

The Unconstitutionality of Bill C-4, The Preventing Human Smugglers from Abusing  
Canada's Immigration System Act

Canadian Association of Refugee Lawyers

October 2011

## A. Executive Summary

### Introduction

In presenting Bill C-4 to Parliament, the Government has expressed confidence in its constitutionality by certifying that it is *Charter*-compliant. This brief explains why this confidence is misplaced.

### Bill C-4

Bill C-4, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*, authorizes the Minister of Public Safety to impose sanctions on “designated foreign nationals” who arrive in Canada as part of a group.

Despite the title of the Bill, the people so designated may suffer these sanctions even if they have had no contact with a human smuggler. This could occur because the Bill authorizes the Minister to designate a group arrival as irregular either where he is of the opinion that the examination of members of the group cannot be conducted “in a timely manner” or if he has reasonable grounds to suspect that the arrival contravened the human smuggling provision in the *Immigration and Refugee Protection Act (IRPA)*.

In other words, undefined bureaucratic convenience rather than any connection to smuggling may justify Ministerial action. The Minister is not required to justify his opinion nor the grounds for suspicion. Nor is any process established that would allow for input or objection prior to the designation being made. In addition, the Minister may exercise his designation power at any time between arrival and the granting of permanent residence status. Even successful refugee claimants may be designated, long after arrival and despite statutory provisions that exempt refugees from prosecution for entry without the requisite documents.

Bill C-4 is also retroactive. It is specifically aimed at identifiable individuals who arrived in Canada before the Bill was even drafted.

The consequences of designation are severe, and include the following:

- Lengthy, mandatory, warrantless, unreviewable detention. No exception is made for children, despite a provision in IRPA prohibiting detention of children except as a measure of last resort.
- Designated foreign nationals - even those granted refugee status - will be denied the opportunity to regularize their status for at least five years. As a result, they will be condemned to an unforgiving limbo, unable to reunify with members of their family, or to obtain travel documents that would otherwise be allowed.

## The Unconstitutionality of Bill C-4

These sanctions violate the *Canadian Charter of Rights and Freedoms*. Although the Minister of Citizenship and Immigration has tarred all opponents of Bill C-4 as “extremists”, the arguments in this brief rely on authoritative opinions of the Supreme Court of Canada in recent, leading cases. These judgments support the contention that Bill C-4 infringes four sections of the *Charter* - sections 7, 9, 10 and 12.

Section 7 of the *Charter* provides that everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The warrantless detention envisaged by Bill C-4 clearly violates the right to liberty. Considering the context of vulnerable and potentially traumatized refugees (including children), the denial of access to family also violates the right to security of the person.

The Chief Justice of the Supreme Court of Canada has made it clear that in the immigration context, this section of the *Charter* requires that detention must be accompanied with both a meaningful process of ongoing review and opportunities to challenge the continued detention. Bill C-4 ignores these judicial warnings by providing neither. In addition, the detention provisions are inconsistent with the principles of fundamental justice insofar as they are both unduly vague and overbroad. The legal doctrine of overbreadth requires that a law be tailored carefully to its purposes. The haphazard swathe of Bill C-4 fails to meet this test.

In addition, the Supreme Court has made it clear that serious, state-imposed psychological stress, especially within the parent-child relationship, will violate the right to security of the person. The stresses inherent in family separation and the anxiety experienced by refugees are compounded by a vague, ongoing and unfettered requirement that designated individuals regularly report to the authorities and submit to questioning by an immigration officer.

The designation and detention in Bill C-4 also violates the *Charter* right not to be arbitrarily detained (Section 9), and the right to prompt review of detention through *habeas corpus* (Section 10(c)). These rights apply equally to foreign nationals and Canadians. While the Supreme Court has offered two different analyses of the concept of arbitrariness, Bill C-4 fails on either interpretation.

Section 12 of the *Charter* guarantees the right not to be subjected to any cruel and unusual treatment or punishment. The Supreme Court has offered a lucid gloss on this section by relying on a standard of “gross disproportionality”

Ultimately, the central thrust of this brief is that Bill C-4 is akin to a Bill of Attainder, a device used by despotic governments to penalize individuals without offering proper recourse to an independent judicial process and for purposes unrelated to or grossly disproportionate to any valid political aim.

## **B. Background**

Bill C-4 , The *Preventing Human Smugglers from Abusing Canada's Immigration System Act* was introduced in the House of Commons on June 16 2011. If passed, it would amend the *Immigration and Refugee Protection Act (IRPA)* in significant ways. The legislative summary attached to the Bill identifies fifteen distinct changes that the Bill would introduce.

According to the title of the Bill, the objective of the legislation is to curtail what the Government represents as abuse of the immigration system. This consists of smuggling non-citizens to Canada, in contravention of visa requirements under IRPA. The existing definition of smuggling under s. 117 of IRPA is expanded to include a fault element of recklessness:

**117.** (1) No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.

Bill C-4 also imposes minimum penalties for smuggling. The IRPA already provides for maximum penalties of \$1 million dollars and life imprisonment for smuggling groups of more than ten people. <sup>1</sup>

---

<sup>1</sup> The amended section would read as follows:

117(2) A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable

(a) on conviction on indictment

(i) for a first offence, to a fine of not more than \$500,000 or to a term of imprisonment of not more than 10 years, or to both, or

(ii) for a subsequent offence, to a fine of not more than \$1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and

(b) on summary conviction, to a fine of not more than \$100,000 or to a term of imprisonment of not more than two years, or to both.

(3) A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.

(3.1) A person who is convicted on indictment of an offence under subsection (2) or (3) with respect to fewer than 50 persons is also liable to a minimum punishment of imprisonment for a term of

(a) three years, if either

(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm to, any of the persons with respect to whom the offence was committed, or

(ii) the commission of the offence was for profit, or was for the benefit of at the direction of or in association with a criminal organization or terrorist group; or

(b) five years, if both

(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, and

(ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in

The Bill seeks to do more than deter and punish smugglers. It also targets the people transported by smugglers. Smuggled persons may include foreign nationals who meet the definition of a refugee (persons with a well-founded fear of persecution on grounds of race, religion, nationality, membership in a particular social group or political opinion), as well as migrants who do not fall within the definition. Until a refugee claim is made and adjudicated, one cannot infer that a person who is smuggled is or is not a refugee.

Bill C-4 creates a separate regime for foreign nationals designated by the Minister of Public Safety as part of a group defined by their 'irregular arrival'. The main elements of the regime are as follows:

### **1. Designation**

The Minister may designate a group (undefined) of foreign nationals as an "irregular arrival" either

- a. if the Minister is of the opinion that the examination or investigation of persons in the group cannot be conducted "in a timely manner" or
- b. if the Minister has reasonable grounds to suspect that the arrival was or will be "a contravention of the smuggling provision of subsection 117(1) for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group"

Note that designation is not limited to the context of alleged smuggling, but rather may hinge on the absence of sufficient bureaucratic resources to process arrivals. Bill C-4 makes designation and its consequences retroactive to March 2009 (in order to capture the passengers aboard the Sun Sea and the Ocean Lady). A foreign national may also be designated at any time after arrival and prior to acquisition of permanent resident status. This means that a person who has been recognized as a protected person but not yet granted permanent resident status may be designated, and designation will suspend any existing application for permanent residence.

No process is specified for designation, and it appears that neither notice nor opportunity to be heard is to be provided to affected foreign nationals prior to designation. This means that the Minister need not justify either his opinion regarding the impossibility of

---

association with a criminal organization or terrorist group.

(3.2) A person who is convicted of an offence under subsection (3) with respect to a group of 50 persons or more is also liable to a minimum punishment of imprisonment for a term of

(a) five years, if either

(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, or

(ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group; or

(b) 10 years, if both

(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, and

(ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

timely processing for one or more members of the group, or his suspicion of the contravention of s. 117, prior to exercising his discretion and triggering the consequences of that designation.

A foreign national who is a member of a designated group is automatically accorded “designated foreign national” status unless they carry the documents required by immigration law and unless they satisfy an officer that they are not inadmissible. This means that the consequences of designation apply to refugee claimants, even though s. 133 of IRPA exempts refugees from prosecution for offences related to entry without the requisite documents.<sup>2</sup>

## **2. The Consequences of Designation**

The consequences of designation will be severe.

### **a. Detention**

Designated foreign nationals will be subject to automatic, warrantless detention for one year<sup>3</sup>. A designated foreign national may (but not must) be released before one year if found to be a protected person, or upon the exercise of Ministerial discretion in exceptional circumstances, for which no criteria are specified<sup>4</sup>.

The detention provision creates no exception for children, and so appears to conflict with s. 60 of IRPA, which states that “a minor child should be detained only as a measure of last resort, taking into account the ... best interests of the child”.

---

<sup>2</sup> This section essentially incorporates Article 34 of the Refugee Convention, which obliges states not to penalize refugees for using irregular means of entry in order to escape persecution.

<sup>3</sup> The Minister may proceed by way of warrant, but is not obliged to do so.

<sup>4</sup> The exact wording of the relevant provisions is as follows:

10(2) Section 55 of the Act is amended by adding the following after subsection (3):

(3.1) If a designation is made under subsection 20.1(1), an officer must

(a) detain, on their entry into Canada a foreign national who, as a result of the designation, is a designated foreign national

...

11. Section 56 of the Act is ... amended by adding the following

(2) Despite section (1), a designated foreign national who is detained under this Division must be detained until

(a) a final determination is made to allow their claim for refugee protection or application for protection;

(b) they are released as a result of the Immigration Division ordering their release under s. 58; or

(c) they are released as a result of the Minister ordering their release under section 58.1

12 The Act is amended by adding the following after section 57:

57.1(1) Despite subsections 57(1) and (2), in the case of a designated foreign national who is in detention, the Immigration Division must review the reasons for their continued detention on the expiry of 12 months after the day on which that person is taken into detention and may not do so before the expiry of that period.

Even though designation may be predicated on the inability to examine the group of foreign nationals in “a timely manner”, the entire group of designated foreign nationals must be detained for one year, whether one, some or all examinations were or could have reasonably been completed earlier. The Immigration Division has no jurisdiction during this year to inquire into whether the objective grounds for detention actually existed, continue to exist, or whether the Minister has made reasonable efforts to complete examinations or investigations. Bill C-4 also adds a new ground for keeping designated foreign nationals in detention that does not apply to other foreign nationals – namely, that the Minister is of the opinion that the person’s identity has not been established. The Minister is not required to show, as he or she is for other detainees, that reasonable efforts to determine identity have been made, nor may Immigration Division release a detainee who has cooperated in efforts to confirm identity. Since the Minister’s opinion and not the Immigration Division’s determination is conclusive, the effect is to permit the Minister to prolong detention indefinitely, regardless of the Immigration Division’s determination regarding the person’s identity.

It is revealing to compare the one year, unreviewable detention (followed by semi-annual review) of designated foreign nationals with the other detention provisions under IRPA. The Immigration Division reviews the detention of other foreign nationals within 48 hours of detention, one week after the first review, and once every thirty days thereafter. The Immigration Division reviews the detention of persons held under security certificates within 48 hours, and every six months thereafter.

b. Denial of Access to Permanent Resident Status, Denial of Humanitarian or Compassionate Consideration and Denial of Temporary Resident Permit

A designated foreign national, even if determined to be a refugee or a protected person, is barred from applying for either permanent resident status, humanitarian or compassionate consideration, or a temporary resident permit for a period of five years. Three consequences flow from this for ‘designated’ refugees and other protected person: First, protected persons will be denied access to many entitlements that depend on holding a regularized status. Second, ‘designated’ refugees and protected persons will be unable to apply to have family members join them in Canada. Third, ‘designated’ refugees will be denied the travel document that refugees otherwise may obtain.

During the five year period, the designated foreign national will be subject to unspecified but mandatory reporting conditions (to be prescribed in regulation). Designated foreign nationals who are refugees are specifically required to report to an officer and “answer truthfully all questions put to him or her and must provide any information and documents that the officer requests”. Bill C-4 does not delimit the scope of an officer’s inquiry (personal, financial, third parties, etc.), the use to which the compelled answers and documents will be put (e.g. cessation or vacation of the designated person’s or another person’s refugee status, smuggling prosecution etc.), or with whom the compelled data will be shared (e.g. CIC, CSIS, RCMP, foreign governments). If the officer considers that the designated foreign national “fails, without reasonable excuse, to comply” with the conditions imposed on him or her, the application for temporary or

permanent residence may be delayed for another year. This means that a designated foreign national may be prohibited from applying to regularize his or status and commencing the process of family reunification for at least five, and possibly six, years.

c. Denial of Appeals

Under Bill C-4 neither a decision by the Refugee Protection Division in relation to a claim for refugee protection, nor decision to vacate or cease the refugee status of a designated foreign national may be appealed to the Refugee Appeal Division.

d. Denial of Access to a Travel Document

Designated foreign nationals who are recognized as refugees or as protected person may not obtain travel documents until they have regularized their status. This means that they will not be able to travel outside Canada until they obtain permanent resident or temporary resident status. In tandem with the inability to reunite with family members in Canada, the consequence is to separate family members for a minimum of five years, plus the time required to process an application for permanent residence.

Bill C-4 also includes provisions that expand the power of the Minister to detain foreign nationals and permanent residents in circumstances entirely unrelated to the manner of arrival in Canada or administrative convenience. These provisions appear to have been inserted into the legislation as a matter of expedience.<sup>5</sup>

## **C. The Unconstitutionality of Bill C-4**

### **1. Designation and detention violate ss. 9 and 10(c) of the *Canadian Charter of Rights and Freedoms***

Section 9 of the *Charter* guarantees that “everyone has the right not to be arbitrarily detained or imprisoned”.

Section 10(c) of the *Charter* provides that everyone who is arrested or detained has the right “to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.”

In *Charkaoui*, Chief Justice McLachlin expanded on the principle that underlies s. 10(c):

---

<sup>5</sup> Bill C-4 would amend the IRPA by allowing foreign nationals and permanent residents to be detained where the Minister has “a reasonable suspicion” that they are inadmissible on grounds of ... serious criminality, criminality or organized criminality.” This significantly increases the power of immigration officials and decreases the security of both foreign nationals and permanent residents. The “reasonable suspicion” standard is a low one. In addition, although “criminality” is a ground of inadmissibility that does not apply to permanent residents, “serious criminality” is defined very broadly

Whether through *habeas corpus* or statutory mechanisms, foreign nationals, like others, have a right to prompt review to ensure that their detention complies with the law. This principle is affirmed in s. 10(c) of the *Charter*. It is also recognized internationally: see *Rasul v. Bush*, 542 U.S. 466 (2004); *Zadvydas v. Davis*, 533 U.S. 678 (2001); art. 5 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 (“*European Convention on Human Rights*”); *Slivenko v. Latvia* [GC], No. 48321/99, ECHR 2003-X, p. 229.<sup>6</sup>

In *Charkaoui*, the Chief Justice, citing Peter Hogg, the leading Constitutional Law authority, also noted that detention is arbitrary in the absence of “standards that are rationally related to the purpose of the power of detention”<sup>7</sup>

In addition, she drew a connection between s. 9 and s. 10(c) of the *Charter* by illustrating when the lack of review would render a detention arbitrary. She stated:

The lack of review for foreign nationals until 120 days [the period imposed in relation to the security certificate process] after the reasonableness of the certificate has been judicially determined violates the guarantee against arbitrary detention in s. 9 of the *Charter*, a guarantee which encompasses the right to prompt review of detention under s. 10(c) of the *Charter*. Permanent residents named in certificates are entitled to an automatic review within 48 hours. The same time frame for review of detention applies to both permanent residents and foreign nationals under s. 57 of the *IRPA*. And under the *Criminal Code*, a person who is arrested with or without a warrant is to be brought before a judge within 24 hours, or as soon as possible: s. 503(1). These provisions indicate the seriousness with which the deprivation of liberty is viewed, and offer guidance as to acceptable delays before this deprivation is reviewed.<sup>8</sup> [emphasis added]

Recently, Chief Justice McLachlin has acknowledged that the law relating to arbitrariness is somewhat unsettled. In *Canada (Attorney General) v PHS Community Services Society*, she states:

The jurisprudence on arbitrariness is not entirely settled. In *Chaoulli*, three justices (*per* McLachlin C.J. and Major J.) preferred an approach that asked whether a limit was “necessary” to further the state objective: paras. 131-32. Conversely, three other justices (*per* Binnie and LeBel JJ.), preferred to avoid the language of necessity and instead approved of the prior articulation of arbitrariness as where “[a] deprivation of a right . . .

---

<sup>6</sup> *Ibid.*, at para 90.

<sup>7</sup> *Ibid.*, at para 89

<sup>8</sup> *Ibid.*, at para 91.

bears no relation to, or is inconsistent with, the state interest that lies behind the legislation”: para. 232. It is unnecessary to determine which approach should prevail, because the government action at issue in this case qualifies as arbitrary under both definitions.<sup>9</sup>

Under the necessity test, neither the designation nor the unreviewable mandatory detention of foreign nationals is necessary to prevent the acts that the government considers to be abusive of Canada’s immigration system.

In the alternative, the mandatory unreviewable detention of designated foreign nationals is unrelated to a legitimate state interest. Even if the state has a legitimate interest in deterring and punishing smugglers, the state does not have a legitimate interest in punishing migrants (including refugees) through the use of the measures triggered by designation. Alternatively, punishing migrants (including refugees) is inconsistent with the state’s interest and legal obligation to protect and not penalize refugees.

Bill C-4 permits designation, which in turn mandates detention, of two or more persons based on administrative convenience, or a ‘reasonable suspicion’ regarding the alleged mode of arrival. The criteria do not require, nor do they support a presumption, that detention is required to serve a valid purpose of immigration: to prevent flight, to facilitate impending removal, to protect the public or national security, to reasonably ascertain identity, or to complete an ongoing examination in respect of a specific individual. The criteria for detention under Bill C-4 cannot be linked to the advancement of any valid purpose served by detention, as measured against the criteria which are required to justify the detention of other foreign nationals.

Punishment and deterrence are not valid purposes of immigration detention in general, and are particularly inimical to Canada’s obligation to protect refugees. Detention in furtherance of penalizing refugees who arrive through irregular means breaches the specific legal duty under the UN Refugee Convention, which is incorporated in s. 133 of IRPA.

Bill C-4 is akin to a bill of attainder, whereby the Minister prosecutes and convicts individuals based on mode of arrival or administrative convenience, and sentences them to up to a term in jail before the incarceration is even reviewed. The criteria of designation are arbitrary in relation to any valid purpose served by immigration detention.

Moreover, indiscriminate mandatory detention is inconsistent with the legislative aim expressed in s. 3(2)(a) of *IRPA* “to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted”.

---

<sup>9</sup> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 132.

In addition to the arbitrariness of detention in relation to the valid purposes of immigration detention, detention under Bill C-4 is arbitrary in two other respects : First, the length of the automatic detention is arbitrary; second, the absence of review for one year, followed by semi-annual review, shields the Minister from accountability for prolonged and severe liberty deprivations. The lack of accountability enables arbitrariness. Thus, it violates both s. 9 and s. 10 (c).

Bill C-4 countenances one year detention of individuals based on the inability of the Minister to process, examine or investigate the group 'in a timely manner'. The group-based trigger for detention may be entirely disconnected from the circumstances of the individuals assigned to the group: For example, the identity of a given foreign national who is part of the designated group may not be in doubt, but the designation mandates a year of detention anyway. The processing of a given foreign national may be completed in a few hours, but that person will remain in detention for a year. It is arbitrary to detain a given foreign national on the basis of factors that are not, or are no longer, apposite to him or her.

Prompt and independent review of the legality of detention is an important safeguard against arbitrary detention because it requires the state to justify the liberty deprivation to a third party. Bill C-4 deprives designated foreign nationals of access to independent review of the reasons for detention for one year. The validity of a Minister's self-serving assertion that his officials are unable to process foreign nationals 'in a timely manner', and the objective basis for the Minister's suspicions about smuggling, are shielded from external scrutiny. Non-designated foreign nationals who are detained are entitled to review within 48 hours, and those who are not under security certificates receive a review after a week, and then every 30 days. This comparison highlights the obvious fact that review after one year is the antithesis of 'prompt' and, further, that this lengthy denial of review to designated foreign nationals is arbitrary.

## 2. Unreviewable detention violates s.7 of the *Canadian Charter of Rights and Freedoms*

The same reasons that support the conclusion that the designation and mandatory, automatic and unreviewable detention violate ss. 9 and 10(c) of the *Charter* also sustain the conclusion that the measures violate s. 7. Section 7 of the *Charter* provides that:

Every one has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Detention violates the right to liberty. Given the impact of detention on vulnerable people, including children and traumatized refugees, it also implicates security of the person. The arbitrariness of the detention and denial of prompt review do not accord with fundamental justice.

In *Charkaoui* Chief Justice McLachlin took pains to explain how the principles of fundamental justice are threatened by unreviewable detention. She stated:

The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process... “It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process”: *Ferras*, at para. 19. This principle emerged in the era of feudal monarchy, in the form of the right to be brought before a judge on a motion of *habeas corpus*. It remains as fundamental to our modern conception of liberty as it was in the days of King John.<sup>10</sup>

She continued by explaining that the basic principles are as applicable in the immigration context as elsewhere:

The principles underlying *Lyons* [which involved criminal detention] must be adapted in the case at bar to the immigration context.... Drawing on them, I conclude that the s. 7 principles of fundamental justice ...require that, where a person is detained or is subject to onerous conditions of release for an extended period under immigration law, the detention or the conditions must be accompanied by a meaningful process of ongoing review that takes into account the context and circumstances of the individual case. Such persons must have meaningful opportunities to challenge their continued detention or the conditions of their release.<sup>11</sup> (emphasis added)

Bill C-4 ignores both the letter and spirit of these judicial warnings. It neither provides a “meaningful process of individual review” nor does it allow for contextual, individualized assessment.

### 3. The “overbreadth” of the detention provisions in Bill C-4 violates s. 7 of the Charter

The Supreme Court of Canada has developed the doctrine of overbreadth to express the constitutional requirement that a law be tailored to its purposes. Failure to respect this principle is a violation of the principles of fundamental justice.

In *R v Heywood*, Cory J. outlined the basic tenets of the overbreadth doctrine:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses

---

<sup>10</sup> *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 at para 28.

<sup>11</sup> *Ibid*, at para 107.

means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate....

However, before it can be found that an enactment is so broad that it infringes s. 7 of the *Charter*, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.<sup>12</sup>

The provisions requiring that designated foreign nationals be detained without review for a lengthy period infringe on the liberty of individuals. This infringement is in a manner that far exceeds what is necessary to meet the purpose of the legislation, namely deterring human smugglers from attempting to bring individuals to Canada by irregular means.

#### 4. The vagueness of the detention provisions in Bill C-4 violates s. 7 of the Charter

In *R v Nova Scotia Pharmaceutical Society*, the Supreme Court of Canada held that it was a principle of fundamental justice that laws not be too vague. It identified that the “‘doctrine of vagueness’ is founded on the rule of law, particularly on the principles of fair notice.”<sup>13</sup> It also outlined the following as the proper test to apply when determining whether a law is deficient on grounds of vagueness:

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary.<sup>14</sup>

The legislative provision permitting the Minister to designate a ‘group’, in circumstances where the examination of persons in the group cannot be conducted in a timely manner, is unconstitutionally vague in the sense intended by the Supreme Court. It does not provide fair notice of to those who are affected. Further, it fails to provide any standards in relation to which the decision may be made.

Moreover, the legislative provision allowing the Minister to designate a group when he or she has reasonable grounds to suspect that “...there has been a contravention of s.117(1) ... for the benefit of, at the direction of or in association with a criminal organization or

---

<sup>12</sup> *R. v Heywood*, [1994] 3 SCR 761 at 792-793.

<sup>13</sup> *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 630

<sup>14</sup> *Ibid*, at 639-640.

terrorist group” is unconstitutionally vague. For a court to review the lawfulness of a designation it will need to determine the intended level of complicity with a criminal organization or terrorist group. The language of the provision fails to provide adequate assistance in this regard.

Because a consequence of designation is the internment of the designated foreign nationals, these provisions violate s. 7 of the *Charter* by restricting the right to liberty in a manner that is inconsistent with the principles of fundamental justice.

The denial of access to the Refugee Appeal Division for designated foreign nationals is also arbitrary and thus inconsistent with principles of fundamental justice. The mode of arrival or administrative convenience do not supply a rationale for denying an appeal to a subset of refugees and refugee claimants that is available to other refugee claimants and refugees.

#### 5. Withholding access to status violates s. 7 of the *Charter*

For purposes of this argument, we focus on the situation of designated foreign nationals found to be refugees or protected persons. The starting position with respect to refugees and protected persons is that they have been found by the Refugee Protection Division to have a well-founded fear of persecution in their country of nationality. IRPA provides that those who used irregular means of arrival shall not be charged with an offence in relation to their mode of entry.<sup>15</sup> Thus, the refugee who arrives via a smuggler has committed no offence under Canadian law. Rather, they have demonstrated on a balance of probabilities that they are entitled to Canada’s protection. Nevertheless, Bill C-4 selectively prohibits them from applying for permanent resident status, obtaining a travel document, or reunifying with family members for a minimum of five years. Bill C-4 also grants CBSA officers unlimited power to compel refugees and protected persons to report, answer questions, and supply information. The withholding of permanent resident status for five years, the inability to reunite with family members in Canada, the refusal of a travel document, and subjection to limitless reporting requirements, deprive refugees of security of the person in a manner that does not comport with principles of fundamental justice.

The Canadian Council for Refugees has identified clearly the most serious consequences faced by those who find themselves in a position of limbo<sup>16</sup>:

#### **No Permanent Residence**

Without permanent residence, Convention Refugees cannot benefit from family reunification, they face discrimination in access to education, employment and social assistance and they cannot travel abroad.

#### **No family reunification**

Family reunification, including reunification of spouses and children, is

---

<sup>15</sup> IRPA s. 133

<sup>16</sup> See <http://ccrweb.ca/en/refugees-limbo-human-rights-issue>

tied to permanent residence. Convention refugees who have not been landed cannot bring their spouses and children (let alone other family members) until they become permanent residents.

### **Disruption of family unity**

Refugees who left spouses and dependent children behind, sometimes in situations of great danger or in a refugee camp in the first country of asylum, often have difficulties communicating with them. When communication does occur, the dependents left behind do not understand why the reunification process is so lengthy (there are frequently reports of stress in the husband-wife relationship as some spouses cannot believe the process is so long and think that they have been abandoned). Moreover, in the long term, disruption of family unity can destroy the family connection and make family reunification impossible.

### **Psychological problems**

Refugees separated from their families often suffer from depression. Family separation increases post-traumatic stress disorders often experienced by refugees. Refugees in limbo waiting for family reunification for many years suffer from anxio-depressive symptoms.

### **Financial problems**

Refugees in general face certain difficulties in finding a job, and worries about the family they left behind makes it even harder. Family separation also increases the financial problems faced by refugees as they frequently have to send money abroad to assist the family left behind.

### **Barriers to integration**

The stress caused by family separation and the absence of family support makes it very difficult for refugees to integrate into a society they are not familiar with.

The ongoing and unfettered reporting requirements imposed under Bill C-4 can exacerbate and compound the anxiety and fear among those who escaped repressive regimes, especially because the purpose of the questioning and the use to which the information will be put are not specified.

The Supreme Court of Canada has recognized that security of the person is jeopardized by measures that impose serious psychological stress on the individual. The Court has specifically adverted to interference with the integrity of the parent-child relationship as a cause of serious psychological stress and, therefore, a deprivation of security of the person.

In *Blencoe v British Columbia (Human Rights Commission)*, Bastarache J. states:

The principle that the right to security of the person encompasses serious state-imposed psychological stress has recently been reiterated by this Court in *G. (J.)*, *supra*. .... State removal of a child from parental custody thus constitutes direct state interference with the psychological integrity of the parent, amounting to a “gross intrusion” into the private and intimate sphere of the parent-child relationship (at para. 61)... Not all state interference with an individual’s psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to “serious state-imposed psychological stress” (Dickson C.J. in *Morgentaler*, *supra*, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (*G. (J.)*, at para. 59).<sup>17</sup>

The consignment of refugees to a minimum five year limbo, with the attendant consequences of heightened social and economic vulnerability, separation from family members, inability to travel outside Canada (even to see family in a third country) infringes the right to security guaranteed by s. 7 of the *Charter*.

These infringements on security of the person fail to comport with the principles of fundamental justice because they are arbitrary, grossly disproportionate, overbroad and vague.

They are arbitrary because they deny a subset of refugees access to permanent residence, family reunification, and a travel document based on their mode of arrival or administrative convenience. There is no legal basis for treating refugees so designated as less worthy of refugee protection, more suspicious, or less deserving of the incidents of refugee protection available to other refugees.

The Supreme Court of Canada has determined that grossly disproportionate restrictions on the right to life, liberty and security of the person will contravene the principles of fundamental justice. As explained by the Court in *Canada (Attorney General) v PHS Community Services Society*:

Gross disproportionality describes state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest.<sup>18</sup>

In *Suresh v Canada (Minister of Citizenship and Immigration)*, the Court offered additional comments on the importance of this doctrine:

The notion of proportionality is fundamental to our constitutional system. Thus we must ask whether the government’s proposed response is reasonable in relation to the threat. In the past, we have held that some

---

<sup>17</sup> *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at para 56.

<sup>18</sup> *Supra*, at para 133.

responses are so extreme that they are *per se* disproportionate to any legitimate government interest...<sup>19</sup> (emphasis in original)

Bill C-4 includes measures that are so extreme as to be disproportionate to any legitimate government interest. In tandem with the detention provisions, Bill C-4's five year limbo, denial of family reunification, refusal of a travel permit, expansive post-claim authority to demand attendance and question refugees, construct a harsh and punitive regime. As noted earlier, punishment and deterrence of refugees is not a valid immigration purpose. To the extent that the purpose of precarious status is to prevent settlement and to facilitate eventual cessation or vacation of refugee status, the measures are grossly disproportionate. The IRPA already permits the Minister to commence vacation proceedings against refugees, even if they have acquired permanent resident status. If denial of a travel document is intended to prevent refugees from returning to their country of origin, it is grossly disproportionate in its effect because it prohibits any travel outside Canada. In combination with the bar on family reunification, the denial of a travel document enforces family separation of at least five years. Ironically, one of the few ways in which a refugee may be reunited with desperate family members is if the family members also resort to smugglers to bring them to Canada, and risk an additional year of incarceration in Canada prior to release. Thus, it is conceivable that the bar on family reunification will provide an incentive to do precisely what Bill C-4 ostensibly seeks to discourage. This would make the enforced family separation inconsistent with the state interest animating Bill C-4.

The reporting requirements imposed on designated refugees are vague and overbroad as those terms have been judicially interpreted and applied. They do not specify the purpose of the reporting, the scope of the officer's authority to demand information or documents, the use to which the information will be put, or with whom the information will be shared. Does the reporting constitute an evidence-gathering process for future cessation or vacation proceedings? Will refugees' precarious status be used to exploit them as informants? Can the officer inquire into non-immigration matters on behalf of law enforcement or CSIS? Will information be shared with other government bodies, or foreign governments? The answers to these questions may precipitate further constitutional concerns. The failure of Bill C-4 to circumscribe the officer's power to compel information breaches the constitutional proscription on vague and overbroad laws. The reporting provisions fail to provide fair notice to the designated refugee nor do they impose any limit on the enforcement discretion of the state official. Refugees subject to the reporting requirement will already be in a deliberately precarious position, and this renders them both vulnerable to abuses of power and reluctant to assert their rights for fear of further jeopardizing their fragile status.

#### 6. Bill C-4 violates s.12 of the *Charter*

Section 12 of the *Charter* provides that:

---

<sup>19</sup> *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 at para 47.

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

The Supreme Court of Canada has offered a lucid gloss on the phrase “cruel and unusual” by again relying on the notion of “gross disproportionality” In *R. v. Smith*, it held that a minimum seven year sentence for importing a narcotic was grossly disproportionate.<sup>20</sup> Relying on the reasons provided above, it is our opinion that the mandatory detention required by Bill C-4 is cruel and unusual treatment.

#### 7. Can Bill C-4 be saved under s. 1 of the Charter?

Section 1 of the *Charter* provides that:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Supreme Court jurisprudence reveals that the burden of persuading the Court that a limitation on a right is reasonable, prescribed by law and demonstrably justifiable in a free and democratic society lies on the Government. The Government has the burden of proving on the balance of probabilities that a limitation on the right is justifiable.

The Government offers its justification for Bill C-4 in the title. The state’s objective is to “stop smugglers from abusing Canada’s immigration system”. To the extent that it deploys immigration law to arbitrarily and harshly punish smuggled persons (including refugees), and to deter future refugees, it pursues its end through unconstitutional means. The IRPA already contains provisions that prohibit entry without requisite documentation (visas etc.). These apply to non-refugees and protected persons, and provide the person concerned with the right to a fair process and adjudication before an independent judge.

The Government has not yet shown and will not in the future be able to show that such justification for the infringements on rights effected by Bill C-4 exists. The consequences imposed on designated foreign nationals are severe. They are inconsistent with values espoused in open societies. They are wholly disproportionate to the goals that the government is seeking to address. They are not rationally connected to the aims of the legislation. They are not sufficiently tailored and adequately crafted to minimally impair the rights of those affected.

Peter Hogg has observed that the s.1 justification of a breach of s.7 of the Charter has never been upheld by a majority of the Court. He also notes in relation to s.12:

It may simply be the failure of my imagination but I find it difficult to accept that the right not to be subjected to any “cruel and unusual

---

<sup>20</sup> *R. v. Smith (Edward Dewey)*, [1987] 1 SCR 1045.

treatment or punishment “ could ever be justifiably limited. This may be an absolute right. Perhaps it is the only one.<sup>21</sup>

#### **D. Conclusion**

In presenting Bill C-4 to Parliament, the Government has expressed its confidence that the Bill is Charter-compliant and constitutional. The Government has chosen not to articulate any basis for its confidence. Since recent judicial pronouncements from the Supreme Court of Canada directly contradict the Government’s position, it is our opinion that this confidence is misplaced. The drafters of the Bill have paid insufficient attention to the carefully worded doctrines that the Supreme Court of Canada has developed to express the basic principles of our Constitution. The government has haphazardly cast an unconstitutionally harsh, wide and arbitrary net in order to deter and punish human smuggling. The consequences inflicted on these individuals will be dramatic, painful and undeserved. It is our hope that the unconstitutionality of the Bill will be recognized before it is enacted as law. If this hope is dashed, it is our hope that it will be recognized by judicial authorities. However, it is our worry that, should we need to rely on the Courts to provide the needed remedy, much hardship will be endured in the interim.

---

<sup>21</sup> Peter Hogg, *Constitutional Law of Canada*, (Toronto: Carswell 2010) at 38-49