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Comments on Bill C-43: An Act to Amend the Immigration and Refugee Protection Act (Faster Removal of Foreign Criminals Act)
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Introduction

The Table de concertation des organismes au service des personnes réfugiées et immigrantes (TCRI) is an umbrella group of 142 community organizations assisting refugees and immigrants across Québec. Founded in 1979, the TCRI's mission is that of defending the rights of newly arrived persons and families, regardless of their immigration status.

The TCRI has serious concerns regarding Bill C-43. We believe it will lead to less fairness to persons found inadmissible to Canada on a number of grounds, as well as to permanent residents facing loss of status due to criminality. The TCRI is a member group of the Canadian Council for Refugees and entirely endorses its brief on Bill C-43, which was presented recently to your Committee and covers a wide range of concerns. [1]

We will focus on an area of particular concern regarding Bill C-43: the denial of access to humanitarian and compassionate (H & C) considerations to persons excluded from refugee protection [2] and the denial of H & C considerations to persons found inadmissible on security grounds who apply for "ministerial relief" from such inadmissibility.[3] We will begin with a real-world example of a person who is currently being assisted by one of our member organizations.

Salma's story

While still a student in her civil-war-torn country in Latin America, Salma (not her real name) was recruited into the student arm of the opposition movement. She helped run meetings, sometimes serving coffee and taking minutes, and was involved in organizing peaceful demonstrations.

Years later, after peace accords were signed and the movement became a legal political party, she again volunteered during an election campaign. Salma says she inadvertently

[1] Canadian Council for Refugees, Bill C-43 Reducing fairness for refugees and permanent residents, October 26, 2012.
[2] Sections 9 and 10 of Bill C-43.
[3] Section 18 of Bill C-43

came across evidence of illegal activities and was then targeted by party officials, who first threatened and then brutally assaulted her. She fled to Canada to seek asylum.

However, the Immigration and Refugee Board found that her involvement in the movement, which had a guerrilla arm that had targeted some civilians during the civil war, excluded her from being considered for refugee protection in Canada. She was deemed to be "complicit in crimes against humanity." [4]

In addition, even though an official at the Canada Border Services Agency confirmed that Salma was never involved in any act of violence and posed no danger to Canada, By the automatic effect of the law, she also became inadmissible for permanent residence under S.35 of IRPA.[5]

Canadian medical professionals believe that Salma was indeed the victim of sexual assault, and that a return to her country would be extremely destructive to her mental health. She has no family to return to back home, as her only son and her ex-spouse have immigrated to Canada in separate immigration procedures.

Eliminating the possibility of H & C applications

Under the law as it stands today, Salma can still apply for permanent residence on humanitarian and compassionate (H & C) grounds. In examining such an application, an officer would have to weigh all the factors present: the hardship for Salma of returning to the country of her traumatization, her medical situation, the best interests of any child affected, the links she has developed to Canada, the nature of her activities with the organization with which she was associated, etc. The officer could then decide whether to grant Salma permanent residence on humanitarian grounds, including a waiver from her inadmissibility. Bill C-43 would render this impossible. She could not even make an H&C application.

This is a matter of great concern to the TCRI, as it is our experience that Salma's case is not an isolated one. Rather, it is our experience that the Exclusion Clauses are being applied by the Immigration and Refugee Board in an increasingly broad manner. Our experience is corroborated by a comprehensive academic study which decries "The growing culture of exclusion" in Canada[6].

This study, published in 2011, examined every exclusion case decided and made public during the period 1998 to 2008. The study concludes, *inter alia*:

> - Exclusions at the IRB have increased dramatically during this period: from two cases in 1998 to a high of 114 in 2004 and 79 in 2008;[7]

[4] Salma was excluded under section IF of the Refugee Convention
[5] Section 35(1)(a) of IRPA and 15(b) of Immigration and Refugee Protection Regulations
[6] Kaushal, A. and Dauvergne, C. The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions, *Int. J. Refugee Law* (2011) 23(1), 54-92
[7] Ibid at page 60-61

- "The Canadian government has aggressively pursued exclusion by intervening in IRB cases and it has employed 'creative' arguments at all levels of adjudication".[8]

- (Regarding the issue of "complicity"): "The cases reveal a troubling state of affairs: it is who you are or who you are associated with, rather than what you have done, that often provides the basis for exclusion". [9]

and further

> "These understandings of complicity go beyond the findings of international criminal tribunals, which 'only dealt with persons most responsible for international crimes'. In this way, refugee law is being used to assign culpability at a far lower threshold than international criminal law". [10]

The authors conclude:

> "This fails to conform to the humanitarian requirements of international refugee law and to international human rights law, and it ignores the fact <u>that many of the excluded claimants have never participated in violence or specific crimes, and would not have been excluded a decade ago."</u> [11] (emphasis added)"

<u>Eliminating H & C considerations from applications for Ministerial Relief</u>

Our member groups sometimes see people whose stories are similar to Salma's but who are caught by the inadmissibility provisions in a different way. For example, even if the Immigration and Refugee Board had chosen <u>not</u> to exclude Salma and had granted her refugee status, she could have subsequently found herself declared inadmissible to Canada under S. 34 for having been "a member of an organization that there are reasonable grounds to believe…has engaged…in instigating the subversion by force of any government,"[12] Indeed, as has frequently been observed, Nelson Mandela would fit that definition.

Under the law as it stands today, such persons can apply for "ministerial relief" from their inadmissibility. To succeed, they must satisfy the Minister that "their presence in Canada would not be detrimental to the national interest".[13]

Historically, the Minister has taken H & C considerations (such as those outlined above for Salma) into account in examining such requests. However, Bill C-43 would amend the relevant section to read that: "the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to

[8] Ibid at page 65
[9] Ibid at page 79
[10] Ibid at page 80
[11] Ibid at pp. 90-91 2011 FCA 224,
[12] Sections 34(1)(f) and 34(1)(a) of IRPA
[13] Section 34(2)) of IRPA

considering the danger that the foreign national presents to the public or the security of Canada".[14]

Under the same provision of Bill C-43, outlined above with respect to Salma, such persons are also barred from filing applications for permanent residence on H & C grounds.

Violation of Canada's International and Charter Obligations

The TCRI submits that the complete exclusion of H & C considerations in these contexts is contrary to Canada's international obligations under the *International Convention on Civil and Political Rights*, which, among other things, provides protections of family rights and security of the person. It also violates Canada's obligations under the *Convention on the Rights of the Child*, since it would eliminate consideration of the "best interests of the child" which is normally an important part of H & C decision-making. It would also violate Canada's obligations under the *Convention Eliminating all Forms of Discrimination Against Women* (CEDAW), which protection women against gender-based discrimination.

In cases where the absence of H & C consideration would put a person's life at risk (eg. return to a country where there is no treatment for a life-threatening medical condition) it would also be in clear violation of their right to life, liberty and security of the person under Section 7 of the *Canadian Charter of Rights and Freedoms.*

Recommendations:

1. Section 9 and 10 of Bill C-43 should be amended to ensure persons excluded from refugee protection are nonetheless permitted to file H & C application and have them fully considered;

2. Section 18 of Bill C-43 should be amended to eliminate any restrictions on the factors the Minister may consider in examining requests for Ministerial Relief.

Thanking you in advance for consideration of our comments, we remain,

Yours truly,

Stephan Reichhold, Executive Director	Me Richard Goldman, lawyer Refugee Protection Coordinator

[14] Section 18 of Bill C-43