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SOCIAL POLICY

**What's In A Name?:
Identity Documents and
Convention Refugees**

by

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Executive summary

This report examines the Immigration Act requirement that Convention refugees present ‘satisfactory’ identity documents in order to be granted permanent resident status in Canada (Section A46.04(8)). The paper looks at the reasons refugees arrive in Canada without the required documents and outlines the impact of the requirement – namely the development of an underclass of some 13,000 Convention refugees in ‘legal limbo.’

The report delves into the history and rationale behind the policy, the reaction of the affected community and discussions around solutions that have taken place between governments and nongovernmental organizations. It analyzes the federal government’s 1997 policy response, a new Undocumented Convention Refugee in Canada Class, which allows undocumented Somali and Afghan refugees to acquire landed status in Canada only after a five-year waiting period. This new class has been unsuccessful in landing refugees in limbo and actually has given rise to some new problems.

The paper concludes with two policy options for the Minister of Citizenship and Immigration. The first is to rescind the identity document requirement for landing and eliminate the Undocumented Convention Refugee in Canada Class. The Department could rely instead on the expertise of the Immigration and Refugee Board to establish identity at the point of refugee determination. Where the Immigration and Refugee Board has satisfied itself with regard to the identity of the refugee, lack of documentation would neither prevent nor delay landing.

An alternative is to reduce the waiting period for landed status for undocumented Convention refugees to three years from date of arrival and establish derivative status for dependants. This change would allow the families of refugees to be brought to Canada during the waiting period. In addition, the federal government would need to adopt measures to reduce the negative impact of the waiting period, including providing travel documents and ensuring full and equal access to health care, postsecondary education and loans.

Introduction

Asha came to Canada in August 1994 with four of her eight children. The family had spent five years in a refugee camp in Ethiopia after fleeing the destruction of northern Somalia. Four children, including the twin brother of one of the girls in Canada, remain in the camp. Until last year, the children were being looked after by their grandmother, but she had died of cancer. The elderly grandfather is in poor health and unable to take care of the children. He has called on Asha to take charge of them. Asha has been unable, however, to obtain permanent resident status here, and so is not permitted to bring the children to Canada. Although she was accepted as a Convention refugee in 1995, she has no identity document other than a photocopy of her passport. The original was stolen in the refugee camp in Ethiopia. The Department of Citizenship and Immigration has refused to accept her photocopy and she has been unable to get other documents. She does not know what to do.

Subha fled to Canada from Sri Lanka with her young daughter and was granted refugee status. Her husband arrived one month after her and was processed separately. He has been granted permanent resident status. Subha and her daughter have not been given permanent residence because they do not have identity documents, having lost them when their house in Jaffna was destroyed. They cannot get new documents because there is no functioning authority in Jaffna, the Sri Lankan embassy refuses to process the request and the central records in Colombo are so arranged that it is impossible to trace a record without knowing the number of the certificate. Subha and her daughter have now been in Canada five years [Canadian Council for Refugees 1996].

These stories are not isolated cases. They represent a whole class of marginalized people

living in Canada today: Convention refugees who do not have travel documents, passports or other official documents to prove their identity to the Canadian government, and who on that basis alone are denied permanent resident status. To be deemed a Convention refugee, one must demonstrate to Canada's Immigration and Refugee Board (IRB), a quasi-judicial tribunal, that one has "a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion" [Immigration Act, Sec. 2]. Once the IRB has deemed a person to be a Convention refugee, the refugee is automatically granted limited protection in Canada and in most cases may not be returned to the place where they face persecution.

The Department of Citizenship and Immigration Canada (CIC) reports that lack of documentation has been an ongoing feature of the refugee claimant population" [Citizenship and Immigration Canada 1998b: 3341]. More than half of all inland refugee claimants do not present a passport or travel document at the time that they claim status. Of these, many present other forms of identification, such as drivers' licences or school certificates. However, the majority show no documents whatsoever [Citizenship and Immigration Canada 1998a: 41].

Canada recognizes that acquiring passports or travel documents can be difficult or impossible for refugees fleeing for their lives, so we do not let the lack of documents get in the way of their making a refugee claim. To be accepted in Canada as a Convention refugee, claimants must satisfy the Immigration and Refugee Board that they are who they say they are and that they have "a well-founded fear of persecution" in their home country. Establishing identity is a key factor in every refugee hearing. Lack of a passport or other official identity document is an impediment to this process, but can be overcome

through the assessment of claimants' credibility by IRB decision-makers, on the basis of sworn testimony from the claimants and people who know them, and other supporting documentation.

Upon a positive decision by the IRB, Convention refugees may apply to the Department of Citizenship and Immigration for permanent resident status in Canada. The Department, in cooperation with the Canadian Security Intelligence Service, conducts a background check for security risk and criminality. If all goes well and refugees have a travel document, passport or other official identity document, they will be landed in 12 to 24 months, and may attain citizenship three years later.

If, however, they pass the background check but do not have the required identity documents, the road to secure asylum is much more uncertain, and in many cases never-ending.

Why do refugees arrive in Canada without proper identity documents?

Refugees arrive in countries of prospective asylum without the required identity documents for a host of reasons.

Many refugees are fleeing from military conflict zones and all their personal belongings have been destroyed. In other cases, refugees are forced to leave their homes at the last minute and have no time to search for documents or even to pack a change of clothes.

In countries where such conflict has been going on for a long time, governments have often broken down, and there simply are no civil institutions in existence to issue identity documents. In other countries, dissidents routinely are denied identity documents by oppressive governments, or have them confiscated. Some-

times prospective refugees may not even seek to obtain official identity documents, afraid of alerting the government of their intent to flee [Canadian Council for Refugees 1996: 4]. Such refugees would not want to apply to their home governments for documents even once they have been granted Canada's protection, for fear of reprisals against family or friends still in the country [Canadian Council for Refugees 1996: 7].

Furthermore, not all cultures are as dependent on print documents as Canadians. Many cultures, especially in Africa, simply do not rely on written records to document life events [Audit and Consulting Canada 1998: 3].

In order to get to Canada by air, a person must present some sort of identity document to the carrier at the point of departure as well as a visa to come to Canada. If desperate asylum-seekers cannot safely acquire official identity documentation and are trying to get to Canada in order to find protection from persecution at home, the regulations leave them little option but to acquire a false passport (and these are readily available in many parts of the world, though they are generally exorbitantly expensive).¹

Once en route to or in Canada, asylum-seekers usually destroy or dispose of the false documents. The reasons are obvious and point to a further Catch-22. Many refugees fear that, if they retain and present false passports to Canadian Immigration officers, they risk being refused an opportunity to make a refugee claim, or being deported to the country named on the passport. Moreover, they may have been reluctant to use fraudulent papers and anxious to be done with them.

In cases where asylum-seekers have paid someone to help them come to Canada to make a refugee claim, the documents used to board a

flight to Canada are frequently handed back to the ‘agent’ for reuse, or are destroyed on the advice of the agent.

Finally, there are those who do not present identity documents for the simple reason that they are not who they say they are and are not genuine refugees. The Department of Citizenship and Immigration, however, has acknowledged that “the great majority [of undocumented refugees] were *unable* to obtain an identity document from their country of origin” (emphasis added). There is only a “small minority of individuals who would willfully conceal their identity or country of origin, for the purpose of hiding information that could adversely affect their entitlement to protection in Canada” [Citizenship and Immigration Canada 1998b: 3342].

Who is affected?

It is impossible to determine the precise extent to which different nationalities are affected by the identity document requirement, as the Department of Citizenship and Immigration does not track cases where landing is denied due to lack of identity documents (see note 4). Intelligence information from the Department combined with anecdotal reports from the refugee community, however, give some indications.

All parties agree that Somali refugees are the hardest hit. Since the collapse in 1991 of the Siyad Barre regime, there has been no central government and thus no institutions able to issue identity documents [Maffett 1995]. So unless the refugee acquired documents before the government’s collapse, it is simply impossible to obtain official identity documents.

Even before the collapse of the government, however, 50 percent of the Somali popu-

lation was nomadic, according to Canadian government reports, and “a large majority of all Somalis did not register their births, marriages or divorces” [Morgan 1995b]. This cultural reality is not unique to Somalia, but is shared by many other countries, especially in Africa. A similar situation exists for refugees from Afghanistan, a fact also acknowledged by the Canadian government [Citizenship and Immigration 1996]. The government recognizes that “the vast majority of persons in this situation are genuine refugees, who are unable, through no fault of their own, to obtain an identity document from their country of origin” [Morgan 1995a].

Many refugees from other countries in severe turmoil face the same problem, though a partially functioning government may continue to exist. Refugees from the former Yugoslavia [Citizenship and Immigration (nd)b] and northern Sri Lanka [Defoy 1994], in particular, face identity document problems, as do those currently fleeing human rights atrocities in the Democratic Republic of Congo.

Refugees from countries where there is a functioning government, such as Iran and some Latin American countries, may arrive in Canada without proper identity documents (ID) because they simply have been refused documents, or have not even requested them because they fear reprisals against their family, friends or community [Canadian Council for Refugees 1996: 4]. The denial of landing specifically to undocumented refugees is a painful irony for many refugees fleeing oppressive governments, for it is generally the oppressed victims, not the powerful oppressors, who lack the means to acquire ID.

As noted above, the Immigration and Refugee Board takes the issue of identity very seriously. At their hearing, undocumented refugees must satisfy the Immigration and Refugee Board

judges that they are who they claim to be, even before the specifics of their claim may be heard.

The Immigration and Refugee Board has developed significant expertise in this area and has published detailed guidelines for its members on the subject of establishing the identity of undocumented refugees. An extensive *Commentary on Undocumented and Improperly Documented Claimants: Assessing the Evidence, Enhancing Procedures* and the accompanying *Practice Notice: Processing of Undocumented and Improperly Documented Refugee Claimants* map out explicit procedures regarding undocumented claims, requiring such claimants to provide a reasonable explanation for their lack of documentation² and, at the same time, to establish their identity through alternative means (e.g., sworn affidavits, rigorous questioning). Only once they have satisfied the tribunal that they are who they claim to be and that they have a good reason for being undocumented, may they proceed to the essence of their claim: fear of persecution.

Nevertheless, in 1993, Canada imposed legislation denying permanent resident status to all 'undocumented' Convention refugees.³

Within three years, more than 7,500 Convention refugees from Somalia and Afghanistan alone had been denied landing⁴ [Citizenship and Immigration Canada 1998b: 3342]. By the fall of 1998, the total number had swelled to 13,000 [Tie 1998]. According to Immigration Minister Lucienne Robillard: "This group incorporated a disproportionate number of women and children" [Citizenship and Immigration Canada 1997d]. Indeed, 40 percent of these refugees are children [Citizenship and Immigration Canada (nd)c].

The development of this underclass of refugees who have been denied landing marks a sig-

nificant shift in approach for Canada. In most countries, refugees are considered temporary residents only, enjoying certain limited rights until their expected return home. Canada, however, has chosen the route of allowing Convention refugees to settle permanently and become Canadian citizens, recognizing that it is in the best interest of refugees, their dependants and all Canadians for refugees to become integrated, participating members of Canadian society as quickly as possible.

Yet the denial of permanent resident status to 13,000 undocumented Convention refugees indicates movement towards temporary protection and away from permanent settlement. And the impact of this shift on the lives and hopes of the refugees affected, and on Canadian society, is enormous.

Social and economic impact

Because Canada normally allows Convention refugees to acquire permanent resident status, it does not recognize the full range of rights accorded to refugees under the Geneva Convention.⁵ As a temporary stage between refugee determination and landing, Canada's restriction of the rights of Convention refugee status are not necessarily a problem. When Convention refugee status becomes a long-term or permanent status for certain communities, however, the limit on rights can pose serious problems and result in social marginalization for whole communities of refugees.

Life in Canada as an undocumented Convention refugee is, in many ways, like living in legal limbo. While safer and in most respects better than life in a refugee camp or facing persecution at home, the lives of Convention refugees denied permanent residence are very much

‘on hold.’ 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” [McNamara 1997].

“The Committee views with concern the plight of thousands of Convention Refugees in Canada who cannot be given permanent resident status for a number of reasons, including the lack of identity documents, and who cannot be reunited with their families before a period of five years.” – United Nations Economic and Social Council [United Nations Committee on Economic and Social and Cultural Rights 1998: 37]

delayed family reunification

The single most painful and damaging aspect of life in legal limbo is prolonged, and often unforeseen, family separation. Family reunification is the main concern of most refugees, and the newcomer community does not consider anyone settled in Canada until their family is here. According to Immigration Minister Lucienne Robillard, family reunification is “the cornerstone of Canadian immigration policy.” She acknowledges that it helps newcomers “in achieving self-reliance” and that it contributes to “ensuring social integration and the building of stronger communities” [Citizenship and Immigration Canada 1999c].

The importance of family unity was recognized in the Final Act of the Conference that adopted the 1951 Geneva Convention. The United Nations Convention on the Rights of the Child recognizes the right of children to be reunited with their parents [Article 10].

Nevertheless, Canada restricts family sponsorship to permanent residents and Canadian citizens. Refugees in limbo are prohibited from bringing their children and spouses to live with them in Canada. This long and indefinite separation from their immediate family members – up to nine years or more is the most devastating consequence of extended landing delays.

Any extended family separation has consequences for emotional and financial health. Refugees carry the extra burden of knowing that their spouses and children often are living in very precarious circumstances in their country of origin, or in desperate conditions in a Third World refugee camp. Psychological problems experienced by families that have suffered severe trauma are exacerbated [Canadian Council for Refugees 1995: 14-20].

The United Nations High Commissioner for Refugees and the United Nations Economic and Social Council have expressed concern to the Canadian government that “refugees lacking satisfactory identity documents are effectively denied the right to family reunion [McNamara 1997].

access to education

Under federal law, Convention refugees are guaranteed equal access to education. In practice, most refugees do have full access to elementary and secondary education. Postsecondary education, however, is another matter.

Postsecondary education falls within provincial jurisdiction, so the provinces are free to set tuition fees as they see fit. As a result, treatment of Convention refugees differs from province to province. In some provinces, Convention refugees pay the same tuition that permanent residents and Canadian citizens do; in oth-

ers, they are charged exorbitant foreign student fees, upwards of twice the domestic rate. Even in provinces where they are eligible to pay domestic fees, Convention refugees are sometimes charged foreign fees due to administrative ignorance.

In addition, Convention refugees are ineligible for public and most private loans and scholarships for postsecondary education, effectively barring one of the neediest student populations the opportunity to acquire valuable skills and training.⁶ The sharp increases in tuition fees over the past years and the recent deregulation of fees for certain professional programs have exacerbated this problem.

On this issue, too, international law has something to say. The Universal Declaration of Human Rights states:

Everyone has the right to education – technical and professional education shall be made generally available, and higher education shall be equally available to all on the basis of merit [Article 26].

The Committee on Economic Social and Cultural Rights, in its recent report on Canada's compliance with that Convention, expressed its concern:

The Committee is concerned that loan programmes for post-secondary education are available only to Canadian citizens and permanent residents and that recognized refugees who do not have permanent residence status as well as asylum seekers, are ineligible for these loan programmes. The Committee views also with concern the fact that tuition fees for university education in Canada have dramatically increased in the past years, making it very difficult for those in need to attend university in

the absence of a loan or grant [United Nations Committee on Economic, Social and Cultural Rights 1998: par. 39].

mobility rights

Until they have been granted permanent resident status, undocumented Convention refugees are effectively banned from travel outside Canada. They are not eligible for Canadian travel documents and are not guaranteed re-entry to Canada if they leave the country. While refugees who have “satisfactory identity documents” may seek an exception to this rule on humanitarian and compassionate grounds, undocumented refugees are denied even this possibility.⁷

If refugees' dependants are overseas, the inability to travel even in the case of family emergencies further erodes family bonds and adds greater stress. Persistent concerns about family members have a severe impact on refugees' ability to build a life in Canada. In an increasingly globalized economy, the inability to travel presents a significant barrier to employment for undocumented Convention refugees.

Under the Geneva Convention, however, Canada has a responsibility to provide travel documents to refugees:

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 their lawful residence [Art. 28(1)].

employment

Refugees without landed status are faced with several obstacles when seeking a job. To begin with, they must apply for and regularly renew a work permit.

Without landed status, refugees are denied access to certain professions and to some types of employment that require specific insurance, including education and health care. They are ineligible for government training programs. Moreover, Convention refugees experience unwillingness on the part of many employers to hire and train employees who may not remain in Canada for long [Mohamed and Hashi, 1998: 19]. Lack of permanent resident status also restricts access to bank loans, thereby limiting self-employment or entrepreneurship.

health care

Convention refugees are eligible for some health care coverage under the federal government's Interim Federal Health Plan. This plan covers only emergency and essential procedures, and is intended to serve as a very short-term, transitional program. Regular medicare falls within provincial jurisdiction, so whether or not Convention refugees have access to the same range of insured health benefits as other Canadians depends on the province in which they live.

voting

The right to vote is restricted to Canadian citizens. Citizenship can be applied for only three years after obtaining permanent resident status. The result is an entire community of people living in Canada who are politically disempowered.

Background of the identity document requirement

When asked about the reasons for identity document restrictions, the most common answer given by Immigration Department officials is that they don't want Canada to become "a haven for criminals and terrorists." It appears that all persons who lack a passport are deemed to pose a potential threat to the peace and security of Canada, whether male or female, a grandparent, single mom or a toddler, no matter their origin.

It was not always the case.

Canadians still remember with pride their country's massive outpouring of public sympathy and support for the Indochinese boat people in 1979-80. But how many of these refugees were carrying valid identity documents?

Prior to 1993, as a result of the lobbying of refugee advocates, the Immigration Act exempted Convention refugees from the requirement to provide identity documents.⁸ Provided their claimed identity was not challenged, lack of documentation was no impediment to the granting of permanent residence in Canada [Citizenship and Immigration Canada 1998b: 3341].

In February 1993, however, the Progressive Conservative government of Brian Mulroney implemented Bill C-86, an overhaul of the Immigration Act. Among the sweeping changes introduced by then-Employment and Immigration Minister Bernard Valcourt was a new prohibition against granting permanent resident status to Convention refugees who did not have 'satisfactory identity documents.'⁹ No substantive definition of 'satisfactory identity document' was provided, and no list produced of what documents were acceptable and what documents were not.

The ID requirement was buried among a broad series of changes to the Act, many of them highly controversial, and thus did not receive significant attention from government or non-government organizations at the time.

Exactly what precipitated the imposition in 1993 of the identity document requirement for asylum-seekers is difficult to ascertain. The Department of Citizenship and Immigration reports that “the phenomenon of persons arriving without documentation who are subsequently determined to be Convention refugees began to occur in significant numbers in 1990” [Citizenship and Immigration Canada 1998b: 3341].

Bill C-86 was seen, at least in the refugee advocacy community, as pandering to widespread anti-immigrant, anti-refugee sentiment and as a major step backward. (In fact, the Somali community in Ottawa is challenging the constitutionality of the requirement, arguing that it violates Section 15 of the Charter of Rights and Freedoms.)¹⁰ The inclusion of the Immigration portfolio in the newly formed “Department of Public Security” under the Solicitor General was an ominous sign.¹¹

While this factor is probably not in itself a sufficient explanation for the imposition of Bill C-86, it likely was one of several contributing factors.

If those responsible for the identity document measure had hoped that it would stem the flow of undocumented refugees, they were disappointed. The Department of Citizenship and Immigration reports that 3,005 refugees arrived at Canada’s airports in 1993 (the year the requirement was imposed) without ‘satisfactory’ documents. In 1994, that figure rose to 3,396, and in 1995 it jumped to 4,466. The numbers dropped to 4,086 in 1996 [IRB Legal Services 1997: note 2].

The primary impact of the identity document requirement has not been a reduction in undocumented arrivals. Rather, it has resulted in the development of an underclass of Convention refugees in Canada who are denied the possibility to integrate in Canadian society.

The government’s response: Undocumented Convention Refugees in Canada Class

With the imposition of the identity document restriction, Section A46.04(8), Immigration officers began to turn away refugees applying for landing unless they had valid passports, travel documents or other ‘satisfactory identity documents.’ The refugee community saw increasing numbers of their members being relegated to legal limbo. Hardest hit were refugees from Somalia and Afghanistan, though Sri Lankans, Iranians and others also were affected.

As the numbers grew, the refugee community began to voice its alarm to the now Liberal federal government. The Minister (both Sergio Marchi and his successor, current Minister Lucienne Robillard) and Departmental officials met with the Canadian Council for Refugees and representatives of the affected communities, in particular, the Somalis to discuss a number of possible solutions.¹²

The possibility of rescinding Section A46.04(8) was considered at the departmental level, but ultimately was rejected on the basis of ‘security concerns’ [Audit and Consulting Canada 1998: 27].

A proposal generated from within the Department of Citizenship and Immigration that received more serious consideration was the imposition of a waiting period for undocumented refugees. The idea was to provide a disincentive

to undocumented arrivals who were perceived as compromising the integrity of the system and posing a potential security threat. At the same time, the proposal recognized the injustice of holding refugees in legal limbo indefinitely. The assumption was that the waiting period would allow authorities to weed out the ‘criminals and terrorists’ before they could be landed – (though the government has the power to strip status from and deport anyone who has acquired permanent resident status or citizenship under false pretenses). The idea of a five-year and later a three-year waiting period was strongly opposed by refugee advocates and the affected community as being unfairly punitive.

The Somali community, recognizing and sharing the government’s concern that landing people without documents might result in the landing of war criminals, offered to establish a Somali Council of Elders to work with the Department of Citizenship and Immigration. The Council would be charged with issuing identity documents if it were positive of the identity of the person and confident that the individual had not committed human rights abuses. But the proposal met with little enthusiasm from Department officials, who saw the use of such an organization as an unacceptable transfer of their departmental authority [Ahmed 1995: 21].

The Minister’s offices, however, had a different suggestion. In an October 1994 meeting with the Somali community in Toronto, an advisor to then-Immigration Minister Sergio Marchi proposed “that it would be a better idea to have Somalis swear affidavits of identity” and that these affidavits “would satisfy the satisfactory identity document requirement” [Ahmed 1995: 21].

This idea was discussed in detail, and soon met with the community’s approval. As a gesture of goodwill, Somali representatives agreed

to cancel a planned political demonstration in front of the House of Commons. The community waited. Somali inquiries regarding the implementation of the plan met first with promises of action and later with silence [Ahmed 1995: 21]. Then the Prime Minister shuffled the Cabinet and Lucienne Robillard replaced Sergio Marchi as Minister of Citizenship and Immigration.

On November 16, 1996, with some 7,500 undocumented Convention refugees from Somalia and Afghanistan now in legal limbo (along with an unknown number from other countries), Immigration Minister Lucienne Robillard resurrected an old idea and introduced a legislative proposal that would allow certain undocumented refugees to be landed after a five-year waiting period. The new Undocumented Convention Refugee in Canada Class (UCRCC) would apply only to Convention refugees from Somalia and Afghanistan.

While some attempt was made to portray the measure as humanitarian, that the government saw undocumented refugees as largely illegitimate was never in doubt: “The message is clear,” said the Minister in her announcement of the new class, “fraud will not be tolerated” [Citizenship and Immigration Canada 1996].

To be eligible for landing under the new class, Convention refugees from Somalia and Afghanistan would need to have waited five years from the date of their IRB determination. What with processing times at the front and back ends, the total waiting period would be at least seven years [Citizenship and Immigration Canada (nd)a].

While any dependants with them in Canada could be included in the application, dependants overseas could not, and would have to wait to be sponsored after the principal applicant had been

granted permanent resident status. It takes an average of two years to sponsor a family member's immigration to Canada. This means that a refugee parent forced to leave a 5-year-old girl behind wouldn't be able to see that child again until she was 14.

Moreover, dependants must be under 19 years of age in order to be sponsored by their landed parents. In effect, this means that any child of an undocumented refugee who was over 12 years old when her parent left would never have the right to be reunited with her parent in Canada, as she would be 20 by the time her parent was landed and in a position to sponsor her.

The restriction of the new class to Somalis and Afghans reflected the government's distinction between individuals from countries that the Canadian government felt could (at least theoretically) provide adequate documents, and individuals from those countries that could not provide such documents because they had no effective central government. The class would not include refugees from countries that were capable of but refused to provide documents to certain people, for example Iran and Sri Lanka, nor those who were undocumented for any of the reasons outlined earlier.

The outcry from the affected community was immediate and intense. A three-year waiting period already had been debated and opposed by refugee groups, and now an even longer waiting period was being proposed. And the previous Minister's promise regarding the use of affidavits had been disregarded. Even the Liberal-dominated Parliamentary Standing Committee on Citizenship and Immigration took issue with the proposal, demanding that the waiting period be cut to two years, and that spouses and dependants abroad of undocumented Convention refugees be allowed to come to Canada during the waiting period.

In addition, the Standing Committee offered advice on the processing of regular landing applications by undocumented Convention refugees, including strongly urging the government to develop guidelines regarding what documents are to be considered satisfactory. The Committee also called on the government to work with interested parties and affected communities to develop expertise in understanding and assessing documents relevant to proving identity [Standing Committee on Citizenship and Immigration 1996].

The government rejected nearly every recommendation of the Committee, and the proposal was adopted into law largely as originally drafted. Undocumented Convention Refugee in Canada Class came into force on January 31, 1997. At the time, the Department projected that, of the 7,000 Somali and 500 Afghan refugees it estimated to have been denied landing due to lack of satisfactory identity documents, 1,800 would be eligible to apply for landing under UCRCC within the first year of the initiative (1997), and a further 1,800 the second year [Audit and Consulting Canada 1998: 18].

The actual results have been very disappointing. By the end of 1998, only 748 undocumented Convention refugees and dependants from Somalia and Afghanistan had been landed [Citizenship and Immigration Canada 1999d], compared to a projected 3,600. A further 297 completed UCRCC landing applications had been submitted to Immigration and had yet to be processed, representing a total of 444 people [Citizenship and Immigration Canada 1999a].

While several factors contribute to the low numbers, the fact is that the policy is not achieving even its limited intended impact with respect to actually landing Convention refugees from Somalia and Afghanistan. One intent of the five-year waiting period was to discourage those who

had documents from destroying them. The Department recently reported, however, that the ‘trend’ of undocumented refugee arrivals continues despite the imposition of a waiting period¹³ [Citizenship and Immigration Canada 1998b: 3341].

A more public rationale for the waiting period was that it would allow the government to ‘weed out’ criminals and terrorists. However, according to an internal “Evaluation Framework” prepared for the department and obtained through the Access to Information Act by the Canadian Council for Refugees, the Undocumented Convention Refugee in Canada Class seems to fail on this count as well: *Not a single criminal or security threat was found* among those who had completed their five-year waiting period and applied for landing under UCRCC as of April [Audit and Consulting Canada 1998: 19].

A further, unforeseen impact of the introduction of the UCRCC has been a reported increase in the rate of rejection of Somali documents by Immigration officers. Since its introduction in 1993, the exact meaning of the term ‘satisfactory identity document’ in Section A46.04(8) of the Act has never been clear. The government did not supply Immigration officers with specific criteria for what constitutes such a document, except to indicate that it should be “a genuine document, that belongs to the Convention refugee, and that provides evidence of the person’s identity should normally predate the claim to refugee status” [Citizenship and Immigration Canada 1993].

Predictably, with so little in the way of guidance, the new restriction was applied very inconsistently by Immigration officers reviewing landing applications. Some overzealous officers refused even to consider any documents outside of passports and travel documents, while others used their discretion to analyze the cred-

ibility of other identity documents. With the introduction of the Undocumented Convention Refugee in Canada Class, in fact, the community reported an escalation in the rate at which Somali and Afghan documents, including passports, were being summarily rejected without proper consideration. The general feeling within the community is that Immigration officers were interpreting the new class as a catch-all for Somalis and Afghans, and that they need not consider any longer statutory declarations or other nontraditional forms of identity documents. Refugees whose documents had been rejected began to take their cases to the courts.

During 1997 and 1998, the Department responded to the growing problem by issuing a series of detailed directives to its officers, explaining their responsibility to consider every document presented to them.¹⁴ Despite these increasingly emphatic instructions, however, there appears to have been little change in the way Immigration officers dealt with Somali applications for landing. An internal “Evaluation Framework on Undocumented Convention Refugee in Canada Class” reports that, essentially, *all* regular landing applications submitted by Somalis and Afghans “in the last few years,” regardless of the documents provided, have been rejected on the basis of A46.04(8) [Audit and Consulting Canada 1998: 23].

Individual case advocacy by community workers in Ottawa has met with some success. Advocates report that when they accompanied applicants to the local Citizenship and Immigration Centre, bringing along a copy of the December 1997 Operations Memorandum and explaining to officers (who appeared to be ignorant of their responsibilities under the directive) how the documents provided by the applicant fulfill the requirements, they have been able to get positive decisions. These results have reinforced the widespread opinion in the refugee

community that some training for Immigration officers is crucial.

Senior bureaucrats in the Department concur, and informal discussions are under way with respect to the development of a training program for Immigration officers on identity document issues and the application of the Operations Memorandum.

In January of this year, the Minister of Citizenship and Immigration proposed to reduce the waiting period for Undocumented Convention Refugee in Canada Class from the current five years after determination, to three [Citizenship and Immigration Canada 1998a: 44] (eliciting a sense of *déjà vu* in those who had been part of the 1994-5 discussions). This proposal reflects the recommendation of the Legislative Review Advisory Group in its 1998 report to the Minister, *Not Just Numbers*.¹⁵ There is no mention, however, of including refugees from other countries in the class, nor of addressing any of the impacts of legal limbo, such as allowing family sponsorship or providing travel documents.

Alternatives

Whatever diversity of opinion may exist among parties interested in this issue, one thing is generally agreed: The Undocumented Convention Refugee in Canada Class, at least in its current form, solves no one's problems. Maintaining an underclass of undocumented Convention refugees is not a sustainable approach.

Refugee policy is first and foremost human rights policy. Any policy solution to the problem of undocumented Convention refugees in legal limbo must be firmly rooted in justice and in compassion. Social justice does not mean that Canada's doors should be opened wide for all to enter. The government's concern for pub-

lic security is valid. Allowing serious criminals, terrorists and human rights abusers to enter and remain in Canada is neither just nor compassionate to members of Canadian society or the refugees who have suffered persecution and human rights abuses. Not surprisingly, refugees themselves are often the most vocal and proactive in their opposition to allowing their persecutors to enter or live in Canada.

The problem with the current policy approach to identity documents is that it paints all undocumented asylum-seekers with the same brush, making no distinction between those who reasonably might be considered fraudulent or security risks, and the patently innocent. Subjecting the very people who already have experienced horrific abuse and persecution in their country of origin to further discrimination and emotional pain is unfair and cruel. It is particularly unfair when, by doing so, Canada implicitly is accusing them of the crimes perpetrated by their very persecutors.

Convention refugees are, for all intents and purposes, future Canadians. They have been granted Canada's protection, and in the normal course of events are expected to become permanent residents and then full citizens. The social and economic costs of blocking thousands of these refugees from integrating fully into Canadian society and maintaining an underclass of refugees in legal limbo are immeasurable. As noted, the current approach furthermore violates Canada's international obligations under the Geneva Convention and other human rights treaties.

The best solution to this dilemma is to end the inhumane treatment of undocumented refugees while maintaining reasonable security controls. The central objectives must be to reunite parents and children, and to facilitate integration as quickly as possible.

1. Rescind Section A46.04(8) of the Immigration Act

The most just solution is to rescind the identity document requirement for landing (and thus also the UCRCC). When the requirement was introduced in 1993, the Immigration and Refugee Board had not yet developed the expertise necessary for the determination of identity as part of the claims process. Today, however, that is no longer the case.

As explained elsewhere in this paper, the IRB now has developed detailed and rigorous procedures for hearing undocumented claims. These procedures should be accepted as sufficient by the Department for the granting of permanent resident status. This acceptance would be consistent with the expression of confidence in the Immigration and Refugee Board implicit in the recent White Paper on immigration and refugee policy reform tabled by the Minister.¹⁶ This legislative change could be included as part of the Minister's forthcoming overhaul of the Act.

The argument that the identity document requirement deters refugees who otherwise might destroy their documents has been effectively countered by the Department of Citizenship and Immigration itself: "This trend (of undocumented arrivals) continues, despite legislative provisions aimed at encouraging refugees and claimants to retain whatever documentation they may possess" [Citizenship and Immigration Canada 1998b: 3341].

Nor is national security a valid reason to automatically withhold permanent resident status from *all* undocumented Convention refugees. The Department, in cooperation with the Canadian Security Intelligence Service and the RCMP, conducts background checks on all landing applicants, documented or undocumented.

Where there is any suspicion of criminality or a security risk with regard to a particular refugee, these authorities have the power to delay landing specific persons until they have satisfied themselves that there is no threat. Furthermore, *should new evidence of war crimes come to light after landing, it is still possible to arrest and deport the person in question.* Moreover, as noted, no criminals or terrorists have been found among those Convention refugees who have completed the five-year waiting period and applied for landing under the Undocumented Convention Refugee in Canada Class.

Lack of documentation is not an indication that an applicant may be a perpetrator of war crimes; in fact, it is generally quite the opposite. In most cases, those who held positions of power in oppressive governments are in possession of all the documents they need. The government ought to take up the offer of the Somali community to work together in identifying war criminals.

Finally, as a blanket requirement applied to all Convention refugees, the policy results in the denial of landing to even the most completely, undeniably innocent: the children.

2. Reform the UCRC Class

While eliminating the identity document requirement is the preferred solution, it may be politically more practical to maintain the requirement and instead adjust the Undocumented Convention Refugee in Canada Class. The government's continuing compulsion to be *seen to be* deterring claimants from destroying documents and preventing criminals and terrorists from landing appear to outweigh the reality (i.e., that neither the identity document requirement nor the Undocumented Convention Refugee in Canada Class is effective) in its policy deliberations.

If this is indeed the case, then a way must be found to address the problem of undocumented Convention refugees within the parameters of current policy. This problem could be resolved by reforming the Undocumented Convention Refugee in Canada Class to make it more equitable and to bring it in line with Canada's obligations under the Geneva Convention and other relevant human rights treaties noted earlier.

“The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings.”
– United Nations Convention relating to the Status of Refugees, Article 34.

waiting period

The first step must be to reduce significantly the waiting period. The Minister already has proposed reducing the waiting period from the current five years to three years. This change would be acceptable only if the three years were *really three years*.

As noted above, the current ‘five-year’ waiting period is in effect closer to seven years, given that it is calculated from the date of Convention refugee determination by the Immigration and Refugee Board (a process that takes more than a year), and the landing process at the end of the waiting period can take up to another year or more.

The proposed three-year waiting period therefore should be calculated from the date refugees arrive in Canada. And the Department of

Citizenship and Immigration should begin processing cases for landing long before the end of the waiting period so that landing can occur immediately after the waiting period has ended.

Furthermore, to minimize the impact of the waiting period on innocent refugees (the vast majority), the portion of the waiting period that occurs after refugees have been granted Canada's protection by the Immigration and Refugee Board should count concurrently as part of the three-year waiting period for citizenship.

eligibility

The other substantive change that needs to be made to the Undocumented Convention Refugee in Canada Class is to expand eligibility to undocumented Convention refugees from countries other than Somalia and Afghanistan. While refugees from these two countries are the most consistently affected, they are not the only legitimately undocumented refugees who arrive in Canada. There are a variety of entirely legitimate reasons why refugees are unable to obtain documentation, as outlined earlier. These refugees should be granted the same opportunity to be landed.

The government should consult with stakeholders, including the Immigration and Refugee Board and the affected communities, to determine the best route: to remove the country of origin restriction entirely, or to hold regular consultations to determine which countries are producing undocumented refugees at any given time.

minimize impact

Should a waiting period be maintained, steps must be taken immediately to minimize the

negative impact on the lives of Convention refugees and their dependants here and overseas. The most important measure is to allow for family reunification either during the waiting period (by bringing dependants of Convention refugees to Canada and giving them some sort of temporary status, or immediately upon its completion by processing overseas dependants concurrently).¹⁷

As required by the Geneva Convention, the government should provide travel documents to Convention refugees during the waiting period, at least in such cases where there is a demonstrated humanitarian or employment-related need. Only where the Department can demonstrate reasonable cause for suspicion of criminality or a security threat should such documents be withheld.

Finally, the federal government should work with the provinces to ensure that Convention refugees and their dependants have full access to health care and postsecondary education, including government loans.

train Immigration officers

It serves no one to build and maintain an underclass of Convention refugees in legal limbo. Convention refugees are here and here to stay, and Canada should do whatever possible to help them integrate into Canadian society as quickly as possible. To this end, it is imperative that the existence of a legislated class of undocumented Convention refugees in limbo does not become (or continue to be) a catch-all for any refugee lacking straightforward documentation.

Past experience has made it clear that issuing written directives from headquarters in

Ottawa is not an effective way to bring about the needed change. If the identity document restriction is to remain and a waiting period continues to be imposed for landing, then the Department of Citizenship and Immigration must undertake to train all of its officers in how to deal with matters relating to proof of identity. Every effort should be made to ensure that only where there are compelling reasons would a refugee be required to endure a waiting period before obtaining landed status.

Conclusion

Over the coming months, Minister of Citizenship and Immigration Lucienne Robillard and her Department will rewrite the Immigration Act and a raft of regulations. They have before them a critical opportunity to address the urgent situation of Convention refugees in legal limbo. The policy options proposed here are practical solutions to a problem that has been ignored too long.

In addition to these solutions, the Department needs to improve the way it gathers, analyzes and shares information and statistics. Efficient statistical programs are fundamental to public accountability, and would not only help the Department to design effective and successful policies, but also would support intelligent and informed debate and discussion between the government, and nongovernmental organizations and other stakeholders. With the right information at the right time, the Department and stakeholders might have foreseen the problems arising from the identity document requirement and the UCRC Class. Perhaps we would have avoided inflicting further suffering on more than 13,000 undocumented Convention refugees now languishing in legal limbo.

Endnotes

1. Logically, refugees from countries that do not issue passports, such as Somalia and Afghanistan, use false passports at a higher rate than do refugees from other countries.

2. “Counsel and claimants appearing before the CRDD are reminded that where claimants lack proper documentation, discharging the burden of proof will require not only the provision of sufficient credible or trustworthy evidence on all the elements of the claim, but also the provision of a reasonable explanation for the lack of proper documentation. In the absence of a reasonable explanation, CRDD panels faced with a claimant lacking proper documentation may draw negative inferences as to credibility or otherwise conclude that part or all of a claim is not well founded.” (Practice Notice: Processing of undocumented and improperly documented refugee claimants, Nurjehan Mawani, March 11, 1997.)

3. Officially, landing is ‘deferred’ indefinitely, until the refugee can produce satisfactory identity documents.

4. This number was vigorously disputed by the Somali and Afghan communities as being too low, and does not include Convention refugees from countries of origin other than Somalia and Afghanistan. Generally, numbers of undocumented Convention refugees are extremely contentious with vast discrepancies between the government’s numbers and those provided by the affected communities. Repeated requests to Department of Citizenship and Immigration for statistics on undocumented refugees and landing have had few results. Department officials give a variety of explanations, including that its computer system does not capture information on the reasons for rejection of landing applications and is thus unable to provide accurate statistics on undocumented Convention refugees, and that it can capture the statistics but does not consider the information reliable and thus will not release it. No explanation, however, has been provided for how the Department arrived at the 7,500 figure in 1996, which it cited repeatedly. While the Department thus has not published statistics with respect to undocumented Convention refugees from countries of origin other than Somalia and Afghanistan who have been denied landing, in November the government reported to the United Nations Committee on Economic, Social and Cultural Rights that there are currently 13,000 Convention refugees living in legal limbo in Canada [Tie 1998]. This number was confirmed by Gilbert Troutet, Acting Director of the Asylum

Division, Refugee Branch of Citizenship and Immigration, on February 12, 1999.

5. Many of the rights accorded to refugees under the Convention stipulate that the refugee must be lawfully staying in the country where protection is claimed. Canada interprets that phrase narrowly, applying it only to refugees admitted for permanent residence.

6. The Canada Student Financial Assistance Act restricts eligibility to “a person who is a Canadian citizen or a permanent resident within the of the Immigration Act” [Canada Student Financial Assistance Act, 1994-C28].

7. Undocumented refugees are subject to a conditional removal order, and thus have no guarantee that they will be readmitted to Canada were they to leave.

8. Then Section A46.04(3) of the Immigration Act.

9. Section A46.04(8) of the amended Immigration Act reads: “An immigration officer shall not grant landing either to an applicant under subsection (1) or to any dependant of the applicant until the applicant is in possession of a valid and subsisting passport or travel document or a satisfactory identity document.”

10. The Somali plaintiffs’ claim is that Section 46.04(8) of the Immigration Act has the effect of discriminating against them on the basis of national origin, contrary to Section 15 of the Charter, thus denying them equal benefit of the law. They claim that rather than end the discrimination, the Undocumented Convention Refugee in Canada Class continues it through its imposition of a five-year waiting period [Aden 1997].

11. The change didn’t last, however; within a few months, the newly-elected Liberal government removed the Immigration portfolio from the Solicitor General’s office and established the Department of Citizenship and Immigration Canada.

12. At the request of the government, a Somali Working Group of representatives of the community and the Department was established in 1993 to work through issues related to the processing and settlement of Somali refugees.

13. Perhaps because of the failure of A46.04(8) to slow the trend of undocumented arrivals, the Department of Citizenship and Immigration recently has focussed increas-

ing resources on overseas interdiction measures to catch undocumented asylum-seekers before they depart for Canada. By keeping undocumented asylum-seekers from arriving in Canada and exercising their universal human right to claim protection, the Department avoids having to address the rights of the undocumented altogether. However, as refugee advocates in Canada and elsewhere vehemently argue, in doing so Canada is preventing countless refugees in real danger from gaining protection from persecution.

14. Operations Memoranda IS 93-19; IP 95-19; IP 97-09; IP 97-29; IS 97-01.

15. "The Immigration and Citizenship Act and the Protection Act should provide that persons determined to need protection but who cannot show satisfactory identity documents should be granted temporary protected status, and they could apply for landing after three years" [Immigration Legislative Review Advisory Group 1998: 96, rec 109].

16. The White Paper proposes "to centralize the consideration of grounds for protection in the Immigration and Refugee Board." The IRB not only would assess the need for protection under the Geneva Convention, the Convention Against Torture and other relevant international instruments, but also undertake post-determination risk review and risk-related humanitarian review, currently the responsibilities of the Department [Citizenship and Immigration Canada 1998a: 43].

17. The Canadian Council for Refugees has proposed that families of Convention refugees be granted 'derivative status' on the basis of which they would receive permission to proceed to Canada immediately. This proposal reflects US practice [Canadian Council for Refugees 1995: 35].

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