



Conseil canadien pour les réfugiés
Canadian Council for Refugees

Anti-refugee provisions in Bill C-97 (Budget bill)

Submission to the Standing Committee on Citizenship and
Immigration

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1. Introduction

This submission is made as a contribution to the Committee's study into the Subject Matter of Clauses 301 to 310 (Part 4, Division 16) of Bill C-97, the omnibus budget bill. The clauses in question would amend the Immigration and Refugee Protection Act in ways that would affect the rights of refugee claimants seeking Canada's protection.

The Canadian Council for Refugees is a national non-profit umbrella organization committed to the rights and protection of refugees and other vulnerable migrants in Canada and around the world and to the settlement of refugees and immigrants in Canada. We have approximately 200 members across Canada: our members are organizations involved in the settlement, sponsorship and protection of refugees and immigrants. The Council serves the networking, information-exchange and advocacy needs of its membership.

2. Changes to the refugee system do not belong in a budget bill

The Canadian Council for Refugees calls on the Committee to reject the proposed amendments in their entirety.

The changes in question are complex and have the potential to cost human lives. They have no direct relevance to the budget.

As explained below, the proposed changes would place many people at increased risk of being sent back to face persecution, in violation of the Canadian Charter of Rights and Freedoms and of Canada's international human rights obligations.

The inclusion of such changes in the budget bill is undemocratic and profoundly disrespectful to the lives of affected non-citizens. The short time available to this Committee and to Parliament as a whole to study the provisions means that they will not properly consider them, despite their profound impact on the fundamental rights of vulnerable people.

The Liberal Party's own electoral platform condemned omnibus bills as undemocratic, noting that they prevent Parliament from properly reviewing and debating proposals.¹ It is very disappointing to see the government disregarding their commitment and resorting to this practice.

If the government believes that the proposed changes merit consideration, they should be re-introduced instead in a separate bill.

3. Denying access to Canada's refugee determination system may lead to return to torture, persecution and death

Among the key changes proposed, the bill would make a person ineligible to make a refugee claim in Canada and thus to be heard by the Immigration and Refugee Board (IRB) if they have previously made a refugee claim in another country with whom Canada has an information-sharing agreement (notably in the US).

¹ www.liberal.ca/realchange/prorogation-and-omnibus-bills/

This means that numerous refugee claimants, who may need Canada's protection because they face persecution, torture or death in their country of origin, will be denied access to Canada's refugee determination system. They will have access only to a Pre-Removal Risk Assessment (PRRA), a process that provides much less fairness than a hearing at the Immigration and Refugee Board.

Canada has much to be proud of in our refugee determination system, including the fact that we rely on an expert, independent quasi-judicial tribunal: the Immigration and Refugee Board. The IRB has earned a reputation around the world as a model for refugee determination. Many other countries turn to Canada's IRB to improve their own refugee determination systems. The proposed change would undermine the role of the IRB and send numerous people to an inferior system (the PRRA).

Because of its focus on refugee determination, the IRB has been able to innovate and develop significant expertise that is essential for high quality refugee determination, including use of the Chairperson's Guidelines (e.g. Gender, Sexual orientation and gender identity and expression, children). The IRB has highly developed programs of training, research and documentation using methods that respect risks inherent to the refugee reality. People who made a claim in the US often come to Canada precisely because the US does not provide the same protections, especially for people whose claim is based on gender or sexual orientation. Depriving these claimants of a hearing before the IRB means, among other things, that we will be failing people who flee persecution based on their gender or sexual orientation.

Until now, the Canadian government has generally responded in a principled and rights-based way to the recent (and likely temporary) increase in the number of refugee claimants arriving in Canada. With this proposal, Canada would be shamefully joining too many other countries who respond to increased numbers of refugees not by matching capacity to needs, but by closing the door on people fleeing rights abuses.

4. It does not make sense to deny access to the refugee system because the person made a refugee claim in another country

The proposed new ground of ineligibility is apparently based on the premise that a person is not in need of, or not deserving of protection if they previously made a claim in another country. This is wrong in law and in fact.

There is no legal obligation, under the Refugee Convention or other international legal instruments, to seek refugee protection in the first country of asylum that a person reaches. Canada's legal obligation is not to return a person to face persecution, torture or death – that obligation is not in any way affected by whether or not a person made a refugee claim in another country.

People may have compelling reasons for making a refugee claim in Canada after previously having made a claim in the US or another country.

- The person may come to Canada to join a family member who is already here. The US-Canada Safe Third Country Agreement in fact includes an exemption for persons who have a family member in Canada, because the two governments agree that it is appropriate for people to pursue their claim in the country where they have family, rather than in the first country they reached. Under the proposed change, some people will present themselves at a land Port of Entry and be found eligible to enter Canada under the Safe Third Country Agreement, but then be denied access to the refugee determination system on the basis that

they made a claim in the US. The result will inevitably be families who are reunited in Canada but forced into separate legal processes (which is also inefficient).

- The person may have been advised that their claim has little chance of success in the US, for example because their claim is based on gender-related persecution or they are fleeing criminal gangs.²
- The person's claim may have been rejected, even though they have a well-founded fear of persecution: many people have been recognized as refugees in Canada after their claim was refused in the US. The rejection rate is particularly high for people in immigration detention – many detainees are unable to find a lawyer to represent them, or anyone to assist them with their claim, and even basic communication with the outside world is very difficult while in detention.
- The person may have made the claim in the other country as part of a family group – as a spouse or a child – without themselves having ever had the opportunity to present the reasons they have today for asking for Canada's protection. Women often have distinct experiences of violence and separate fears of persecution which are never examined in the context of a claim made together with their husband.
- The person may always have intended to come to Canada, but in their journey through the US they may have had no choice but to make a refugee claim in order to avoid deportation back to persecution in their country.

5. The Pre-Removal Risk Assessment is not an adequate alternative

Ineligible claimants will have access only to a Pre-Removal Risk Assessment (PRRA), a process that provides much less fairness than a hearing at the IRB. There is no right to a hearing (sometimes an “interview” is offered, but not in the vast majority of cases). PRRA decision-makers are more junior civil servants than those at the IRB and they are not part of a quasi-judicial tribunal. They don't have the same access to training, legal services and Chairperson's guidelines. Claimants in the PRRA process have no right to an appeal at the Refugee Appeal Division in case of a negative decision. Their only recourse is to apply for judicial review at the Federal Court: the Court can choose to deny leave and, in any case, there is no stay of removal while the Court considers the application. Consequently, claimants can be removed from Canada while awaiting the outcome of their judicial review application. The acceptance rate at the PRRA is significantly lower than at the IRB.

Shortcomings in the PRRA system will almost certainly lead to people who need protection being denied it and facing removal from Canada to persecution, torture or even death, in violation of their Charter rights and Canada's international obligations.

6. Unaccompanied minors and other vulnerable persons will be unsupported

The Immigration and Refugee Protection Act provides for the Immigration and Refugee Board to appoint a Designated Representative to protect the interests of minors and other persons who are unable to understand the proceedings, such as people with serious mental health problems. Only the IRB can appoint a designated

² For more information on these and other situations where refugees may not be protected in the US, see CCR, “Why the US is not safe for refugees: challenging the Safe Third Country Agreement”, July 2018, ccrweb.ca/en/why-US-not-safe-challenging-STCA.

representative: therefore vulnerable people whose claim is found ineligible as a result of these proposed changes, and who are therefore not referred to the IRB, will be deprived of a designated representative.

This means that unaccompanied minors and people with mental health problems will be required to navigate the PRRA process – their only chance to win protection in Canada – without a representative appointed to assist them in understanding the procedures. The lack of a designated representative will seriously affect the ability of minors (especially unaccompanied minors) and people with mental health problems to fully present their case in a PRRA.

Canada already falls short in its treatment of unaccompanied minors seeking protection as refugees (there is no consistent national strategy for ensuring their care and protection). The proposed changes will create additional gaps and failures in the protection of extremely vulnerable minors.

7. Ineligible claimants are more likely to be detained and those in detention face extra challenges applying for a PRRA

Ineligible claimants who are only entitled to a PRRA are more likely to be detained than claimants who are referred to the IRB for a refugee hearing. This is because the PRRA process is viewed as being quicker and more likely to lead to a negative result.

This is to a large extent a self-fulfilling prophecy, since PRRA applications are decided more quickly when the person is in detention, and people in detention are often unable to properly prepare their PRRA application: it may be difficult or even impossible for them to find a lawyer to represent them and they cannot collect evidence to support their claim.

8. Ineligible claimants do not have access to rights and necessary services

Ineligible claimants have significantly fewer rights than eligible claimants and face daily challenges in accessing services to which in theory they are entitled.

Some ineligible claimants do not receive a Refugee Protection Claimant Document (RPCD): this document is essential because it provides a government-issued photo ID that is necessary for countless daily interactions, such as opening a bank account or undergoing an immigration medical exam. Even people who have been accepted as Protected Persons through the PRRA may continue to face the same daily challenges if they were not issued a RPCD, because they still lack a photo ID.

While eligible claimants have a fee exemption for work permits, ineligible claimants must pay a fee. Depending on the province, they may be denied access to social assistance or only get access after delays and appeals.

The recent dramatic cuts at Legal Aid Ontario will have devastating effects on ineligible claimants. It has been announced that there will no longer be legal aid coverage for PRRAs. Legal representation is necessary to effectively present a PRRA application.

9. Ineligible claimants from moratorium countries will be in long-term limbo

The changes will result in long-term limbo in Canada for claimants from countries to which Canada has suspended removal, due to a situation of generalized risk. A PRRA is not available to a person who is not facing deportation from Canada, which means that PRRAs are not offered to people from a country or region subject to a Temporary Suspension of Removals or an Administrative Deferral of Removals.³ People from these countries whose claims are ineligible will therefore find themselves in limbo: they are not at imminent risk of deportation, but they also have no access to protected status.

Condemning these people to limbo is particularly perverse because the same reasons leading to the suspension of removals (generalized risk) often mean that nationals tend to have very high acceptance rates when heard by the Immigration and Refugee Board (and their claims are often expedited). But because of the proposed new ineligibility provisions, countless people will find themselves in long-term limbo, rather than being quickly accepted as refugees and able to get on with their lives.

People in this situation can apply for humanitarian and compassionate (H&C) consideration, but the grounds for refugee protection cannot be considered in that process. They would likely need to wait years before they could satisfy “establishment” grounds for a positive H&C. In the meantime, they would have no opportunity to reunite with immediate family members and no opportunity to get on with their lives.

There is no evidence that the government considered the fate of people in this situation before tabling the bill: an indication that the provisions have not been well thought out.

10. The proposed changes are likely to lead to legal challenges

The changes engage rights under the Canadian Charter of Rights and Freedoms: the Supreme Court’s 1985 Singh decision confirmed that a refugee claimant is entitled under section 7 of the Charter to life, liberty and security of the person, and found that the refugee determination process therefore needs to respect principles of fundamental justice, including the right to an oral hearing.

If these changes are adopted, it is likely that there will be Charter challenges.

11. Transferring claims to the PRRA process is inefficient

The PRRA is managed by Immigration, Refugees and Citizenship Canada (IRCC). IRCC does not currently have the capacity to decide on the thousands of additional PRRA applications that would be transferred to them under this proposal. There will therefore be long delays while additional decision-makers are hired and trained.

The IRB has for some time been preparing for increased numbers of decision-makers, should additional funding be voted – it is not clear that there have been such plans at IRCC. The result is likely to be that

³ Temporary Suspension of Removals currently apply to Afghanistan, the Democratic Republic of Congo, and Iraq. Administrative Deferral of Removals apply to certain regions in Somalia (Middle Shabelle, Afgoye, and Mogadishu), the Gaza Strip, Syria, Mali, the Central African Republic, South Sudan, Libya, Yemen, Burundi, Venezuela and Haiti.

claimants will wait longer for a decision and there will be overall decreased efficiency in the refugee determination process.

Since 2012, the Immigration and Refugee Protection Act provides for the PRRA to be transferred to the IRB, but successive governments have failed to implement this measure. Rather than duplicating decision-making structures at the IRB and PRRA, the government should increase efficiency by transferring the PRRA to the IRB.

12. Extending the bar on PRRA and H&C is unfair

The bill would also extend the bar on applications for Pre-Removal Risk Assessment and humanitarian and compassionate consideration for refugee claimants who apply to the Federal Court for judicial review, following an IRB decision.

The law currently makes refugee claimants wait 12 months from the final decision on their refugee claim before they can bring new evidence of risk forward in a Pre-Removal Risk Assessment (PRRA). This is already problematic because during the year there may be dramatic new developments in a person's case (e.g. a family member was arrested in the country of origin), but the person has no opportunity to bring it forward.

The proposed amendment would start the 12 month clock from the final decision on an application for leave and judicial review at the Federal Court.

This makes no logical sense since it is impossible to raise new evidence before the Federal Court. Therefore, claimants will face a period far longer than 12 months during which important new evidence of risk to their life and liberty may come forward, without any avenue to present it before they are removed from Canada.

The same applies to the bar on making a humanitarian and compassionate (H&C) application. This application is crucial for many people whose compelling circumstances cannot be raised in any other process. An H&C application does not suspend removal from Canada, so the only effect of barring access is that it prevents people from even bringing forward compelling humanitarian factors.

This new provision is nothing but a means of punishing people for using the legal recourse provided in Canadian law.

13. The refugee determination process should be made fairer and more efficient

In lieu of these changes, there is a principled and straightforward alternative solution easily available to the government: expand the capacity of the IRB to hear claims. This can be done by (a) increasing the resources at the IRB (the budget already includes significant funding increases), (b) introducing innovations in processing at the IRB in order to maximize efficiency (the IRB has already dramatically increased its finalization rate, by fast-tracking clear cases and introducing other measures), and (c) changing the law to eliminate unhelpful rules (notably unrealistic timelines and different processes for some claimants based on country of origin).

The CCR has proposed a model for refugee determination in Canada, which we believe would better meet the needs of both fairness and efficiency: ccrweb.ca/en/ccr-proposed-model-refugee-determination.

14. Conclusion

If adopted, the proposed changes to the refugee system contained in Bill C-97 (Clauses 301 to 310 (Part 4, Division 16)) would risk people's lives, violate the fundamental rights of vulnerable people, leave unaccompanied minors unprotected, generate legal challenges and create completely unnecessary inefficiencies in the refugee determination system.

The consequences of the changes do not appear to have been well-thought through. An omnibus bill does not provide a proper opportunity for Parliament to give the proposals the attention they deserve – and that is owed to the thousands of human beings whose lives will be dramatically and dangerously affected, should the provisions be adopted.

The CCR therefore urges the Committee to reject these proposed amendments to the Immigration and Refugee Protection Act.

