PERMANENT PROTECTION

Why Canada should grant permanent resident status automatically upon conferral of protected person status

Andrew Brouwer
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CITIZENS *for* PUBLIC JUSTICE

CONTENTS

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Executive Summary

In 2003, the Government of Canada selected 7502 women, men and children seeking asylum from persecution and brought them to Canada from overseas. Church and other private groups sponsored a further 3247 refugees, and 10544 refugees who claimed protection after coming to Canada on their own were granted permanent residence in 2002, along with 4019 of their dependants overseas.

For those refugees brought to Canada by the government or sponsoring groups, arrival here generally marked the end of a long road. Upon arrival they were granted Permanent Resident status and could become citizens three years later. For those who made it here on their own, however, arrival in Canada marked the beginning of a whole new ordeal.

Before granting Permanent Resident status to refugees, Canada puts them through a three-stage procedure involving (1) eligibility determination, which includes security/criminality screening; (2) refugee status determination, which normally includes an oral hearing before a tribunal; and (3) application for permanent residence, which includes a second security and criminality screening. The entire procedure, from request for protection to conferral of Permanent Resident status takes, on average a minimum of 3 years.

During this waiting period, refugees find themselves in "legal limbo." Having been recognized as bona fide refugees by the Immigration and Refugee Board, they have the right to remain in Canada. However, until they are granted Permanent Resident status, their rights and access to the benefits available to everyone else are severely curtailed. Their mobility may be restricted, and they are not authorized to sponsor their spouses and children. Employment opportunities are curtailed, as well as access to loans and credit. Refugees in this limbo are excluded from federal job training programs and may be ineligible for public housing.

While some delay in order to screen the candidate may have made sense for security reasons under the previous system, with the enactment of the Immigration and Refugee Protection Act and its front-end screening procedures in mid-2002, further screening at the Permanent Resident stage has become redundant.

The unnecessary delay in access to basic rights available to Permanent Residents and citizens violates the provisions of several international treaties to which Canada is a party. It may also violate the Canadian Charter of Rights and Freedoms.

Given the serious impact of the delays on the lives of refugees, the procedure needs to change. This paper concludes with two policy options: the federal government could eliminate altogether the screening of permanent residence applications of recognized refugees, and grant them Permanent Resident status automatically upon recognition as a refugee. Alternatively, it could implement a "rebuttable presumption" of automatic permanent residence, which would allow immigration officials to postpone granting permanent residence for a fixed period in special cases to conduct additional security and/or criminality screening.

Introduction

1. The United Nations High Commissioner for Refugees estimates the global refugee population to be approximately 12 million people.[1] In addition, there are some 8 million "internally displaced persons" and other "persons of concern" to the UNHCR.[2]

2. Refugees are a global responsibility, and Canada has a reputation as a state that takes this responsibility seriously.[3] Canada does this in a number of ways, from contributing to the UNHCR to selecting and sponsoring refugees, and by granting asylum to refugees who make refugee claims[4] inside Canada.

3. In 2003, the Government of Canada selected 7502 women, men and children seeking asylum from persecution and brought them to Canada from overseas. Church and other private groups sponsored a further 3247 refugees. Of those refugees who claimed protection after coming to Canada on their own, 10,544 were granted permanent residence in 2002, along with 4019 dependants overseas.[5]

4. For those refugees brought to Canada by the government or by sponsoring groups, arrival in Canada generally marked the end of a long road. While they may have endured dangerous and impoverished conditions overseas for many years before being sponsored, once they arrived in Canada they were safe, and generally were given Permanent Resident status automatically upon arrival here. For those who made their way to Canada on their own, however, arrival here marked the beginning of a whole new set of ordeals.

5. This paper argues that some aspects of this ordeal – specifically, administrative obstacles that refugees must overcome to gain permanent status in Canada – are unnecessary and counterproductive. They also violate international human rights standards that Canada has undertaken to uphold. The paper proposes that the federal government eliminate these obstacles by immediately and automatically granting Permanent Resident status to refugees and persons in need of protection as soon as they are recognized as Protected Persons.

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[1] United Nations High Commissioner for Refugees, *Refugees by Numbers, 2002 Edition,* <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+cwwBmeLqZw_wwwwMwwwwwwwmFqtFEIfgIhFqoUfIfRZ2ItFqtxw5oq5zFqtFEIfgIAFqoUfIfRZ2IDzmxwwwwwww1FqtFEIfgI/opendoc.htm#Who%20does%20UNHCR%20help>

[2] Ibid.

[3] While it is true that Canada is among the leaders in refugee protection, it is by no means the top country for asylum claims or resettlement. In 2000 Canada ranked 7th in terms of total number of asylum claims, and 13th in per capita terms. [United Nations High Commissioner for Refugees, *2000 Global Refugee Trends,* table 13 < http://www.unhcr.ch/cgi bin/texis/vtx/home/opendoc.pdf?tbl=STATISTICS&id =3b9378e32&page=statistics>] With a refugees-to-Canadian population ratio of just 3.9 per 1000, our oft-discussed "flood" of refugees is not even in the same league as that of Armenia (80.2 per 1000 inhabitants), Guinea (58.5 per 1000) or FR Yugoslavia (45.7 per 1000). Even compared to other "industrialized" countries we are well below Sweden (at 17.7 per 1000 inhabitants), Denmark (13.4 per 1000), Norway (11.6 per 1000), Germany (11 per 1000) and Austria (10.1 per 1000) in terms of refugee claims per capita. [Table 13.] On this scale, Canada is ranked 37th. [Table 12].

[4] In this paper "refugee claim" is used to denote a claim for refugee protection as either a Convention refugee or a person in need of protection.

[5] Citizenship and Immigration Canada. "More Than 250,000 New Permanent Residents In 2001. Backgrounder: 2001 Landings." News Release 2002-11. April 17, 2002. <http://www.cic.gc.ca/english/press/02/0211-pre.html>

Protecting refugees

6. Canada's refugee program is rooted in international law. The individual right to seek asylum is enshrined in the *Universal Declaration of Human Rights* (UDHR), which states: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."[6]

7. The 1951 *Convention relating to the Status of Refugees*[7] and its 1967 *Protocol*[8], both of which Canada acceded to in 1969,[9] give content to the right guaranteed by the Declaration, by setting out the obligations of states with respect to asylum-seekers. Article 1 of the Refugee Convention defines a "refugee" as a person who,

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.[10]

8. States that have become parties to the Convention are bound by Article 33 not to expel or return ("*refouler*") a refugee "to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[11] The prohibition on *refoulement* to torture is also provided for in Article 3 of the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[12] to which Canada acceded in 1987, and Article 7 of the 1966 *International Covenant on Civil and Political Rights*[13], to which Canada acceded in 1976. So well entrenched is the principle of *non-refoulement* to torture that it has evolved into a customary norm of international law.[14]

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[6] *Universal Declaration of Human Rights*, GA Res. 217 A (III), UN Doc. A/810, (1948). <http://www.unhchr.ch/udhr/lang/eng.htm>. It is also included in Article XXVIII of the American Declaration of the Rights and Duties Of Man, 1948. <http://www.cidh.oas.org/Basicos/basic2.htm>.

[7] *Convention relating to the Status of Refugees*, 28 July 1951,189 UNTS 150 (Entered into force 22 April 1954) Hereinafter the "*CSR*". <http://www.unhchr.ch/html/menu3/b/o_c_ref.htm>.

[8] *Protocol relating to the Status of Refugees, 16* December 1966, 606 UNTS 267. (Entered into force 4 October 1967). <http://www.unhchr.ch/html/menu3/b/o_p_ref.htm>.

[9] Office of the High Commissioner for Human Rights. Convention relating to the Status of Refugees: Status of ratifications, reservations, and declarations as of 5 February 2002. <http://www.unhchr.ch/html/menu3/b/treaty2ref.htm>

[10] *CSR*, Art. 1(2).

[11] The non-refoulement provision is subject to exceptions. Article 1(C - F) sets out circumstances under which a refugee may be excluded from protection, including for having committed war crimes, crimes against humanity, serious non-political crimes, etc.

[12] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, Can. TS 1987 No. 36. (Entry into force 26 June 1987). <http://www.unhchr.ch/html/menu3/b/h_cat39.htm>

[13] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976). <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>. Article 7 refers to the right to be free from torture, but this provision has been interpreted by the UN Human Rights Committee to include a guarantee against *refoulement* to torture or cruel, inhuman or degrading treatment or punishment (General Comment 6 of the Human Rights Committee; UN Doc. HRI\GEN\1\Rev.1 at 6 (1994).

[14] E. Lauterpacht and D. Bethlehem, "The Scope and Content of the Principle of Non-Refoulement" in E. Feller, V.

9. As a result of this principle, states parties are obliged to consider the claims of those who request asylum in their territory or at their frontier. Only after due consideration has been given to the claim of the asylum-seeker, and the claimant has been fairly and finally determined not to need or deserve protection, may a state return the person to their country of origin.[15]

10. Canada's *Immigration and Refugee Protection Act*[16] (IRPA) reflects these principles by providing for the conferral of refugee status, or "Protected Person" status[17]. In order to receive such protection, claimants must meet a refugee definition based on the Refugee Convention, or show they face a risk of torture, a risk to life, or a risk of cruel and unusual treatment or punishment, as set out in the *Convention Against Torture*. They must also meet certain eligibility and admissibility criteria, as discussed below.

11. Once they have been formally recognized as refugees and granted Canada's protection, refugees are entitled to remain in Canada.[18] Only if they cease to require protection[19] (for example, if the conditions that caused them to flee no longer exist[20]) or lose their status due to misrepresentation[21] may they be returned.

12. Recognition as a refugee or Protected Person, however, does not result in refugees receiving equal treatment with other residents of Canada. While protection from *refoulement* is generally the most immediate concern for most refugees upon arrival, other key rights protections are not available to them even after refugee protection has been granted. In order to enjoy the full range of rights enjoyed by other residents of Canada, refugees must apply for and be granted Permanent Resident status. Only after such status has been granted are refugees in a position to become full and (nearly) equal[22] participants in Canadian society.

Turk and F. Nicholson, eds., *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003) at 216.

[15] With some exceptions. The CSR provides that protection from nonrefoulement "may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." (Art. 33(2)) This exception would not, however, justify *refoulement* to torture by a state that is also party to the Convention Against Torture.

[16] SC 2001, c. 27.

[17] IRPA, s. 95. In this paper, "refugee" and "protected person' are used interchangeably.

[18] Only if they cease to require protection (for example, if the conditions that caused them to flee no longer exist) or lose their status due to misrepresentation may they be returned.

[19] IRPA, s. 108, reflecting Article 1C of the CSR.

[20] IRPA, s. 108(1)(e), reflecting Articles 1C(5)&(6) of the CSR.

[21] IRPA, s. 109.

[22] While permanent resident status provides a wide range of rights and benefits, full legal equality requires citizenship status, which may be conferred on permanent residents after a 3 year waiting period (reduced by up to a year for refugees). However, citizenship law and policy is beyond the scope of this paper.

Three steps to permanent status

13. Refugee protection claimants seeking Canada's permanent protection must proceed via a three-step process of (1) eligibility, (2) refugee status determination and (3) permanent residence. The process is as follows:

Step 1: Eligibility determination

14. Under the *Immigration and Refugee Protection Act*, protection claimants must pass an "eligibility" determination before their protection claim may be heard by the Refugee Protection Division of the Immigration and Refugee Board. Eligibility determination includes both administrative matters and a criminality and security screening. The Act provides:

> A claim is ineligible to be referred to the Refugee Protection Division if
> (*a*) refugee protection has been conferred on the claimant…;
> (*b*) a claim for refugee protection by the claimant has been rejected by the Board;
> (*c*) a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned;
> (*d*) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;
> (*e*) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence; or
> (*f*) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(*c*).[23]

15. Under section 100(1) of IRPA, immigration officers have three working days (72 hours) from receipt of the claim to determine whether the claim is eligible to be referred to the Refugee Protection Division. If the three days pass without a determination by the immigration officer who received the claim, then the claim is "deemed to be referred."[24] It is worth noting, however, that in the event that information comes to light after referral, the

[23] IRPA 101(1). Note further that, under s. 101(2): "A claim is not ineligible by reason of serious criminality under paragraph (1)(*f*) unless
(*a*) in the case of inadmissibility by reason of a conviction in Canada, the conviction is for an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years and for which a sentence of at least two years was imposed; or
(*b*) in the case of inadmissibility by reason of a conviction outside Canada, the Minister is of the opinion that the person is a danger to the public in Canada and the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of at least 10 years."

[24] IRPA, s. 100(3).

immigration officer retains the power to reclassify the claim as ineligible, suspending and eventually terminating consideration of the claim by the Refugee Protection Division.[25]

16. In response to the s. 100(1) referral rule, as well as an increase of claimants arriving at the border due to new U.S. registration procedures for non-citizen nationals of certain countries,[26] Citizenship and Immigration Canada began denying protection claimants entry into Canada from the U.S. until an immigration officer had screened the claimants for security and criminality. In January 2003, CIC headquarters in Ottawa issued a directive on front-end procedures to ports of entry across Canada. The directive set out procedures and minimum requirements for processing:

> All refugee claimants must undergo front-end processing, which includes an in-person examination, security screening and criminality checks, before the person is allowed into Canada.
>
> All refugee claimants must be interviewed to elicit information so that decisions on admissibility, security and criminality can be made.
>
> The policy is to have a full and complete front-end screening (examination) before the claimant is allowed into Canada.[27]

17. Where, due to high volumes of arrivals or insufficient resources, officers find they are unable to complete the eligibility determinations within the stipulated 3 working days, the directive instructs them to detain[28] or "direct back" claimants as measures of last resort. IRPA gives immigration officers discretion to detain a refugee claimant, without a warrant, in a variety of circumstances, including:

- in order to complete an examination[29] or

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[25] IRPA, s. 103 & 104.

[26] One of the U.S. government's many post-9/11 security measures has imposed extra monitoring on certain people coming to the United States on nonimmigrant (temporary) visas and on certain men who are already in the United States on nonimmigrant visas. In November 2002, U.S. Citizenship and Immigration Services (USCIS, briefly known as BCIS and prior to that known as the INS) instituted what it calls Phase II of the registration program. It announced that you needed to register at a local USCIS office if you are a man who:
was born on or before December 2, 1986;
is a citizen or national of one of the countries listed below;
entered the United States on or before certain dates in 2002 (listed below) on a nonimmigrant (temporary) visa, and;
planned to stay in the United States until at least your required registration date (see below).
If you fit this criteria and failed to register, the USCIS has the power to deport you. Most of the men affected are students and men on extended business or tourist visits.
The countries affected: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen.

[27] CIC Refugees and Enforcement Branches, "Instructions for Front-end processing of refugee protection claims," (January 27, 2003).

[28] Authority to detain refugee claimants in these circumstances is provided by IRPA, s. 55(3)(a).

[29] Per IRPA, s. 55(3)(a).

- if the officer has "reasonable grounds to believe" the person is inadmissible and poses a danger to the public,[30] or
- if the officer has "reasonable grounds to suspect" the person is inadmissible on grounds of security or for violating human or international rights,[31] or
- if the officer "is not satisfied of the identity of the foreign national…."[32]

18. The January 2003 directive caused chaos at some ports of entry, as no additional resources or staff had been provided to accommodate the accelerated processing. As a result, direct-backs became the rule rather than the exception. In the ensuing weeks and months, refugee claimants arriving at US-Canada ports of entry were summarily directed back to the US with instructions to return for an interview scheduled two to six weeks later. Many of those directed back were detained by the US authorities, in many cases in prisons with the general prison population. It has been reported that as a result many were unable to return to the border to seek asylum in Canada.[33] By 2004, direct backs were much less common. This is likely explained by both the reduction in refugee claimants approaching the Canada-US border, and the fact that word has spread to asylum-seekers and the US agencies and shelters that assist them that they must not approach the Canadian border to make a claim unless they have scheduled an appointment.

19. In addition to the direct-backs at the Canada-U.S. border, with the implementation of the Act some inland CIC offices delayed initial intake interviews for persons applying from within the country, so as to keep the 3-day referral clock from starting to tick. Refugee claimants arriving at CIC's Etobicoke, Ontario offices, for example, were told they may not make their claim immediately and were scheduled for intake interviews up to three months later (a waiting period which reportedly fell to an average of eleven days in the summer of 2003[34]). Refugee claimants are not allowed to submit application forms detailing their background, place of residence and work, family connections, etc. until such time.[35]

20. Until their claim has been referred to the Refugee Protection Division, claimants have no legal status in Canada and are extremely vulnerable. Not only may they be detained without a warrant (this may also happen after referral), they are also ineligible to work, study, or receive social assistance or publicly funded medical care. While in principle the 3-day deemed referral should keep this period of extreme vulnerability very short, the delay in receiving claims has served instead to prolong the vulnerability.

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[30] Per IRPA, s. 55(2)(a).
[31] Per IRPA, s. 55(3)(b).
[32] Per IRPA, s. 55(2)(b)
[33] Canadian Council for Refugees, "Two steps forward, six steps back", Refugee Rights Day Backgrounder (April 4, 2003). <http://www.web.ca/~ccr/april4.pdf>.
[34] CIC Etobicoke, August 2003
[35] While this procedure allowed officers to comply with the letter of the directive and the Act, it seems contrary to the underlying security objective of the 3-day referral rule, which presumably includes keeping track of non-nationals living in Canada.

Step 2: Refugee status determination

21. Claims found deemed eligible are referred to the Refugee Protection Division of the IRB, a quasi-judicial tribunal. A one-member panel[36] makes a determination of the merits of the protection claim, usually following an oral hearing.[37] As discussed above, the Refugee Protection Division can confer protection based on the Refugee Convention, the Convention Against Torture, and other grounds.

22. It should be noted that the Refugee Protection Division also applies the exclusion clauses of the Refugee Convention. The exclusion clauses allow states to deny refugee status to claimants for whom, though they may meet the definition of a Convention refugee, there are serious grounds to believe they have committed a crime against peace, war crime, crime against humanity, serious non-political crime, or "acts contrary to the purposes and principles of the United Nations."[38] This is a second opportunity to screen out persons believed to pose a security or criminal threat to Canada or Canadians.

23. If the claim has already been heard by the Refugee Protection Division and refugee protection conferred, the Minister may still seek to revoke ("vacate") that status if it was obtained fraudulently:

> The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.[39]

24. The average processing time by the Refugee Protection Division is approximately 12-18 months. During this period, claimants may apply for and are generally granted a temporary, renewable student authorization.[40] If they are unable to otherwise support themselves, claimants may also apply for, and are generally granted, a temporary, renewable employment authorization.[41] There are, however, restrictions on the types of employment in which refugee claimants may engage.

25. While refugee claimants do not have access to provincial health insurance programs, they are covered by the Interim Federal Health (IFH) program, which covers emergency and essential health services, essential prescription medications, contraception, prenatal and obstetrical care.[42] There is no charge for the IFH coverage.

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[36] There are provisions for 3-member panels in certain exceptional circumstances (IRPA, s. 163). This is new under IRPA; under the previous legislation 2-member panels were the rule (again with some exceptions).
[37] In exceptional cases, where the claim is clearly a winning one, the claim will be conducted informally on an "expedited" basis.
[38] IRPA, s. 98, referring to Articles E and F of the CSR.
[39] IRPA, s. 109(1).
[40] Immigration and Refugee Protection Regulations, 2002 (IRPR), SOR/2002-227, Part 8, Div 1, s. 215(1)(c). Under this regulation, study permits are only granted to those who already have a work permit. It is unclear if a claimant can receive only a study permit.
[41] IRPR, s. 206(a).
[42] Citizenship and Immigration Canada. "Rights to Employment, Education and Health Care" <http://www.cic.gc.ca/english/refugees/asylum-5.html>

26. Depending on their province of residence[43], refugee claimants may also be eligible for social assistance, provided they demonstrate that they have obtained or at least applied for an employment authorization and that they are looking for work.[44]

27. Refugee claimants seeking college or university education are generally charged tuition at foreign student rates, upwards of twice the rate charged to domestic students[45]. They are usually ineligible for public or private loans and credit cards, and face great difficulty in securing rental accommodation or employment, as landlords and employers are often wary of their insecure and temporary status in Canada.

Protected Persons

28. Upon being found to be a Protected Person by the Refugee Protection Division, the claimant may apply for a status document indicating her/his new status.[46] Protected Persons may not be removed to their country of origin except in very exceptional circumstances relating to national security or public safety.[47] Protected Person status is thus generally more secure than refugee claimant status. Protected Persons are eligible for full provincial health insurance, usually after a three-month waiting period, during which they continue to be covered by IFH.[48] Protected Persons continue to be eligible for (restricted) work and study permits without cost. Most post-secondary institutions in most provinces charge domestic tuition rates to Protected Persons, and as of August 2003 public student loan programs are opening up to Protected Persons.

29. Some post-secondary institutions across Canada will charge domestic tuition rates to Protected Persons (though it is not consistent). Consequent to the federal budget announcement in February 2003, the federal portion of the loan (referred to as the Canada Student Loan[49]) was made accessible to Protected Persons and disbursed by most provinces beginning August 2003. All provinces that participate in the Canada Student loan program have harmonized their policies with that of the federal government and grant the provincial part of the loan to Protected Persons. Nunavut, the Northwest Territories and the province of Quebec, which operate their own student assistance plans, do not give provincial assistance at this time, though Quebec has indicated that it plans to do so.[50]

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[43] Until April 2004, the province of Manitoba did not provide social assistance to claimants.
[44] *Supra* note 33.
[45] A. Brouwer, *Equal Access to Student Loans for Convention Refugees.* Ottawa: Caledon Institute of Social Policy, February 2000.
[46] IRPA, s. 31.
[47] See *supra* n. 17.
[48] *Supra* note 41.
[49] In most provinces, the Canada Student Loan portion accounts to approximately 60% of the total available to students
[50] See www.cpj.ca/studentloans for details.

30. Though clearly better off than claimants, Protected Persons remain very vulnerable. While they have Canada's protection against *refoulement* and have access to many basic rights and privileges, their status is temporary and their rights and access to services are narrowly proscribed. As will be discussed further below, they face significant legal restrictions in employment and mobility and are unable to sponsor close family members including spouses and children. The Department of Citizenship and Immigration has itself acknowledged, albeit with respect to the previous legislation:

> Convention refugees who do not become permanent residents in Canada remain without legal status... They enjoy only limited protection: they have a right not to be returned to the country where they fear persecution, but they do not have a right to return to Canada once they leave.... Refugees who are not permanent residents may legally take employment only if they are in possession of an employment authorization.... It is important that they initiate the landing process as early as possible...in order to entitle them to privileges and services that are acquired with full legal status.[51]

Pre-Removal Risk Assessment

31. Refugee claimants who are rejected by the Refugee Protection Division or who are determined to be ineligible to make a refugee claim have a last-chance opportunity to acquire Protected Person status under the Pre-Removal Risk Assessment (PRRA) just prior to being removed:

> A person in Canada, other than a person referred to in subsection 115(1) [a Protected Person or Convention refugee recognized by another country], may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1) [a person considered by the Minister and the Solicitor General to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality].[52]

32. The grounds for protection under PRRA are the same as those considered by the Board during refugee determination, though applicants who have already had a protection hearing before the IRB may only submit new evidence. The PRRA procedure is generally done in writing[53], though there are provisions for an oral hearing where credibility is at issue.[54] Persons seeking status under the PRRA must submit their application within 15 days of receiving notification that they are eligible to apply. However, this notification is only

[51] Citizenship and Immigration Canada. Operations Memorandum: Refugees - Time to apply for landing - Regulation 40. IL 95-02, October 16, 1995.
[52] IRPA, s. 112(1).
[53] IRPA, s.113(a).
[54] IRPA, s. 113(b).

provided to eligible persons once they become "removal ready"; i.e. once a country of removal has been identified and travel documents are in hand.[55]

33. In parallel with the ineligibility assessment for referral to the Refugee Protection Division, the Act provides that a person will not be eligible for the PRRA if certain conditions are met:

> Refugee protection may not result from an application for protection if the person
> (a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;
> (b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;
> (c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or
> (d) is named in a certificate referred to in subsection 77(1).[56]

34. As can be seen in Appendix I, these restrictions on the PRRA are in most respects identical to the s. 101 ineligibility provisions with respect to refugee claims.

Step 3: Permanent resident status

35. Upon recognition as a Protected Person, either by the Refugee Protection Division or via the PRRA process, Protected Persons are eligible to apply for Permanent Resident status (previously known as "landing"), followed (in time) by Canadian citizenship. Applying for permanent residence is considered by the federal government to be "part" of the refugee determination process: "If the IRB determines a person to be a Protected Person, *the next step* is for that person to apply for permanent resident status."[57] (Italics added)

36. This policy conforms with Article 34 of the *CSR*, which obliges states to "as far as possible facilitate the assimilation and naturalization of refugees." Permanent resident status confers many of the rights and privileges available to Canadian citizens,[58] and enables holders of the status to apply for Canadian citizenship after three years.[59]

[55] IRPA, s. 112(1); IRPRegs, s. 160(1) & 160(3)(a).
[56] IRPA, s. 112(3)
[57] Citizenship and Immigration Canada <http://www.cic.gc.ca/english/refugees/asylum-2.html>. Accessed 12 April 2004.
[58] Exceptions include voting rights, access to certain public positions, the right to hold a Canadian passport, etc.
[59] Recognized refugees receive a reduction of up to one year in the citizenship waiting period, to reflect the time spent in Canada after refugee determination.

37. Protected Persons seeking Permanent Resident status in Canada must file a written application, along with the required processing fees, within 180 days of the positive determination by the IRB.[60] Applications are generally approved, provided they are not found to be inadmissible. The Act provides that a person who:

> has been finally determined by the Board to be a Convention refugee or to be a person in need of protection, or a person whose application for protection has been allowed by the Minister, becomes, … a permanent resident if the officer is satisfied that they have made their application in accordance with the regulations and that they are not inadmissible on any ground referred to in section 34 [security] or 35 [violating human or international rights], subsection 36(1) [serious criminality] or section 37 [organized criminality] or 38 [danger to public health or safety].[61]

38. These inadmissibility grounds are nearly identical to the grounds for ineligibility, which are considered at the front end of the process. As can be seen in Appendix I, the inadmissibility investigation for permanent residence is in most respects a repetition of the inquiry already undertaken at the eligibility stage.

39. The more controversial question is the length of time it takes to conduct any additional investigation and process permanent residence applications. Under the previous legislation, CIC's Call Centre reported that the process took 12-24 months.[62] The application kit itself warned applicants that while, "in some cases, you will receive your permanent residence status within 12 months…. if you have dependent children residing outside Canada or if you have lived in several countries, it could take 18 months."[63] The kit went on to explain that "[t]hese time frames include the 90-day application processing period" at CIC, but that the CIC "has little control over the time it takes to complete medical, criminal and security checks." This would suggest that the bulk of the waiting time (everything beyond the 90 days for processing) was caused by the background checks. In many instances security certificates which lapse after 18 months have to be renewed which process could in itself take a further six months. In the meantime the medical clearance certificate which is valid for only 12 months may have lapsed, requiring re-examination of the claimant. The delays caused by trying to synchronize the validity of these two certificates alone cause intolerable hardship and frustration to clients trying to negotiate this administrative quagmire.

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[60] IRPRegs, s. 175. At the time of filing the application, Protected Persons are required to pay a non-refundable processing fee of $550 for each adult family member (22 years of age and over) included in the application, as well as $150 for each dependent child included in the application. [IRPR s. 301(1)(b)]. Applicants may include dependants overseas in this application. Failure to submit an application within this time limit will result in the refugee forfeiting the opportunity to be landed as a Protected Person. (They must apply on Humanitarian and Compassionate grounds, and become subject to additional landing requirements, including medical admissibility and a $975 Right of Landing Fee.) (IRPR 175(1); CIC Immigration Manual, Chapter PP 4: Processing Protected Persons' in-Canada Applications for Permanent Resident Status, s. 9.3, <http://www.cic.gc.ca/manuals-guides/english/pp/pp04e.pdf>.

[61] IRPA, s. 21(2). The specific grounds for inadmissibility will be discussed below.

[62] Call to CIC Call Centre by the author in March 2002.

[63] Citizenship and Immigration Canada. "Applying for Permanent Residence From Within Canada: Convention Refugees." p. 11. <http://www.cic.gc.ca/english/pdffiles/kits/KIT2.PDF>. Accessed April 8, 2002.

40. Despite the new front-end screening procedures, however, little seems to have changed with the introduction of IRPA. Permanent Residence application kits produced after the implementation of IRPA provide no guidance on processing times, aside from the following general acknowledgement:

> The length of time it takes to receive permanent resident status varies considerably depending on individual cases. Factors such as if you have dependent children residing outside Canada or if you have lived in several countries may lengthen the process. Citizenship and Immigration Canada has little control over the time it takes to complete medical, criminal and security checks.[64]

In fact those awaiting landing after all inadmissibility checks have been completed and passed have increased in 2004 compared with the same period in 2003[65].

41. It seems, therefore, that the timeline continues to be determined primarily by the inadmissibility screening process – a process rendered largely redundant by the dramatic new emphasis on front-end eligibility screening.[66]

42. For applicants who have included family members abroad in their application or who lack identity documents, the time it takes to get Permanent Resident status can stretch on indefinitely.[67] There are no enforceable public standards for processing of permanent residence applications, nor is there a formal complaint or review mechanism where timelines become unreasonable.[68] During this indefinite processing and background check period, refugees remain in "legal limbo."

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[64] Citizenship and Immigration Canada. "Applying for Permanent Residence From Within Canada: Protected Persons and Convention Refugees," p. 11. <http://www.cic.gc.ca/english/pdf/kits/guides/5205E.PDF>. Accessed March 15, 2003.

[65] In 2004, there were 5313 cases involving 7074 individuals, whereas there were 2323 cases in 2003, involving 3307 persons. CIC statistics branch.

[66] CIC maintains a webpage, updated weekly, which purports to give information on actual processing times for applications: <http://www.cic.gc.ca/english/department/times/process%2Din.html>. On December 26, 2003, the website indicated a "current processing time" for applications for permanent residence by refugees and protected persons of 208 days, and reported that as of December 22, 2003, CIC was processing applications received *up to* June 3, 2003. There is no information on the website about whether this figure is an average or median processing time, or a minimum. This figure is nearly double the 116-day processing time reported less than a year ago, on March 15, 2003.

[67] Another group in this position is persons who are suspected of having had some association with an organization that is suspected of having had links to terrorism.

[68] The only option available is to seek a writ of *mandamus* from the Federal Court, i.e. an order to CIC to make a decision on the case.
The lack of an effective complaint mechanism is a long-standing concern of refugee policy advocates. The Canadian Council for Refugees, the Coalition for a Just Immigration and Refugee Policy, the Sanctuary Coalition and the Maytree Foundation have all called for the establishment of an effective, independent ombudsperson's office.

Life in legal limbo

43. While in general refugees may expect to proceed relatively quickly to Permanent Resident status, the reality for many is that it takes a year or longer. The United Nations High Commission for Refugees has expressed concern that "the inability to obtain permanent residence status can be a serious impediment to integration into Canadian society."[69] Indeed, life in Canada while waiting for Permanent Resident status is, in many ways, life on hold.

Prolonged family separation

44. The single most painful and damaging aspect of life in legal limbo is prolonged, and often unforeseen, family separation. It is widely recognized that due to the many barriers facing asylum-seekers, refugee families are often split up, one parent attempting the perilous journey alone while the other remains behind with the children in the country of origin or the country of first asylum.[70] Upon gaining asylum in Canada, then, family reunification becomes the main concern of most refugees; indeed, the newcomer community does not consider anyone settled in Canada until their family is here.

45. As will be discussed below, international human rights law protects the integrity of the family and recognizes the universal right of children to be with their parents. Nevertheless, until they are granted Permanent Resident status, Convention refugees are prohibited from bringing their children and spouses to live with them in Canada. This means that, even in a straightforward case where refugee determination takes just 10 months and permanent residence takes 18 months because family members overseas have been included in the application for permanent residence, they will not be reunited with their family in Canada for almost two and a half years.

46. In some cases, overseas dependants are not included in the original application for permanent residence. The reasons for this vary, from bad advice, to an inability to locate the dependants within the 180-day period in which the permanent residence application must be filed. While keeping overseas dependants off the original application will facilitate faster processing of the Convention refugee's permanent residence, it may have the drawback of significantly delaying acquisition of Permanent Resident status for the refugee's dependants. Dependants who were not included in the refugee's original application for permanent residence have one year from the day the refugee was granted Permanent Resident status to appear at a visa office and request permanent residence. They will be processed as part of the refugee's application. Failing that, the refugee who was granted permanent residence will have to begin the process for sponsoring their dependants under the Family Class. (In some cases, the dependant will have surpassed the age limit for sponsorship by this time, and will become ineligible to be sponsored.) As well, they will be

[69] D. McNamara (UN High Commission for Refugees), Letter to Sharry Aiken, Canadian Council for Refugees. May 14, 1997.
[70] K. Jastram and K. Newland, "Family unity and refugee protection" in Feller, Turk and Nicholson, *supra* n. 14 at 559.

required to pay the $975 Right of Permanent Residence fee if they take this route (refugees are exempted from this fee for their own applications). According to Citizenship and Immigration Canada, Family Class sponsorships takes anywhere from six months to 20 months, or longer. Thus refugee families are routinely separated for three years or more if they are not all on the same permanent residence application.

47. Any extended family separation has consequences for emotional and financial health. Refugees often carry the extra burden of knowing that their spouses and children are living in very precarious circumstances in their country of origin, or in desperate conditions in a refugee camp. Psychological problems experienced by families that have suffered severe trauma are exacerbated.[71]

Inability to travel

48. Until recently, Convention refugees who had not yet been granted Permanent Resident status faced significant barriers to travel outside Canada. They were generally not given Canadian travel documents and were thus not guaranteed re-entry to Canada if they left the country. While refugees who had "satisfactory identity documents" could seek an exception to this rule on humanitarian and compassionate grounds, undocumented refugees were denied even this possibility.[72] If refugees' dependants or other close family members were overseas, the inability to travel even in the case of family emergencies further eroded family bonds and added greater stress. Persistent concerns about family members have a severe impact on refugees' ability to build a life in Canada. In an increasingly integrated, globalized economy, the inability to travel for business also presented a barrier to employment for refugees who had not been granted Permanent Resident status.

49. With the implementation of the new IRPA in 2002, however, Protected Persons became eligible to apply for Convention Refugee Travel Document (CRTD), after first acquiring a Protected Person Status Document. The CRTD is valid for travel to any country except the refugee's country of origin. While this should in principle eliminate concerns about refugees' ability to travel, there are reports that undocumented refugees continue to find themselves denied a CRTD.

Barriers to employment

50. Until they are granted permanent residence, refugees face several obstacles to employment. To begin with, they must apply for and regularly renew temporary work permits. Delays in processing applications at CIC often result in gaps in coverage.[73] Some refugees have reported being laid off during these gaps; others have been fired when their employers discovered their authorization was not valid. Further, refugees have long reported that they

[71]Canadian Council for Refugees. Refugee Family Reunification: Report of the Canadian Council for Refugees Task Force on Family Reunification. July 1995. At 14-20.
[72]*Supra* note 61 at 7.
[73] According to CIC, the current processing period for work authorizations is 53 days. <http://www.cic.gc.ca/english/department/times/process%2Din.html>. Accessed December 26, 2003

face discrimination by potential employers because their Social Insurance Number, which begins with a "9", indicates their temporary status in Canada. Some find it more difficult to get employment that requires training, because employers are unwilling to invest resources training workers who may only be in Canada temporarily.[74] Other refugees report that they are more vulnerable to exploitation by employers because employers know the difficulty refugees face in finding stable and adequately paid work.

51. Without Permanent Resident status, Convention refugees are denied access to certain professions and to some types of employment that require specific insurance, including employment in the education and health care sectors. They are also ineligible for government training programs. Lack of Permanent Resident status also restricts access to bank loans, thereby limiting self-employment or entrepreneurship opportunities.

Social marginalization and the cost to Canadian society

52. This exclusion and marginalization of refugees from mainstream society has social and economic costs not just for the individuals directly affected, but also for their communities and for broader society. With respect to the social costs, it is important to recognize that refugees are by definition people who have suffered and/or have grounds to fear serious persecution. Many have been tortured or seen loved ones tortured or killed. They have come to Canada to seek refuge and to rebuild their lives. The sooner they are allowed and encouraged to do this fully, the sooner they will become fully functioning and self-supporting participants in Canadian society. On the other hand, the longer they are kept in limbo, the more entrenched they will become in marginalized communities, making it increasingly difficult to integrate into Canadian society.

53. This is particularly significant in the case of children and youth. While children are extraordinarily adaptable and resilient, the longer they find themselves deprived of the rights and benefits accorded to their peers, the more difficult it becomes for them to feel part of broader Canadian society. As distinctions become entrenched, resentment may become deeply embedded.[75]

54. There are also economic costs associated with the gap between refugee determination and permanent residence. As noted above, until they are granted Permanent Resident status, refugees often face significant barriers to appropriate employment. They are also ineligible for many federal government job-training programs. As a result, Convention refugees are generally prevented from contributing to the Canadian economy to their full potential until they have permanent residence. Indeed, in the case of those who cannot find any work with their temporary status and are forced to avail themselves of social assistance, the economic costs to Canadian society are steeper yet.

[74]Mohamed, H.S. and A. Hashi. Beyond Settlement: Economic and Occupational Adjustment of the Somalis in the Ottawa-Carleton Region: Report of the Task Force on Employment Project for the Somali Community. October 1998.
[75]Conversation with Farah Khayre, Midaynta Association of Somali Service Agencies, February 1999.

International law on the treatment of refugees

55. While there is no right to Permanent Resident status for refugees *per se* in either international refugee law or international human rights law, these areas of law do guarantee refugees a range of important civil, political, economic, social and cultural rights**.** Unfortunately, in Canada these rights are limited by a person's immigration status.

56. As the basic treaty on states' obligations *vis-à-vis* refugees, the 1951 *Convention relating to the Status of Refugees* includes provisions on the treatment that states parties must provide to refugees in their territory. At a minimum, the Convention requires states to treat refugees as they treat aliens generally[76] and to refrain from discriminating between refugees on the basis of their race, religion or country of origin.[77] However, the Convention provides for higher levels of protection in several specific areas. For example, states are obliged to treat refugees at least as favourably as they do their own nationals with respect to: freedom of religion[78], access to the courts[79], access to elementary education[80], public relief[81], labour law protection[82] and social security.[83] In other areas, refugees must be given "the most favourable treatment accorded to nationals of a foreign country, in the same circumstances" (e.g. non-political, non-profit freedom of association and trade unions[84], employment[85]) or treatment "as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances" (e.g. property rights[86], housing[87], education other than elementary**,** and recognition of foreign credentials[88], and mobility rights[89]). In addition, the Refugee Convention obliges states to provide refugees with administrative assistance[90], identity papers[91] and travel documents.[92] Many of these obligations have been reinforced by statements from UNHCR's Executive Committee.

57. A number of the rights set out in the Convention are limited to refugees who are "lawfully staying" in the territory of the contracting state.[93] Canadian officials have sometimes argued that this language allows Canada to deny the rights that are qualified in this way to recognized refugees who have not acquired Permanent Resident status. As Guy Goodwin-

[76] CSR, Art. 7(1).
[77] CSR, Art. 3.
[78] CSR, Art. 4.
[79] CSR, Art. 16.
[80] CSR, Art. 22(1).
[81] CSR, Art. 23.
[82] CSR, Art. 24(1)(a).
[83] CSR, Art. 24(1)(b).
[84] CSR, Art. 15.
[85] CSR, Art. 17.
[86] CSR, Art. 13.
[87] CSR, Art. 21.
[88] CSR, Art. 22(2).
[89] CSR, Art. 26.
[90] CSR, Art. 25.
[91] CSR, Art. 27.
[92] CSR, Art. 28.
[93] These include the right of association (Art. 15), wage-earning employment (Art. 17), self employment (Art. 18), access to liberal professions (Art. 19), housing (Art. 21), public relief (Art. 23), labour legislation and social security (Art. 24), freedom of movement (Art. 26), travel documents (Art. 28), and expulsion (Art. 32).

Gill and Judith Kumin have pointed out, however, this interpretation of the Convention in incorrect.[94] Canada has a reservation to articles 23 (public relief) and 24 (labour legislation and social security) providing that "Canada interprets the phrase 'lawfully staying' as referring only to refugees admitted for permanent residence; refugees admitted for temporary residence will be accorded the same treatment with respect to matters dealt with in Articles 23 and 24 as is accorded visitors generally."[95] This reservation was made only for those two articles, however; no such reservations were made with respect to any of the other articles that use the "lawfully staying" language. In the absence of a reservation, the other articles must be read to apply not just to Permanent Residents but also to recognized refugees.

58. The rights protections articulated by the 1951 Refugee Convention have been significantly supplemented by the development of the international human rights regime in the intervening 50 years, and need to be interpreted in the light of these developments.[96] Treaties such as the 1966 *International Covenant on Civil and Political Rights*[97] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), both of which Canada acceded to in 1976, give legal expression to the more general commitments of the 1948 *Universal Declaration of Human Rights*. Other treaties such as the *Convention on the Elimination of All Forms of Racial Discrimination*[98], to which Canada acceded in 1970, the 1965 *Convention on the Elimination of Discrimination Against Women*, and the 1989 *Convention on the Rights of the Child*[99], to which Canada acceded in 1991, have combined to much more fully articulate a normative baseline of universal rights that states must respect.

Non-discrimination

59. The basic principle of non-discrimination lies at the heart of all of these treaties. As the UN Special Rapporteur on the Rights of Non-Citizens has observed, "The architecture of international human rights law is built on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights."[100] All persons, regardless of their national or ethnic origin, immigration status, or other irrelevant criteria, are equally entitled to have their human rights respected. While there may be situations in which states can legitimately treat non-citizens differently from citizens, these are exceptional cases: "Exceptions … may

[94] G. Goodwin-Gill and J. Kumin, *Refugees in Limbo and Canada's International Obligations* (Ottawa: Caledon Institute of Social Policy, September 2000).
[95] CSR, Declarations other than those made under section B of article 1 and Reservations <http://www.unhchr.ch/html/menu3/b/treaty2ref.htm>
[96] *Vienna Convention on the Law of Treaties* (VCLT), 1969, 1155 UNTS 331, Art. 31(3). See also Jastram and Newland, *supra* n. 70 at 569.
[97] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976). <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>.
[98] *Convention on the Rights of the Child*, 20 November 1989, Can TS 1992 No. 3. (Entry into force 2 September 1990). <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.
[99] *Convention on the Rights of the Child*, 20 November 1989, Can TS 1992 No. 3. (Entry into force 2 September 1990). <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.
[100] D. Weissbrodt, Prevention of Discrimination: The rights of non-citizens. Final report of the special Rapporteur, UN Doc E/CN.4/Sub.2/2003/23, May 2, 2003 at 6.

be made only if they are to serve a legitimate State objective and are proportional to the achievement of that objective…".[101] The *Covenant on Economic, Social and Cultural Rights* prohibits any distinction between citizens and non-citizens with respect to economic, social and cultural rights.[102] The *Covenant on Civil and Political Rights* provides that, in times of domestic stability, differential treatment of non-citizens is not permissible except with respect to political participation rights and certain rights of entry and residence.[103]

60. Differential treatment of non-citizens on the basis of nationality may, in some circumstances, be permissible in international law, according to the Special Rapporteur on the Rights of Non-Citizens. Article 1(3) of the *Convention on the Elimination of All Forms of Racial Discrimination* provides: "Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality." Criteria for differential treatment must be assessed in light of the objects and purposes of the Convention. As the Committee on the Elimination of Racial Discrimination has observed in its General Recommendation 14, "In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin."

61. Immigration status may be used as a ground for differential treatment only in limited areas. For example, the *Covenant on Civil and Political Rights* permits states to deny undocumented non-citizens freedom of movement (Art. 12), the right to choose their residence (Art. 12), and the right to certain procedural protections in expulsion proceedings (Art. 13). These provisions should however, be read also in the light of the Refugee Convention, which requires that states provide undocumented refugees with identity papers. This provision would thus remove refugees from the group against whom the state may discriminate under articles 12 and 13 of the *Covenant on Civil and Political Rights*.

<u>The right to family unity</u>

62. Articles 16(3) of the *Universal Declaration of Human Rights*, 23(1) of the *Covenant on Civil and Political Rights* and 17(1) of the *American Convention on Human Rights* all provide: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Similar provisions may be found in the *International Covenant on Economic, Social and Cultural Rights*[104], *the African Charter on Human and Peoples Rights*[105] and the *European Social Charter*[106]. Indeed, it has been observed that there is a "universal consensus" on the right of the family to respect and protection.[107]

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[101] *Ibid.* at 1.
[102] ICESRC, Art. 2(2).
[103] D. Weissbrodt, *Progress report on the rights of non-citizens*, UN Doc E/CN.4/Sub.2/2002/--(2002) at 50.
[104] ICESCR, Art. 10(1).
[105] ICESCR, Art. 18(1).
[106] ICESCR, Art. 16.
[107] Jastram and Newland, *supra* n. 70 at 566.

63. Recognition of the family as the "fundamental group unit of society" necessarily entails a right to family unity, for as Kate Jastram and Kathleen Newland observe, "if members of the family did not have the right to live together, there would not be a 'group' to respect or protect."[108]

64. Children in particular are granted special rights and protections under international law in view of their particular vulnerability. The *Convention on the Rights of the Child* (CRC) requires states to make the best interests of the child a primary consideration in all actions that concern them, and to ensure protection and care for children, taking into account the rights and duties of their parents and guardians.[109]

65. The Convention includes specific provisions for children who have been separated from their parents or guardians.[110] It requires, *inter alia*, that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner."[111] Further, "A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents."[112]

66. The importance of family unity for refugees in particular was recognized in the Final Act of the Conference that adopted the Refugee Convention, which provides that "the unity of the family… is an essential right of the refugee," and urges states to "take the necessary measures for the protection of the refugee's family."[113]

<u>The right to mobility</u>

67. The right of every person to leave any country is articulated in Article 13(2) of *the Universal Declaration of Human Rights*, as well as, *inter alia*, in Article 12(2) of the *Covenant on Civil and Political Rights* and Article 22(2) of the *American Declaration of Human Rights*. Refugees who lack identity or travel documents, however, are often unable to exercise the right, as such documents are required both to gain entry to another country and to re-enter their country of asylum.

68. Recognizing this pitfall, the framers of the 1951 Refugee Convention (CSR) included a provision explicitly requiring that states parties provide the necessary documents to undocumented refugees in their territory. Article 28 of the CSR obliges states to provide travel documents to refugees:

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[108] *Ibid*. at 566. The authors also note: "The right to marry and found a family … includes the right to maintain a family life together. The right to a shared family life is also drawn from the prohibition against arbitrary interference with the family … and from the special family rights accorded to children under international law."
[109] CRC, Art. 3(1).
[110] CRC, Arts. 9 and 10.
[111] CRC, Art. 10(1).
[112] CRC, Art. 10(2).
[113] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951, UN Doc. A/CONF.2/108/Rev.1, 26 Nov. 1952, Recommendation B.

> The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require. They shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

69. In their analysis of previous Canadian practice with respect to refugee documentation, Goodwin-Gill and Kumin note that in the absence of a reservation,

> Article 28 permits few exceptions to the obligation to provide travel documents to refugees. The reference to 'compelling' reasons of national security and public order as justifying an exception clearly indicates that a restrictive interpretation of this exception is called for. [114]

70. The authors conclude that Canada's reported failure to provide travel documents to Convention refugees who need them violates Canada's international legal obligation. Though as noted Canada has subsequently begun to issue Convention Refugee Travel Documents to refugees, the failure to do so for undocumented refugees constitutes an ongoing violation of this obligation.

Employment

71. The right to work is enshrined in numerous international human rights instruments, including Article 23(1) of the *Universal Declaration of Human Rights*, Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights* and Article XIV of the *American Declaration of the Rights and Duties of Man*. The right to work has also been elaborated in some detail through a variety of International Labour Organization instruments. The Refugee Convention itself requires that states treat refugees at least equally to foreign nationals with respect to employment, and encourages states to align their rights with those of nationals.[115]

72. With respect to Protected Persons in Canada, however, the issue is not whether their legal right to work is formally recognized by the Canadian government – it is – but the degree to which Protected Persons can actually enjoy that right. The impact on employment and training opportunities of having temporary status in Canada, combined with restrictions on access to certain regulated occupations, means that refugees have less access to employment than Canadians and Permanent Residents. This falls afoul of Canada's international legal obligation to treat refugees without discrimination, as discussed above.

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[114] *Supra* note 94 at 6.
[115] CSR Art 17. In addition, UNHCR's Executive Committee has issued Conclusions elaborating state obligations with respect to the employment of refugees.

Status in Canada of international legal protections

73. Though Canada is party to all of the international human rights and refugee instruments discussed above, the legislature has not enacted "implementing legislation" to incorporate these instruments directly into domestic law. Government officials as well as Justice Department lawyers have traditionally argued that because the treaties have not been legally implemented Canada is not bound to comply with them.[116] However, the law of treaty interpretation, jurisprudence of the Supreme Court, and an important new provision in *Immigration and Refugee Protection Act* all indicate that international obligations voluntarily undertaken are far from irrelevant – rather, Canada is obliged to comply.

74. The 1969 *Vienna Convention on the Law of Treaties* sets out the basic law of treaty interpretation. A core provision of the Convention, which is also recognized as a pre-existing peremptory norm of international law, is the principle of good faith performance, known as *pacta sunt servanda*. Article 26 of the Vienna Convention states: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Thus when Canada became a party to the Refugee Convention, the two Covenants and other human rights instruments, it took on international legal obligations to perform its obligations in good faith. That Canada must, according to international law, do what it promised to do, cannot be in doubt.

75. Domestic jurisprudence, on the one hand, has traditionally drawn a sharp line between international law and domestic law. Only treaties that had been explicitly and directly incorporated into Canadian law were considered by the courts to have binding authority.[117] At the same time, however, the court has long recognized the rule that statutes should be interpreted as far as possible into conformity with international law,[118] and it is now accepted that the Canadian Charter of Rights and Freedoms is to be interpreted in accordance with similar international human rights norms.[119]

76. Recent case law goes further. In *Pushpanathan v. Canada (MCI)*[120] Bastarache J writing for the majority applied the Vienna Convention to assess Canada's obligations under the Refugee Convention, noting that the Court had used the Vienna Convention for this purpose in two previous cases.[121] In *Baker v. Canada (MCI)*[122], the Supreme Court ruled that immigration officers were obliged to consider the *Convention on the Rights of the Child* – an unimplemented international treaty to which Canada is a party – in decisions affecting children. The majority cites the principle that "the legislature is presumed to respect the

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[116] See for example, *Ahani v. Canada* (2002), 58 O.R. (3d) 107 (C.A.). In his dissent Rosenberg JA summarizes the government's position with respect to its obligations as a party to the Optional Protocol to the ICCPR.
[117] The most cited case for this principle is the 1956 Supreme Court case of *Francis v. The Queen* [1956] SCR 618.
[118] P.W. Hogg, *Constitutional Law of Canada*, 1999 Student Ed., (Toronto: Carswell, 1999) at 33.8(c). citing *Re Powers to Levy Rates on Foreign Legations* [1943] SCR 208.
[119] Slaight Communications Inc. v. Davidson [1989] 1 SCR 1038.
[120] [1998] 1 SCR 982.
[121] The cases are *Thomson v. Thomson*, [1994] 3 SCR 551, and *Canada (AG) v. Ward,* [1993] 2 SCR 689. For a discussion on this point see G. Van Ert, *Using International Law in Canadian Courts*, London: Kluwer, 2002, at 229b-c.
[122] [1999] 2 SCR 817.

values and principles enshrined in international law, both customary and conventional."[123] This approach has been affirmed in numerous subsequent decisions.

77. Finally, it is important to note a provision in IRPA that did not exist in the previous Immigration Act. Expanding on the legislative objective to "fulfil Canada's international legal obligations with respect to refugees,"[124] s. 3(3)(f) provides: "This Act is to be construed and applied in a manner that … complies with international human rights instruments to which Canada is signatory."

78. This provision unambiguously imports Canada's international human rights obligations directly into the Act. By adding this provision to the new Act the legislature signaled to the courts that it intends to be legally bound by international human rights law in the field of immigration and refugee law – in any matter governed by IRPA. The earlier hesitation of the courts to bind the legislature to international treaties negotiated and ratified only by the executive should be firmly dispelled by the adoption of this provision by the legislature itself.

79. This has significant implications for refugees in legal limbo. While Canada is under no legal obligation, domestic or international, to specifically provide Permanent Resident status to recognized refugees, it nevertheless is under an international obligation to treat them without distinction based on immigration status. As laid out above, international human rights law is very specific about the rights that must be accorded to all persons without distinction. Current distinctions between refugee status and Permanent Resident status violate these international obligations, which, under s. 3(3)(f) of IRPA, are now also domestic legal obligations. Moreover, even in the absence of this provision, there are solid grounds for a constitutional challenge of this differential treatment under s. 15 of the Charter, as interpreted through international human rights law.

Faulty rationales

80. Considering the many difficulties faced by refugees awaiting permanent residence and the fact that the vast majority of refugees become Permanent Residents eventually, one must question the policy of maintaining three distinct stages.

81. Canada has an established and clearly articulated policy of granting permanent residence to Convention refugees. As noted, CIC itself describes the application for permanent residence as "the next step"[125] for Protected Persons, and IRPA requires that such applications be approved, so long as the applicant has not violated the regulations in applying and is not inadmissible.[126] Section 21(2) of IRPA provides that a Protected Person becomes a Permanent Resident:

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[123] *Ibid*. quoting R. Sullivan, *Dreidger on the Construction of Statutes* (3rd ed. 1994) at 330.
[124] IRPA, s. 3(2)(b).
[125] *Supra* n. 58.
[126] The House of Commons Standing Committee of Citizenship and Immigration, in their recent report on the draft

> if the officer is satisfied that they have made their application in accordance with the regulations and that they are not inadmissible on any ground referred to in section 34 [security] or 35 [violating human or international rights], subsection 36(1) [serious criminality] or section 37 [organized criminality] or 38 [danger to public health or safety].[127]

82. The existence of separate steps for Protected Person status followed by Permanent Resident status does not reflect an intention to maintain two separate populations in Canada. Rather, refugee or Protected Person status is a way-station on the road to permanent residence. It is a way-station built under the previous legislation, prior to the shift to front-end screening, and provided the government with a first opportunity to assess the admissibility (particularly with respect to security and criminality) of persons *en route* from refugee claimant to Permanent Resident status.

83. This way station is now unnecessary and redundant. The screening conducted at the front-end is more than adequate to screen out those who may be inadmissible for permanent residence. Requiring Protected Persons to undergo a second screening before granting them permanent residence is both cruel to the individuals affected and wasteful of limited public resources.

84. The rationales that have traditionally been put forward to justify the current approach do nothing to diminish this conclusion. The two most compelling rationales will be briefly discussed below.

Permanent resident status is more than is required under the Refugee Convention

85. The first and perhaps most obvious justification is that asylum and permanent residence are inherently quite distinct. Asylum is an internationally recognized human right rooted in international law. As a party to the Refugee Convention as well as numerous international human rights treaties, Canada must grant protection to refugees, and treat them in accordance with the Convention and international human rights standards for as long as they remain on Canadian territory. However, Canada has no similar legal obligation to provide Permanent Resident status. In contrast to the human right to asylum, permanent-resident status is considered by the Canadian government to be a "privilege" which Canada may or may not confer, according to its own policy interests.[128]

86. This distinction - between protection and permanent stay - is a matter of lively debate at the international level. It is argued by some that the conflation of refugee status and

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Immigration and Refugee Protection Regulations, called for a regulatory provision going even further: "Those granted refugee or protected person status by the IRB should be granted permanent resident status within 60 days of the receipt of their application for permanent residence, with the IRB's determination of identity considered valid for this purpose. (House of Commons Standing Committee on Citizenship and Immigration. Report on Proposed Immigration and Refugee Protection Regulations. March 20, 2002. Recommendation 41.)

[127]The specific grounds for inadmissibility will be discussed below.

[128]Meeting with Gerry Van Kessel, Director General, Refugees, Citizenship and Immigration Canada, February 2001.

permanent residence is one of the reasons for the erosion in public support for asylum, and is damaging the always fragile political will of many - perhaps most - states to participate in refugee protection at all.[129] As a result, several industrialized states are considering or have adopted temporary protection regimes that allow refugees to remain in their territory only for as long as they continue to face a risk of persecution at home.

87. Whatever may be the merits of maintaining the distinction in other jurisdictions it makes little sense in Canada. Perhaps the most glaring legal problem with the proposed distinction between refugee protection as international law and permanent residence as sovereign Canadian domestic policy is that, as discussed, Canada does not recognize some of the rights guaranteed to refugees by the Refugee Convention and international human rights law until permanent residence.[130]

88. A prime example of this practice is Canada's previous interpretation of Article 28 of the CSR (travel documents). Though international refugee law experts found Canada to be in clear contravention of the Convention requirement to provide travel documents to refugees, Canadian senior officials insisted they were not obliged to do so until the refugee became a Permanent Resident.[131] As noted, Canadian practice with respect to travel documents was recently reformed to bring it into compliance generally with international law. However, other internationally guaranteed human rights continue to be withheld from Protected Persons until they become Permanent Residents, including the right to family unity, the right of children to be reunited with their parents, the right to employment, and the general right to equality and nondiscrimination.

89. As long as Canada continues to withhold from Protected Persons rights and benefits promised under the Refugee Convention and other international treaties, and to confer them upon acquisition of Permanent Resident status, it cannot argue that permanent residence is purely a privilege that Canada is not obliged to grant to refugees under international law. While permanent residence may not be explicitly required under the Refugee Convention (though it is strongly encouraged by Article 34), some of the benefits that are only available upon becoming a Permanent Resident *are* guaranteed to refugees under such international instruments as the Refugee Convention, the *Convention on the Rights of the Child*, the *International Covenant on Economic Social and Cultural Rights,* and the *Universal Declaration of Human Rights.*

90. Canada is thus obliged either to grant permanent residence to Protected Persons, or to ensure that those with Protected Person status enjoy all of the rights and benefits to which

[129] See for example Hathaway. J.C. "Toward the Reformulation of International Refugee Law." In *Refuge* 15:1 (1996) pp. 1 to 5.

[130] A further legal problem with maintaining the distinction is that permanent residence is a prerequisite in Canada for naturalization, or citizenship, and Article 34 of the CSR obliges states to "facilitate" naturalization. While this certainly does not in itself amount to a right to either naturalization or permanent residence, it does suggest that permanent residence is more than simply a privilege to be granted or withheld at the whim of host states. Under the Convention, refugees can legitimately expect Canadian policies to "facilitate" their obtaining Canadian citizenship, which necessarily includes granting them the prerequisite of permanent resident status.

[131] *Supra* note 85.

they are entitled under international law. While the latter option would allow the government to maintain the two separate statuses, there are a number of fairly significant practical drawbacks. One is that such an approach would require amendments to a wide range of federal laws and policies that restrict certain benefits to Permanent Residents and citizens. It would also require negotiations with other levels of government and institutions that currently provide services, to ensure that they also begin to provide their services to Protected Persons[132]

91. But there is also a policy reason for allowing Protected Persons to become Permanent Residents and, eventually, citizens: immigration targets. Canada's economic future depends on a continuous in-flow of immigrants. Without immigration, it is widely forecast that Canada's population growth will slow to a halt and begin to decline within the next quarter century. Recognizing this, the governing Liberal Party has a longstanding goal of increasing immigration to an annual rate of one per cent of the population -- approximately 318,000 immigrants. Yet we have so far been unable to reach those rates. In 2002, Canada accepted 229,058 immigrants, of which 29,111 were refugees. In 2001 the numbers were 250,346 immigrants, of which 27,894 were refugees. Given the fact that we continue to strive, and fail, to attract enough immigrants to this country, while at the same time some 17,680 people are accepted as Protected Persons, it only makes sense to grant them permanent status as soon as possible, so that they can remain and become full participants in Canadian society and the economy. Refugees more than immigrants have a heightened desire to integrate and settle quickly since they have fled their own country, detached themselves emotionally and want to make a fresh start in Canada.

Security and criminality

92. The other major argument for maintaining two separate steps relates to questions of security and serious criminality. As noted, newcomers to Canada are subjected to security and criminality (as well as medical) background checks prior to being granted authorization to remain here. Since it is easier to expel a person who is found to be inadmissible on one of these grounds before s/he has been granted Permanent Resident status, systematic screening has generally been conducted upon receipt of a refugee's application for permanent residence. Only where authorities had a particular reason to look into the background of a specific claimant would such investigation take place prior to receipt of a landing application.

93. The increased focus on terrorism in recent years, however, has resulted in a change in procedure. Concerns about potential terrorists abusing the refugee determination system and using Canada as a fund-raising and organizing base for terrorist acts in the US and elsewhere underlie many of the reforms in IRPA and associated regulations. The same concerns have led to changes in procedure introduced independently of the new legislation.

[132] A good example is the complicated nature of the harmonization of federal and provincial regulations and policies with respect to student loans for refugees. In spite of the announcement in the federal budget of February 2003 that protected persons were eligible to receive student loans, it took over 18 months to adopt and implement policies that reflected this change in the provinces.

94. Perhaps most important has been the shift in the timing of the screening procedure. Questions of security and serious criminality that were previously left for investigation at the permanent residence stage are now being addressed at the "front end" of the refugee determination process, during the eligibility stage. The federal government has allocated significant new resources to this front-end screening process, and has made much of the added security for Canadians enabled by this front-end screening.[133]

95. Front-end screening is provided for in s. 100 of *IRPA,* which requires immigration officers to make a determination of eligibility within three working days of receiving a refugee claim. A claim may be found ineligible if, among other things,

> the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(c).[134,135]

96. On the matter of ineligibility for serious criminality, the *IRPA* provides that:

> A claim is not ineligible by reason of serious criminality under paragraph (1)(f) unless
>
> (a) in the case of inadmissibility by reason of a conviction in Canada, the conviction is for an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years and for which a sentence of at least two years was imposed; or
>
> (b) in the case of inadmissibility by reason of a conviction outside Canada, the Minister is of the opinion that the person is a danger to the public in

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[133] Citizenship and Immigration Canada. "Strengthened Immigration Measures To Counter Terrorism; Backgrounder 2: Security Screening For Refugee Claimants" News release 2001-19, October 12, 2001:
"Since September 11, immigration officials have begun implementing interim procedures for front-end screening of refugee claimants based on new security concerns. Citizenship and Immigration (CIC) is receiving an additional $17M to increase its capacity to conduct a detailed examination of claimants.

Persons who make a claim to refugee status in Canada are entitled to a hearing of their claim before the independent Immigration and Refugee Board. The current *Immigration Act* gives immigration officials the authority to fingerprint and photograph claimants and to determine their admissibility to Canada and eligibility to make a refugee claim. A person who is found inadmissible on criminal or security grounds may be ordered removed from Canada. The removal order becomes effective if the person is not eligible to pursue a refugee claim or is denied refugee status after determination of the claim. If refugee status is granted, the person may apply for permanent residence, and a complete security and criminal check is carried out before permanent residence is granted.

CIC officials already conduct an in-depth front-end screening process as soon as refugee claimants arrive. While this process is possible under current immigration law, proposals under Bill C-11 [IRPA] will streamline the process and allow CIC to suspend and terminate the processing of refugee claims where persons are determined to be a security threat."

[134] *IRPA*, s.101(1)(f).

[135] Section 35(1)(c) of the *IRPA* states: "being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association."

> Canada and the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of at least 10 years.[136]

97. Even after an initial determination of eligibility and referral to the IRB's Refugee Protection Division (formerly the Convention Refugee Determination Division) for a determination of the merits of the refugee protection claim, the officer may suspend IRB consideration of the claim under s. 103 by referring the matter to the Immigration Division "to determine whether the claimant is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality."[137]

98. In addition, under s. 104 (1)(b) a claim may be "clawed back" by the officer on similar grounds of inadmissibility, terminating consideration before a decision has been made.

99. As shown in Appendix I, ineligibility and inadmissibility criteria related to criminality and security are identical in almost every respect. To the extent that they are identical there is no need, from a security perspective, to maintain separate stages for protection and for permanent residence, at least in principle. The only differences are the following:

- A claimant with a criminal conviction in Canada will not be found ineligible to make a refugee claim on "serious criminality" grounds unless they have been sentenced to at least two years' imprisonment,[138] whereas all that is needed to make a person inadmissible for permanent residence is a sentence of six months.[139]

- With respect to serious crimes committed outside of Canada, to be found ineligible to make a refugee claim a person must be found by the Minister to present a "danger to the public in Canada" and must have been convicted of an offence that in Canada would carry a maximum sentence of at least 10 years' imprisonment. [140] In contrast, all that is needed to be found inadmissible for permanent residence on the same grounds is a conviction that would in Canada carry a maximum sentence of at least 10 years[141] or to be found by the immigration officer on a balance of probabilities[142] to have "committed" such an act (i.e. even without a conviction).[143]

- A person may be found inadmissible for permanent residence as a person restricted on the basis of international sanctions[144], but this would not be a ground for ineligibility for refugee protection.

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[136]IRPA, s.101(2).
[137]IRPA, s. 103(1)(a).
[138]IRPA, s. 101(2)(a).
[139]IRPA, s. 36(1)(a).
[140]IRPA, s. 101(2)(b).
[141]IRPA, s. 36(1)(b).
[142]IRPA, s. 36(3)(d).
[143]IRPA, s. 36(1)(c).
[144]IRPA, s. 35(1)(c).

- A person may be found inadmissible on health grounds,[145] but this would not have made them ineligible to make a refugee claim.

100. Notwithstanding these differences between ineligibility criteria and inadmissibility criteria, it is difficult to see how CIC justifies maintaining the current three-stage procedure, in which screening happens twice, the second time (with respect to permanent residence applications) mostly repeating the screening that was conducted at the front end. The vast majority of asylum-seekers are neither ineligible nor inadmissible.[146] Given this, it makes no sense to require the entire population of Protected Persons to be re-screened for the full range of criteria before granting permanent residence.

101. Moreover, even for those few Protected Persons who might be found inadmissible on one of the four grounds listed above, it difficult to see any public policy advantage to denying them permanent residence. Upon being granted refugee protection, Protected Persons are in Canada to stay. They have the right not to be removed, except in the most exceptional of circumstances. Quite apart from the matter of Canada's international legal obligations, what public policy purpose is served by denying some of them the opportunity to become Permanent Residents and full participants in Canadian society? Consider the first of the four grounds, for example: serious criminality. Given the fundamental rights at stake for refugees, Canada has recognized – appropriately – that a serious criminal conviction with a sentence of up to two years in prison is not enough to justify denying a person the chance to claim protection from persecution and to stay in Canada as a Protected Person. That being so, what benefit is there to keeping such persons in a vulnerable subclass by denying them the next step, permanent residence, and with it the opportunity to become contributing members of Canadian society? Canada is not made safer by keeping people in limbo.

Solutions

102. The previously stated analysis indicates that the current three-stage refugee procedure of eligibility, refugee determination and permanent residence is neither necessary nor just, and is in fact counterproductive. It is unnecessary from a security perspective, and is unjust in that it delays full realization of certain basic rights that are guaranteed to refugees and their families. It is counterproductive because it delays integration for refugees, sometimes resulting in long-term costs to both the affected individuals and families and to the community at large. Several options should therefore be considered to reform the current procedure.[147]

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[145] IRPA, s. 38.

[146] A 2001 report prepared for CIC on undocumented refugees found that out of a group of 2,161 undocumented persons who applied for permanent resident status, only one failed the criminal check. (T.K. Gussman Associates Inc. *Summary Assessment of the Undocumented Convention Refugee in Canada Class, Draft Report*, 2001.)

[147] An issue which must be considered under both of these options, but which is not in the scope of this paper, is the question of processing fees. Since 1994, refugees seeking permanent resident status have been required to pay $500 per adult ($100 per child) to apply for landing. This non-refundable fee is due at the time the application is submitted.

If landing is to be made automatic upon the grant of protection, the landing processing fee should be eliminated for this group, or the result will be that many protected persons still face a delay in landing as they seek to earn enough

Option 1: Amend IRPA to make permanent residence automatic upon recognition as a Protected Person.

103. The most direct and unambiguous solution would be to amend the Immigration and Refugee Protection Act to grant permanent residence to protected persons automatically upon recognition by the Immigration and Refugee Board.

104. The simplest way to do this would be to amend s. 21(2) of the Act to read as follows:

> Except in the case of a person described in subsection 112(3) or a person who is a member of a prescribed class of persons, a person whose application for protection has been finally determined by the Board to be a Convention refugee or to be a person in need of protection, or a person whose application for protection has been allowed by the Minister, becomes a permanent resident.

105. Given that, as discussed, in almost every case inadmissibility for permanent residence purposes would have been detected during front-end screening, and that as a result such persons would have been denied access to refugee protection, nothing more is needed.

106. However, as is also noted above, there are some minor differences between the grounds for a finding of inadmissibility for permanent residence and grounds for inadmissibility in the context of eligibility screening. Therefore, if there are compelling policy reasons for maintaining a slightly higher bar to permanent residence than for refugee protection,[148] the following additional clause could be added to the end of the amended s. 21(2):

> provided an officer has not found previously them inadmissible on any ground referred to in section 34 or 35, subsection 36(1) or section 37 or 38.

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money to pay the fee before they can be landed. This exemption from the processing fee could be introduced under the regulatory authority granted by s. 89 of the IRPA: "The regulations may govern fees for services provided in the administration of this Act, and cases in which fees may be waived by the Minister or otherwise, individually or by class."
There are strong rationales for removing the processing fee. To begin with, as advocates have pointed out for many years, the fee runs contrary to Article 34 of the *CSR*, which requires states parties to "make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings." Further, because the fee is charged at a flat rate, it has a heavier impact on the most vulnerable: women and people of colour from countries of the South are less able to pay the fee than many men and persons from the North, where higher GDPs may lessen the impact of the fee.
There are also pragmatic reasons for eliminating the fee as a part of the policy of granting immediate landing. The most obvious of these is that the fee is a "cost-recovery fee" designed to off-set the cost of providing the "service" of processing landing applications. With inadmissibility screening having already been completed and landing being granted immediately upon the grant of protection, there will be very little "processing" that needs to be done, and thus no justification for the $500 fee.
Another reason to eliminate the fee for protected persons is that, as noted, maintaining the fee could delay landing. The fee represents a significant amount of money to many refugees, and it frequently takes them time to acquire the necessary funds. As a result, the fee requirement could work directly against the policy goal of landing protected persons immediately upon determination.

[148] Though to be sure, no such compelling grounds have been discovered by the author.

Option 2: Amend the Regulations to harmonize inadmissibility provisions with ineligibility provisions, and grant permanent residence automatically to Protected Persons

107. An alternative that would have generally the same effect would be to approach the matter via regulatory change, which could be done much more quickly by the Minister and would not require Parliamentary approval. This approach would see the Minister harmonizing inadmissibility with ineligibility by exempting Protected Persons from those inadmissibility provisions that differ from ineligibility provisions. This would give refugees permanent residence automatically upon being granted Protected Person status.

108. This exemption could be introduced under the regulatory authority granted by s. 43:

> The regulations may provide for any matter relating to the application of this Division, may define, for the purposes of this Act, any of the terms used in this Division, and may include provisions respecting circumstance in which a class of Permanent Residents or foreign nationals is exempted from any of the provisions of this Division.[149]

109. Subsection 175(1) of the Immigration and Refugee Protection Regulations could be replaced with a new clause:

> An officer shall be satisfied that an application to remain in Canada as a permanent resident meets the conditions of subsection 21(2) upon the determination of the board or the decision of the Minister referred to in that subsection.[150]

110. There are sound reasons for granting this exemption. Foremost among these is the fact that, even without Permanent Resident status, these persons, once granted protection, have the right to remain in Canada. Having granted such persons protection, Canada recognizes their right to remain. There is nothing to be gained by delaying their permanent residence, and much to lose, for both the individuals themselves and for Canadian society at large. Canada is neither more secure nor economically better off by keeping such individuals in limbo.

111. Moreover, the *IRPA* provides broad authority to the Minister to revoke Permanent Resident status and remove Permanent Residents from Canada should information come to light indicating that they misrepresented themselves during refugee determination or on their application for permanent residence:

> 40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation

[149] Further authority may be derived from s. 26 of the *IRPA*: "The regulations may provide for any matter relating to the application of sections 18 to 25, and may include provisions respecting...(b) permanent resident status or temporary resident status, including acquisition of that status."

[150] Further technical amendments would of course need to be made to regulations and operational procedures to change the system from one requiring submission of an application upon recognition as a protected person to a system that allows for conferral of permanent residence concurrently with protected person status.

> (a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;
>
> (b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;
>
> (c) on a final determination to vacate a decision to allow the claim for refugee protection by the permanent resident or the foreign national; or
>
> (d) on ceasing to be a citizen under paragraph 10(1)(a) of the Citizenship Act, in the circumstances set out in subsection 10(2) of that Act.[151]

112. Even where there has been no misrepresentation, a Permanent Resident may lose status through the operation of s. 44 to s. 46. Under s. 44(1) an immigration officer "who is of the opinion that a permanent resident ... is inadmissible may prepare a report setting out the relevant facts, which shall be transmitted to the Minister." If the Minister "is of the opinion that the report is well-founded"[152] the report may be referred to the Immigration Division of the IRB for an admissibility hearing. The Immigration Division has the authority to issue a removal order if, after a hearing, it is satisfied that the Permanent Resident is inadmissible.[153] Permanent resident status is automatically lost when such a removal order comes into force.[154]

113. In addition, Permanent Resident status is automatically revoked upon "vacation" of refugee protection.[155] (Under s. 109 the Minister may apply to the Refugee Protection Division to vacate a refugee protection decision "if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter."[156])

114. Finally, as noted above, s. 40(1)(d) of the *IRPA*, combined with *s.* 10(1)(a) and s. 10(2) of the *Citizenship Act,* allow Citizenship and Immigration Canada to strip the status even of those who have progressed all the way to citizenship on the basis of misrepresentation.

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[151]Section 10(1)(a) of the *Citizenship Act*, 1974-75-76, c. 108, s. 1. provides as follows: "Subject to section 18 but notwithstanding any other section of this Act, where the Governor in Council, on a report from the Minister, is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances,
(a) the person ceases to be a citizen..."

Section 10(2) provides: "A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship."

[152]IRPA, s. 44(2).

[153]IRPA, s. 45(d).

[154]IRPA, s. 46(1)(c).

[155]IRPA, s. 45(d).

[156]IRPA, s. 109(1). Note also that s. 114(3) allows the Minister to vacate a decision to grant protected person status under the Pre-Removal Risk Assessment, on the same grounds.

115. These safeguards are more than sufficient to ensure that, should a Protected Person who was automatically granted Permanent Resident status later be found to be inadmissible, they can be stripped of that status relatively easily. Thus, granting refugees and Protected Persons permanent residence immediately would improve their rights protections and access to benefits while living here; however, it would not prevent Canada from stripping them of their status and removing them from the country should it come to light that they pose a threat to Canada or Canadians.

Option 3: Amend the Regulations to establish a rebuttable presumption of admissibility and, where not rebutted, permanent residence upon conferral of refugee protection.

116. A further, least desirable alternative which would allow Canada to continue to deny Permanent Resident status to Protected Persons inadmissible under IRPA would be to establish a "presumption" of permanent residence upon determination as a Protected Person, but ensure that during front-end screening CIC would assess and keep a record of not just the ineligibility factors but also the inadmissibility factors that differ from them. Upon examination of a Protected Person's application for landing, the officer would presume the applicant to be admissible for permanent residence without further examination, except where during front-end screening an officer specifically indicated in the file that the applicant is inadmissible for permanent residence.

117. In a situation where a claimant is found eligible to make a refugee claim but may be inadmissible for permanent residence, the claim would proceed, and a report on possible grounds for inadmissibility included in the person's file, which would be sufficient to enable the immigration officer to rebut the presumption of permanent residence.

118. As discussed under Option 1 above, the presumption of permanent residence could be established via the authority granted under s. 43 of *IRPA*.[157] Subsection 175(1) of the Immigration and Refugee Protection Regulations could be amended to provide:

> An officer shall be satisfied that an application to remain in Canada as a permanent resident meets the conditions of subsection 21(2) upon the determination of the board or the decision of the Minister referred to in that subsection, unless, prior to such determination by the board or decision of the Minister, an immigration officer has determined that the applicant, though not ineligible under section 101, is inadmissible under subsection 36(1), 35 (1)(c) or section 38.

119. In this latter situation, where an officer at the front end had ascertained that a claimant may be inadmissible for permanent residence, albeit not ineligible for Protected Person status, a regulatory provision should be added requiring an officer to review the file after refugee protection has been granted. The officer should be required to make a final determination regarding inadmissibility within twelve months of the date of the grant of protection. Where no decision is made within such time, the Protected Person should be deemed to be admissible and be granted Permanent Resident status.

[157] See para. 0 above.

120. This approach has the advantage of allowing the vast majority of Protected Persons to be granted Permanent Resident status immediately upon determination, while allowing Citizenship and Immigration Canada to still enforce the current inadmissibility provisions. However, the very significant drawbacks are that it is premised on the flawed assumption that there is a public policy advantage to keeping some Protected Persons in a vulnerable status and, more importantly, it would maintain Canada's violation of international law by keeping certain persons in "limbo" without recognizing the full range of rights to which they are entitled as refugees under the Refugee Convention and other relevant international treaties.

Conclusion

121. Section 3 of the *IRPA*, which sets out the objectives and application of the new Act, states:

> This Act is to be construed and applied in a manner that ... complies with international human rights instruments to which Canada signatory.[158]

122. Canada's three-stage procedure of (1) eligibility determination, (2) refugee protection and (3) permanent residence is not in line with international law. During the processing period between granting of refugee protection and granting of permanent residence, refugees are denied rights guaranteed to them under a variety of international treaties.

123. While there *may* have been valid security-related reasons for delaying permanent residence under the *Immigration Act* regime, this is no longer the case. With the implementation of front-end screening of refugee claimants, the allocation of additional resources to this endeavour, and the wide discretion to revoke Permanent Resident status under the *IRPA*, the three-step process is neither necessary nor advisable. It is time to make permanent residence automatic for refugees and Protected Persons.

[158]IRPA, s. 3(3)(f).

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