deciding a Ministerial Relief application on one ground of inadmissibility if relief also needs to be sought on another ground. However, where the applicant wishes, and is eligible, to apply for relief from the additional ground, justice and efficiency would favour updating the current application. At a minimum, the person should be given a period of time to ask for Ministerial relief on the new ground, and the application only closed if they decline to make the request.

We are also concerned that the proposed new rule creates an incentive for CBSA to write new inadmissibility reports. A new report may be reasonable if there are new acts by the individual or new information has become available, but it is deeply unfair if the CBSA is given the opportunity to frustrate a Ministerial Relief application simply by creating a new report based on information that was long available to them.