Making Sense of an Immigration Omnibus: Asper Centre Submissions on Bill C-31*

On April 30 of this year, Prof. Audrey Macklin made submissions on behalf of the Asper Centre before the House of Commons' Standing Committee on Citizenship and Immigration. The Committee was considering Bill C-31, *Protecting Canada's Immigration System Act,* a sweeping piece of legislation with far-reaching changes to refugee determination, detention of newcomers and family reunification, among other issues. Prof. Macklin appeared alongside Prof. Sean Rehaag of Osgoode Hall Law School and lawyer Barbara Jackman.

Together, they highlighted a number of the bill's Charter and international law violations and responded to the sometimes zealous questions of committee members. Bill C-31 is an omnibus bill altering core provisions of the *Immigration and Refugee Protection Act* and other laws. It includes changes to Bill C-11, the *Balanced Refugee Reform Act,* just enacted in 2010 and only partially in force, and revives the bulk of the now-abandoned Bill C-4, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act.* Making sense of the complex and overlapping consequences of this bill has proved a challenge to the immigration bar, particularly as new Ministerial announcements continue apace.[1] Days after this Committee hearing, the Minister announced additional amendments, some of which responded to the Asper Centre's concerns and others which aggravated them.

Provisions of Bill C-31 have been roundly criticized by the legal community, including the Canadian Civil Liberties Association, the Canadian Association of Refugee Lawyers, the Canadian Bar Association, the Canadian Council for Refugees and other organizations.[2] Rather than touch on every problematic aspect of the bill, Prof. Macklin, Prof. Rehaag and Ms. Jackman focused on a shorter list of key concerns: new ministerial powers to revoke permanent residence, arbitrary limits on access to refugee appeals, and the expansion of absolute bars rather than individualized decision-making in areas such as mandatory detention. More broadly, the bill's dramatic expansion of Ministerial powers has far-reaching constitutional implications.

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[1] Peter Edelmann, a member of CBA's National Immigration Law Section, describes the layering of clauses and amendments that render sound analysis of Bill C-31 challenging; he points out mistakes made by both the Library of Parliament and the Minister in describing the bill. See Evidence, Standing Committee on Citizenship and Immigration, 41st Parliament, 1st Session, 1 May 2012.

[2] See CCLA's website dedicated to advocacy on Bill C-31: http://ccla.org/protectrefugees. CARL has compiled a list of statements by leading refugee lawyers: http://www.refugeelawyersgroup.ca/billc-31. CBA's analysis, *Bill C-31: Protecting Canada's Immigration System Act,* April 2012, can be found at: http://www.cba.org/CBA/submissions/pdf/12-27-eng.pdf. The CCR also has an advocacy page: http://ccrweb.ca/en/refugee-reform. The CCLA, CARL, CCR and Amnesty International Canada issued a joint statement here: http://www.refugeelawyersgroup.ca/coalition.

Revocation of permanent residence

Prof. Macklin addressed amendments to the "vacation" and "cessation" provisions in *IRPA*. Under the current law, refugee status may be "vacated" if it was obtained by misrepresentation or fraud; this also results in revocation of permanent resident status and, as a result, deportation. In contrast, where refugee status is "cessated" because the conditions in the source country improve, refugee protection is lost but permanent residence is not. Bill C-31 as originally drafted imposed the same consequence for cessation as for vacation – loss of permanent residence – even though changes in country conditions are entirely out of the control of the individual. In other words, bona fide refugees who built their lives in Canada could be deported years later, if the Minister decides their home country is no longer unsafe.

In supporting written submissions, the Canadian Association of Refugee Lawyers (CARL)[3] identified four section 7 Charter violations flowing from this change. First, deportation where the person has not deliberately breached any condition of permanent residence may engage section 7 liberty and security, following *Chiarelli*.[4] Second, the devastating impact on individual and family is arbitrary, in that it "bears no relation, or is in inconsistent with,"[5] the stated objective of combating fraud or misrepresentation. Third, since existing vacation provisions already accomplish the objective of revoking permanent residence where refugee status was obtained fraudulently, extending this revocation to cessation violates the section 7 proscription of overbreadth. Finally, permanent resident refugees would live in a state of constant fear and anxiety about their status, amounting to serious, state-imposed psychological stress. In addition to violating the section 7 of the Charter, this is antithetical to the *IRPA* objectives of facilitating settlement and integration.

Two weeks after Prof. Macklin made her submissions, the Minister announced changes to Bill C-31, perhaps to address this provision's apparent unlawfulness. A revised version of the bill removed the automatic revocation of permanent residence where cessation was based on a change in country conditions since the refugee came to Canada. However, it retained revocation of permanent resident status for cessation based on other grounds.[6] Even with a softening of this draconian provision, the bill remains deeply problematic.

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[3] CARL is an organization of over 150 refugee lawyers and academics, several of whom addressed the committee regarding Bill C-31. CARL submitted two briefs to the Standing Committee on Citizenship and Immigration: "Canada Must Protect, Not Punish Refugees," 19 April 2012 and "Fair Refugee Outcomes Depend on Fair Processes," 20 April 2012. Prof. Macklin drafted the vacation and cessation section of CARL's written submissions.

[4] *Canada v. Chiarelli*, [1992] 1 SCR 711.

[5] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 132.

[6] Permanent residence may still be revoked following certain kinds of "cessation," including where the accepted refugee reavails himself of his home country's protection, reacquires nationality or voluntarily becomes re-established there – these are still changes to the current law. However, in the latest text, permanent residence is not revoked where "the reasons for which the person sought refugee protection

Arbitrariness in access to appeal

Prof. Rehaag's submissions primarily focused on the arbitrary limits on access to a refugee appeal. Bill C-31 limits access to an appeal for several categories of refugee claimants, including but not limited to claimants designated as having arrived irregularly in groups and claimants from "designated countries of origin" deemed by the Minister to be safe.[7] Prof. Rehaag emphasized the life-and-death stakes of refugee decisions, and described how the risk of error that characterizes all administrative decision-making is amplified in refugee adjudication where claimants are often traumatized and arrived from long journeys. (Another aspect of Bill C-31 – dramatically expedited timelines – amplifies the possibility of error.) Prof. Rehaag's research demonstrates statistically significant variance in acceptance rates among refugee adjudicators, further supporting the importance of an appeal on the merits.

Refugee determinations invoke section 7 rights to life, liberty and security of the person. The Minister has stated that limiting access to an appeal serves the objective of deterring abuse of the refugee system, but Prof. Rehaag submitted that these limitations were arbitrary in that they bore no relation to the stated objective.

In questioning, MP Rick Dykstra (PC) persistently claimed that in fact Bill C-31 gives an appeal to all claimants, but Prof. Rehaag clarified the difference between an appeal on the merits and judicial review. Though claimants may seek to judicially review decisions before the Federal Court, such claims require leave of the Court (denied in 85% of cases), are typically limited to legal, not factual questions (though most cases turn on factual questions, for example credibility assessments), and are meaningless without a stay of deportation. Prof. Rehaag's research further shows dramatic disparity in the granting of leave, varying from 1% to over 70% grant rates depending on the Federal Court judge, with an average leave grant rate of around 14%.[8] What is more, Bill C-31 expands non-suspensive review, meaning a greater number of individuals will lack protection against deportation during judicial review applications, rendering this remedy meaningless.

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have ceased to exist" (Art. 108(1)(e) of IRPA). See sections 18 and 19 of the latest version of Bill C-31, Reprinted as Amended by the Standing Committee on Citizenship and Immigration as a Working Copy for the Use of the House of Commons at Report Stage and as Reported to the House on May 14, 2012, online: http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5391960&file=4.

[7] The full list of individuals excluded from the Refugee Appeal Division under Bill C-31 comprises: a) "Designated Foreign Nationals"; b) Withdrawn or Abandoned claims; c) "No Credible Basis" or "Manifestly Unfounded" claims; d) Claimants who traveled through a "Safe Third Country" but, due to an exception, were permitted to make a claim in Canada; e) Claimants from a Designated Country of Origin; and f) Decisions revoking refugee status through "vacation" or "cessation" procedures.

[8] Sean Rehaag, "The Luck of the Draw? Judicial Review of Refugee Determinations in the Federal Court of Canada (2005-2010)," Osgoode CLPE Research Paper No. 9/2012, 22 March 2012, online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027517 at page 16.

Absolute bars and mandatory detention

Barbara Jackman's more broad-ranging submissions highlighted the importance of individualized decision-making in immigration law, which Bill C-31 erodes. Most problematically, the bill as first drafted would have mandatorily imprisoned "irregular arrival" refugee claimants for 12 months without the possibility of review. Ms. Jackman drilled home the blatant section 7 violation of this provision, following *Charkaoui*;[9] CARL's written submissions outline the sections 9, 10(c) and 12 violations of the same provision. The Minister has since revised Bill C-31 replacing 12-month mandatory and unreviewable detention with detention review after 2 weeks and after 6 months.[10] This recognizes problems with the old provision, though even the new timelines still appear to run afoul of the *Charkaoui* precedent.

Bill C-31 also imposes an absolute 12-month bar on applying for a Pre-Removal Risk Assessment (PRRA) where a previous PRRA has been refused. This absolute bar applies even where exceptional circumstances may exist, such as deterioration in country conditions prior to deportation or the appearance of significant new evidence. In the Minister's most recent changes to Bill C-31, this bar was increased to 36 months for designated foreign nationals.[11]

General expansion of Ministerial powers

Various other provisions were not addressed orally, but are discussed in CARL's written submissions to the committee. They include dramatically expedited timelines for refugee determinations and appeals, which undermine the section 7 guarantee of fairness in refugee determination. The designation of certain countries as safe, resulting in procedural disadvantages for claimants based on their nationality, threatens both section 7 and section 15 rights. The blanket 5-year bar on family reunification applications (likely 6 to 8 years including processing times) for "designated foreign nationals" arguably violates section 7 of the Charter, and certainly undermines international law and the objectives of *IRPA*.

Broader than its particular provisions, Bill C-31 represents a troubling expansion of Ministerial powers in immigration law. Ms. Jackman identified an emerging trend of "framework legislation" in which substantial law-making is done by regulation, and Ministerial orders and instructions take on a more active role. Prof. Macklin criticized this trend in the context of Bill C-31. Both the process of designating countries as safe and the process of designating people as irregular arrivals "are not subject either to parliamentary oversight or even to the process for

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[9] *Charkaoui v Canada,* 2007 SCC 9.

[10] The two-week and six-month detention review applies to people 16 years of age and older, meaning children below the age of 18 may be detained under this provision. See section 25 of the May 14, 2012 version of Bill C-31.

[11] Bill C-31, ss 58-59.

regulatory rule-making by cabinet." The enormous scope of Ministerial discretion that pervades Bill C-31 suggests that should the bill pass, Charter challenges will not be limited to scrutinizing the letter of the law, but will also include attacks on the Minister's exercise of these unprecedented levels of discretion.

After Prof. Macklin said she had not seen a substantive legal defence of Bill C-31's constitutionality, Mr. Dykstra asked if she truly believed that the government would bring forward legislation without testing its Charter compliance. Prof. Macklin replied, "I have yet to hear any defence of the legality of the legislation, apart from saying we had it checked. I would be delighted to hear a substantive engagement about the content of the bill, and look forward to that." Mr. Dykstra conceded, "Okay, that's a fair point." The government to date has not provided a constitutional analysis of the bill.

For the minutes of the Standing Committee's 30 April 2012 meeting, click here.
For the most recent text of Bill C-31, click here.
Links to other comments on Bill C-31: Canadian Civil Liberties Association (link); Canadian Association of Refugee Lawyers (link); Canadian Bar Association (link); Canadian Council for Refugees (link); Amnesty International Canada (link).

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[*] This summary was prepared by Asper Centre summer research assistant, Louis Century, JD/MGA candidate, 2013.