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**“Making Canada’s Refugee System Faster and Fairer”:  
Reviewing the Stated Goals and Unintended  
Consequences of the 2012 Reform**

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# “MAKING CANADA’S REFUGEE SYSTEM FASTER AND FAIRER”: REVIEWING THE STATED GOALS AND UNINTENDED CONSEQUENCES OF THE 2012 REFORM

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## LIST OF ABBREVIATIONS

ASR:	Automatic Stay of Removal
CARL:	Canadian Association for Refugee Lawyers
CBSA:	Canadian Border Service Agency
IRCC:	Citizenship and Immigration Canada
CSIS:	Canadian Security Intelligence Service
DCO:	Designated Country of Origin
DFN:	Designated Foreign National
ECtHR:	European Court of Human Rights
FESS:	Front-End Security Screening
H&C:	Humanitarian and Compassionate Relief
IAD:	Immigration Appeal Division
IOM:	International Organization for Migration
IRB:	Immigration and Refugee Board of Canada
IRCC:	Immigration, Refugees and Citizenship Canada
IRPA:	Immigration and Refugee Protection Act
PRRA:	Pre-Removal Risk Assessment
PSEPC:	Department of Public Safety and Emergency Preparedness
RAD:	Refugee Appeal Division
RPD:	Refugee Protection Division
RSD:	Refugee Status Determination
SSHRC:	Social Sciences and Humanities Research Council of Canada
UNHCR:	United Nations High Commissioner for Refugees
UORAP:	University of Ottawa Refugee Assistance Project

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## INTRODUCTION

Over the past decade, the Canadian government has changed our refugee protection system markedly.

Between 2006 and 2015, the Conservative Government amended the *Immigration and Refugee Protection Act* (IRPA) (S.C. 2001, c. 27) and associated regulations numerous times, although two recent bills stand out: the *Balanced Refugee Reform Act* (Bill C-11, 2010) and the *Protecting Canada's Immigration System Act* (Bill C-31, 2012). These bills significantly altered the operation of the refugee status determination (RSD)<sup>1</sup> system through “designated country of origin” (DCO) criteria (IRPA, s. 109), “designated irregular arrivals” (IRPA, s. 20.1(1)), and a host of new procedural frameworks, including time limits for refugee hearings and restricted access to Pre-Removal Risk Assessment (PRRA).

Advocates, academics, refugee and immigration lawyers, and civil society organizations have levelled pointed criticisms towards many of these measures, arguing that they violate the rights of refugee claimants in Canada. These criticisms have been supported by empirical research outlining the impact of the measures, particularly on asylum seekers. For instance, the University of Ottawa's Refugee Assistance Project (UORAP) found that these changes carry implications for the ability of refugee claimants to attain procedural, substantive, and symbolic access to justice as they seek protection in Canada (Bates et al., 2016: 71-72). The Canadian Association of Refugee Lawyers (CARL) conducted a thorough analysis of the changes and provided a series of recommendations for Canada to better comply with its domestic and international human rights obligations (CARL, 2016).

Courts have on several occasions agreed that some recent measures against asylum seekers contravene the *Charter of Rights and Freedoms* (“the *Charter*”) and are not justified by the principles and purposes of the IRPA. In July 2015, the Federal Court ruled that refugee claimants from DCOs should have the right to appeal to the Refugee Appeal Division (RAD) of the Immigration and Refugee Board (IRB) — a right that was previously denied them (Y.Z., 2015: FC 892). Another example are two Supreme Court decisions, issued in November 2015, revising overly broad interpretations of human smuggling provisions that permitted

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<sup>1</sup> The terms RSD and in-Canada asylum system are used interchangeably in this report.



criminal and/or regulatory prosecution of asylum seekers for offering humanitarian, mutual, or family assistance (*Appulonappa*, 2015: SCC 59; *B010*, 2015: SCC 58).

The Liberal Government, elected in October 2015, pledged to review and either amend or remove unsound measures, and generally to restore humanitarian commitment and respect for international human rights as a pillar of our immigration and refugee system. The Minister of Immigration, Refugees and Citizenship *Mandate Letter* states that “Canadians are open, accepting, and generous — qualities that should be reflected in Canada’s immigration policies and in our approach to welcoming those seeking refuge from conflict and war” (Office of the Prime Minister, 2015). An indication of the authenticity of this pledge was the government’s resettlement of more than 40,000 Syrian refugees, between November 4, 2015 and February 29, 2017 (21, 876 as government-assisted refugees and 14, 274 as privately-sponsored refugees) (Government of Canada, n.d., #*Welcome Refugees*). In addition, the new government renamed Citizenship and Immigration Canada (CIC) as the Immigration, Refugees and Citizenship Canada (IRCC), and created a new division of protection policy in the Refugee Affairs branch in Spring 2016. But many changes required additional thought and public outreach. For example, the government organized several consultations with major stakeholders to evaluate the cumulative impacts of more than a decade of changes; it also sought input on how best to revise the most controversial policies implemented by the previous government. As an illustration, the consultations on the in-Canada asylum system in which one of our research team members took part, focused on timelines, the DCO regime, whether there is a need to prioritize some claims, restrictions on who can access the Refugee Appeals Division, and on work permits.

Drawing notably on primary sources, this Working Paper aims to contribute to this national process of reflection and practical change. It represents the preliminary results of a 5-year research project funded by the Social Sciences and Humanities Research Council of Canada (SSHRC). The SSHRC research project explores the practical and human rights implications associated with the recent moves towards securitization of migration in Canada. Although our research addresses both migration and refugee policies and legislation, our specific focus in this Working Paper are the refugee measures affected by the *Protecting Canada’s Immigration System Act* and the *Balanced Refugee Reform Act*. The Working Paper’s twofold purpose is, first, to examine whether reforms following the adoption of these Acts – which we shorthand to “the 2012

refugee reform” - work in intended ways and have reached their stated goals, notably protecting the “refugee system’s integrity”, including public safety and security. Second, the Working Paper aims at identifying some of the unanticipated consequences of the new measures. It is argued that the government has not been successful in reaching the stated objectives of the laws and policies under review. In addition, these measures have had some unintended and counter-productive results. We hope that the current government will take seriously the need to make progressive changes to our RSD system, in order to better protect the rights of refugees, restore Canada’s compliance with its international human rights obligations, and ensure smoother overall functioning.

We begin by outlining our research methodology. We then provide an overview of the legislative background pertaining to Canada’s refugee status determination system with the aim of highlighting the scope and nature of the recent changes. This is followed by an identification and analysis of the stated goals of the *Protecting Canada’s Immigration System Act* and the *Balanced Refugee Reform Act*. Finally, we critically analyze the selected legislative measures with an eye to unintended consequences.

## 1. THE RESEARCH PROJECT: METHODOLOGY

For this research, we collected and analyzed data from a variety of primary sources (e.g., interviews) and secondary sources (e.g., statistics from government databases, government and external stakeholder reports, scholarly publications, grey material). We should note that the program/system evaluation reports published by the Immigration and Refugee Board (IRB), IRCC, Canadian Border Services Agency (CBSA) and the Royal Canadian Mounted Police (RCMP) provided rich contextual information. The primary field research was conducted between October 2015 and December 2016 and included 57 research participants from Quebec and Ontario. We conducted 47 semi-structured interviews (one-on-one or in group) with stakeholders from various professional perspectives and profiles. The participants were drawn from three main groups:

Civil servants (6) from the IRB, a member of the Crown Attorney’s Office, civil servants from IRCC (5) and Public Safety Canada (1), elected members of the City council of Toronto (1) and Federal parliament (1), and city staff in the City of Toronto (2). These interviews allowed us to collect the viewpoints of those responsible for the operation of the recent immigration and asylum measures at the local and national levels;

Practitioners (refugee, immigration and criminal lawyers, lawyers working in legal clinics (17), an intergovernmental organization (IGO) representative (1), NGO workers and representatives (19), i.e., nongovernmental service provider organizations working with migrants and refugees, and health professionals that operate “on the ground” in Toronto, Ottawa, and Montreal). These interviews provided firsthand, concrete information on the implementation of recent immigration and asylum measures as well as a contextualized account and empirical knowledge of the perspectives of these professionals on policy outcomes and the human rights impact of the measures examined;

Academics and researchers in Canada (3). These interviews provided detailed firsthand accounts of some of the empirical and theoretical research undertaken on the 2012 asylum and immigration policy changes. They also helped us to identify knowledge gaps in the field.

The irregular migrant community (2) to gain insight on the pathways into irregular migration status and on migrants’ experiences. Irregular migrants may be defined as people who enter or reside in a country without that country’s express legal permission (Vollmer 2011).

It is important to emphasize that this research is not finalized yet. Given that these two provinces are homes to the largest number of asylum seekers in Canada, we began fieldwork in Ontario and Quebec (IRCC, 2016). Interviews with stakeholders in Vancouver will take place during Spring 2017, and we are planning to conduct follow-ups with some Ontario and Quebec research participants, to ensure the accuracy of our findings.

We used two strategies to identify interviewees. First, we went through academic and grey literature, as well as governmental and non-governmental documents, materials, and reports, in order to identify key people and organizations actively involved in the area. Second, we asked our participants to help us locate potential interviewees within their networks (“snowball sample”), or to direct us to people they knew were involved in the field (“nomination sample”). The interviews lasted, on average, one hour. They took place either in the researchers’ offices (at Ryerson University or the University of Ottawa) or in the offices of the interviewees. We audio-recorded each interview, and we treated the data collected according to Ryerson and University of Ottawa Research Ethics Boards guidelines. All interviews were transcribed and coded in NVivo.



## 2. THE CANADIAN REFUGEE STATUS DETERMINATION SYSTEM: OVERVIEW OF THE 2012 REFUGEE REFORM

This section provides an overview of the current in-land refugee status determination system in Canada. It highlights the changes and the new measures introduced by the 2012 refugee reform. Some of the measures will be explored in more detail in the following sections.

Persons can claim refugee status from within Canada either to the CBSA at a port of entry, or to an inland office operated by IRCC or the CBSA. Eligible claims are referred to the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), which is in charge of determining whether the claimant is a “Convention refugee”<sup>2</sup> or a “Person in need of protection”<sup>3</sup> (IRCC, 2016).

The *Protecting Canada’s Immigration System Act* introduced substantive changes to the asylum procedure, including truncated timelines in asylum claims’ processing. Individuals who claim asylum at a port of entry now have 15 days - as opposed to 28 days previously- to submit the Basis of Claim form. This form records biographical details about identity, family, documents and travel history, and about why they are claiming refugee protection in Canada (IRB Claimant’s Guide, n.d.).

For most claimants, hearings at the RPD are supposed to be held no later than 60 days after the refugee claim is referred to the IRB. However, differentiated timelines have been established for claimants from the “designated countries of origin” (DCOs). DCO claimants are asylum seekers coming from countries that the Minister of Immigration, Refugees and Citizenship (“the Minister”) has formally designated as “safe”. DCOs are so listed in part because they are deemed to possess formal state institutions commensurate with democratic principles and the rule of law, including an independent judicial system, basic democratic rights and freedoms (e.g., the right to vote; freedom of expression, conscience and belief; right to a fair trial), as well as mechanisms for redress if those rights or freedoms are infringed (IRPA, s. 109). Currently the Minister has

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<sup>2</sup> IRPA s. 96: A *Convention* refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

<sup>3</sup> IRPA s. 97(1): A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the *Convention Against Torture*; or (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment.

designated 42 countries as DCOs. They include Mexico and Hungary, which, prior to 2012, were the two main countries of origin for asylum seekers in Canada. Claimants from DCOs have a shorter period of time to prepare for an IRB hearing (30 days for inland claims and 45 days for claims made at a port-of-entry) than non-DCO claimants.

“Designated foreign nationals” (DFNs, s. 20.1(2) of IRPA) are required to prepare their IRB hearing within 45 days. The class was created by the *Protecting Canada’s Immigration System Act* and amended the IRPA legislation. It allows the Minister of Public Safety to designate individuals who arrive to Canada with the help of a smuggler, in a group of two or more and mandates the detention of DFNs aged 16 and over (IRPA s. 55). The detention is reviewed after 14 days, followed by another review after 6 months and then every 6 months. In comparison, the decision to detain non-designated foreign nationals is always made on a discretionary (case-by-case) basis; an initial detention review takes place within 48 hours, followed by a review within 7 days, and then every 30 days from the previous review (IRPA, s. 57). As will be discussed below, the DFN provision has been very rarely used in practice.

IRCC or the CBSA may participate at the RPD or the Refugee Appeal Division (RAD) hearing to present evidence and arguments on the merit of a claim or on the exclusion of the claimant from the refugee status determination process (pursuant to Article 1E and Article 1F of the *Convention relating to the Status of Refugees* (hereafter “*Refugee Convention*”). These ministerial interventions have the objective of contesting some aspect of the claimant’s submissions.<sup>4</sup> The Minister of Citizenship and Immigration or the Minister of Public Safety, as the case may be, is not limited to exclusion and integrity/credibility issues. They have the right to intervene in any claim before the RPD (IRPA, s. 170).

If the refugee claim is accepted by the RPD, the individual can remain in Canada as a refugee and apply for permanent residence 6 months after receiving refugee status. If the claim is rejected or if the individual withdrew or abandoned the claim, the individual must leave Canada or the CBSA will enforce the removal (IRCC, 2016).

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<sup>4</sup> IRCC ministerial interventions are restricted to cases involving program integrity and credibility as well as cases where exclusion pursuant to article 1E of the 1951 *Refugee Convention* arises. The CBSA intervenes in cases involving serious criminality, security concerns, war crimes, crimes against humanity, or acts contrary to the purposes and principles of the United Nations. The CBSA also intervenes in hybrid cases (i.e., where there are combined program integrity/credibility issues and criminality or security concerns). For more on this topic, see IRCC’s and CBSA’s Operation Manual on “Ministerial Intervention” (2016).

Rejected claimants can appeal the RPD decision to the RAD of the IRB (IRPA, s. 110 (1) and IRPA, s.159.91). The RAD was established in December 2012 by the *Protecting Canada's Immigration System Act*. Its role is to review the merits of decisions by the RPD, ultimately deciding to confirm the decision, set it aside and substitute its own decision, or refer it back to the RPD for redetermination. DFNs whose refugee claims are rejected by the RPD are denied a right of appeal to the RAD (IRPA, s. 110(2)(a)), and face immediate deportation. The same was true for claimants from DCOs until the Federal Court judgment that struck down the bar in 2015 (Y.Z. case, mentioned above).

Furthermore, claimants who receive a negative decision from the RAD and those who do not have access to the RAD can file an application for leave and for judicial review of the RAD decision or the RPD decision with the Federal Court. DFNs and claimants from DCOs (among other classes of persons) do not have the right to an automatic stay of removal upon applying for leave and for judicial review, and can therefore be deported during their application. The Federal Court may grant or dismiss judicial review. In the latter case, the claimant is subject to removal. If judicial review is granted, the claim is returned to the RPD or the RAD (IRCC, 2016: 1).

A non-citizen who is ordered deported from Canada has the right to a pre-removal risk assessment (PRRA) during which new evidence can be presented of the risk of danger or persecution. PRRA assesses the risk of return in accordance with the principle of *non-refoulement*, which prohibits deportation of individuals to places where they may face persecution or the substantial risk of torture or similar abuse (Article 33(1) of the *Refugee Convention*; Article 3 of the *UN Convention against Torture*; IRPA s. 115). The CBSA considers whether the individual may apply to IRCC for a PRRA. Pursuant to the *Balanced Refugee Reform Act*, failed refugee claimants are barred to apply for a PRRA for one year following their final IRB decision. Those from DCOs and DFNs have no access to a PRRA for 36 months after a negative decision (IRPA s. 112(2)(b.1)).

Rejected asylum claimants can apply for permanent residence on humanitarian and compassionate (H&C) grounds (IRPA s. 25) only one year following their final IRB decision (or five years following the IRB final determination in the case of DFNs (IRPA, s. 25(1.01))). Claimants are barred from submitting H&C applications while their refugee claim is pending, which was previously allowed.

The *Balanced Refugee Reform Act* and the *Protecting Canada's Immigration System Act* include social and economic deterrents such as the denial of work permit. DCO claimants and DFNs are ineligible to apply for a work permit until their claim is approved by the IRB, or until their claim has been in the system for more than 180 days and no decision has been made (IRPA, s. 24(4)). In addition, even when they obtain refugee status or the status of a 'person in need of protection,' DFNs are required to wait five years before applying for permanent residence and before they can sponsor their family members (IRPA, s. 11(1.2)). By contrast, foreign nationals who obtain the status of "refugee" or "protected person" can apply for permanent residence after 180 days have passed, and sponsor family members once they gain permanent residence.

The IRPA sets out circumstances by which a claimant can be inadmissible, including, security (s. 34(1)), human and international rights violations (s. 35(1)), serious criminality and criminality (s. 36), and organized criminality (s. 37). Individuals who are declared inadmissible under IRPA s. 34, 35 and 37 have no access to H&C or to the Immigration Appeal Division to appeal removal order<sup>5</sup> (Bill C-43 *Faster Removal of Foreign Criminals Act*).

The *Protecting Canada's Immigration System Act* amended and expanded the definition of what constitutes "human smuggling" under IRPA s. 37. It imposed mandatory minimum prison sentences on convicted human smugglers. As previously stated, some of the provisions of this Act were found unconstitutional by the Supreme Court of Canada in 2015 (*Appulonappa*, 2015: SCC 59; *B010*, 2015: SCC 58).

Finally, pursuant to s. 40.1(2) and s. 46(1)(c.1) of IRPA, an individual can lose his/her status of refugee or protected person through a cessation process where the person voluntarily re-establishes themselves in their previous country of nationality, becomes a national of another country where they do not fear persecution, or "re-avails themselves of the protection of their former country," which could include applying for a passport or temporarily returning to the home country (IRPA s. 108; CARL, 2016: 24-25). Cessation applications are made by the Minister to the RPD and it is the RPD who conducts the cessation proceedings.

The next section discusses the rationale offered by the government to justify the 2012 legislative changes.

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<sup>5</sup> Section 64 of IRPA states that no appeal may be made to the Immigration Appeal Division by a foreign national if the foreign national has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

### 3. “MAKING CANADA’S ASYLUM SYSTEM FASTER AND FAIRER”: THE GOALS OF THE 2012 REFUGEE REFORM

The objectives of Canada’s refugee protection system are outlined in IRPA s. 3. First and foremost, the government aims at establishing “fair and efficient procedures” that maintain the “integrity of the system”.

The integrity of our system is presented as related to the protection of fundamental purposes, objectives, and principles found in the IRPA. These include: the protection of the health and safety of Canadians, Canada’s and international security, family reunification, respect for Canada’s humanitarian commitments, and compliance with international human rights (IRPA, s. 3).

Although a cornerstone of Canadian immigration and refugee policies, the concept of “system integrity” lacks a clear definition. In practice, it refers to ensuring that people work within the framework of the IRPA, using its provisions for reasons, and in ways, that are consistent with legislative intent and broader public values that inform judicial exercises in statutory interpretation. This helps to explain why recent amendments have been focused on preventing fraud, misrepresentation, and various forms of irregular migration. But the government also employs “efficiency” as a measure of integrity. This is noticeable in reference to timely decisions, i.e. timely protection and removal in the name of protecting the safety and security of the Canadian public (Government of Canada, Backgrounder – *Protecting our Streets and Communities from Criminal and National Security Threats*, 2012; *Regulations Amending the Immigration and Refugee Protection Regulations*, 2012).

The key rationale offered for the 2012 legislative changes was maintaining public confidence in the “integrity” of the immigration and refugee system. The government sought to recalibrate the always challenging balance between providing fair and rapid adjudication of asylum claims, while at the same time ensuring that the system is not “misused” by those claimants who do not meet the 1951 *Refugee Convention* definition for other purposes, such as work, access to healthcare and social services (IRCC, Backgrounder, n.d.). The government referenced two main factors as indicia of a purported crisis afflicting the refugee system:

- *Refugee backlogs*. First, the number of asylum claims received between 2005 and 2008 considerably increased, from 19,660 to 36,759. The IRB backlogs reached a high of 62,000 claims by 2009. Further, between 2010 and 2012, it took an average of 21 months to receive a positive decision from the RPD and an

average of 24 months to exhaust all remedies. The situation created, according to the government, a considerable pressure on the system, including on the Federal Court which, in the absence of an appeal division at IRB, was facing growing numbers of leave for judicial review of RPD decisions and judicial review cases. In 2012, there were 5,099 applications for leave and for judicial review awaiting a Federal Court decision and 1,034 pending decisions for judicial review. As a result of these backlog and delays, the RSD system had come to be viewed as “inefficient”, “costly”, and “slow” (IRCC, 2016: iv and v). It was presumed that part of the strain was attributable to persons who “abused” the system. By restricting access to the RSD system, the government aimed to enhance efficiency without compromising the rights of *bona fide* claimants.

- *Safety and security concerns.* Safety and security were a second set of factors that seemed to play a role in the reform of the refugee system. As noted by IRCC, “the longer-term expected outcome of the reforms is: underlying principles of Canada’s asylum system (ensuring fairness, protecting genuine refugees, upholding Canada’s humanitarian tradition) are supported while ensuring the safety and security of Canadians.” (IRCC, 2016: 17). Although a long process stretching back to 9/11 and before, security discourse was amplified after the irregular arrival of nearly 600 Tamil asylum seekers aboard the *MVs Ocean Lady* and *Sun Sea* in 2009 and 2010. The government portrayed these asylum seekers as terrorists, criminals, and ‘queue jumpers’, as opposed to refugees and immigrants who file paperwork and wait in line overseas (Prime Minister, House of Commons 2010; Bradimore & Bauder, 2011). Then Canadian Citizenship, Immigration and Multiculturalism Minister defined Canada’s asylum system as ‘broken’ and presented the reform proposal as a means of preventing the ‘abuse’ of the refugee system (Government of Canada, 2012; Kenney, 2012). The title of Bill C-31’s first iteration, “the Preventing Human Smuggling from Abusing Canada’s Immigration System Act” (October 21, 2010), is telling in this respect. The legislative language focused on the dangerous and criminal nature of human smuggling rings:

Bill C-31, Protecting Canada’s Immigration System Act, is part of our plan to restore integrity to our asylum system and restore Canadian’s confidence in our immigration system. The bill would make Canada’s refugee determination process faster and fairer and would result in faster protection for those who legitimately need refugee protection. It would also, and this is the important aspect of it, ensure faster removal of those whose claims are withdrawn, those claims that are bogus and those



claims that have been rejected. Bill C-31, the protecting Canada's immigration system act, is part of our plan to restore integrity to our asylum system (Parliamentary Secretary to the Minister of Citizenship and Immigration, House of Commons 2012).

Therefore, following the political discourse and aforementioned statutory limitations and bars, making Canada's asylum system "faster and fairer," motivated the 2012 refugee reform process. For instance, while the establishment of the Refugee Appeal Division (RAD) in December 2012 was a welcome development in terms of ensuring fundamental justice in refugee protection, a number of foreign nationals have been barred from appealing to the RAD in order to deport more speedily those individuals whose claims are rejected by the RPD. In fact, section 48 of the IRPA describing removal timelines was amended to enable the CBSA to remove a non-citizen *as soon as possible*, as opposed to *as soon as was practicable*, from the former legislation. The government also sought to eliminate or restrict previously existing reviews, notably the H&C and PRRA (IRPA s. 112(2)(b.1)).

The Conservative government's objective to facilitate deportation of "bogus refugees" is seen in the end of the automatic stay of removal (ASR) for persons filing an application for judicial review to the Federal Court against a negative RPD refugee decision. This means that unsuccessful claimants without access to the RAD do not benefit from an ASR, and are deported before a final decision on their claim has been made. As IRCC put it, "the no-ASR policy was intended to allow the CBSA to initiate the removal of these claimants several months earlier than claimants who are granted an ASR" (IRCC, 2016: 21).<sup>6</sup>

The goal of accelerating the processing of claims and deportations animated three pilot projects implemented between 2013-2015: 1) the CBSA-led Assisted Voluntary Return and Reintegration pilot aimed to increase the number of failed refugee claimants who voluntarily leave Canada; 2) the Ministerial Reviews and Interventions pilot, which allowed IRCC to intervene in cases involving "program integrity and credibility" as well as cases where exclusion pursuant to Article 1E and Article 1F of the *Refugee Convention* arises; and 3)

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<sup>6</sup> Between 2010 and 2012, it took between 18-20 months on average to remove a failed claimant after a final RPD decision was made (Government of Canada, 2013). The previous Conservative Government pledged to accelerate the removal procedure and set the target for the CBSA to get 80 % of removals to be completed within 12 months of an IRB decision (IRCC, 2016).

the RCMP's Enhanced Security Screening pilot aimed at further strengthening the security screening of refugee claimants (IRCC, 2016: 2-3). Some of these projects are examined below.

Ultimately we argue that the 2012 refugee reform sought to deter unwanted migration movements to Canada. The DFN is a clear illustration of this deterrence goal. The DFN regime which, according to a refugee lawyer, amounts to "the demonization of refugees" (Participant 7, Toronto, 10 December 2015), has been used only once, in December 5, 2012, against five groups of foreign nationals; in total, 85 people including 35 children who illegally crossed the Canada-U.S. border into the province of Quebec between February and October 2012. Retroactively designated as irregular arrivals, 30 people were detained (Public Safety, 2012; CBC News, 2012). According to the figures provided by IRB, Immigration Division has heard 11 of these cases since January 2013, leading to nine Romanian citizens being removed and two released. As a lawyer put it:

*I mean, sometimes, it's just for show.... But the Supreme Court said you can't put someone in jail arbitrarily. And a designated foreign national, like, they pass a law that provides for arbitrary detention [...] within what, a year of winning the case, that says you can't do that. [...] And so they haven't really used it much (Participant 2, Toronto, 20 November 2015).*

In sum, the acceleration of timelines at the IRB and the speedy removal of rejected claimants appear to be strategic governmental tools aimed at preserving the "integrity and credibility" of the system. Implicit within this narrative is a focus on managing the volume of unwanted migrants, in particular rejected asylum seekers and irregular migrants. A prominent refugee law scholar we interviewed underlined this point. This person noted that since the early 1980s, the government "never gave up on the issue of the volume and too many refugees. And the whole issue of fraud which was allegedly linked to that" (Participant 22, Ottawa, 8 December 2016). In line with this opinion, we believe that the new measures are meant to reduce the occurrence of irregular migration, which is perceived or postulated to: a) question Canada's sovereignty; b) threaten the health, safety, and security of the Canadian public; and c) compromise the integrity of the refugee system. In other words, the measures are meant to protect safety and security but they are also considered to be a matter of principle, i.e. respect for the rules.

#### 4. HAVE THE 2012 REFUGEE REFORM'S STATED GOALS BEEN REACHED?

Two main stated policy goals emerge from the *Balanced Refugee Reform Act* and the *Protecting Canada's Immigration System Act* : a) acceleration of timelines and clearing the backlog at the IRB, b) faster removal of rejected claimants. In the following sub-sections, we explore whether the legislative measures have reached their policy goals, in cases where the government failed to reach these goals, we offer a critical analysis of the reasons why.

##### *A. ACCELERATING TIMELINES AND CLEARING THE BACKLOG OF CLAIMS AT THE IRB*

One way of assessing the success of the new measures is to review how they may have affected the overall number of refugee claims processed. Pursuant to the entry into force of the 2012 refugee reform, the number of asylum claims decreased by half, from 20,427 claims in 2012 to 10,322 in 2013. By contrast, globally, asylum applications reached a record high of 1,067,500 individual applications submitted in 167 countries or territories during 2013. This figure constituted a 15% increase in asylum claims in industrialized countries compared to 2012 (UNHCR, 2014: 27). In Canada, the implementation of the DCO regime seems to have had an impact on the decrease in the number of overall refugee claims, since claims from citizens of countries on the DCO list declined by 69%, from 5,170 in 2012 to 1,625 in 2014. This drop may also be related to a potential deterrence effect as a result of quicker processing times for claims and increased restrictions in access to certain steps in the system (IRB, 2016). A spokesperson from IRCC noted:

*So there seemed to be a depressive effect on asylum claims, simply based on the signals the government was sending, which might lead you to conclude that that government was right, that a lot of people were using the asylum system for purposes it wasn't intended for. Because, simply based on policy indicators that people from certain countries would have a lesser access to appeal, and probably misunderstanding of those measures, lead to a sharp and immediate drop in asylum claims especially from Eastern Europe (Participant 21, Ottawa, 7 December 2016).*

This quote needs to be analyzed further, because it blurs descriptive and evaluative claims, with neither being supported by strong evidence. First, while the number of claimants decreased at the same time as new measures were introduced, the cause is not clear. It is reasonable to suppose these measures played a role,

but other factors may also be at play, including heightened interdiction and border control measures. For instance, in the 2011–12 fiscal year, the CBSA denied entry to 54,000 people at ports of entry and intercepted another 4,000 overseas. The RCMP intercepted an additional 1,277 people for entering Canada illegally between ports of entry (Auditor General of Canada 2013). More recent figures are not available. Nonetheless, given the most recent policy objectives, one could reasonably expect an increase in these numbers.<sup>7</sup>

Secondly, and more importantly, there is no evidentiary basis to conclude that the reduced number of claims proves the system was abused prior to the 2012 refugee reform. Indeed, if it is suggested, based on existing statistics, that the DCO regime led to a reduction in the number of credible refugee claims, it is important to remember that the whole point of the DCO regime is precisely to ensure that claimants from DCOs face more obstacles in filing a successful claim. It stands to reason that even persons with sound factual claims would select another country of asylum, if the Canadian system creates a formidable administrative barrier to success that also takes considerable time to navigate. It is not possible to soundly conclude that the decision for an asylum seeker not to file a claim in Canada is proof of its lack of merit, rather than the government's choice to obstruct entry and/or the filing of proper claims.

It is also noteworthy that, despite the drop in the volume of claims, the IRB has not been able to meet its timelines. In particular, RPD hearings were not held within the targets for any claimant stream. Targets for DCO claimants were met less often (55% heard within the targets) than non-DCO (70% heard within the targets) (IRB, 2016: 10). According to figures obtained from IRB, 30% of hearings held by the RPD in 2015 were rescheduled (33% in 2013 and 2014). 40% of postponements were “case related,” including lack of time (2,516 cases out of 3,753 cases in 2013; 2,207 cases out of 3,275 cases in 2014, and 1,668 out of 2,617 in 2015). Not only was the RPD timeline target not met, but also RAD's target to finalize appeals within the 90-day limit: in 2014-2015, 36% of finalized paper-based appeals exceeded this limit (IRCC, 2016: 12). On average, these cases were finalized 44 days over the target. This should not come as a surprise: the processing timelines are considered by most research participants to be too short. There are many reasons for this, not

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<sup>7</sup> As stated by IRCC, Canada conducted interception operations in transit countries and “funded activities related to outreach and sensitization while managing the consequences of irregular migration. Activities funded in fiscal year (FY) 2014/15 in West Africa and Sri Lanka included projects that focused on building basic capabilities” (IRCC, 2015: iv). To give another example, the Canadian government was involved in the interception of several Sri Lankan migrants destined to Canada, in 11 countries in West Africa between January 2012-September 2015. The operation resulted in over 500 migrants being returned back to Sri Lanka, the vast majority of removals taking place between January 2012-April 2013. (IRCC, The Global Assistance for Irregular Migration (GAIM), 2015: 16).

least being that the complexity of the RSD means it cannot be dealt with in an expedited manner (see, e.g., Rousseau et al., 2002).

Thus, the new RSD has not cleared the RPD backlogs. As pointed out in the IRCC and IRB evaluation reports, the administration's priority was to schedule the initial RPD hearings for new asylum applications. As a result, secondary intake of claims, i.e. claims returned to RPD by the RAD or Federal Court, remained unresolved for a period of time. In addition, significant delays have occurred in the processing of the legacy claims, i.e. asylum claims referred to the IRB prior to the entry into force of the new regime on December 15, 2012. In 2016, more than 5,000 legacy claimants were still awaiting a decision. As a representative of an organization providing services to asylum seekers in Toronto put it:

*Because the IRB is under such pressure to process new claims within two months that some cases such as the so-called legacy cases, cases in which claimants have their hearing postponed for some reason.*

*Moreover, files that are referred back to IRB for a new hearing as a result of a judicial review at the federal court are considered the lowest of the low in terms of priority in rescheduling. So those claims just aren't getting rescheduled at all (Participant 17, 21 November 2016).*

Consequently, in April 2017 the backlog has reached 20,000.

In addition to rising numbers of ministerial interventions and applications for vacation and cessation, the heightened security check requirements contributed to creating major delays in claims processing. For example, DCO claimants' hearings were more likely to be rescheduled because of Front-End Security Screening (FESS)<sup>8</sup> (IRCC, 2016: 19). In addition, RCMP ran an Enhanced Security Screening Pilot Project between 2013-2015, in order to "contribute to FESS and enhance CBSA's capacity to identify security threats within the refugee claimant population" (RCMP, 2015). The question was whether an individual's history engaging in and/or being associated with criminal activities should inform admissibility decisions. To that end, the RCMP screened a portion of refugee claimants against existing law enforcement databases and

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<sup>8</sup> FESS is implemented by CBSA, with the aim of identifying potential security cases within the refugee claimant population. A claimant's hearing at the RPD cannot proceed until the FESS process is completed (IRCC, 2016: 19). CBSA officers provide recommendations to IRB with respect to the eligibility of claimants for refugee claim hearings, based on inadmissibility reasons detailed in sections 34, 35, and 37 of the IRPA. In 2014-15, FESS accounted for almost half of the delays in holding of hearings. Over 700 claims were delayed due to a pending FESS and experienced about a four-month delay on average.

shared the results with the CBSA to feed their larger front-end screening process. In September 2015, the project evaluation found that screenings could not always be completed in a timely enough manner to contribute to the CBSA's FESS recommendation<sup>9</sup>. More importantly, of the 4,085 claims subjected to enhanced screening through the pilot project in the 2013-14 fiscal year, only 85 claims produced positive findings of concern (2.08%). The RCMP admitted that the pilot has not had any impact on the admissibility recommendations made by the CBSA (RCMP, 2015).

The fact that the acceleration of the timelines was accompanied by multiple security checks performed on asylum claimants may seem counterintuitive, since these checks, by their nature, are complex and time-consuming. They therefore constitute an additional impediment to achieving the faster processing of refugee claims, and hence the integrity of the system.

### *B. FASTER REMOVAL OF FAILED CLAIMANTS*

Following the 2012 refugee reform, the government was not able to meet the target for the removal of failed refugee claimants. On the contrary, removals decreased after the changes, from 13,869 in 2012 to 10,743 in 2013, and 7,852 in 2014. In 2013 and 2014, only 14% (2,674) of those who claimed asylum after December 15, 2012 were deported. Just over half of the failed claimants that received an IRB decision in 2013 were removed within one year and the target of 80% was not reached. As of 6 June 2014, the CBSA had a pending removals inventory of 18,631 (IRCC, 2016: iv-v).

Moreover, 62% of failed new system claimants (DCOs and non-DCOs) who received an IRB decision in 2013 were not removed within 12 months (IRCC, 2016: 20). As a result, individuals who were initially ineligible to apply for H&C and PRRA became eligible to apply. These figures prove once again that the government's aim to make the system faster to enhance quick removal of rejected claimants -notably for deterrence purposes and/or without a long-term assessment of the policy feasibility and cost- has some unintended consequences. The one-year bar established by the government to deny rejected asylum seekers' access to these recourses in order to remove them within this period therefore proved inefficient given its policy goal, as well as highly problematic in terms of the human rights of the individuals concerned (see section a) below).

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<sup>9</sup> It may not be accurate to characterize this as a recommendation. This is rather a finding by CBSA as to whether there are security concerns or not.



In addition, the CBSA faced a number of challenges to achieve the removals targets. Obtaining travel documents, due to lack of co-operation by the home country, accounted for 76% of all impediments identified by IRCC. Other obstacles to the CBSA's removal process include: lack of documentation to prove nationality; inability to locate foreign nationals; foreign nationals who are medically unfit to travel; and failure of some countries to accept the repatriation of their nationals (IRCC, 2016: 15-16). These obstacles are not unique to Canada. For example, research in Europe shows that, in practice, only a limited number of deportation orders are effectively implemented. In 2015, around 36 % of the non-European Union (EU) citizens who had been issued with an order to leave the territories of EU Member States were returned to their country of origin (outside of the EU) (Frontex, 2015; Eurostat, 2016). In addition to the above-mentioned problems, certain constitutional and international legal norms, such as the *non-refoulement* principle, effectively limit the states' capacity to remove non-citizens. Similarly, there is the issue of "undeportables," those asylum-seekers excluded from refugee status due to suspected involvement in serious crimes (as defined by Article 1F of the *Refugee Convention*) who cannot be removed from the host state's territory on other legal or practical grounds (Refugee Law Initiative, n.d.).

Another factor that should be taken into consideration when assessing whether the 2012 refugee reform has attained its policy objectives — notably, the protection of the system's integrity — is the financial cost of the process. According to the government, a total of \$324 million over five years (2010/11-2014/15) was initially allocated for the implementation of the in-Canada asylum system reforms, with \$61M in ongoing funding. Expenditures on the reforms over the five-year period reached \$258.7 million. A total of \$136.2 million has been further allocated over 5 years. The budget of the above-mentioned Enhanced Security Screening Pilot Project was \$16 million. Also, removal costs in FY 2013-2014 were \$43,120,600 (IRCC, 2016: 5), which is more than twice as much as in FY 2009-2010 (\$21,311,881) and yet the Canadian government has removed about the same number as the earlier period. Despite their high financial cost, the 2012 reforms have not been successful in terms of achieving the government's stated policy goals, notably the integrity of the refugee system. They have, however, engendered a number of unintended consequences.

## 5. UNINTENDED CONSEQUENCES OF THE 2012 REFUGEE REFORM

We identified a number of unintended consequences of the changes introduced in Canada's refugee status determination system in 2012. They are classified into four main themes: migrants' human rights violations, criminalization of asylum seekers, negative impacts on third parties involved in the refugee protection system, and irregular migration.

### A. HUMAN RIGHTS VIOLATIONS

The most obvious outcome of the recent changes is their negative impact on the human rights of migrants. As stated in the introduction, some of the recent policies have been successfully challenged before the courts. In this section, we focus on the interactions of accelerating timelines and faster removal of non-nationals, on the one hand, and the denial of *Charter* protections at crucial stages of the asylum process, on the other. We point out that lack of access to fair procedures at the front-end or middle of the process results in the exertion of pressures at the final stage (e.g. PRRA and H&C) and/or non-compliance with international human rights standards.

Accelerated timelines are a serious impediment to access to justice for in-land asylum applicants in Canada. Our research findings corroborate the previous studies (Bates et al., 2016; CARL, 2016). Refugee lawyers and community organization representatives invariably thought that, while the new timelines may work for some asylum seekers, they typically do not give claimants enough time to prepare their claims. Several interviewees noted how shorter timelines impact vulnerable claimants, who have difficulties providing formal legal and factual materials in support of what are credible claims. As one lawyer put it:

*[T]he changes...It flipped so drastically, that now it's very hard for a lot of individuals to compile the evidence that they need, in time for their refugee hearing, and the interpretation of the new evidence requirements for introducing new evidence on appeal, if you're lucky enough to have an appeal, before the refugee appeal division (Participant 10, Toronto, 28 January 2016).*

In addition, the new timelines have been particularly problematic for claimants from DCOs who have even less time than non-DCO claimants to prepare their applications. According to the figures we obtained from the IRB, high acceptance rates in 2015 for two main DCO countries - Hungary (78.2%) and Slovakia (80.4%) -

reveal that people coming from these countries have in fact well-founded reasons to claim protection. The new timelines therefore exacerbate the risks of rejecting legitimate applications without a thorough analysis of the merits of the claims; there is a consequent, unjustifiable risk of *refoulement* for DCO claimants.

Some interviewees noted that the system has become either too fast or too slow to be fair. As a result of the IRB decision to prioritize new claims, some groups of claimants' files (such as the aforementioned "legacy cases") have not been dealt with, leaving these claimants in limbo for several years. As noted by CARL, some of the legacy claimants remained in Canada for more than three years on temporary status with no assurance of receiving Canada's protection, and no means of getting on with their lives (CARL, 2016: 21). A representative from a Toronto-based service organization corroborated this finding:

*We still have families that are in the legacy cases. There are seven or eight families connected to [the organization] that still haven't had their hearings, and it's been, like, four years or longer. There's a family that hasn't had their hearing in five years. ...every single one of those families is suffering from some serious mental health challenge, related to it. Indefinite, like, long family separation... [I]f they are accepted, it's still going to be another two, three, four years. So, it's like, almost a decade of being separated from their children (Participant 17, 21 November 2016).*

It should also be noted that legacy claimants do not have a right of appeal if their claim is rejected by RPD, which considerably increases the hardship on these claimants who, because of their prolonged stay in Canada, are likely to establish strong social and economic ties in the society. Their situation contradicts the very aims of the recent changes, which are to process claims before claimants grow roots in Canada.

In accordance with the recent Federal Court ruling in *Y.Z* (2015), the right to appeal a negative RPD decision should be made available to all groups of claimants. A refugee lawyer explained to us:

*the Refugee Appeal Division [...] was really a very positive development in the way refugee status determination is handled in Canada. The problematic part of it is the number of limitations they've put on those who have access to it. In my mind, if there is merit to an appeal process, in refugee status determination, then there's merit in providing it to everybody who is eligible to make a refugee claim. It's just kind of common sense to me (Participant 10, Toronto, 28 January 2016).*

The absence of an automatic stay of removal (ASR) for certain groups of migrants is also quite problematic. A study by IRCC that examined a sample of claimants (312) who did not benefit from an ASR, found that the CBSA attempted to remove more than half (57%) of these claimants while the judicial review litigation before the Federal Court was pending (IRCC, 2016). Figures also show that there has been a steady increase in the number of persons with pending H&C applications who were removed since 2002. In Europe, there are numerous court decisions both at the European and national level highlighting the human rights violations caused by the absence of a stay of removal (ECtHR, *Jabari v. Turkey* CEDH 2000-VIII; FRA, 2016: 102-103). In *I.M. v France*, for instance, the European Court of Human Rights held that an “effective remedy” requires an appeal with suspensive effect in order to prevent *refoulement*, granting enough time to prepare the appeal and acquiring effective legal assistance and interpretation (2012, para. 157-158). As a result, France introduced a suspensive effect for all appeals before the National Court of Asylum (*Cour Nationale du Droit d’Asile*), which enables asylum seekers to remain on French territory while their appeal is pending (AIDA, 2016: 21). A similar measure was adopted in Belgium following a Constitutional Court ruling in January 2014; this ruling found that the lack of suspensive effect in the appeal for asylum seekers from “safe countries of origin” violates the right to an effective remedy (Decision no. 1/2014, 16 January 2014).

Further to the absence of an ASR, other factors negatively impact claimants’ right to an effective remedy. Restrictive time frames can lead to increased rates of abandonment of claims and a rise in the number of unrepresented claimants. We obtained figures from IRB on legal representation. Interestingly, the data shows that, on average, more than 40% of individuals were not represented by legal counsel<sup>10</sup> during admissibility hearings (43% in 2010; 49% in 2011; 45% in 2012; 43% in 2013; 55% in 2014; 46% in 2015 and 37% in 2016). Some interviewees argued that reduced timelines exacerbate the existence of inferior legal representation and have incentivized volume-based practices which could be detrimental to the principle of due process of law.

Legislative reform is the only realistic avenue to ensure that persons with meritorious claims are not denied protection – a group, it bears recalling, was not officially supposed to be bereft of this right. The urgency of a

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<sup>10</sup> This includes members of: a bar of a province, the Chambre des Notaires du Quebec, Canadian Society of Immigration Consultants; Immigration Consultants of Canada Regulatory Council.

need for amendments is underscored by the retraction or general shrinking of *Charter* protections in front-end and intermediary proceedings, such as admissibility and exclusion determinations. In other words, the absence of *Charter* protections at key stages of the removal process exacerbates the cumulative or holistic impact of discrete measures introduced between 2010 and 2012. Unfortunately, courts have not had the advantage of full empirical studies on the impacts of these measures, which may have contributed to a misunderstanding of the nature and gravity of rights deprivations. Nevertheless, Parliament has a responsibility to protect and promote *Charter* rights, even in the absence of judicial intervention or widespread dissemination of social sciences research.

Several prominent refugee lawyers compared the current urgency to a series of Supreme Court decisions. One began with the 2002 case of *Suresh* ([2002] 1 S.C.R. 3), where the Court ruled that deportation to torture is generally (but not absolutely) prohibited, and that decisions about this risk must abide by a core minimum of procedural protections. This decision (inadvertently) linked the applicability of the *Charter* to the existence of irreparable harm over and above the mere act of deportation, but also intimated that such harm must be of a grave nature akin to torture or death. One interviewee stated:

*I don't think the Supreme Court when they wrote it out in Suresh, thought that they were making any kind of statement compared to Burns and Rafay, the death penalty cases, because Suresh wasn't Canadian. But it's there. The test is you have to show the court that you have a serious issue, that you would suffer irreparable harm, harm that's not compensable in damages ...It's irreparable harm to be deported from Canada, therefore, you have to show something beyond irreparable, something more than irreparable, the fact that your child's going to be harmed, and your child's not going to get better, because she's been separated from her mom for ten years, ..., is irreparable harm. But it doesn't count, in these cases. And it's only immigration cases that they use irreparable harm plus, only in immigration cases. You won't find it anywhere else in the case law in Canada (Participant 2, Toronto, 20 January 2016).*

Other interviewed lawyers pointed to recent cases that have denied the applicability of the *Charter* to front-end and intermediary stages of the removal process. In the 2015 case of *B010 v. Canada*, the Court decided that s. 7 is “not engaged at the stage of determining admissibility to Canada” and that the benefit of the *Charter* “is typically engaged” only during the actual removal stage (*B010*, 2015, para. 75). One participant

noted:

*In the section 37 cases, the court pretty summarily dismissed the notion that the Charter found application to inadmissibility determinations. The question that that raises is, where that leaves the same decision [...] in admissibility contexts, where the inadmissibility determination completely removes the right of a refugee hearing. So, if the 1985 Singh decision said, 'Section 7 of the Charter and the Bill of Rights require that in matters of refugee determination where credibility is at stake, refugees claimants have the right to an oral hearing.' where is that, now that we have Supreme Court jurisprudence that says a process that removes that right, categorically, the Charter has no application to it (Participant 10, Toronto, 28 January 2016).*

This interviewee's observation should be placed in the context of rules that deny to certain classes of inadmissible persons protection against deportation to persecution. In *Febles v. Canada* ([2014] 3 S.C.R. 431), the Court denied the applicability of the *Charter* to decisions about whether a person should be excluded from refugee protection. The Court reasoned that persons who are denied the right to claim refugee status on grounds mentioned above can always "apply for a stay of removal to a place if they would face death, torture or cruel and unusual treatment or punishment if removed to that place" i.e. for a PRRA (para. 67). But this list of human rights abuses is under-inclusive and excludes persecution – in many cases affecting persons who have diminished capacities to meet fully the case against them in the contexts of inadmissibility and exclusion determinations.

The Supreme Court has not yet ruled on whether the substantive and procedural protections available at the end stage of the removal process are adequate. If they are not, then diminished access to justice at earlier stages assumes even greater significance. There are sound reasons for thinking PRRA bars and other obstacles to challenge deportation to persecution are inconsistent with the *Charter*:

*(B10) they clearly found that the Charter is not engaged at the immigration division process or at the RPD. And that, you know, the whole reason that we have [...] this refugee adjudication process and the oral hearing is because in saying the Supreme Court found that the Charter is engaged; there's a right to a hearing, that's required for section 7. And gradually, they've managed to push the Charter entirely out of*



*the refugee protection regime. ... they do that in part because they rely on the fact that under the current system, ... it's not the final risk assessment. The person isn't going from the refugee board on to a plane. They still have other procedures available to them. .... So then they say, 'There's no Charter at the RPD.' And then you try to raise in the context of the PRRA, but ... the court recently found that the Charter is not engaged in the PRRA proceeding either, because that's also not the final moment. You're not actually facing removal immediately. You still have access to the federal court for a stay, and you can always ask CBSA very nicely to please, please not put you on a plane to torture. So, ...the Charter, and section 7 is being pushed back and back and back, to the point that it feels like the only time that we can actually force the court to recognize there's a Charter issue engaged is when they have, like, one foot on the plane. Until they're at that point, and only if they've exhausted every possible remedy, even the request to defer removal, which has no law around it. It's just a discretionary administrative request (Participant 15, Toronto, 2 November 2016).*

Parliament should not wait for a court to take notice of the inadequacy of amended PRRA procedures. Two recent judgements are noteworthy here. In *Peter v. Canada* (Peter v. Canada ( [2014])), the Federal Court found that s. 7 of the Charter is not engaged when persons who may have a well-founded fear of persecution are denied the right to make that claim, either to the RPD or to a removals officer. The case concerned s. 112 (2) of the IRPA, which was introduced through the *Balanced Refugee Reform Act*. The provision bars persons from claiming protection through PRRA if they are from DCOs or have filed unsuccessful claims before the RPD within the last 12 or 36 months, depending on their designation. The claimants argued this regime denies protections to which persons are entitled under international law and by virtue of principles of fundamental justice.

Although the reasoning in this case is hard to follow, the gist of the ruling was that persons who have failed to make a successful claim for refugee protection before the RPD are unlikely to do so before a removal officer; this supposedly takes care of the 12/36-month PRRA bar. Annis J. ruled that removal to persecution “does not expose the applicant to irreparable harm, in the sense that if the decision of the removal officer is overturned, the applicant is prevented from being readmitted to Canada” (at para 296), and, that the Federal Court can always overrule the negative decision of a removal officer, if it is unreasonable (para. 274).

The Federal Court of Appeal overruled this decision on the grounds that it was premised on insufficient factual foundations (*Savunthararasa v. Canada (Public Safety and Emergency Preparedness)*, [2016] FCJ No 173 (QL)). But, it declined to pronounce on the substantive issues, meaning that the constitutionality of this portion of the removal process remains unsettled and will likely be before courts again in short order. We would note that Annis J.'s confidence in the effectiveness of hearings before the RPD is misplaced. A good number of persons with credible claims are being deemed ineligible to apply for refugee protection. Further, aforementioned legislative changes drastically reduce the ability to file complete claims. When making inferences about the success rate of claimants before the RPD, we should also consider harms accruing from timeline accelerations and increased use of detention and video-conferencing. The availability of empirical evidence concerning the ineffective, arbitrary, and overly broad nature of recent measures will help bolster the strength of future *Charter* challenges. Parliament should deal with obvious flaws now.

### *B. THE CRIMINALIZATION OF ASYLUM SEEKERS*

A second unintended consequence of the 2012 refugee reform is the criminalization of migration. This phenomenon can be defined as the integration of criminal law processes into immigration control, and the adoption of criminal law enforcement strategies, or administrative sanctions (Stumpf, 2006: 376; Guild, 2010: 1). Our Working Paper has focused on the adoption of criminal law enforcement strategies, or administrative sanctions, which either impose harsher immigration consequences than before, or, remove basic protections against unjust decisions. (Stumpf, 2006: 376; Guild, 2010: 1). Immigration and refugee protection law intersects with criminal law in denying entry to or excluding those with a criminal history (Aliverti, 2012). However, the criminalization of asylum seekers goes beyond this intersection, catching persons who have little to no links with criminality. With reference to the U.S. context, for example, Vázquez discusses how over the last sixty years, social and political debates about the immigration system have increasingly focused on threats to national security and community safety, connecting “criminal aliens” to these threats. This rhetoric, according to Vázquez, gives the American public the perception that those individuals who are removed are either dangerous criminals or terrorists (Vázquez, 2015: 33).

A similar process has been at play in Canada. Harsher substantive asylum law and reduced procedural guarantees, together with increased law enforcement against non-citizens, have been part of the

criminalization of migrants and asylum seekers. Extraordinary measures, such as lack of appeals or of a stay on removals, were justified by a negative political discourse against asylum seekers. Ministerial interventions, inadmissibility proceedings, and cessation are some examples that illustrate this process.

The Conservative Government's rhetoric coincided with a drastic increase in ministerial interventions at the IRB hearings between 2012-2015. Some participants pointed to a striking rise in interventions from an average of 3% a year before 2012, to up to 20% of cases in 2012-2013, as well as to increased budget allocations for ministerial interventions. Whereas previously interventions were only performed by the CBSA and focused mainly on issues of serious criminality or security concerns, CIC (currently IRCC) has been increasingly involved in the interventions since 2012 before the IRB, focusing on cases involving program integrity and credibility issues.<sup>11</sup>

As pointed out by Emily Bates et al., there has been a perceived loosening of the standard by which the Minister decides to intervene. In addition to their potential to restrict access to protection, by increasing stress, financial cost, and preparation time for claimants, this escalation of ministerial interventions raised participant concerns that the RSD process is becoming more adversarial and "anti-refugee" (Bates et al., 2016: 66-67). Although it is difficult to draw inferences from the figures available, there seems to be a correlation between ministerial interventions and cases being rejected by RPD. In cases intervened into by either CIC or the CBSA, there was a higher proportion of negative RPD decisions than in cases where no intervention was made. An IRCC review found that the strongest effects were for the rate of positive RPD decisions, where positive decisions were 40% when no intervention was conducted, compared to 24% when an IRCC intervention was conducted and 26% in cases of a CBSA intervention (IRCC, 2015: 14). Drawing on the results of our own project and on previous research available, we hypothesize that the higher rejection

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<sup>11</sup> An example of this is the Reviews and Interventions pilot project launched by IRCC in October 2012 with the following objectives: a) to ensure that persons representing serious criminality or security threats do not benefit from Canada's protection; b) to maintain the integrity of the in-Canada asylum system; and c) to ensure that the IRB has comprehensive information for refugee determination (IRCC, 2015: 5). As with the RCMP's above-stated pilot project, this particular pilot was also found of limited use. In the first 18 months of the pilot (January 2013-June 2014), IRCC conducted 10,775 reviews of in-Canada claims, with 77% of those claims being reviewed prior to being heard at the RPD. Moreover, they intervened in 23% of the cases that were reviewed, which represents 2,465 interventions (IRCC, 2015: p. 12).

rates are linked to the adversarial climate created by ministerial interventions, coupled with substantive and procedural limitations.

Some participants, including a Federal MP, expressed concern on the issue of inadmissibility and claimed that it has been taken to new heights, with very little scrutiny of the ministerial interventions. IRPA s. 34, 35 and 37 are considered by refugee lawyers as overbroad, if not arbitrary.

It is noteworthy that the number of individuals who were declared inadmissible since 2004 has been steadily increasing. For instance, according to figures provided to us by the IRB, 245 inadmissibility decisions were taken under IRPA s. 37(1)(a) (i.e., being a member of an organized crime organization) and 19 decisions were taken pertaining to 37(1)(b) (i.e., smuggling, trafficking, money laundering) between 2004-2010. The numbers climbed to 192 under 37(1)(a) and 66 under 37(1)(b) during the following four years (2011-2014). According to the IRB, the increase noted above may be at least partially attributable to the fact that admissibility decisions by the ID involving s. 37(1)(b) were made during these years (2011 – 2014) for persons who were referred to the ID and had travelled to Canada on board the *Ocean Lady* (October, 2009) and the *Sun Sea* (August, 2010) ships. The number of persons who were declared inadmissible under 37(1)(a) and/or (b) since 2004 increased in 2007 to 2009 reflecting marine arrivals. The numbers levelled off to approximately 45 inadmissibility decisions under 37(1) per year in 2015 and 2016. The number of inadmissibility decisions under 37(1)(a) and (b) increased, averaging 10 cases per year since 2010 compared to an average of 2 cases from 2004 to 2008.

In *B010* (2015), the Supreme Court ruled that s. 37 should only apply to people who act to further illegal entry of asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime (para. 5). The court rejected the government's contention that limiting the people-smuggling provision to those circumstances involving a material benefit to the smugglers fails to catch operations undertaken for other illicit purposes, such as sexual exploitation or terrorism (Grant, forthcoming 2018). While welcomed, this reasoning can and should be applied to other corners of the security/asylum nexus.

### C. NEGATIVE IMPACT ON THIRD PARTIES

The *Balanced Refugee Reform Act* and the *Protecting Canada's Immigration System Act* have had important unintended consequences not only for migrants, but also for third parties involved in the refugee protection system. These stakeholders include criminal justice professionals, social workers, IRB members, and service providers. The extent and the pace of these changes are considered to be “draconian” by several participants. The Canadian refugee landscape is seen as a field of law in flux, in the sense that the legal uncertainty affects all actors involved, including IRB members. In fact, an IRB evaluation found that the new system has generated huge pressure on its members. Concerns were raised over how the stressful nature and pace of the work could diminish job satisfaction, lead to burnout, and drive members to seek opportunities elsewhere (IRB, 2016). There is no doubt such pressures have created a work environment that affects the ability to reach the immediate expected outcomes of the new legislation, as well as the long-term sustainability and quality of the IRB's work.

The changes also made it more difficult for professionals working in solidarity with asylum seekers and migrants to perform their tasks. To give an example, representatives from some civil society organizations noted that the changes and, in particular, the new RSD timelines have shifted their organizations' priority from providing vital social support to newcomers through community programming, to assisting them with their refugee claim. As described by a frontline service provider:

*Now our interns and our settlement workers are basically so overwhelmed with just supporting people in their first two weeks, in their first two months, because everything has to happen at the front end and it is really, really busy. So it has really changed the shape of our community. But also, it means that people who are incredibly vulnerable when they first arrive, and might not have access to social assistance, or need to find housing or need to get into school... they are just things that get put on the back burner, because their legal process is so demanding that I think it creates a lot of vulnerability for people at the very beginning (Participant 17, Toronto, 21 November 2016).*

Moreover, some participants considered that the criminalization that has permeated the system has had a considerable impact on how immigration and refugee law is understood and practiced by each key stakeholder, including lawyers, decision-makers, and law enforcement officers. As a refugee lawyer in

Toronto said, “the changes over the last several years have put such a negative cloud over the practice of refugee law, they’ve made it feel like an embattled zone” (Participant 1, Toronto, 2 November 2015). Another Toronto-based lawyer noted:

*The whole system has become more punitive. The whole environment, in which we practice immigration law has changed under the previous ten years. The Conservative government was sort of really bent on criminalizing and sort of restricting immigrants’ rights, I think it almost give license to the individual officers as well (Participant 6, Toronto, 8 December 2015).*

And one human rights activist told us:

*With the reforms that have happened, you can’t really recognize the system anymore, and so we’re dealing with a whole new way of looking at refugees in particular... And so the entire practice is permeated by these views (Participant 1, Toronto, 2 November 2015).*

The rapid changes have also created confusion among frontline workers. Legal uncertainty affects the way the services are delivered and exacerbates the vulnerability of migrants.

*There is uncertainty of the answers, the situations, the recourses, what to say, what advice to give.... It’s an animal that moves and every week, ... and we have been... working here in the last 5 years in a very, very frustrating environment, because the people were so desperate (Participant 3, Toronto, 24 November 2015).*

The representatives of a Toronto civil society organization described their experience as follows:

*P8: the extent of changes in immigration and refugee policy has been so broad and so deep that it’s confusing to...*

*P9: and so quick...*

*P8:... to anyone who makes it their full-time work, and front-line workers in settlement, this is not their full-time work, and yet inevitably, because there are no other access of services, it all ends up, you know, coming to them. It’s really hard for frontline workers to understand this is what’s going to happen to their*



*client, and so very often we've heard of clients traveling, coming back, and at the border, being told 'oh really, you traveled and you came here as a refugee, ok' and the next thing they know is that their status is being vacated and proceedings are in place to have them removed. And so the impact of the changes is really happening at many different levels (Participants 8 and 9, Toronto, 19 January 2016).*

A particularly problematic area in this respect is the vacation and cessation provisions redefined in the *Protecting Canada's Immigration System Act* in 2012. Cessation applications are brought against permanent residents who have traveled back to their countries of origin, often many years after their claims for protection have been decided. The government considers them to have "re-availed" themselves of the protection of their country of origin. Whereas from 2007-2011, there were 106 cessation applications made by the Minister of Public Safety, a target of 875 applications per year was set in 2013 (Operational Bulletin PRG-2013-59, September 19, 2013). As a result, cessation and vacation proceedings have increased five-fold between 2012-13 and 2014-15 (CARL, 2016). Several NGO representatives described how the extensive use of cessation has affected their work. For example, they noted:

*Overnight, the person can lose Convention refugee status, permanent refugee status, and be deported. And [a] lot of the people doing the day-to-day work on the ground are completely overwhelmed by what's happening, and not prepared to deal with it, but they are the ones who are in day-to-day touch with these people making these sort of, you know, literally life and death decisions, so there's a huge gap in what we are seeing, in terms of what's going on (Participants 8 and 9, Toronto, 19 January 2016).*

Immigration and refugee lawyers faced similar challenges. As one of them highlighted:

*The issue, in terms of giving legal advice and for people to make informed decisions, decisions about their future, is that they, they honestly don't know what to do and they're often left in a situation where they prefer not to disclose, i.e. not to apply for citizenship, not to apply for anything else, and not put themselves at risk of losing their status in Canada (Participant 18, Toronto, 21 November 2016).*

In addition to the pressure it has created on the system, the enforcement of cessation provisions also criminalizes migrants and results in violations of their human rights. Those who are affected by cessation provisions have no right of appeal and no statutory stay of removal pending their leave application for

judicial review to the Federal Court. Moreover, the law can be applied retroactively to any conduct prior to the entry into force of the provision on December 15, 2012. On a positive note, some interviewees mentioned that the cessation applications have considerably decreased since the election of the Liberal Government.

To alleviate the disproportional effects of some of these policies, lawyers must craft creative strategies. Immigration detention is one such area. Since the Ontario Superior Court of Appeal affirmed, in *Chaudhary v. Canada*, (2015 ONSC 1503) that detainees' constitutional rights under the *Canadian Charter of Rights and Freedoms* translate into a right to apply for direct *habeas corpus* relief at court, notwithstanding the existence of the detention review regime under IRPA, several lawyers prefer taking their detainee clients to the Ontario Superior Court, instead of challenging IRB's detention decisions before the Federal Court. Some lawyers we interviewed noted the difficulty of challenging detention decisions before the Federal Court, including the long timelines they are facing. According to them, Superior Courts have a tradition and a rich jurisprudence in terms of the rights of detained individuals that the Federal Court has not. They also noted that the "competition" between the Federal Court and provincial courts over the immigration detention jurisdiction plays to the advantage of individuals detained. As explained by an immigration and refugee lawyer:

*If you were detained, you couldn't go under section ten of the Charter, and assert your right to habeas corpus and right to release if your detention's unlawful, which is a constitutional right, a human right. Because there was a Federal Court process. Well, the Federal Court process is broken. If it takes a year to get a case heard on a detention, when you could be heard on two days' notice in the Ontario Superior Court. And the federal court judges are now open to expediting as a matter of principle, these detention cases, but only since the Court of Appeal for Ontario said that they would take jurisdiction over them* (Participant 2, Toronto, 20 November 2015).

In a similar vein, lawyers in Ontario have developed ad hoc mechanisms to prevent the risk of *refoulement* that stems from the PRRA bars. An illustrative example is the deferral of removal available to refugee claimants who are in possession of new evidence of risk, in case they are sent back to their home countries. As these individuals are precluded by the PRRA bar from having the evidence considered, lawyers take the initiative to present the evidence of risk to a removal officer and ask for a deferral of removal until the new evidence can be assessed by a PRRA officer. If the removal officer refuses to defer, the refusal can then be

challenged in the Federal Court, with a request for a stay of removal. However, participants noted that deferral of removal is processed by removal officers who do not have any expertise in the refugee system, and is not as thorough as a PRRA decision. They confirmed CARL's finding that it is not an adequate or appropriate substitute for a risk review by a competent, properly-trained and statutorily-mandated decision maker (CARL, 2016: 21-22).

#### *D. EXPANDED LAW ENFORCEMENT INTERVENTION BY THE CBSA*

Over the past decade, the CBSA has been vested with increased powers and discretion in the implementation of key policies, with little to no judicial or public oversight. The CBSA was highly criticized by non-governmental interviewees.

The 2012 refugee reform accompanies a considerable increase in the law enforcement mandate and capacity of the CBSA. It received approximately \$8.5 million in dedicated funding to implement refugee system reform (IRCC, 2016). Several interviewees see the CBSA as having a distinct institutional security-oriented culture within the federal immigration and refugee policy field. A spokesperson from IRCC explains:

*I think one of the most important changes was when CBSA, the enforcement arm, left the department and the public safety portfolio was created. Because what it has meant, as well, while the Immigration and Refugee Protection act is joint, between us and public safety, like, we're the ones that, you know, like, we're the welcoming ones. We have our arms out (Participant 24, Ottawa, 9 December 2016).*

According to this interviewee, this change "created a healthy tension inside the federal family" and "a pretty solid level of checks and balances through the system". However, non-governmental participants tend to see the CBSA as strongly embedded in its enhanced law enforcement mandate and as neglecting other key policy objectives, such as upholding Canada's humanitarian approach and international human rights obligations. Some of them point out that with increased powers, the CBSA maintains a culture of fear targeting racialized immigrant communities and intruding in the private lives of asylum claimants. An immigration and refugee lawyer noted "a willingness and a de-sensitization", highlighting that "one of the biggest problems with the CBSA [is that it is] a huge police force now...without any controls, without any kind of monitoring or surveillance, without a history of how police operate" (Participant 2, Toronto, 20 November 2015).

Interestingly, a former civil servant also noted that several of this person's colleagues "ended up moving back into IRCC because they hated the mentality" (Participant 22, Ottawa, 8 December 2016).

Some participants expressed discontent with CBSA's enforcement mandate. It is seen as unsympathetic to the Canadian values system, such as the principle of prioritizing the best interest of children. Some see detention as a tool to intimidate or exert power over migrants. One lawyer noted:

*[This woman] went to a CBSA appointment... the officer said 'So, do you want us to buy the ticket back? Or shall you get it?' or something like that. And she panicked and she thought they literally were going to send her back in two days or something like. She panicked; she said 'Oh, I can't go back. I'm terrified.' or she said something like that. Well, that's what you're not supposed to say in front of an officer. ... [This woman] was handcuffed and she was brought to detention (Participant 16, Toronto, 9 November 2016).*

As well, when preparing to remove a failed claimant, it is CBSA officials who consider whether the individual may apply to IRCC for a PRRA. Some interviewees pointed to the manipulative nature of such interviews. A spokesperson for a service-providing organization described the situation:

*CBSA will ask a question like, "Okay, are you afraid to go back to your country?" and if you say "Yes, I'm afraid," then you might be detained. There have been cases of people being detained because if they say that they're afraid, then they're showing that they're a flight risk. But the CBSA officer has no reason to detain them, because they're sitting there in front of them. If they're going to disappear, they wouldn't have shown up to their appointment. So we have to coach people, before they go, in terms of what they would say. Such as, to never answer a question like that directly... how to answer that question without saying, "I'm afraid"... So we coach people to say, "I understand that I'm in the removal process, and I will comply with the removal process." And just don't answer those questions (Participant 17, Toronto, 21 November 2016).*

Others drew attention to the detention of migrants with mental health issues. Lawyers and service providers have brought up the CBSA's general lack of willingness or ability to consider the special needs of vulnerable individuals. With reference to the case of a female rejected asylum seeker who was mentally ill and who was called in to the enforcement centre in Toronto, a refugee lawyer told us:

*The officer had, beforehand, a copy of our request to defer removal, which included a copy of the humanitarian request, which referred to her mental health status and referred to the fact that she had previously attempted suicide. And the officer asked her, “Is it true that you have contemplated suicide?” And she said, “Yes, in the past.” And he said, “You’re under arrest” and arrested her and detained her for a month and a half at a medium- to high-security prison for women, on the grounds that she was unlikely to appear for removal, because she was so desperate not to [leave Canada] that she’d attempt to commit suicide. She went off of her meds. She had no access to her mental health support team in downtown Toronto (Participant 15, Toronto, 2 November 2016).*

Numerous participants referred to certain CBSA practices as an “abuse of power” and a “waste of public resources”. According to an NGO representative, “ils pourraient sauver beaucoup d’argent s’ils contrôlaient plus les pratiques des agents frontaliers sur le terrain” (Participant 29, Montreal, 5 December 2016). They pointed out to the lack of proper training of CBSA officers and highlighted that there needs to be an oversight mechanism to hold agents accountable for misconduct and human rights violations. The establishment of a parliamentary monitoring committee (Bill C-22, June 2016) which is on the agenda of the current Liberal Government, is thus a welcome development. More reforms over the discretionary wielding of power and interventions should be explored.

### *E. IRREGULAR MIGRATION*

Another unintended consequence of the 2012 refugee reform is its potential impact on irregular migration. The number of irregular migrants present in Canada is unclear. Although there are no official statistics, politicians and the media tend to claim they are between 200,000-500,000, most of whom reside in Toronto, Montreal, and Vancouver. In a recent report on Toronto’s sanctuary city policy, we examined how profound the human rights implications of living without status are (Hudson *et al.*, 2017).

Some of the Canadian government representatives we interviewed told us that irregular migration is a negligible phenomenon in Canada. Yet, not all influential actors share this minimalist appraisal. For example, a Federal MP explains that: “everybody, everyone knows it [the presence of irregular migrants in Canada]. Nobody wants to talk about it” (Participant 28, Toronto, 18 November 2016). However, because irregularity is extremely hard to measure and evaluate, it remains unclear *if* and *how* reform policies have directly

impacted irregularity in Canada. What is clear, nonetheless, is that certain policies are seen as having a connection with irregular migration which results from a complicated interplay of immigration, asylum policy, and border controls (Dauvergne, 2008; Bauder, 2014; Ellis, 2015). For instance, not all rejected asylum seekers are deported from Canada and may thus become irregular migrants. In addition, there is extensive evidence-based research in Europe and the U.S. suggesting that harsher border controls and tighter asylum policies are conducive to more irregular migration (De Giorgi, 2002; Samers, 2003; Koser, 2005; Bloch, 2014). As noted by Düvell, “constantly changing and/or complex legislations, bureaucratic and inefficient procedures, (and) hostile organisational cultures are likely to result in irregularity” (Düvell, 2011: 278). A recent research conducted in Europe even suggests that a 10% increase in asylum rejections raises the number of irregular migrants by an average of 2% to 4% (Czaika & Hobolt, 2016). Tougher border controls also mean that once migrants become irregular, they are less likely to return to their countries of origin. This may contribute to an increase in the volume of irregular migrants present in a country (Migrants Right Network, 2009; Massey, Durand & Pren, 2016).

Migrants remain underground to avoid arrest, detention, and deportation. Research shows that in some European countries, migrants who may actually be entitled to asylum remain irregular because they feel it is impossible to receive refugee status in Europe (Fasani, 2008; Bloch, 2014; Schuster, 2011; Düvell, 2011).

Because irregularity is extremely hard to measure and evaluate, it remains unclear *if* and *how* reform policies have directly impacted irregularity in Canada. What is clear, nonetheless, is that certain policies are seen as having a connection with irregular migration because they have created a more “unsafe” climate for refugee claimants. Several participants provided concrete examples of how the *Protecting Canada’s Immigration System Act* (C-31) and the *Balanced Refugee Reform Act* (C-11) may have an effect on irregular migration in Canada.

Among all refugee reform measures, the DCO policy was seen by some participants as having encouraged people not to file a refugee claim for fear of refusal and subsequent removal. As previously noted, DCO claimants have less time to prepare their hearing than other claimants. They are also ineligible for a work permit for a period of 6 months and (until recently) did not have the right to appeal a refugee decision. They also have 2 years more than other claimants to be permitted to do a PRRA, if they have not been already

deported. One can expect that these factors would serve as effective deterrents against some DCO nationals in Canada who may otherwise consider claiming refugee status.

Likewise, some of the participants pointed out that accelerated timelines disincentive claimants to make their claim upon arrival to Canada, and in some cases, result into refugee claimants preferring to remain in an irregular situation until they gather evidence needed to support their claim. As explained by a refugee lawyer:

*Now if you come in, either illegally or as a visitor, you control the timeframes. So until you put in your set of documents, the clock doesn't start ticking, and you can kind of buy time to gather up personal corroborative evidence that way. The downside is that you have no benefits in the meantime, so you don't get any Ontario Works, you don't get any health coverage (Participant 1, Toronto, 2 November 2015).*

Some participants also highlighted how service providers and legal counsels have had to adapt to claimants' preferences and develop resistance strategies to the new rules that are seen as unjust.

*I think it's about 80 % of asylum seekers now, are not presenting themselves at the borders; asking for asylum inland. At least it buys them time to do more preparing before the clock starts ticking. ...we don't hurry them up to run out and make their appointment, because we want to help them get as prepared as they can, before they even present themselves (Participant 16, Toronto, 9 November 2016).*

Another problem concerns the unwillingness of migrants to use existing last resort remedies. For instance, we were told by some interviewees that many rejected claimants refrain from making a stay of removal request to CBSA because they are scared of being detained. A refugee lawyer underlined the counterproductive effects of CBSA practices:

*What CBSA has started doing is calling them in, two or three weeks before the claimant goes to court to get a stay of their removal. CBSA calls them in before the court makes a decision and they detain them. So if you're going to go underground, you have to go underground before the court makes a decision on the stay order, because they always make the appointment before the court. And then, if you don't come for the appointment, they tell the court you didn't come, and then the court refuses the stay because you don't have clean hands. They're almost playing games with them (Participant 2, Toronto, 20 November 2015).*

Reduced legal options for failed refugee claimants are also considered to have an effect on irregular migration. Rejected refugee claimants are barred from accessing PRRA for 12 months and for DCO claimants the bar is 36 months. In addition, IRCC assesses the PRRA but CBSA initiates it. A service provider representative explained how these two conditions have served as a deterrent for failed claimants:

*You don't have access to a PRRA for three years, and so some people actually have gone underground for three years, until the bar on accessing the PRRA is up, and then have tried to access that application. You have to go into CBSA and be given a PRRA. Well, if you've been underground for the past few years and you go to CBSA, good chances are you're going to be detained. You'll still be able to fill out a PRRA, but from within detention, and so if it's not successful then you'll be deported. So there's lot of people, I think, who've thought, "I'm going to get over the three-year PRRA bar by not having status." And we've had people come in and say like, "Okay, now I want to do a PRRA." And then we explain to them what they actually have to do to access a PRRA — to go and present themselves to CBSA — and they say, "There's no way I'm going to do that" (Participant 17, Toronto, 21 November 2016).*

This quote illustrates how criminalization drives refugee claimants underground. Asylum seekers are deterred from claiming refugee status, and undocumented migrants are unwilling to come forward to regularize their situation because they are scared of being arbitrarily detained and think they have little prospect for legal status.

## CONCLUSIONS

Canada's refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted (IRPA s. 3(2)(a)). In this Working Paper, we explored how the 2012 reforms put this objective on the backburner and focused on making the system more efficient and faster – at any cost.

The Conservative Government was preoccupied with controlling the movement of unwanted migrants and removing undesirable foreigners. The language of "security" and "efficiency" combines to deny persons with credible claims access to basic procedural and substantive protections. At root, policies and practices make it easier for the government to label asylum seekers inadmissible, exclude them from refugee status. But the



cost of this strategy is not felt only by asylum seekers. Indeed, some of the measures have proven to be inefficient, requiring vast resources that have not delivered on key priorities.

Although several research participants mentioned some successful parts of the reform, such as the establishment of the RAD, the vast majority highlighted that the stated goals have not yet been reached. Strikingly, the Liberal Government has fallen short of the basic reform of processing refugee claims and appeals in accordance with regulated time limits (IRB, 2016: 17). Further, in the face of faltering tangible and intangible policy goals, the pilot projects to enhance security screening and removals have not only proven to be inefficient, but also added to the financial costs of the post-2012 policies.

Several participants felt that the government's approach has shifted from humanitarianism and protecting refugees to control through punitive policies. More particularly, they raised concerns regarding the lack of fairness of the reform, its discriminatory impact for specific groups and classes, and the fact that the RSD process was either too slow or too fast, depending on the various circumstances. The new measures are considered consistently (though by no means totally) ineffective, insofar as many claimants find recourse through H&C applications and other "exhaust valves" built into the system. Many interviewees spoke about how this is a primary means of securing reasonable decisions that ought to have been provided earlier in the process.

Our research corroborates previous findings on how the 2012 reforms have had negative systemic implications on access to justice and have engendered human rights violations (Bates et al., 2016). The rigid and atrophied design leads stakeholders to work creatively within the system. We also found evidence of the criminalization of asylum seekers through aggressive law enforcement, and a connection between the 2012 changes and irregular migration in Canada. These developments endanger the integrity of the system. If we look at the stated objectives of the 2012 refugee reform, the measure of success should not be in looking at the simple reduction of claims, but rather in ensuring that efficiency aligns with and strengthens the principles of the refugee system. Since one of the pillars of our refugee system is humanitarianism and procedural fairness, the integrity of our system requires us to be mindful of the negative human rights implications of unjust measures.

Some of the government representatives who we met acknowledged that some of the changes by the previous government are unfair and need to be revised. It was admitted, for instance, that both the accelerated and differentiated timelines for hearings between the DCO and the non-DCO regimes created inefficiencies. Making the timelines more reasonable is part of the RSD reform planned by IRCC, with a view to ensuring timely protection of refugees and removals of rejected asylum claimants. We believe that the government should take the opportunity to repeal the most controversial measures such as the DFN and the DCO regimes in order to provide equal access to the asylum system for everybody without discrimination. Bringing some other highly problematic issues — such as the implementation of IRPA s. 34 and the cessation policies — in line with the Supreme Court case law should be part of the new reform process. The draft bill that aims to establish some civilian oversight over the CBSA is also a step in the right direction (Jaffer & Oh, 2017).

Ultimately, a new reform of the refugee system should bring Canada's humanitarian approach and human rights obligations back into balance, as a condition to ensuring the system's fairness and integrity. Such a move would be in line with the Liberal Government's objective of taking a leadership role in addressing the global refugee "crisis", by changing the negative narratives about refugees and immigrants, and by respecting the 1951 *Refugee Convention*.

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