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# Refugee Protection in Canada

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*Refugee Protection in Canada*  
(Background Paper)

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# REFUGEE PROTECTION IN CANADA

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## 1 INTRODUCTION

The *Immigration and Refugee Protection Act* (IRPA)<sup>1</sup> lists a series of objectives with respect to refugees, foremost of which is “to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted.”<sup>2</sup> Other key objectives include fulfilling Canada’s international legal obligations, specifically under the 1951 United Nations *Convention Relating to the Status of Refugees* (and its Protocol),<sup>3</sup> providing assistance to refugees in need of resettlement from overseas, and granting fair consideration to those who come to Canada claiming persecution. This paper focuses on the Canadian procedure set in place to achieve this last objective.

Under the IRPA,

A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

- (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
- (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.<sup>4</sup>

According to the United Nations High Commissioner for Refugees, in 2012 there were 15.4 million persons who fit this definition around the world.<sup>5</sup>

Canada has signed and ratified the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>6</sup> As a result, refugee protection under Canadian law is also conferred on “persons in need of protection,” that is, those who face a risk, assessed on a case-by-case basis, of death, torture, or cruel and unusual treatment or punishment. A person to whom refugee protection is granted in Canada is a “protected person.”

The Immigration and Refugee Board (IRB) is the body responsible for conferring Convention refugee or protected person status in Canada.<sup>7</sup> The IRB was established in 1989. Canada’s inland refugee determination system subsequently remained relatively unchanged until two recent legislative initiatives received Royal Assent.<sup>8</sup> After summarizing the changes introduced by this new legislation – the *Balanced Refugee Reform Act* (2010) and the *Protecting Canada’s Immigration System Act* (2012) – this paper describes the various steps in the refugee determination process in Canada. It also provides information with respect to actions that claimants may take after receiving an initial positive or negative decision from the IRB.

## 2 RECENT LEGISLATIVE CHANGES

Two government bills, introduced in 2010 and 2012, respectively, have brought a number of substantial changes to refugee status determination in Canada. These were Bill C-11, An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act (short title, Balanced Refugee Reform Act [BRRA]),<sup>9</sup> and Bill C-31, An Act to Amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act (short title, Protecting Canada's Immigration System Act [PCISA]).<sup>10</sup>

Most claims for refugee protection are made at a port of entry or inland office upon or after the claimant's arrival. The most significant change initially introduced by the BRRA and later amended by the PCISA is the greater differentiation between distinct groups of refugee claimants with respect to processes and access to post-decision recourse and privileges. The relevant designations are described below, while the corresponding differences within the refugee determination system are summarized in Table 1 and are explained in greater detail later in this publication.<sup>11</sup> Table 1 also describes the "standard" processes that apply to claimants who do not fall under any of these special designations.

- Claimants from *designated countries of origin*: nationals from countries designated by the Minister of Citizenship and Immigration as having low refugee claim success rates and/or high withdrawal and abandonment rates, or as meeting certain criteria concerning available protections.<sup>12</sup> (IRPA, s. 109.1)
- Claimants whose claims are *manifestly unfounded*: foreign nationals whose claims for protection were rejected by the Refugee Protection Division because it is of the opinion that they were clearly fraudulent. (IRPA, section 107.1)
- Claimants whose claims have *no credible basis*: foreign nationals whose claims for protection were rejected by the Refugee Protection Division because there was no credible or trustworthy evidence on which the claim could have been accepted. (IRPA, section 107(2))
- Claimants who are *designated foreign nationals*: claimants who arrive in Canada as members of a group designated by the Minister of Public Safety as an "irregular arrival" because examinations of the group cannot be conducted in a timely manner or there are reasonable grounds to suspect, in relation to the arrival, the involvement of a criminal organization or terrorist group. (IRPA, section 20.1)
- Claimants who make a claim under an exception to the *Safe Third Country Agreement*.<sup>13</sup> (IRPA, section 101(1)(e))

**Table 1 – Differences in the Refugee Determination Process by Claimant Group**

Claimant Group	Refugee Protection Hearing Timeline	Access to Refugee Appeal Division	Detention Regime (see section 4.1)	Stay on removal for Judicial Review (see section 3.7.3)	Other Restrictions	Interim Federal Health Program Coverage (see section 3.2)
Most claimants (standard)	60 days	Yes	Standard.  Grounds for detention: identity not established, unlikely to appear for an immigration proceeding, flight risk, danger to the public, inadmissibility on grounds of security risk or violation of human rights.  Review must occur within 48 hours of claim, within 7 days of first review, and at least once every 30-day period thereafter	Yes		Health care coverage while claim pending
Designated countries of origin	30 days for inland claims; 45 days for port of entry claims	No	Standard (see "Most claimants")	No	Ineligible for work permit for 180 days while claim pending  Failed claimants are not eligible for pre-removal risk assessment until 36 months have passed since the negative Refugee Protection Division decision	Public Health or Public Safety Health care coverage
Manifestly unfounded (claim rejected)	60 days	No	Standard (see "Most claimants")	No		Public Health or Public Safety Health care coverage
No credible basis (claim rejected)	60 days	No	Standard (see "Most claimants")	No		Public Health or Public Safety Health care coverage

## REFUGEE PROTECTION IN CANADA

Claimant Group	Refugee Protection Hearing Timeline	Access to Refugee Appeal Division	Detention Regime (see section 4.1)	Stay on removal for Judicial Review (see section 3.7.3)	Other Restrictions	Interim Federal Health Program Coverage (see section 3.2)
Designated foreign national	60 days	No	Mandatory.  Review must occur within 14 days after initial detention, within 6 months after the conclusion of the first review, and within 6 months after any subsequent review <sup>a</sup>	No	5-year wait for applications on humanitarian and compassionate grounds;  5-year wait for eligibility for permanent resident status;  no issuance by Canada of travel documents until permanent resident status is attained	Health care coverage while claim pending
Exception to Safe Third Country Agreement	60 days	No	Standard (see "Most claimants")	No		Health care coverage while claim pending

Note: a. These two differences are only part of the unique detention regime faced by designated foreign nationals. For more information, see Julie Béchar and Sandra Elgersma, [Legislative Summary of Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act](#), Publication no. 41-1-C31-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 4 June 2012.

### 3 REFUGEE STATUS DETERMINATION IN CANADA

#### 3.1 THE IMMIGRATION AND REFUGEE BOARD OF CANADA

The Refugee Protection Division (RPD) of the IRB decides claims made for refugee protection within Canada. Originally staffed with Governor in Council appointees, the RPD is now comprised of members appointed in accordance with the *Public Service Employment Act*.

The other division of the IRB that is instrumental to the refugee determination process is the Refugee Appeal Division (RAD). Provisions for the RAD were included in IRPA but were never brought into force. Both the BRRA and the PCISA amended the provisions implementing the RAD, which came into force on 15 December 2012. The members of the Refugee Appeal Division are appointed by the Governor in Council.



The IRB also includes the Immigration Division and the Immigration Appeal Division. The Immigration Division (ID) is responsible for admissibility hearings and detention reviews. The Immigration Appeal Division (IAD) decides appeals on removal orders, issued by a Canada Border Services Agency (CBSA) officer or by the ID, that may affect Convention refugees and protected persons. At the head of the IRB are the Chairperson, appointed by the Governor in Council, and an Executive Director. The activities of the IRB are reported to Parliament through the Minister of Citizenship and Immigration.

### **3.2 THE FIRST STEP IN MAKING A CLAIM: THE ELIGIBILITY ASSESSMENT**

A person wishing to make a refugee claim must either state so at a port of entry to the country (i.e., an airport, sea port or land border) or, within Canada, to an officer of the CBSA or of Citizenship and Immigration Canada (CIC) (IRPA, section 99(3)).

An eligibility interview ensues wherein the individual gives personal information and a brief explanation of why protection in Canada is being sought. The individual has the burden of proving that her or his claim is eligible to be referred to the RPD. The officer must determine within three days whether the claim should be referred; if a decision is not made in this time frame the claim is automatically referred to the IRB.

IRPA provides six main reasons for which a refugee claim may be found ineligible. These are as follows: <sup>14</sup>

- refugee protection has already been obtained by the person under IRPA;
- a claim for refugee protection by the claimant has been rejected by the IRB;
- the claim was previously found ineligible to be referred to the RPD or was withdrawn or abandoned;
- the person has been recognized as a Convention refugee by another country and can be returned to that country;
- the person came to Canada through the United States without making a claim there first;<sup>15</sup> and
- the person is inadmissible to Canada on grounds of security, a violation of human or international rights, serious criminality or organized criminality.

The relationship between inadmissibility and ineligibility to make a refugee claim (reason 6 above) has been amended through recent legislation. The coming into force of the PCISA will likely increase the number of persons who are ineligible to present a claim. With respect to serious crime, a person no longer needs to have received a minimum sentence of two years for a conviction in Canada to be found inadmissible. For claimants with foreign convictions, the Minister no longer needs to provide an opinion that they pose a danger to the public.

People found eligible to have their claims to protection heard by the IRB are issued conditional removal orders; having these orders in place facilitates the departure of a foreign national in the event that his or her claim is abandoned or withdrawn, or if it is finally refused and all further recourse is exhausted. Security screening procedures also begin once a claim is found eligible to be heard.

Foreign nationals whose claims have been referred to the IRB may obtain a work permit if they cannot support themselves without working. However, claimants from designated countries of origin are not eligible to acquire a work permit until at least 180 days have passed since their claim was referred to the IRB.<sup>16</sup>

Finally, claimants are registered with the Interim Federal Health Program<sup>17</sup> until they can apply for provincial health coverage where they reside. The Interim Federal Health Program provides urgent and essential medical services to most claimants while their claim is pending, with the exception of claimants from designated countries of origin, who are eligible only for medical services in the interest of public health or public safety.

### 3.3 THE BASIS OF CLAIM

As of 15 December 2012, refugee claimants must outline their need for protection in a new Basis of Claim (BOC) document, which is similar to the Personal Information Form it replaces. For claims lodged at a port of entry, claimants are to provide a completed BOC Form to the Refugee Protection Division within 15 calendar days. If the supporting documents<sup>18</sup> and information cannot be provided within this time, the RPD may extend the deadline. For claims made within Canada, claimants are directed to provide the BOC Form with supporting documents upon presenting their claim. (The officers receiving the claim then proceed with the eligibility interview.)

### 3.4 THE REFUGEE HEARING

The officer from CIC or the CBSA who refers the claim to the IRB also schedules the hearing at the Refugee Protection Division in accordance with the *Immigration and Refugee Protection Regulations* (IRPR) and the IRB rules. The timelines provide for an expedited process for claimants from designated countries of origin. The RPD hearing is to take place within 30 days of referral for claimants from designated countries of origin who make their claim inland and within 45 days of referral for claimants from designated countries of origin who make their claim at a port of entry. For all other claimants, the hearing is to take place within 60 days of referral. Exceptions to these timelines are possible for reasons of fairness and natural justice or when there is an inquiry regarding national security, war crimes, serious criminality or organized crime, or because of operational limitations at the RPD.<sup>19</sup>

The hearing at the RPD is usually held privately (in camera) before one decision-maker, i.e., an IRB member. The claimant will be asked to testify, and may have an interpreter if he or she does not feel comfortable communicating in English or French. The claimant may have a representative to assist him or her. On occasion, a hearings officer from the Canada Border Services Agency may also present evidence to exclude the person as a refugee.<sup>20</sup> All supporting documentation must be shared before the hearing. These procedures are explained in the RPD rules. The vast majority of decisions and the reasons motivating the IRB member will be rendered orally after the hearing. To support the claim, the individual usually offers mainly his or her own testimony, sometimes supported by documentation

about the country of origin. However, as the Canadian Council for Refugees has noted, in some cases such documentation can be difficult to gather:

Claimants fleeing a situation that is well-documented in the human rights reports and frequently seen before the Immigration and Refugee Board may be able to present documentation relatively quickly. On the other hand, women fleeing gender-based persecution in a country where little attention is paid to women's rights will likely need more time. ... The same difficulties in collecting documentation apply for claimants fleeing emerging patterns of human rights violations, or from a small and neglected ethnic minority.<sup>21</sup>

The IRB has at its disposal a research division that provides basic information on the country of nationality to inform the decision. Evidence from an expert witness may also be considered in cases involving vulnerable persons (e.g., victims of torture or trauma).<sup>22</sup>

### **3.5 POST-DECISION PROCESS FOR SUCCESSFUL REFUGEE CLAIMANTS**

A successful claimant attains the status of Convention refugee or person in need of protection and must apply to become a permanent resident. A regulatory change that came into effect in July 2012 removed the 180-day deadline for this application.<sup>23</sup>

Successful refugee claimants who are “designated foreign nationals” are not eligible to apply for permanent residence status for five years from the date of a final determination of a refugee claim, a final determination of a pre-removal risk assessment (PRRA), or the day after they became a designated foreign national.<sup>24</sup> Designated foreign nationals who would have to overcome some type of inadmissibility by making an application for a temporary resident permit<sup>25</sup> or an application based on humanitarian and compassionate grounds<sup>26</sup> must also wait five years from the date of a final determination on a refugee claim, a final determination of a PRRA, or the day after they became a designated foreign national.

Permanent residents enjoy certain privileges, including the freedom to enter and leave Canada and to work without a permit, and the possibility of sponsoring their family members to be reunited in Canada. To maintain permanent resident status, individuals must not become inadmissible (by, for instance, committing certain crimes). If they successfully maintain permanent resident status and meet certain other requirements in relation to residence in Canada, knowledge of Canada, and language skills, they may eventually apply for Canadian citizenship.

### **3.6 LOSS OF REFUGEE STATUS**

Under Canadian law, refugee status may be lost through cessation or vacation. Decisions on cessation and vacation are made by the RPD and may not be appealed to the RAD.

IRPA allows for the minister to apply for *cessation* of refugee protection when a refugee's actions indicate that he or she is no longer in need of protection, for example by returning to their country of origin on a long-term basis or by acquiring the citizenship of another country.<sup>27</sup> Upon a final decision that refugee status has

ceased, the foreign national who was previously a Convention refugee or person in need of protection loses status and is rendered inadmissible to Canada; this means that he or she cannot remain in or enter the country.<sup>28</sup> Permanent residents are not subject to loss of their status through cessation if the reasons for which they sought refugee protection have ceased to exist (IRPA, s. 108(e)) but can lose their status for the other reasons stated above.

*Vacation* of refugee protection occurs when the original RPD decision or positive PRRA was obtained through omission or misrepresentation. Misrepresentation currently renders a foreign national inadmissible to Canada for two years. Bill C-43, the *Faster Removal of Foreign Criminals Act*,<sup>29</sup> which received Royal Assent on 19 June 2013, will increase the penalty to five years when the relevant provision comes into force.

### 3.7 POST-DECISION OPTIONS FOR FAILED REFUGEE CLAIMANTS

Once the IRB establishes that a person is neither a Convention refugee nor a person in need of protection, the conditional removal order that was issued comes into effect and the failed claimant must leave Canada within 30 days of the decision.

However, there are five avenues by which the failed claimant may seek to remain in Canada or acquire permanent resident status: application for a temporary resident permit, appeal to the Refugee Appeal Division, application for leave for judicial review (and a stay of removal), application for a pre-removal risk assessment, or application for permanent residence on humanitarian and compassionate grounds. Each of these processes has limitations and exceptions and is described below.

When all legal avenues have been exhausted, the individual may leave Canada voluntarily, perhaps with the support of the “assisted voluntary return and reintegration” (AVRR) pilot program, or will be forcibly removed. As of 29 June 2012, failed refugee claimants deemed eligible to participate in the AVRR pilot program have the opportunity to receive the cost of their plane ticket and up to \$2,000 in reintegration assistance upon leaving Canada.<sup>30</sup> The funds are administered by the International Organization for Migration and are not given directly to the individual.

One component of the government’s recent reforms is the goal of removing failed refugee claimants within a year of their RPD decision. Accordingly, removal from Canada is to take place “as soon as possible,” and the Minister of Public Safety has, since 15 December 2012, the authority to make regulations concerning the factors and circumstances that may or may not be considered when determining whether to temporarily defer a removal.<sup>31</sup>

#### 3.7.1 TEMPORARY RESIDENT PERMIT

Temporary resident permits are used to allow a foreign national who would otherwise be inadmissible to enter and stay in Canada temporarily. Most failed refugee claimants may not apply for a temporary resident permit unless they have been in Canada for more than a year after the negative RPD decision.<sup>32</sup>

Designated foreign nationals may not apply for a temporary resident permit until five years from the date of a final determination on a refugee claim, a final determination of a pre-removal risk assessment, or the day after they became a designated foreign national.

### 3.7.2 REFUGEE APPEAL DIVISION

The provisions implementing the RAD came into force on 15 December 2012. The RAD provides claimants with an opportunity to introduce evidence about their claim that was not known or available at the time of their hearing. This appeal is normally conducted by paper review, although an oral hearing may be held in certain situations.<sup>33</sup> The RAD may refer a matter back to the RPD if it is of the opinion that the RPD decision is wrong in law, in fact, or both. The RAD may also confirm a decision of the RPD or set aside a RPD decision in favour of its own decision.

According to the *Immigration and Refugee Protection Regulations* (IRPR) section 159.91, the notice of appeal before the RAD must be filed within 15 days of the negative RPD decision. Rule 3 of the RAD indicates that the appellant's record must be filed and complete within 30 days of the decision. If these time limits cannot be met, the RAD may, for reasons of fairness and natural justice, extend them.<sup>34</sup> Appeal decisions must be rendered within 90 days in cases where no hearing is held.

RPD decisions concerning the following five groups of refugee claimants may not be appealed to the RAD: designated foreign nationals, those whose claims are found to have no credible basis, those whose claims are found to be manifestly unfounded, those whose claims are heard as exceptions to Safe Third Country Agreements, and those from designated countries of origin. In addition, determinations that a refugee claim has been withdrawn or abandoned may not be appealed.

The RAD is available only to claimants whose original claim was referred to the IRB after 15 December 2012. Those whose claims were determined under the old refugee determination process and have been ordered back to the RPD after a favourable Federal Court ruling do not have access to the RAD after their second refugee determination decision.

### 3.7.3 JUDICIAL REVIEW

Unsuccessful claimants may seek judicial review at the Federal Court if they feel that the decision by the IRB member might be set aside on the grounds that the tribunal erred in law or failed to observe a principle of natural justice.<sup>35</sup> In filing an application for leave for judicial review with respect to a decision of the Refugee Appeal Division, most failed refugee claimants receive an automatic stay or postponement of removal. However, regulatory changes that came into force on 15 December 2012 provide that failed claimants in the following categories no longer receive an automatic stay in such situations: those from designated countries of origin, those with manifestly unfounded claims, those with claims with no credible basis, those whose claims were made as an exception to the Safe Third Country agreement, and designated foreign nationals.<sup>36</sup>

### 3.7.4 PRE-REMOVAL RISK ASSESSMENT

An unsuccessful claimant who is “ready for removal”<sup>37</sup> may be eligible for a pre-removal risk assessment (PRRA), a review currently conducted by officials at CIC. In this process, submissions are made concerning facts that were not presented to the IRB because they were not known at the time. The PRRA is generally a paper review evaluating the risks that the individual would face if he or she were returned to the country of origin, including the risk of persecution, torture, cruel and unusual treatment or punishment, and risk to life. Making a PRRA available ensures that Canada does not violate the principle of non-refoulement,<sup>38</sup> consistent with its international obligations and the *Canadian Charter of Rights and Freedoms*. A PRRA is offered only when valid travel documents are available for the failed claimant and must be completed before removal takes place.

To address what was perceived as duplication in the system, recent legislative amendments have placed restrictions on when an application may be submitted for a PRRA. Consequently, most failed refugee claimants may not apply for a PRRA if their claim for refugee protection was rejected, abandoned or withdrawn within the last 12 months. For failed claimants from designated countries of origin, this waiting period is 36 months from the negative RPD decision. Similarly, those who received a negative PRRA decision within the previous 12 months must wait a year before submitting a second one. This second PRRA application, contrary to the first one, does not stay a removal while the decision is being made.<sup>39</sup>

The Minister may establish exemptions to this 12- or 36-month waiting period for nationals of a certain country or a class of nationals if events in a country have arisen that could place all or some of its nationals or former habitual residents in a refugee-like situation.<sup>40</sup> Furthermore, persons whose claims have been vacated or persons who were excluded from the refugee determination process do not have to wait 12 months to apply for a PRRA.

Generally, persons who receive a positive PRRA decision are granted “protected person” status and may apply to remain in Canada as permanent residents, unless they are inadmissible to Canada on grounds of security, violation of human or international rights, organized criminality or serious criminality. A positive PRRA decision for these individuals results only in a stay of removal rather than protected person status.

Risk assessment will be consolidated when responsibility for most PRRA decisions is transferred to the RPD at the IRB, at a date expected to be two years from 15 December 2012.<sup>41</sup> The Minister of Citizenship and Immigration will retain responsibility for decisions regarding persons inadmissible on grounds of security, violation of human or international rights, or serious or organized criminality.

Time limits may be set in regulations for the RPD to process PRRA applications when section 40 of the PCISA comes into force (on a day fixed by order of the Governor in Council). Currently, regulations allow a person 15 days to respond to a notification that he or she may apply for protection, indicating that no decision may be made until at least 30 days have passed since the notification.<sup>42</sup>

### 3.7.5 HUMANITARIAN AND COMPASSIONATE APPLICATIONS

A failed refugee claimant can also request permanent residency through a humanitarian and compassionate application to the Minister of Citizenship and Immigration,<sup>43</sup> which allows a foreign national to submit an application that, under other circumstances, would be rejected because it fails to meet a basic requirement. A humanitarian and compassionate application does not stay the conditional removal that is in effect for the failed claimant unless the application was approved in principle before the removal order came into effect. Although failed claimants may request that the Federal Court suspend the deportation until a final outcome is known, such requests have met with mixed results.

The humanitarian and compassionate application assesses how well established the foreign national is in Canada and what hardship it would cause to leave.<sup>44</sup> The degree of the applicant's establishment may be measured with questions such as whether he or she has a history of stable employment, has been involved in the community, has shown integration by undertaking studies, or has family members in Canada.

With respect to assessing hardship, the immigration officer must assess whether the applicant would face "unusual, undeserved or disproportionate hardship" were the application to be denied.<sup>45</sup> Unusual hardship is hardship of a kind that was not anticipated in the Act or the regulations. Undeserved hardship is understood as the result of circumstances out of the person's control. The concept of disproportionate hardship refers to situations that do not meet the definitions of unusual or undeserved hardship, but would nonetheless have an unreasonable impact on the applicant as a result of personal circumstances.

Significant changes were made to the IRPA provisions regarding when an individual requests permanent residence on humanitarian and compassionate grounds.<sup>46</sup> First, a clear distinction was made between the refugee determination process and requests for permanent residence on humanitarian and compassionate grounds through provisions in the BRRRA stipulating that, in examining humanitarian and compassionate requests made in Canada, decision-makers may not consider risks that are assessed within the refugee protection process, i.e., risk of persecution based on grounds set out in the Refugee Convention or risk of torture, or of cruel and unusual treatment or punishment. Instead, only the hardships that affect the foreign national, as outlined above, must be considered.

Another change introduced by BRRRA is that the processing fee must be submitted with applications for permanent residence on humanitarian and compassionate grounds in order for them to be considered.

Subsequent changes have placed restrictions on when an application may be submitted for permanent residency on humanitarian and compassionate grounds and by whom. As provided in the PCISA, the Minister may not examine the request in any of the following circumstances: the foreign national has already made a humanitarian and compassionate application and the request is pending; the foreign national has a claim pending before the RPD or the RAD; or less than 12 months have passed since the foreign national's claim was last rejected or determined to be withdrawn or

determined to be abandoned by the RPD or the RAD. These restrictions do not apply in cases where there is a risk to life in the country of origin owing to inadequate health or medical care or where removal would have an adverse effect on the best interests of a child directly affected.

Designated foreign nationals may not apply for permanent residence on humanitarian and compassionate grounds for five years from a final determination on a refugee claim or of a PRRA, or from the day after they became a designated foreign national. Foreign nationals who are inadmissible on grounds of security, human or international rights violations, or organized criminality are not eligible to apply for humanitarian and compassionate considerations at all.

## **4 DETENTION**

In fiscal year 2010–2011, the Canada Border Service Agency (CBSA) detained 8,838 persons, of whom 47% were refugee claimants.<sup>47</sup> The CBSA has three immigration holding centres located in the Greater Toronto Area, near Montreal and at the Vancouver Airport. Where there is no immigration holding centre, persons are detained in provincial facilities (usually remand centres, jails or prisons). The following describes reasons for detention and alternatives to detention.

### **4.1 REASONS FOR DETENTION**

#### **4.1.1 BEING A DESIGNATED FOREIGN NATIONAL**

The PCISA created a new category of designated foreign nationals with a specific detention regime, as shown in Table 1: automatic detention upon arrival, first detention review after 14 days, and subsequent reviews every six months. A designated foreign national is a person who arrived in a group that is designated as an irregular arrival by the Minister of Public Safety because the examination of all group members cannot be conducted in a timely manner or because there may be ties to organized crime or a terrorist group. The rationale behind the detention scheme is twofold: to allow the authorities to proceed with their investigations of all group members, and to act as a deterrent.<sup>48</sup>

#### **4.1.2 TRADITIONAL REASONS FOR DETENTION**

The five potential reasons for detention can apply to refugee claimants at different times in the determination process. The first reason is that a person presents a danger to the public. The second is that there is a flight risk when removal is pending. The third is a belief that the person will not appear for an examination, an admissibility hearing or any immigration process. The fourth reason, which is most often at issue upon arrival in Canada, is that the claimant's identity has not been established.<sup>49</sup> Finally, persons will be detained if there are reasonable grounds to suspect they are inadmissible on grounds of security, violation of human rights or ties to organized crime.



## 4.2 ALTERNATIVES TO DETENTION

A person may be released on terms and conditions, such as regular reporting requirements. There may be a request for a cash bond or for a guarantor to ensure that the person complies with the terms and conditions. In the Greater Toronto Area, the Toronto Bail Program is a non-profit organization that supervises individuals facing removal, although not imminently, and who have no guarantor.<sup>50</sup> The possible use of electronic monitoring (GPS bracelets) for failed refugee claimants was discussed during a study by the Standing Committee of the House of Commons on Public Safety and National Security.<sup>51</sup>

## 5 CONCLUSION

Recent legislative and regulatory reforms affect virtually every aspect of Canada's inland refugee determination system. The cumulative impact of these changes will only be understood with time. CIC has indicated its intention to evaluate the changes after three years, which should provide important insight into the speed and fairness of the new system, its impact on claimants and its implications for Canada's ongoing success in providing protection to displaced and persecuted persons.

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## NOTES

1. Most provisions of the [Immigration and Refugee Protection Act](#) [IRPA], S.C. 2001, c. 27, came into force in 2002.
2. IRPA, s. 3(2).
3. United Nations High Commissioner for Refugees [UNHCR], [Convention and Protocol relating to the Status of Refugees](#). Canada ratified the convention in 1969.
4. IRPA, s. 96.
5. UNHCR, [Global Trends 2012](#), p. 5.
6. UNHCR, [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#).
7. IRPA, ss. 151–186.
8. The process of applying for refugee protection under the previous system is described in previous versions of this publication. See Julie Béchar and Sandra Elgersma, [Refugee Protection in Canada](#), Publication no. 2011-90-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 1 September 2011; and Penny Becklumb, [Canada's Inland Refugee Protection System](#), Publication no. BP 185E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 16 September 2008. This publication is focused primarily on the refugee determination system currently in place in Canada.
9. [An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act](#), S.C. 2010, c. 8. See Daphne Keevil Harrold and Sandra Elgersma, [Legislative Summary of Bill C-11: An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act, \(Balanced Refugee Reform Act\)](#), Publication no. 40-3-C11E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 12 January 2011.

10. [\*An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act\*](#), S.C. 2012, c. 17. See Julie Béchar and Sandra Elgersma, [\*Legislative Summary of Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act\*](#), Publication no. 41-1-C31-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 4 June 2012.
11. The summary provided in this section was first published in Béchar and Elgersma (2012).
12. Section 109.1 of the IRPA establishes thresholds for refugee claim patterns that may trigger the assessment of a country for designation. The countries to be included in the list of designated countries of origin are established by ministerial order, and the first list was published 15 December 2012. The list has been amended several times and is available at Citizen and Immigration Canada, [\*Designated countries of origin\*](#).
13. Section 102 of the IRPA allows the designation of countries as safe third countries by regulation if an agreement for the purpose of sharing responsibility for refugee claim consideration exists, among other considerations. At the time of this publication, the United States is the only country designated as a safe third country by Canada. In 2002, the United States and Canada signed the [\*Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries\*](#), commonly referred to as the Safe Third Country Agreement (STCA). Exceptions under the STCA are provided for certain people with family members in Canada, unaccompanied minors, certain document holders, and those charged with or convicted of an offence that could subject them to the death penalty in the United States or in a third country. See Citizenship and Immigration Canada, [\*Canada–U.S. Safe Third Country Agreement\*](#).
14. IRPA, s. 101.
15. The Canada–U.S. Safe Third Country Agreement has been in force since 2004. Exempt from this rule are persons who already have family in Canada or who may face the death penalty in the United States.
16. [\*Regulations Amending the Immigration and Refugee Protection Regulations\*](#), SOR/2012-252, s. 2.
17. Changes that took effect on 30 June 2012 established tiers of coverage within the Interim Federal Health Program, which provides interim health coverage to refugee claimants (among others) who are not insured under provincial or private plans. Public health or public safety health care coverage includes hospital, physician and laboratory services as well as immunizations and medications *only if* they are required to diagnose, prevent or treat a disease posing a risk to public health or a condition that poses a public safety concern. Health care coverage includes those same benefits if they are of an urgent or essential nature. See Citizenship and Immigration Canada, [\*Interim Federal Health Program: Summary of Benefits\*](#).  
  
For more information, see [\*Order Respecting the Interim Federal Health Program, 2012\*](#), SI/2012-26, and Citizenship and Immigration Canada, [\*Interim Federal Health Program Policy\*](#).
18. [\*Regulations Amending the Immigration and Refugee Protection Regulations\*](#), SOR/2012-252, s. 1. The Basis of Claim Form asks claimants on p. 2 to:  
  
[a]ttach copies of any documents you have to support your claim, such as travel documents (including your passport) and identity, medical, psychological or police documents.  
  
See Immigration and Refugee Board of Canada, [\*“Basis of Claim Form.”\*](#)

19. *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2012-252, s. 1.
20. IRPA, s. 98.
21. Canadian Council for Refugees, "[Protecting rights in a fair and efficient refugee determination system: Submission on Bill C-11](#)," 5 May 2010.
22. According to paragraph 8.1 in the Immigration and Refugee Board (IRB) [Guideline on Procedures with Respect to Vulnerable Persons Appearing before the IRB](#):

A medical, psychiatric, psychological or other expert report regarding the vulnerable person is an important piece of evidence that must be considered. Expert evidence can be of great assistance to the IRB in applying this guideline if it addresses the person's particular difficulty in coping with the hearing process, including the person's ability to give coherent testimony.
23. [Regulations Amending the Immigration and Refugee Protection Regulations](#), SOR/2012-154, s. 2.
24. IRPA, s. 11(1.1).
25. IRPA, s. 24(5).
26. IRPA, s. 25(1.01).
27. Section 108 of the IRPA lists the following five grounds for cessation of refugee protection:
  - (a) the person has voluntarily reavailed themselves of the protection of their country of nationality;
  - (b) the person has voluntarily reacquired their nationality;
  - (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;
  - (d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or
  - (e) the reasons for which the person sought refugee protection have ceased to exist.
28. This consequence arises only for those whose refugee status has ceased for one of the reasons cited in IRPA s. 108(a) to 108(d). It does not apply in situations where cessation occurs because the reasons for which the person sought refugee protection no longer exist (IRPA, s. 108(e)).
29. [Faster Removal of Foreign Criminals Act](#), S.C. 2013, c. 16.
30. Canada Border Services Agency, [Assisted Voluntary Return and Reintegration pilot program](#). Failed refugee claimants may be eligible to participate in program if they made a claim in or around the Greater Toronto Area, complied with all terms and conditions set by the government during the refugee claim process, and complete an application for a new travel document. Failed claimants who are not from a designated country of origin can obtain the full amount if they have not made an application for judicial review, \$1,500 if they apply before making a pre-removal risk assessment (PRRA) application, and otherwise a maximum of \$1,000. Failed claimants from designated countries of origin can obtain \$500 and an additional \$200 per family member, up to a maximum of \$1,500 for a family of six or more. Certain unsuccessful refugee claimants are not eligible to participate in the pilot program – for example, if the claim was found not credible or the failed claimant has a criminal record.

31. IRPA, s. 53(e). Up to now, there was limited discretion, developed through case law, to defer removals. In *Baron v. Minister of Public Safety and Emergency Preparedness*, 2009 FCA 81, at para. 49, the Federal Court of Appeal cited the opinion that:  

a removal officer may consider various factors such as illness, other impediments to travelling, and pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system.
32. IRPA, s. 24(4).
33. IRPA ss. 110(3) and 110(6). A hearing may be held if the new evidence “raises a serious issue with respect to the credibility of the person who is the subject of the appeal,” is “central to the decision with respect to the refugee protection claim,” or, “if accepted, would justify allowing or rejecting the refugee protection claim.”
34. *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2012-252, s. 1.
35. Grounds for judicial review are set out in the [Federal Courts Act](#), R.S.C., 1985, c. F-7, s. 18.1(4).
36. [Regulations Amending the Immigration and Refugee Protection Regulations](#), SOR/2012-272.
37. Such a person is facing removal, has exhausted all procedures that allowed any stays, and has travel documents available.
38. IRPA, s. 115.
39. [Immigration and Refugee Protection Regulations](#) [IRPR], SOR/2002-227, s. 232. A stay of removal is granted during the process of a first PRRA application.
40. *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2012-154, s. 7.
41. *Refugee Protection Division Rules*, “Regulatory Impact Analysis Statement,” SOR/2012-256, p. 2724. Further changes to these rules are expected to introduce the changes required for the transfer of the PRRA function from Citizenship and Immigration Canada (CIC) to the IRB.
42. IRPR, ss. 160–162.
43. IRPA, s. 25(1).
44. CIC, IP 5, [Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds](#).
45. *Ibid.*, paragraph 5.10. These are not simply guidelines, as they were adopted by the Federal Court in *Singh v. Canada*, 2009 CF 11.
46. Note that IRPA sections 25.1 and 25.2 provide that the Minister may also, on his or her own initiative, grant permanent resident status on humanitarian and compassionate grounds (taking into account the best interests of a child directly affected) or if the Minister believes it is justified by public policy considerations.
47. House of Commons, Standing Committee on Citizenship and Immigration, [Standing on Guard for Thee: Ensuring that Canada's Immigration System is Secure](#), Seventh Report, March 2013, 1<sup>st</sup> Session, 41<sup>st</sup> Parliament, Table 2, p. 23.
48. CIC, [“Backgrounder – Overview: Ending the Abuse of Canada's Immigration System by Human Smugglers.”](#)
49. IRPA s. 55 and IRPR ss. 244–247.
50. CIC, ENF 20, [Detention](#), paras. 5.11 and 5.12.

51. House of Commons, Standing Committee on Public Safety and National Security, [\*Study of Electronic Monitoring in the Correctional and Immigration Settings\*](#), Sixth Report, 1<sup>st</sup> Session, 41<sup>st</sup> Parliament, September 2012.