Gender Persecution and Refugee Law Reform in Canada

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For Battered Women's Support Services

Written by Lobat Sadrehashemi, refugee and immigration lawyer, September 2012.
A previous version of this paper was prepared in response to Bill C-11, the Balanced Refugee Reform Act in April of 2011; due to the introduction and passing of Bill C-31, the Protecting Canada's Immigration System Act, which further fundamentally alters our refugee system, an update of that paper was required.

Gender Persecution and Refugee Law Reform in Canada[1]

Gender is not one of the grounds of asylum listed in the 1951 Convention relating to the Status of Refugees, upon which Canadian refugee law is based. Despite this, gender-related persecution has been found by our courts and the international legal community as being a basis on which to seek asylum. Typically, gender-related claims for protection have related to family or domestic violence, acts of sexual violence, forced marriage, punishment for transgression of social mores, coerced family planning, or female genital mutilation.[2] Canada was the first country to develop guidelines to recognize the special issues that arise for women claimants in the refugee process.[3]

I practice refugee and immigration law in Vancouver where the majority of my cases have involved women who have experienced some form of violence. As a refugee lawyer my job is to make arguments about how a particular claim fits within the refugee definition based on the facts of my client`s case and the law. The most challenging part of that work is ensuring that my client is able to fully present the facts of their claim to the decision-maker. For women who have experienced violence this can be extremely difficult; often these are facts that they have not disclosed to anyone and now are expected to disclose to a stranger. My work with these women has taught me that a significant struggle in these cases is being able to create the right conditions for highly traumatized claimants to be able to present their story to a decision-maker.

Over the past few years there have been a series of proposals to fundamentally alter Canada's refugee system. In June of 2010 The *Balanced Refugee Reform Act* (formerly Bill C-11) received Royal Assent.[4] That legislation provided until June 2012 for the Immigration and Refugee Board ("the Board") to implement the new law. Prior to the required implementation date, the now majority Conservative government introduced, in February of 2012, Bill C-31 which amended the *Immigration and Refugee Protection Act* ("*IRPA*"), the current law governing immigration and refugee mat-

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2 UNCHR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 2002

3 Chairperson Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution

4 *An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act*

ters, and the *Balanced Refugee Reform Act* which had been passed a year and a half earlier. The *Protecting Canada's Immigration System Act*, ("C-31") received Royal Assent in June of 2012. C-31 and associated regulations fundamentally alter the way in which refugee claims will be determined in Canada. Some of the law is already in force and much of it has yet to be implemented. The Board has advised that they expect that the changes to the way in which refugee claims are processed will be implemented by January of 2013.[5] The sweeping changes set out in C-31 were passed four months after they were first proposed. There was little time for the general public, civil servants, researchers, and the legal community to digest the fundamental shift in how refugee claims would now be processed in Canada. There are still many questions about how the new system will play out once it has been implemented.

This article will explore some of the possible consequences of these reforms on women whose fear of persecution relates to their gender. Many of the comments about the possible consequences for these women would also apply to other refugee claimants who are severely traumatized and vulnerable. Instead of making it easier for the most vulnerable claimants to present their stories, in my view, the amendments to *IRPA* under C-31 and the proposed regulations make it much more likely that the full facts of these types of cases are not presented to refugee decision-makers.[6] Moreover, if their claims fail at the Board, the changes in C-31 make it less likely that they will be able to remain in Canada on humanitarian grounds.

Key Changes in C-31

Under C-31, claimants will be subjected to unfair timelines, limited access to counsel, and an inability to re-open their refugee claims. Some claimants will face faster removals without access to humanitarian review or a new risk assessment. Others will face the possibility of prolonged detention without review while they are making their refugee claims. Some categories of claimants will not be able to appeal their negative decision to the newly created Refugee Appeal Division. Other claimants will not be able to obtain permanent resident status for a period of five years after they have been successful on their refugee claim.

A multitude of significant changes were introduced in C-31 without public consultation and a chance to study the consequences of the proposals. A number of commentators called for the withdrawal of C-31 prior to it becoming law for the very reason that many of the changes are either considered unconstitutional or grossly undermine the ability of a claimant to have a fair hearing.[7] It is expected that a number of the changes will be challenged through litigation early on after their implementation. Women refugee claimants will necessarily be impacted by these changes.[8] In this paper, I would like to highlight only three of the key changes that, in my view, clearly work against ensuring that women who are making gender persecution claims will have a fair hearing before the Board and access to a humanitarian review as a last resort prior to removal from Canada.

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5 Ross Pattee, Deputy Chair of the Immigration and Refugee Board, IRB Rules Information Session - Vancouver, August 20, 2012.

6 The changes discussed in this paper are based upon the provisions in the *Protecting Canada's Immigration System Act*, ("C-31"), the *Balanced Refugee Reform Act,* and its accompanying regulations. A series of accompanying regulations have been published in the Canada Gazette. The proposed rules for the Refugee Protection Division of the Immigration and Refugee Board have also been published in the Canada Gazette and can be found at: http://www.gazette.gc.ca/rp-pr/p1/2012/2012-08-11/html/reg1-eng.html#rias

7 Canadian Council for Refugees, the Canadian Bar Association, the Canadian Association of Refugee Lawyers, and Amnesty International all asked that Bill C-31 be withdrawn.

8 For a more fulsome review of some of the consequences for women refugee claimants, see the submissions of METRAC, Legal Education Action Fund (LEAF), and the Barbara Schlifer Commemorative Clinic at http://www.metrac.org/about/press.room/downloads/submission.parliamentary.committee.bill.c31.24apr12.pdf

- **COMPRESSED TIMELINES**: The timelines for all steps throughout the refugee determination process - from presenting the initial claim in written form, through to the scheduling of oral hearings before the Board, and the filing of an appeal record at the newly created Refugee Appeal Division have been drastically shortened.

- **DIFFERENT RIGHTS FOR CLAIMANTS FROM DIFFERENT COUNTRIES OF ORIGIN**: For the first time claimants from particular countries that have been designated by the Minister of Citizenship and Immigration Canada as a so-called "safe" country will have different procedural and substantive rights than other refugee claimants. Those claimants who are from a country designated by the Minister will be subjected to quicker timelines for their refugee hearings, will have no ability to appeal their decision at the Refugee Appeal Division, no automatic stay of their removal while they are judicially reviewing their decision at Federal Court, and no access to a work permit for 180 days after their claim is referred to the Board.

- **RESTRICTIONS ON WHEN HUMANITARIAN AND COMPASSIONATE APPLICATIONS CAN BE FILED:** Refugee claimants can no longer have a pending humanitarian and compassionate application while their refugee claim is being processed. Refugee claimants are further restricted from filing a humanitarian and compassionate application for one year after a final determination at the Immigration and Refugee Board.

Compressed Timelines

There are three places in the refugee determination process where a refugee claimant will be expected to act within a very short timeframe:

- A Basis of Claim document ("BOC"), where the claimant is expected to provide the details of their claim, including: why they fled their home country, the details of persecution they faced, and the efforts they have made to seek protection in their home country, must be submitted in English or French either 15 days after making a claim if the claim was made upon arrival to Canada at a Port of Entry or at the time the claim is made, if the claim was initiated at an inland office.

- Refugee hearings will be scheduled by Citizenship and Immigration Canada or the Canada Border Services Agency at the time that the claimant files the BOC form; the hearing will be scheduled without an opportunity to consult counsel on the proposed date. The hearing date will either be within 30 days after filing the BOC form or 60 days after filing the BOC.[9] This means that for claimants who made a claim upon arrival to Canada, their claim will be heard either 45 days or 75 days after their arrival to Canada.

- If the claim is denied, the claimant, if they have access to the Refugee Appeal Division, will then have 15 days to submit a complete appeal record, including the transcript of the initial hearing, any new evidence upon which they want to rely, and arguments as to why the first decision was in error.

After a refugee claim has been determined eligible, the first stage of the *current* refugee determination process involves the filing of a Personal Information Form ("PIF"). The PIF is a document that includes background questions about the claimant`s family, education, work, and travel. The

9 C-31 gives the Minister the power to designate certain countries as "designated countries of origin" so-called "safe countries;" as will be discussed below. Claimants from countries that have been so designated will have their claims heard 30 days after the BOC is filed instead of 60 days. At the time of writing, no country has been designated by the Minister.

central part of the PIF is the space for a claimant to provide their story – why they are seeking protection, what efforts they have made to obtain assistance from their government, and why they are unable to be able to go anywhere else in their country. In British Columbia, legal aid funds lawyers to represent claimants with their PIFs in most cases. Currently the PIF is a very important document and forms the basis for the refugee claim. Claimants have 28 days to file the PIF after their claims are referred to the Board. The Member of the Board who hears the claim treats the narrative in the PIF as sworn testimony. Claimants often are not expected to go through the details that they have provided in their narrative at the hearing.

For women who have experienced violence, like family or domestic violence, their narratives may be about decades of abuse. It is a very difficult process to set out these incidents of violence. Many cannot remember the sequence of events or may have blocked certain events out of their mind; others need trauma counselling or other forms psychological support while they are going through the process of setting out their history of abuse. Others do not feel comfortable disclosing incidents of sexual violence. A well-developed narrative is important in these cases as the narrative becomes one form of evidence that the abuse has happened to them. In my experience it also means a lot fewer questions about the abuse at the hearing, if the details are already set out in the narrative.

The changes in C-31 eliminate the PIF and introduce a new form called the BOC. The draft BOC that has been circulated looks fairly similar to the PIF; although instead of a blank area to set out the basis of the claim, a series of questions are posed regarding the claim. In any case the BOC form is where the basis of the claimant's case is set out for the Member prior to the oral hearing. Cases will be screened and understood by the Board on the basis of this document. This document will have to be filed either at the time of making the claim, if it is filed at an inland office, or 15 days after the claimant first arrives at a port of entry to Canada. The document must be filed in English or French.

For most women who have experienced violence, it will be impossible to set out in a coherent way the incidents of violence they have experienced so quickly after they have made a claim or arrived in Canada. In many cases that I have worked on I only learn about some of the most horrific acts of violence in my third or fourth time speaking to the claimant. In other cases it takes a number of meetings to piece together the various incidents that have happened – to assist the woman, if she is able, to describe the events in some type of sequence. It is unimaginable to me that most women in this situation will be able, on their own, to provide an accurate picture of the reasons that they have fled immediately upon making their claim or 15 days after they have first arrived in Canada.

Imagine a claimant who was deeply afraid upon arrival in Canada, does not feel comfortable setting out what happened to her on the initial form she has been given, got mixed up about the events that happened to her, did not fully explain the incidents of violence that had occurred, and misunderstood many of the questions posed to her. She then appears at her hearing where the Member has before him or her a copy of the BOC form that sets out a confusing history. Instead of the hearing being focused on a few narrow issues, the hearing becomes a frustrating process of trying to figure out why the claimant said this or that on the form or trying to develop some sort of timeline of the events that the claimant mentioned and the new incidents she is now mentioning at the hearing. It takes time to develop a person`s narrative; the hearing should not be the place where the Member is trying to sort this out. Instead the hearing should be focused on whether based on the facts of the claimant`s case she fits within the refugee definition.

Once the BOC document has been filed, a date will be automatically set for the hearing. There will be no consultation with counsel to determine if they are available for the particular date that has already been set. For some claimants the date will be set 30 days after the BOC has been filed and in other cases it will be set 60 days after the BOC is filed.

There are a number of concerns with the faster scheduling of hearings. A month or two months is not very much time to gather documents in support of your claim. In the case of women who have experienced violence they may have to obtain police records, medical records, and proof of their relationship with their abuser. These documents often also have to translated. In these types of cases I also often rely upon medical reports from Canada. In most cases I request a medical assessment documenting any physical scaring on the claimant that has arisen from the violence she has endured. I also request a psychological assessment that explores the impact of the abuse on the claimant and their ability to testify as well as their ability to relocate in the country of origin. It will be difficult to obtain these medical reports within such a short timeframe.

It will also be challenging for claimants to secure counsel within such a short timeframe. There will need to be structural changes at legal aid in order to respond with a faster turn-around time to requests for counsel for hearings. Counsel will also no longer be consulted about the scheduled hearing date; even if the claimant manages to secure legal aid funding there may be no counsel available to represent them on the particular day that their hearing has been pre-scheduled. Claimants without financial means who are unsuccessful at obtaining legal aid will not have had much, if any, time in Canada working in order to pay the costs of counsel or even the costs for the translation of their documents into English.

The quick timelines will also mean that claimants who have suffered trauma may not be prepared psychologically to testify at a hearing. The hearing will be taking place for many claimants just over a month or two after they first arrived in Canada. Claimants may not yet be prepared to present their story to a decision-maker.

The legislation provides that the rules of the tribunal will set out the circumstances where requests for postponements can be made. We will have to see how the Board responds to these requests. Under our current system the Board has been very rigid in granting postponements. The proposed rules that have been published in the Canada Gazette suggest that the Board will be taking a restrictive approach to requests for postponements and other procedural accommodations. For example, the Rules require that a claimant provide an amendment to the BOC form 10 days prior to the hearing; the Rules also require that an extension of time to file the BOC form must be provided 3 days prior to its due date. Given the extremely short timelines already imposed on claimants, it is unreasonable to further impose restrictions on them to request accommodations.

The new legislation provides for the implementation of a Refugee Appeal Division ("RAD") . Refugee claimants and the Minister will both be able to appeal decisions made by the Refugee Protection Division at the IRB to the RAD. In general the RAD will be a paper process where the decision-makers can be provided with new evidence that was not reasonably available to the claimant at their hearing at the Refugee Protection Division. Given that the new timelines for the hearing are quite restrictive, I imagine that there will be claimants who are only able to obtain particular documents in support of their claim after their hearing and will wish to present these documents to the RAD. The Member at the RAD can confirm the decision made at the Refugee Protection Division, set aside the decision and substitute their own decision, or refer the case back to the Refugee Protection Division.

Many practitioners and advocates have been advocating for many years for an appeal process within the Immigration and Refugee Board. C-31 restricts access to the RAD to only certain types of decisions and certain classes of claimants. For example, claimants from countries that have been designated by the Minister as "safe" will not be able to appeal negative decision to the RAD body; claimants who the Minister has determined arrived "irregularly[10]" will also not have access to an appeal.

10 C-31 allows the Minister to broad ability to designate certain individuals as "designated foreign national" simply if it is determined that they arrived in a group of two or more by irregular means. It is a very broad provision with retroactive application to March 2009; it is uncertain at this time how this provision will be applied.

Timelines are a major concern with the implementation of the RAD. The proposed regulations state that appeals will have to filed and perfected (completed) 15 days following a decision of the Refugee Protection Division. This is an incredibly restrictive and nonsensical timeline to impose. It means that within the space of 15 days, a claimant would have to do the following: decide that they would like to file an appeal of the decision, submit any new evidence that was not reasonably available at the time of their hearing, provide written arguments outlining how the tribunal erred in their decision, and arrange for counsel to assist with the process. The 15 day timeline makes a claimant's appeal right meaningless.

In order to have a meaningful appeal process, claimants must be able to present new evidence that was not before the decision-maker at their hearing; claimants must be given adequate time to obtain counsel, and prepare documents and arguments as to why their appeal should be allowed. Otherwise the implementation of an appeal process will be a complete waste of energy.

Different Rights for Different Countries of Origin

The new legislation allows for different substantive and procedural rights for claimants based on country of origin. This is the first time that our refugee law has distinguished formally between claimants from different source countries in setting out which rules apply to them and what types of mechanisms they will be able to access within the refugee determination process. The Minister of Citizenship and Immigration can create a list of "Designated Countries of Origin." Taking into account certain criteria (such as the Board's rate of acceptance of claims, the rate of the withdrawal or abandonment by claimants from a particular country, or whether certain democratic institutions exist in the opinion of the Minister, the decision to put a country on this list is solely left to the Minister. The consequences for claimants from these countries is grave as they will have substantially reduced procedural and substantive rights throughout the refugee determination process than other claimants. Claimants from so-called "safe" countries will face different timelines than other claimants – their hearing dates will be held 30 days after they have filed their BOC form; this may be only 45 days after they have first arrived in Canada. As discussed above, these claimants will not have access to the appeal process at the Board. They will also not be given a statutory stay of removal pending a review at Federal Court. This means that these claimants can be removed from Canada without the opportunity to appeal their refugee decision within the Board process or have it reviewed at Federal Court. These claimants will also not be able to apply for work permit for 180 days after their claim has been referred to the Board; the practical effect of this restriction, given the 30 day timeline for hearings to be held, will mean that these claimants will not be allowed to apply to work while their refugee claim is being processed. In short, there are a multitude of consequences for these claimants that will make it much more difficult for them to be able to present their refugee claim to the Board.

The provisions relating to designating certain countries as "safe" will certainly have a detrimental impact on groups like women who have experienced gender related persecution. A particular country may produce a very low acceptance rate at the Board and may in general have democratic, functioning institutions, but still not provide adequate protection to women fleeing domestic violence. In my practice, I have successfully represented women fleeing domestic violence in Mexico, Chile, and South Korea. All of these countries are generally thought to have a system of functioning democratic institutions with low levels of acceptance rates for refugee claims at the IRB. However, in all of these countries there is evidence that women who have experienced domestic violence are not being adequately assisted by the police; their experience of state protection is fundamentally different than another person seeking protection. In the case of South Korea and Chile there is not a great deal of documentary evidence documenting this failure to protect women on the part of state institutions; these claims were primarily grounded in the experiences of the claimants and their family members with the police. Under the new system, these women may have all been put

in the faster processing stream, where as outlined above, it would be much more difficult for them to present their stories to the decision-maker. They will also be likely to be subjected to removal without an opportunity to appeal or even review the decision of the Board.

Access to a Humanitarian Review

Humanitarian and compassionate applications are generally written applications made to Citizenship and Immigration Canada where an officer has to decide whether a person would face unusual, undeserved, or disproportionate hardship if required to apply for a permanent resident visa from outside of Canada. The decision is a highly discretionary one in which an officer is free to consider a number of factors. The task of the immigration officer determining a humanitarian and compassionate application is quite distinct from that of the Member of the Immigration and Refugee Board whose scope of analysis is limited to the narrow issue of whether the claimant fits within sections96 and 97 of the Act(i.e. whether they would face a well-founded fear of persecution based on a set of enumerated grounds or whether there is risk to their life or the risk that they will face torture, cruel and unusual treatment upon return).

The Member at the Board has to remain focused on very limited issues. The Member cannot consider the humanitarian factors in the case. In contrast, the immigration officer determining a humanitarian and compassionate application has a much broader discretion and mandate to consider a number of factors. The officer does not need to remain focused on the limited question of whether the risk the applicants would face would amount to persecution. For example, an officer could consider whether the claimant would face discrimination upon returning to their home country; the officer could consider whether the claimant has established herself in Canada – in a refugee hearing, these issues are not relevant.

C-31 restricts when a humanitarian and compassionate application can be filed. First, it no longer allows for claimants to have both a refugee claim and a humanitarian and compassionate application pending at the same time. For women who are making gender persecution claims, many of which may be difficult to set out to the Board or may not amount to persecution based on the narrow definition used, this presents them with a very difficult decision that must be made early on in the process. This is made even worse by the bar on filing a humanitarian and compassionate applications for one year after a final determination of the Board.[11] This could mean that many women would be removed prior to anyone considering the humanitarian factors in their case. This is particularly problematic for women who are making gender persecution claims. While some of these women may not be able to fit within the narrow refugee definition, their difficult life history and time in Canada may make them likely to be approved on humanitarian grounds.

11 There are two exceptions to the one year bar provided for in the legislation - if the case involves a consideration of the best interests of the child(ren) or if access to medical treatment is an issue. At this time it is difficult to know how these exceptions will be applied.

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Conclusion

It is heartbreaking when I read a transcript of a refugee hearing where it is painfully obvious that the crux – the heart of why a claimant is afraid – is completely missed, where the particular facts of their case are muddled and confused. When a decision-maker cannot get why a person is afraid, or fails to understand the context in which the claimant was living, no justice can be done. So much of the hard work of being a refugee lawyer or advocate is ensuring that a claimant's story is understood.

Our refugee system is going to fundamentally change over the next year. I am afraid that the changes I have described will make it more difficult for women fleeing gender-related persecution to be able to make their stories understood by decision-makers at the Board. Given that procedural adjustments will be even more necessary under the new system, it will be important to continue to use the Vulnerable Person Guideline,[12] requesting in these types of cases that the claimant be recognized as a vulnerable person requiring procedural accommodations. These accommodations can include: female interpreters, and Members, postponements of the interview and the hearing, permission to file documents like medical documentation post hearing, extension of time to file the appeal at the RAD, and reversing the order of questioning at the hearings themselves. The challenge is that there will be many women who do not have access to counsel making these types of requests on their behalf. There will be women whose claims are not properly presented at the Board and then have no access to an appeal or any review prior to removal. There will be women whose claims are rejected at the Board and who are deported prior to any official being able to consider the humanitarian factors in their case. There can be no doubt that the changes in C-31 do not make the refugee system fairer for the most vulnerable claimants – in my view, the system will only become more difficult to navigate with far fewer recourses to an overall safety net to catch the many who inevitably will fall through the cracks.

12 Chairperson Guideline 8 - Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada