

# Student Chapters 2014-15

## Refugee Rights



CANADIAN LAWYERS ABROAD  
AVOCATS CANADIENS À L'ÉTRANGER

Using law to improve lives

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## **Introduction\***

Every year, Canadian Lawyers Abroad (CLA) chooses an annual theme for the Student Chapter Program relating to law and development. Student Chapters LEARN about the theme; THINK about steps Canada can take to address the issue; and ENGAGE in activities that raise awareness. In past years, topics have included Children's Rights, Indigenous Rights, Transitional Justice and Corporate Social Responsibility. This year we have chosen to focus on Refugee Rights.

Canada has been viewed as a global leader with respect to refugee protection. It was the first country to set out guidelines for considering the refugee claims of women, and has taken an active role in the resettling of refugees through both government and private sponsorship programs. However, refugee protection has become a controversial topic as Canada purported to reform the refugee determination system in December 2012. These changes have created significant barriers for refugee claimants. The recent decision of the Federal Court ruled that the recent cuts to refugee health care were "cruel and unusual."

This document focuses on three areas. It will touch upon some of the current domestic issues relating to refugee protection. It will also focus on recent judicial decisions which address key issues arising in the international context, such as, child soldiers, human trafficking and statelessness. And finally, it explores several special topics to give students a better understanding of the kinds of contemporary issues that are impacting refugees today. These include, securitization, children's' rights, the current Syrian refugee crisis and issues relating to LGBT refugees. CLA believes that it is important that law students, as the future of the legal profession, have the opportunity to learn about these issues and understand the impact that they have on refugees today. This document is not meant to be an exhaustive list of all issues that pertain to refugee rights. Rather, it is an overview of key principles, which will be useful to CLA Student Chapters.

## **Basic Principles**

### **Who is a Refugee?**

The 1951 Convention relating to the Status of Refugees is the key legal document in defining who a refugee is. The 1967 Protocol removed geographical and temporal restrictions from the Convention. A refugee is someone who is:

- Outside his/her country of nationality or habitual residence;
- Has a well founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group or political opinion; and
- Is unable or unwilling to avail him/herself of the protection of that country, or to return there, for fear of persecution.<sup>1</sup>

There is now considerable jurisprudence with respect to just about every word in the above definition. Anyone who meets this definition is considered a Convention Refugee, which is the

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\*Report written by Ahsin Rafi, University of Ottawa J.D./M.A. Candidate '16, in consultation with Brittany Twiss, Executive Director of CLA. We would like to acknowledge and give special thanks to experts Alex Neve, Secretary General of Amnesty International Canada, Barbara Jackman, Partner at Jackman Nazami & Associates, and Professor Michael Bossin, University of Ottawa Faculty of Law, for their generous review and thoughtful feedback on this report.

<sup>1</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, online: <<http://www.refworld.org/docid/3be01b964.html>>.

term used in Canadian Law, according to Section 96 of the Immigration and Refugee Protection Act (IRPA).

States have an obligation under the Convention to cooperate with the United Nations High Commissioner for Refugees (UNHCR) in the exercise of its supervisory function. These texts entrust UNHCR with the responsibility to provide international protection to refugees, and to seek permanent solutions for their problems.<sup>2</sup> According to Section 97 of IRPA, a person is in need of protection if someone's removal would subject them to danger or risk to their life.<sup>3</sup>

### **Why do refugees need protection?**

States are responsible for protecting the fundamental human rights of their citizens. By definition, refugees are not protected by their own governments because they are either not willing or are unable to provide them with this protection. This is why the United Nations High Commissioner for Refugees (UNHCR) and other states intervene to offer them this protection.

### **What is Asylum?**

Asylum is when a state grants protection on its own territory to persons outside their countries of nationality or habitual residence because they are fleeing persecution. In countries with individualized procedures, an asylum-seeker is someone whose claim has not yet been finally decided by the country in which he or she has made a refugee claim. Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum-seeker.<sup>4</sup>

### **The principle of Non-Refoulement**

The most important feature of asylum is protection from being forcibly sent back to a country where a refugee's life or freedom would be in danger. This forced return is known as *refoulement*. *Non-refoulement* is a rule of international law which stipulates that no person may be returned against his or her will to a country where his or her life or freedom would be in danger. This is a core principle of international human rights and refugee law that prohibits states from returning individuals to territories where they may be at risk of persecution. The principle is clearly outlined in Article 33(1) of the 1951 Convention. It is also part of customary international law, which makes it binding on all states whether or not they are parties to the 1951 Convention or other relevant international refugee law or human rights instruments.<sup>5</sup> However, there is an exception to this principle, outlined under Section 33(2) of the Convention, which states that a claim may be rejected if there are reasonable grounds for regarding the claimant as a danger to the security of the country in which he or she is in.

### **How do migrants differ from refugees?**

Although refugees and migrants often travel in the same way, they are treated differently in international law. Migrants usually choose to move for many different reasons, often in order to improve the future prospects of themselves and their families. In many cases, migrants continue to enjoy the protection of their own government, when abroad.<sup>6</sup> Refugees move to protect themselves from harm, often to save their own lives and to ensure their own freedom. However, it should be noted that there are cases of migrants that often move because they desperately feel they have no other choice. This sense of fear is often very similar to the persecution that is faced by refugees.

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<sup>2</sup> "Frequently Asked Questions on International Humanitarian Law, Human Rights and Refugee Law", Inter-Agency Standing Committee Task Force on Humanitarian Action and Human Rights (2004) online: <[http://www.unicef.org/emerg/files/FAQs\\_IHL.pdf](http://www.unicef.org/emerg/files/FAQs_IHL.pdf)>.

<sup>3</sup> Immigration and Refugee Protection Act, SC 2001, c 27, <<http://canlii.ca/t/529s2>>.

<sup>4</sup> *UNHCR Resettlement Handbook* (Geneva: United Nations High Commissioner for Refugees, 2011) at 407.

<sup>5</sup> *Ibid* at 414.

<sup>6</sup> *Supra* note 2.

<sup>6</sup> "The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol," UN Refugee Agency (September 2011) at 3. Online: <http://unhcr.org.au/unhcr/images/1951%20Convention%20Q%20%20A.pdf>.

### **What is the difference between an Internally Displaced Person (IDP) and a refugee?**

IDPs are similar to refugees, but they have not crossed an international border. Internally displaced people flee within their own country because of war, human rights violations or natural disasters.

Despite not being the beneficiaries of a specific convention, IDPs are protected by various bodies of law, principally national law, human rights law and if they are in a state experiencing an armed conflict, international humanitarian law.<sup>7</sup> In an effort to strengthen protection and draw attention to the plight of IDPs, the Representative of the United Nations Secretary-General on Internally Displaced Persons formulated the “Guiding Principles on Internal Displacement”. While not legally binding, the principles draw extensively on legally binding provisions of international humanitarian and human rights law and, on the basic principles of refugee law.<sup>8</sup>

### **Intersection of other areas of International Law with Refugee Rights**

It is important to be able to make a distinction between various forms of international law that are applicable to refugees. **International Humanitarian Law (IHL)** regulates the protection of persons and the conduct of hostilities in armed conflict. **International Human Rights Law** imposes standards that governments must abide by in their treatment of persons in both peacetime and war. **International Refugee Law** focuses specifically on protecting persons who have fled their country out of fear of persecution. Both **IHL** and **International Refugee Law** overlap when refugees are involved in armed conflict. In this case, the refugees are actually both refugees and victims in a conflict and should be offered protection under both legal frameworks. However, **International Refugee Law** has some weaknesses that are covered by **IHL**. For example, according to Article 9 of the 1951 Convention relating to the Status of Refugees “a contracting state can take provisional measures against asylum-seekers or refugees in time of war or other grave and exceptional circumstances.”<sup>9</sup> Therefore, it authorizes a contracting state to derogate from all the provisions of the Convention, creating the risk that refugee rights may be suspended in times of war. This is where **IHL** urges states to show the greatest restraint in applying special measures to protected persons by making the clear distinction between a civilian and a combatant. Also, IHL contains different or stronger protections in times of war.

Another important area of law that involves refugee rights is that of Article 3 of the United Nations Convention Against Torture (UNCAT), which states that, “no State party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.<sup>10</sup> It is also worth noting that Canada has incorporated these protections in its provisions in the IRPA.

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<sup>7</sup> “Legal protection of internally displaced persons” *International Committee of the Red Cross* (3 May 2010), online: ICRC Resource Centre <<http://www.icrc.org/eng/resources/documents/misc/5dhd82.htm>>.

<sup>8</sup> *Supra* note 3 at 25.

<sup>9</sup> “Frequently Asked Questions on International Humanitarian Law, Human Rights and Refugee Law”, Inter-Agency Standing Committee Task Force on Humanitarian Action and Human Rights (2004) online: <[http://www.unicef.org/emerg/files/FAQs\\_IHL.pdf](http://www.unicef.org/emerg/files/FAQs_IHL.pdf)>.

Stephanie Jaquemet, “The Cross-fertilization of International Humanitarian Law and International Refugee Law” (2001) 83: 843 *IRRC* 651 at 654.

<sup>10</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, online: <<http://www.refworld.org/docid/3ae6b3a94.html>>.

## **Refugee System in Canada**

The Canadian Refugee system has two main parts: the Refugee and Humanitarian Resettlement Program and the In-Canada Asylum Program. The Refugee and Humanitarian Resettlement Program is for people seeking protection from outside Canada. This claim must be made by making an application for a visa as a Convention Refugee or a person in similar circumstances and is governed by Section 99(2) of the IRPA. The In-Canada Asylum Program is for people seeking refugee protection from within Canada. The asylum program works to provide refugee protection to people in Canada who have a well-founded fear of persecution or are at risk of torture, risk to their life or cruel or unusual punishment in their home countries.<sup>11</sup>

A claim for refugee protection can be made at a port of entry or at a Citizenship and Immigration Canada (CIC) office in Canada. The claimant is required to fill out a Basis of Claim Form. Once an officer decides that a refugee protection claimant is eligible to be referred, CIC issues the claim and assesses it for eligibility. It is then sent to the Immigration Refugee Board (IRB) for a decision. He/she is given a Notice to Appear for a hearing with the date of the hearing before the Refugee Protection Division. Before letting the person proceed with the application for protection, CIC ensures that the claimant does not have another resettlement option, cannot go home or cannot stay in the country where they initially sought asylum. Once selected, individuals undergo medical, security and criminality screening. It is important to note that people convicted of serious criminal offences or deemed to be inadmissible for security reasons are not eligible to make a claim for asylum.<sup>12</sup>

## **Refugee Rights and Current Issues in Canada**

### **Recent Refugee Reforms**

The federal government has made a number of significant changes to immigration legislation, to its regulations, and to its policies and directives over the last several years, including significant changes in 2010 and in 2012. Some of these changes are touched upon below.

#### **Shortened timelines deny refugees a fair chance to prove their claims**

On December 15, 2012, important changes to Canada's refugee determination system came into effect and were incorporated into IRPA. The new system imposes unrealistic deadlines on refugee claimants and uses the failure to meet the deadlines as a means to "disqualify refugee claimants without ever having a fair and reasonable opportunity for them to tell their story."<sup>13</sup> The Canadian Council for Refugees (CCR) has argued that these short timelines disadvantage the most vulnerable refugees, including survivors of torture and rape, women with claims based on gender persecution, and refugees fleeing persecution on the basis of their sexual orientation.<sup>14</sup>

#### **Creation of a "designated country of origin"**

The amendments have given the Minister of Citizenship and Immigration broad powers to designate countries of origin (DCO). Claimants from these countries are subject to an even more expedited claim process that denies them a reasonable opportunity to prove their refugee claims. The hearing takes place after 45 days or 30 days in the case of an inland claim.<sup>15</sup> They are also prohibited from appealing to the Refugee Appeal Division and denied federal refugee health care.

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<sup>12</sup> "Claimant's Guide", Immigration and Refugee Board of Canada (16 June 2014) online: <<http://www.irb.cisr.gc.ca/Eng/RefClaDem/Pages/ClaDemGuide.aspx#spr>>.

<sup>13</sup> Canadian Association of Refugee Lawyers, Press Release, "CARL Responds to New Refugee Legislation, Bill C-31" (16 February 2012) online: <<http://carldevelopment.zenutech.com/articles/45>>.

<sup>14</sup> Canadian Council for Refugees, Media Release, "Concerns about changes to the refugee determination system" (December 2012) online: <<https://ccrweb.ca/en/concerns-changes-refugee-determination-system>>.

<sup>15</sup> *Ibid.*

Judicial review is only with leave and limited to a review of the reasonableness – not the correctness - of the decision made.

### **Designation of “irregular arrivals” by the Minister of Public Safety**

Purportedly as a result of the arrival of two ships carrying Tamil refugee claimants, the Canadian government tabled Bill C-49, Preventing Human Smugglers from Abusing Canada’s Immigration System Act, which was tabled on October 21, 2010. The Bill broadly defines a “smuggler”: it could include a person who supplies false documents or a person who helped someone get passage on a boat even if they did not know for certain that the person’s visa was not valid.<sup>16</sup> The Canadian Civil Liberties Association argues that this bill will actually target refugees, not smugglers and will cause harm and difficulty to refugees that are seeking asylum in Canada.<sup>17</sup>

This bill also creates a new class of “designated foreign nationals” – a class, which is defined extremely broadly: it potentially applies to most people fleeing persecution, torture or death in their countries of origin.<sup>18</sup> The Minister of Public Safety (MPS) is given the power to designate foreign nationals as a group of “irregular arrivals” based on suspicion of “smuggling”.<sup>19</sup> On December 5, 2012, former Minister of Public Safety, Vic Toews, designated five groupings of foreign nationals as irregular arrivals. He stated in a news release:

The facts I have reviewed have provided me with reasonable grounds to suspect that these arrivals have occurred as part of a human smuggling operation, in contravention of Section 117(1) of the Immigration and Refugee Protection Act, for profit or in association with a criminal organization.<sup>20</sup>

With this action, the designated foreign nationals will be subject to a series of measures such as a five-year ban on applying for permanent resident status, sponsoring family members, or receiving a Refugee Travel Document.<sup>21</sup>

This designation was made to prevent claimants from earning their livelihood by criminally exploiting Canada’s immigration system. CCR has argued that the changes are unfair because they unjustly prohibit access for a minimum of five years to the benefits of refugee protection, including reuniting with spouses and/or children.<sup>22</sup> Also, the “irregular arrivals” are subject to mandatory detention and have infrequent detention reviews.

### **One-year bar on access to Pre-Removal Risk Assessment for refused claimants**

The Pre-Removal Risk Assessment (PRRA) is an opportunity for people who are facing removal from Canada to seek protection by describing, in writing, the risks they believe they would face if removed. Persons whose PRRA applications are approved may stay in Canada. Since August 15, 2012, refused refugee claimants are not eligible for a PRRA for a year following refusal. The ban is 3 years for claimants that are from a designated country of origin. This ban prevents claimants from submitting new evidence that becomes available after the refusal.<sup>23</sup>

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Canadian Civil Liberties Association, News Release, “Bill C-49 Punishes Asylum Seekers” online: < <http://ccla.org/our-work/focus-areas/bill-c-49/#secondclass>>.

<sup>19</sup> *Ibid.*

<sup>20</sup> Public Safety Canada, News Release, “Minister of Public Safety makes first designation of irregular arrival under Protecting Canada’s Immigration System Act” (5 December 2012) online: < <http://www.publicsafety.gc.ca/cnt/nws/nws-riss/2012/20121205-eng.aspx>>.

The five groups of foreign nationals who were designated as ‘irregular arrivals’ were those who illegally crossed the Canada-U.S. border in the province of Quebec on February 2, 2012; April 26, 2012; October 11, 2012; October 19, 2012; and October 23, 2012.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Supra* note 12.

<sup>23</sup> *Ibid.*

Also, refused refugee claimants can no longer apply for humanitarian and compassionate consideration for one year following refusal, unless they are invoking best interests of a child or a life-threatening medical condition. Designated Foreign Nationals cannot apply on any ground at all for five years. This is despite the fact that there may be changes in personal circumstances and the country conditions may change within those 12 months, such that individuals may face a grave risk of harm that will not be considered prior to their removal. The longer timeline for DCOs arguably heightens the vulnerability of some claimants from these countries.<sup>24</sup>

Former System	New System
28 days to submit Personal Information Form ("PIF")	15 days to submit Basis of Claim ("BOC")
Refugee hearing average wait: 19 – 21 months	Refugee hearing within 60 days Claimants from DCOs must have their refugee hearing 30 days after they submit their BOC
Automatic access to a Pre Removal Risk Assessment	No PRRA for 12 months post-RPD  No PRRA for 36 months for individuals from DCOs
Access to Humanitarian and Compassionate ("H & C") Application	No H & C for 12 months, with two limited exceptions  A five-year bar on applying for an H&C after a negative refugee claim or PRRA for people found to be Designated Foreign Nationals ("DFNs")

(Table taken from [http://sanctuarycanada.ca/userfiles/downloads/The\\_Legal\\_Implications\\_of\\_Offering\\_Sanctuary.pdf](http://sanctuarycanada.ca/userfiles/downloads/The_Legal_Implications_of_Offering_Sanctuary.pdf))

### **"Historic low" for refugee claimants in Canada in 2013**

The number of people claiming refugee status in Canada reached what Ottawa calls a "historic low" in 2013 after it brought in changes to speed up the program by deterring applicants from countries deemed by Canada to be safe. The new measures have remained unpopular by refugee rights advocates. Organizations such as the Canadian Civil Liberties Association, the Canadian Bar Association and the Canadian Association of Refugee Lawyers (CARL) have expressed concern about the constitutionality of these reforms. Canada claims to have cut its case backlog by two-thirds, and deported 10,000 failed claimants in the past year.<sup>25</sup> The recent changes have resulted in a record low number of refugees turning to Canada for protection in 2013. Last year there were 10,000 refugees in Canada, which is less than half of the number that Canada usually admits every year. The decreased number of claimants is estimated by the government to have saved \$600 million to date and will reach \$1.6 billion over 5 years.<sup>26</sup> Canada also designates 37 countries as safe places that should not generate many legitimate refugee cases. These include many countries from the European Union whose nationals actually made up 85% of the refugee claims in 2011. Hungary, which was Canada's top source of refugees from

<sup>24</sup> "Legal Implications of offering sanctuary", Sanctuary Canada (30 May 2014) online: <<http://sanctuarycanada.ca/userfiles/downloads/Legal-implications-of-offering-sanctuary-May302014.pdf>>.

<sup>25</sup> The Globe and Mail, News Release, "Refugee claims hit 'historic low' as Ottawa's policy faces fresh criticism" (22 January 2014) online: <<http://www.theglobeandmail.com/news/politics/refugee-claims-hit-historic-low-as-ottawas-policy-faces-fresh-criticism/article16461486/>>.

<sup>26</sup> *Ibid.*

2010 to 2012, is one example of a country that was designated.<sup>27</sup> Furthermore, Mexico is also on the list and there are a significant number of very serious human rights concerns in Mexico.

**Canadian Doctors for Refugee Care, the Canadian Association of Refugee Lawyers, Daniel Garcia Rodrigues, Hanif Ayubi and Justice for Children and Youth v. Attorney General of Canada and Minister of Citizenship and Immigration (2014)**

**Interim Federal Health Program (IFHP)**

The pre-2012 IFHP provided the same level of insurance coverage to all individuals eligible for benefits, whether they were refugees, refugee claimants, failed refugee claimants, individuals only entitled to a PRRA, victims of human trafficking or immigration detainees. Coverage was available to these individuals until they either became eligible to receive provincial or territorial health insurance, or left the country.<sup>28</sup>

The 2012 IFHP regime now provides for three tiers of coverage:<sup>29</sup>

- Expanded Health Care Coverage (EHCC);
- Health Care Coverage (HCC); and
- Public Health or Public Safety Health Care Coverage (PHPS).

Which tier of IFHP coverage a person will be entitled to receive under the 2012 IFHP depends on the following factors:

- Where the individual is in the refugee determination process (e.g. refugee claimant, successful claimant or rejected claimant);
- Whether the individual is a national of a DCO;
- If the individual is not a refugee claimant, the person's status in Canada (e.g. permanent resident, resettled refugee, victim of human trafficking, person with a positive PRRA decision, etc.);
- Whether the individual receives federally-funded resettlement assistance; and
- Whether the individual is being detained.<sup>30</sup>

On Friday, July 4, 2014, the Federal Court released a judgment labeling the federal government's changes to the refugee health care system as "cruel and unusual". Justice Mactavish found the government's two-year-old policy of denying health care to certain classes of failed refugee claimants amounted to cruel and unusual treatment because it intentionally targeted vulnerable children and adults and violated Section 12 of the Canadian Charter of Rights and Freedoms ("Charter"). She said it put at risk "the very lives of these innocent and vulnerable children in a manner that shocks the conscience and outrages our standards of decency."<sup>31</sup> She gave the government four months to restore the health-care funding.<sup>32</sup> At paragraph 28, she found:

The 2012 change puts refugee claimants lives "at risk and perpetuates the stereotypical view that they are cheats and queue-jumpers, that their refugee claims are 'bogus', and that they have come to Canada to abuse the generosity of

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Supra* note 28 at para 57.

<sup>29</sup> *Ibid* at para 61.

<sup>30</sup> *Ibid* at para 62.

<sup>31</sup> The Globe and Mail, News Release, "Ottawa's refugee health-care cuts 'cruel and unusual,' court rules" (4 July 2014) online: <http://www.theglobeandmail.com/news/politics/ottawas-refugee-health-cuts-cruel-and-unusual-court-rules/article19459837/>.

<sup>32</sup> *Ibid.*

Canadians. It serves to perpetuate the historical disadvantage suffered by members of an admittedly vulnerable, poor and disadvantaged group.<sup>33</sup>

Immigration Minister Chris Alexander said the government would appeal the decision, stressing the financial burden placed on Canadians. Refugee rights advocates have praised the decision as a victory. Lorne Waldman, president of CARL and lead counsel on the case stated, "This decision gives life to Canada's commitment to protect refugee rights. It sends a clear message to government that it cannot abdicate its responsibility to meet the most basic health care needs of vulnerable refugees and refugee claimants."<sup>34</sup>

#### **Implications of health care cuts**

These changes have created a pile of paperwork for doctors who refused to deny care to refugees, leaving them to figure out who to bill for the costs. Also, rejected refugee claimants and claimants from countries the government considers safe are eligible under the new law only when they pose a threat to public health. This means that claimants are no longer permitted coverage for heart problems, pregnancy, infant vaccinations, diabetes and other illnesses that threaten the refugee claimant's health. The recent Federal Court ruling focused heavily on pregnant women and children, detailing cases such as a sick child, unable to get chest X-Ray to diagnose what might be life-threatening pneumonia.<sup>35</sup>

#### **Individual claimants cited in decision**

Justice Mactavish considered a number of individual examples. One involved "Saleem Akhtar", who sought refugee protection in Canada out of fear of persecution in Pakistan for his Christian faith. He was diagnosed with cancer; as he was not covered for chemotherapy, a Saskatoon hospital ended up paying for the additional medical expenses.<sup>36</sup>

There was also the case of "Sarah", an Iranian woman whose claim is currently outstanding. She is covered for urgent health care matters but not for her regular medications. This is despite her being diagnosed with angioedema, asthma and other severe allergies. Her Canadian doctor has provided a letter stating that Sarah might die if she does not take her medications regularly.<sup>37</sup>

Hanif Ayubi is diabetic, and was a failed refugee claimant and cannot return to Afghanistan because it is currently deemed too dangerous. He works as a dishwasher and is unable to pay for medication. He is no longer covered for insulin and other medical supplies and is currently being kept alive by free samples of insulin which are provided to his Community Health Centre by a pharmaceutical company on compassionate grounds.<sup>38</sup> There is no guarantee that these samples will continue to be available to him in the future.

Daniel Garcia Rodrigues and his wife came to Canada from Colombia in 2007. His refugee claim was refused but his wife's was accepted. Mr. Garcia Rodrigues was diagnosed as having suffered a retinal detachment. He was told that he needed to have surgery as quickly as possible, or he risked the permanent loss of his vision.<sup>39</sup> Mr. Garcia Rodrigues was initially scheduled for surgery on August 13, 2012. However, the surgery was cancelled when it was determined that he did not have any IFHP coverage for the procedure. It appears that Mr. Garcia Rodrigues' PHPS coverage had expired on August 12, 2012, and he had not renewed it.<sup>40</sup> His doctor ultimately

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<sup>33</sup> Canadian Doctors For Refugee Care v. Canada (Attorney general), 2014 FC 651 (available on CanLII) at para 837.

<sup>34</sup> Canadian Association of Refugee Lawyers, Press Release, "Federal Court Strikes Down Refugee Health Cuts" (16 February 2012) online: <<http://www.carl-acaadr.ca/articles/81>>.

<sup>35</sup> *Ibid* at para 650.

<sup>36</sup> *Ibid* at para 218.

<sup>37</sup> *Ibid* at para 236.

<sup>38</sup> *Ibid* at para 186.

<sup>39</sup> *Ibid* at para 203.

<sup>40</sup> *Ibid* at para 204.

agreed to operate on Mr. Garcia Rodrigues, given that any further delay in the surgery could cause him to permanently lose his vision.<sup>41</sup>

The government has claimed that these cuts are designed to deter “bogus refugees” from taking advantage of Canada’s generosity and defending the interests of the Canadian taxpayer.<sup>42</sup> Ottawa Doctor, Doug Gruner has argued that this policy affects all refugee claimants, of which almost half become Canadian citizens. Furthermore, there has been no attempt to identify how much of the reduction in refugee claims is attributable to cuts to the IFHP specifically, and not other changes to the refugee determination process. Therefore, Justice Mactavish concluded that there was no evidence before her to suggest that the cuts to the IFHP were necessary to achieve a legitimate aim.”<sup>43</sup>

### **Sick Kids Case Study**

According to a study by PLOS ONE, admission rates for refugee children at Sick Kids Hospital doubled after Ottawa cut its health care coverage for asylum seekers. The study focused on Sick Kids Hospital because it is Canada’s largest tertiary pediatric hospital and its data is the most representative of the child refugee population.<sup>44</sup> There were 173 refugee children visits to the emergency room in the six months before and 142 visits in the six months after funding cuts. The total amount billed to the IFHP program during the one-year of this study was \$131,615. Prior to the IFHP cuts, 46% of the total emergency room bills were paid by IFHP compared to 7% after the cuts.<sup>45</sup> The Hospital for Sick Children was unable to obtain federal health coverage for the vast majority of refugee claimant children registered under the IFHP, after the cuts had been implemented. Before the cuts were made, in June 2012, only 6.4 per cent of refugee patients appearing in the emergency room of the Hospital for Sick Children actually had to be admitted, compared to 12 percent, six months later. The study found that parents who couldn’t access government health care had delayed seeking medical help until the children became very ill.

### **Discussion Questions**

1. Although this case is seen as a victory for refugee rights groups, do you think the ruling went far enough? Why or why not?
2. Do you think that Canada has an obligation to provide health care and other social benefits to people who claim refugee protection? Why or Why not?
3. The government insists that the IFHP cuts are needed to curtail what they say is abuse of the refugee determination system. Is that a legitimate trade-off to make?

## **Key Canadian Cases**

### **Singh v. Minister of Employment and Immigration (1985) (Singh Decision)**

#### **Facts**

Harbhajan Singh and five other Sikh foreign nationals and one from Guyana attempted to claim convention refugee status under the Immigration Act of 1976 on the basis that they had a well-founded fear of persecution in their home country. They were denied status by the Minister of Employment and Immigration on the advice of the Refugee Status Advisory Committee and were

<sup>41</sup> *Ibid* at para 210.

<sup>42</sup> The Star, News Release, “Refugee kids’ hospital admissions doubled after Ottawa’s health cuts” (15 May 2014) online: <[http://www.thestar.com/news/investigations/2014/05/15/refugee\\_kids\\_hospital\\_admissions\\_doubled\\_after\\_ottawas\\_health\\_cuts.html](http://www.thestar.com/news/investigations/2014/05/15/refugee_kids_hospital_admissions_doubled_after_ottawas_health_cuts.html)>.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Supra* note 40.

<sup>45</sup> “The Cost and Impact of the Interim Federal Health Program Cuts on Child Refugees in Canada”, PLOS one (8 May 2014) online: <<http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0096902>>.

not entitled to an oral hearing. They applied in writing for an oral hearing before the Immigration Appeal Board, but this was denied.

They challenged the adjudication procedures under the Immigration Act on the basis that they violated Section 7 of the Charter and violated Section 2(e) of the Canadian Bill of Rights. The government claimed that since they had no status within the country, they were not subject to the Charter. According to Section 7 of the Charter, "Everyone has the right to life, liberty and security of the person, and has the right not to be deprived thereof except in accordance with the principles of fundamental justice."<sup>46</sup> The SCC ruled that Singh's right of security would be violated if he was not allowed to appeal the decision because he could be forced to return to a place where he was unsafe or would be persecuted.<sup>47</sup>

#### **Issue**

Does the Charter apply to non-citizens? Are non-citizens entitled to fairness when claiming a risk of persecution in being returned to their countries?

#### **Ratio**

The Court ruled that the "everyone" in Section 7 of the Charter included non-citizens physically present in the country. The court also ruled that administrative convenience does not override the need to adhere to the principles of fundamental justice. Justice Wilson stated, "I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions."<sup>48</sup> Therefore, where there are serious issues of credibility involved; fundamental justice requires that credibility be determined on the basis of an oral hearing.

#### **Significance**

As a result of this ruling, people who come to Canada as refugees now have the right to a hearing they attend and the Immigration and Refugee Board was established to provide these hearings. Also, the government must provide refugees with the necessities of life while they wait for a hearing. The case also established April 4<sup>th</sup> as Refugee Rights Day in Canada.

### **Canada (AG) v. Ward (1993)**

#### **Facts**

Patrick Ward was a member of the Irish National Liberation Army (INLA). He was assigned to guard some hostages and when they were ordered to be killed, he allowed them to escape. The INLA discovered that Ward had assisted in the escape. They tortured him and sentenced him to death. He escaped and went to the police who discovered his involvement in the initial kidnapping and sent him to jail. Upon his release he fled to Canada and claimed refugee status. His claim was initially rejected and was sent back for redetermination on appeal. He left Northern Ireland and did not go to the UK, because he believed that the governments in both places could not protect him from the INLA.

#### **Issue**

How should a "well founded fear of persecution" be determined?

#### **Ratio**

The court held that persecution does not need to originate from the state, and the mere inability to provide protection is sufficient to establish a claim for persecution. Typically, if the state is able to protect the claimant, then from an objective standard, the fear of persecution is not well founded.

<sup>46</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 at s 7.

<sup>47</sup> *Supra* note 46.

<sup>48</sup> *Singh v. Minister of Employment and Immigration*, (1985), 1 SCR 177, at para 59 (available on CanLII), (SCC).

The claimant must provide clear and convincing confirmation of a state's inability to protect that national.<sup>49</sup> However, ineffective state protection is also taken into consideration and in this case; the state's ability to protect Ward was admittedly ineffective.

**Significance**

This is the leading immigration case decided by the SCC on the test for determining a "well-founded fear of persecution" in order to make a claim for Convention refugee status, particularly in respect of state protection. It is also significant as it lays out the definition of a "particular social group."

**Suresh v. Canada (Minister of Citizenship and Immigration) (2002)**

**Facts**

Suresh was a Convention refugee who was found by CSIS (Canadian Security Intelligence Service) to be a member of the LTTE (Liberation Tigers of Tamil Eelam). A deportation hearing found that he was not a terrorist but should be deported on the grounds that he was a member of a terrorist organization.

**Issue**

Does the Charter preclude an individual's deportation to a country where the refugee could face torture or death?

**Ratio**

The SCC held that the Minister of Citizenship and Immigration should reassess that decision, because both the Canadian Constitution and international law rejects deportation to torture. Also there would be a clear connection between the deprivation of someone's human rights and the Canadian decision to expel that person. As there is a possibility that Suresh may have been tortured if he was expelled to Sri Lanka, he should be provided with the "procedural safeguards necessary to protect his Section 7 right, not to be expelled to torture."<sup>50</sup> Therefore, the SCC held that under the Charter, in most circumstances the government cannot deport someone to a country where they may be tortured. However, the SCC also concluded that they could still be deported if they are a serious security risk to Canada.

**Significance**

This case demonstrated that the principle of non-refoulement cannot be violated, especially if the claimant has a risk of being tortured if expelled to his or her country of origin.

**Charkaoui v. Canada (Citizenship and Immigration) (2007)**

**Facts**

Adil Charkaoui, a permanent resident in Canada since 1995, was arrested and imprisoned under a security certificate by the Minister of Citizenship and Immigration and then, Solicitor General. The security certificate regime allows the government to detain and deport non-citizens who are deemed to be a threat to national security.

**Issue**

Does the security certificate process violate the right to liberty and habeas corpus under Sections 7, 9 and 10 of the Charter?

**Ratio**

<sup>49</sup> Canada (AG) v Ward (1993) 2 SCR 689 at 692 (available on CanLII) (FCA).

<sup>50</sup> Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3, para 130 (available on CanLII).

The Court held that the security certificate process, which prohibited Charkaoui from examining evidence used to issue the certificate, violated his Charter rights. The existing levels of secrecy unjustifiably infringed his Section 7 right to a fair hearing. Also, he may have been deported and would have faced substantial risk of torture and similar abuses.<sup>51</sup>

#### **Significance**

This case is a landmark decision of the SCC on the constitutionality procedures for determining the reasonableness of a security certificate and for reviewing detention under a certificate.

### **Ezokola v. Canada (Minister of Citizenship and Immigration) (2013)**

#### **Facts**

This case concerns the interpretation of Article 1F(a) of the 1951 Refugee Convention, which excludes people from refugee protection where there are serious reasons for considering that they have committed a crime against peace, a war crime, or a crime against humanity. Ezokola, a career civil servant, worked at the Permanent Mission of the Democratic Republic of the Congo at the United Nations until January 2008, when he resigned and fled to Canada because he refused to serve a government that he considered to be “corrupt, anti-democratic and violent.”<sup>52</sup> It was because of his senior role at the Mission, that the Refugee Division found him to be complicit in the crimes of his government. He was excluded from the protection as a result.

#### **Issue**

What constitutes involvement in war crimes? Should a refugee claimant be denied refugee status because of involvement in war crimes?

#### **Ratio**

The SCC ruled that the claimant should have made a “voluntary, significant, and knowing contribution” to an international crime.<sup>53</sup> The SCC emphasized, “complicity arises by contribution.”<sup>54</sup> There are three elements to the test which include: 1) whether contribution is voluntary; 2) whether there was a significant contribution by the claimant; and 3) whether the claimant was aware of the crime being committed and that his/her conduct will assist in the furtherance of the crime.<sup>55</sup>

#### **Significance**

The SCC’s new “significant contribution” test sets principled parameters for determining responsibility for international crimes. The new contribution test ensures that decision makers cannot overextend the concept of complicity.

### **Canada (Minister of Citizenship and Immigration) v. Harkat (2014)**

#### **Facts**

Mohamed Harkat is alleged to have come to Canada for the purpose of engaging in terrorism. A security certificate was issued under the IRPA. The certificate declared him inadmissible to Canada on national security grounds.

#### **Issue**

<sup>51</sup> Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9, [2007] 1 S.C.R. 350, para 65 (available on CanLII).

<sup>52</sup> *Ibid* at para 11-14.

<sup>53</sup> *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 at para 92, 2 SCR 678 (available on CanLII).

<sup>54</sup> *Ibid* at para 7.

<sup>55</sup> *Ibid* at para 89.

Is the security certificate regime under IRPA constitutional? Does the IRPA scheme give Harkat a fair opportunity to defend himself against the allegations that have been made against him?

#### **Ratio**

The designated judge found the security certificate scheme under the amended IRPA to be constitutional, and concluded that the certificate declaring Harkat inadmissible to Canada was reasonable. The designated judge did not err in refusing to exclude summaries of intercepted conversations. Also, he did not commit an error in concluding that there were reasonable grounds to find that Mr. Harkat was inadmissible on security grounds.<sup>56</sup>

#### **Significance**

This case affirms the constitutionality of security certificates, which marks the end of Harkat's battle against the security certificate regime. According to Secretary General of Amnesty International, Alex Neve, the decision is, "surprising and very troubling in that it did not set out guarantees that individuals will get to know the information against them and didn't even reference the international treaties on human rights that Canada must adhere to."<sup>57</sup>

This document has focused on key Canadian cases. However, it is also important to be aware of international cases as they can help enhance students' understanding of key refugee issues. Furthermore, many international cases serve to compliment principles found or used within Canadian domestic law. The following are a selection of important international cases that may be of interest to students.

## **Key International cases**

### **Principle of *non-refoulement* in customary international law**

#### **Soering v. United Kingdom (1989)**

##### **Facts**

A German national was charged with a murder and was serving a sentence in the UK. An order was issued for the applicant's extradition to the US where he faced the possibility of a death sentence. The applicant claimed that the extradition to the US would thus constitute a violation of Article 3 of the European Convention, which prohibits torture and inhumane treatment.

##### **Issue**

Does waiting on death row constitute as inhumane treatment?

##### **Ratio**

The court ruled that Article 3 of the Convention had been breached, finding:

...having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States

<sup>56</sup> Canada (Minister of Citizenship and Immigration) v Harkat, 2014 SCC 37 at para 11 (available on CanLII).

<sup>57</sup> "The Star Canada, News Release, "Supreme Court upholds security certificate law in Mohamed Harkat terror case" (14 May 2014) online:

<[http://www.thestar.com/news/canada/2014/05/14/supreme\\_court\\_upholds\\_security\\_certificate\\_law\\_in\\_mohamed\\_harkat\\_terror\\_case.html](http://www.thestar.com/news/canada/2014/05/14/supreme_court_upholds_security_certificate_law_in_mohamed_harkat_terror_case.html)>.

would expose him to a real risk of treatment going beyond the threshold set by Article 3.<sup>58</sup>

### **Significance**

This case was a landmark judgment of the European Commission of Human Rights. This case also demonstrates the principle of *non-refoulement* in customary international law, which prohibits forcibly sending anyone back to a state where they face the risk of torture or cruel or inhumane treatment.

## **Illegal Entry**

### **R v. Uxbridge (1999)**

#### **Facts**

Mr. Adimi was an Algerian who fled Algeria in October 1997 out of fear of persecution from the GIA (an Islamic terrorist group). He arrived in France with a false Italian passport and identity card. The immigration officer was not deceived by these documents and Mr. Adimi was not permitted to enter. He then claimed asylum but was nonetheless arrested and charged.

#### **Issue**

Can illegal entry be a basis to deny a refugee claim?

#### **Ratio**

On April 15, 1999, the Secretary of State recognized Mr. Adimi as a refugee and granted him indefinite leave to enter.<sup>59</sup> The purpose of Article 31 of the 1951 Convention was to provide immunity for genuine refugees whose quest for asylum reasonably involved a breach of the law. Article 31 of the 1951 Convention states, "the Contracting shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened."<sup>60</sup> To enjoy this protection, a refugee must have come directly from the country of his persecution, presented himself to the authorities without delay and have shown good cause for his illegal entry or presence. A short stop en route to an intended sanctuary could not forfeit this protection.

#### **Significance**

This case is of fundamental importance as it pertains to millions of refugees that currently cross borders illegally out of fear of persecution.<sup>61</sup>

## **Trafficking in Persons**

### **SB (PSG – Protection Regulations – Reg 6) Moldova v. Secretary of State for the Home Department CG [2008] UKAIT 00002, 26 November 2007**

<sup>58</sup> Case of Soering v. the United Kingdom (1989) ECHR Application no: 14038/88 at para 79. Years later, Canada adopted a similar approach: the SCC in *USA v. Burns*, [2001] 1 S.C.R. 283; [2001] S.C.J. No. 8; 2001 SCC 7 concluded that removal to face the death penalty was in breach of s. 7 of the Charter.

<sup>59</sup> *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, online: <<http://www.refworld.org/docid/3ae6b6b41c.html>>.

<sup>60</sup> *Supra* note 1 at Article 31.

<sup>61</sup> These issues do not normally come up in Canada since the IRPA provides that refugee claimants are not to be charged. S. 133 states: A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the Criminal Code, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.

### **Facts**

The applicant was a female victim of trafficking for sexual exploitation, who had been found to be at risk of maltreatment, which would breach Article 3 of the European Convention on Human Rights. She had been granted humanitarian leave but appealed against the refusal to be recognized as a refugee. The reasons for refusal were that she could not bring herself within the definition of a refugee, not being a member of a particular social group. Also, these women could typically relocate internally, and therefore did not fit under the definition of a refugee.

### **Issue**

Can trafficking victims be considered a particular social group?

### **Ratio**

The court was persuaded that individuals who have been trafficked for the purposes of sexual exploitation are reasonably likely to be perceived as being different by the surrounding society if the fact that they had been trafficked for the purposes of sexual exploitation is known to the surrounding society.<sup>62</sup> Therefore, it was ruled that, “former victims of trafficking for sexual exploitation” could be members of a particular social group because of their shared common background or past experience of having been trafficked.<sup>63</sup>

### **Significance**

This case was the first application of Article 10 of the Qualification Directive in the United Kingdom to a case involving human trafficking.

## **Child Soldiers**

### **Lukwago v. Ashcroft, Attorney General (2003)**

#### **Facts**

In this case, Bernard Lukwago, a former child soldier who escaped the Lord’s Resistance Army (LRA) petitioned for review of the decision of the Board of Immigration Appeals (“BIA”) ordering his deportation after denying his application for asylum. Lukwago was forcibly recruited into the LRA at age fifteen. He was repeatedly threatened and was beaten on more than one occasion for failing to adhere to LRA orders. Lukwago was exposed to the killing and physical torture of his fellow captives, innocent civilians, and government soldiers. He was confined against his will for four months, only to escape in the face of a significant risk of death.<sup>64</sup>

#### **Issue**

Can former child soldiers constitute as a particular social group?

#### **Ratio**

The BIA held that Lukwago failed to satisfy his burden of establishing that he suffered past persecution or had a well-founded fear of future persecution by the LRA or the Ugandan government on account of his race, nationality, religion, membership in a particular social group, or political opinion. The only defining characteristic of this group that the respondent has provided is age, i.e. all persons under the age of 18. However, although the evidence indicates that the LRA does harm children, the respondent failed to demonstrate that he was targeted by the LRA **because** he was a child. Nonetheless, the court remanded the case to the BIA based on its finding that Lukwago’s claim for asylum was based on a well-founded fear of persecution by the

<sup>62</sup> SB (PSG – Protection Regulations – Reg 6) Moldova v. Secretary of State for the Home Department CG [2008] UKAIT 00002, (26 April 2007) (Asylum and Immigration Tribunal), online: Asylum Law Database [http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/UK\\_075%20Judgment.pdf](http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/UK_075%20Judgment.pdf).

<sup>63</sup> *Ibid.*

<sup>64</sup> *Lukwago v. Ashcroft, Attorney General*, No. 02-1812, 14 May 2003 (US Court of Appeals for the 3rd Circuit), online: <http://caselaw.findlaw.com/us-3rd-circuit/1359381.html>.

LRA.<sup>65</sup> It was decided that the class of former child soldiers who have escaped from the LRA fits within the statutory definition of a “particular social group,” because there is evidence that the class may be in *more* danger from the LRA than the general population. Therefore, former child soldiers who have escaped the Lord’s Resistance Army captivity may constitute a particular social group.

#### **Significance**

Lukwago’s case had received significant media attention because he had spoken about his experiences in, “Armed and Innocent,” a short film about child soldiers that was narrated by Robert DeNiro.<sup>66</sup>

### **Nationality/Statelessness**

#### **Well-founded fear**

#### **Revenko v. Secretary of State for the Home Department, 31 July 2000 (England and Wales Court of Appeal)**

#### **Facts**

The applicant was a stateless person from Moldova who was unable to return to his country of former habitual residence. Prior to the 1951 Convention, there was usually no distinction drawn between stateless persons and refugees, as they were both persons who were defined by the shared characteristic of being unable or unwilling to rely on the protection of the state from which they originated.

#### **Issue**

Is statelessness per se sufficient to grant a claimant refugee status?

#### **Ratio**

It was decided that a claimant’s statelessness is not enough to be granted refugee status. The claimant has to demonstrate that he or she is unable or unwilling to return owing to a fear of persecution.<sup>67</sup> Article 1A(2) of the 1951 Refugee Convention states, “the term ‘refugee’ shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular political group or political opinion, is outside the country of his nationality and is unable or unwilling to gain protection or return to that country.”<sup>68</sup> The Court of Appeal concluded the applicant was not a refugee because he had not established that he had a well-founded fear of persecution, which was ruled as a requirement for refugee status.<sup>69</sup>

#### **Significance**

This case demonstrated that a well-founded fear of persecution is a requirement for refugee status, even to claimants that are stateless.

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<sup>65</sup> *Ibid.*

<sup>66</sup> AP News Archive, News Release, “Ex-Uganda Child Soldier given Asylum” (2 September 2003) online: <<http://www.apnewsarchive.com/2003/Ex-Uganda-Child-Soldier-Given-Asylum/id-a2b1e141bac417b6717f4b418f25cb5f>>.

<sup>67</sup> *Revenko v. Secretary of State for the Home Department*, United Kingdom: Court of Appeal (England and Wales), 31 July 2000, online: <<http://www.refworld.org/docid/3ae6b6f32c.html>>.

<sup>68</sup> *Supra* note 1.

<sup>69</sup> *Supra* note 68.

## Country of former habitual residence

### Maarouf v. Canada (Minister of Employment and Immigration) [1994]

#### **Facts**

This case involved an application for judicial review of the Convention Refugee Determination Division's (CRDD) decision that the applicant was not a Convention refugee because he did not have a country of former habitual residence.

#### **Issue**

Is a country of former habitual residence necessary to be able to make a refugee claim?

#### **Ratio**

The CRDD adopted a test for habitual residence requiring: 1) a significant period of *de facto* residence in the putative state of reference; (2) *de facto* abode and not merely ongoing transient presence; and (3) a legal right to return.

The CRDD found that the Ayman Maarouf did not have a country of former habitual residence in Kuwait because he did not meet the third part of the test as he left Kuwait in 1988 to attend university in the U.S.A. He arrived in Canada in 1992. Palestinians who left Kuwait prior to the Gulf War were not allowed to return. Also, although he was born in a refugee camp in Lebanon, he was not entitled to return there either: he had previously been detained by Syrian intelligence officers and interrogated about his uncle and his affiliation with the Palestine Liberation Organization. He had been arrested and held for three days. On his release he was told that it would be best for his safety if he left Lebanon and never returned. Also, even if either country could be considered a country of former habitual residence, he could not argue that he required protection from anything that might happen to him in Kuwait since he could not return there. With respect to Lebanon, the CRDD held that he did not face a reasonable chance of persecution at the hands of Syrian forces in Lebanon because the civil war had ended. The Court concluded that the Board erred in defining "country of former habitual residence" and that the application should be allowed.

#### **Significance**

As Canada has not ratified the *Convention Relating to the Status of Stateless Persons*, a stateless claimant who falls outside the Convention refugee definition is currently without recourse in Canada. To come within the definition, a stateless person must demonstrate that he or she has a country of former habitual residence and is unwilling to return there. The court concluded that a country of former habitual residence should not be limited to the country where the claimant initially feared persecution. The argument that habitual residence necessitates that a claimant be legally able to return to that state is contrary to the shelter rationale underlying international refugee protection. Also requiring the claimant to have a legal right of return would allow the persecuting state control over the claimant's recourse to the Convention, which would undermine its humanitarian purpose.<sup>70</sup>

The following special topics explore contemporary issues affecting refugees, and have been included to enhance students' knowledge and interest in refugee rights.

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<sup>70</sup> Maarouf v. Canada (Minister of Employment and Immigration), 1994 1 FC 723 (available on CanLII)(FCA).

## **Special Topics in Refugee Rights**

### **Securitization of Refugee Rights**

Canadian law excludes refugee claimants if they are found to be inadmissible on the basis of national security, serious criminality, organized criminality or human rights violations. Since November 2001, refugee claimants are required to go through a front-end security screening, during which the Canadian Security Intelligence Service checks all refugee claimants on arrival in Canada. Since the screening was put in place, the number of claimants found to represent any kind of security concern has been statistically insignificant.<sup>71</sup>

The Canadian Government has enacted measures to guard against perceived security threats to Canada. Refugee rights groups such as CARL and CCR have acknowledge that although there may be “some” refugee claimants who pose a threat, the system for assessing that threat must be a fair one. This is especially important when there are certain human rights protections such as *non-refoulement* to torture, that apply even if someone is a security threat.

In September 2013, the IRPA was amended to limit the review mechanisms for certain foreign nationals and permanent residents who are inadmissible because of serious criminality or security concerns. It amends the IRPA to provide for the “denial of temporary resident status to foreign nationals based on public policy considerations.”<sup>72</sup> Also, Bill C-43 denies permanent residents the right of appeal to the IRB if they are sentenced to a six-month term of imprisonment. Therefore, permanent residents will be removed without an independent decision-maker considering all the relevant circumstances of the case. Often, many claimants came to Canada when they were very young and have no ties to or know the language of their own country of origin. Also, some may be suffering from mental health problems, which may have contributed to their commission of the crime.<sup>73</sup>

Concerns over illegal migration have caused Canada to restrict access to refugee claimants through its 2012 reform measures. As a result, Canada has experienced record low numbers in 2013, for the number of people claiming refugee status. These new refugee determination policies, have led to an increased labeling of non-citizens who enter Canada as “illegals” and “bogus refugees”, subjecting them to criminalization and detention with little juridical oversight.<sup>74</sup>

Increasing securitization has lead to tougher border security in attempts to dissuade the illegal entry of claimants and human smugglers. The Liaison officers of the Canadian Border Services Agency (CBSA) work with local, regional, national and international partners to screen people before or on arrival at the Canadian border. Through these officers, CBSA has stated that it has “strengthened the CBSA’s ability to interdict migrants overseas” and prevented thousands of people from reaching Canada each year.<sup>75</sup> Through these kinds of measures and procedures, CBSA is making it more difficult for asylum seekers to make successful refugee claims. It is unrealistic to expect refugee claimants to have all proper documentation with them when they leave their country of origin. One refugee practitioner stated, “the first thing that would come to

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<sup>71</sup> Canadian Association of Refugee Lawyers, Press Release, “Challenging the Myths: The Truth about Canadian Refugee Law” (2014) online: <<http://carl-acaadr.ca/challenging-the-myths#11.%20There%20is%20no%20such%20thing%20as%20a%20safe%20country%20for%20refugees>>.

<sup>72</sup> Bill C-43, *An act to amend the Immigration and Refugee Protection Act*, 1<sup>st</sup> Sess, 41<sup>st</sup> Parl, 2013 (assented to 19 June 2003).

<sup>73</sup> Canadian Council for Refugees, Press Release, “Summary of comments on Bill C-43” (October 2012) online: <<https://ccrweb.ca/en/summary-comments-bill-c-43>>.

<sup>74</sup> Crépeau, F., & Nakache, D, “Controlling irregular migration in Canada: Reconciling security concerns with human rights protection.” (2006) 12:1 *IRPP Choices*, 1-44.

<sup>75</sup> Efrat Arbel and Alletta Brenner, “Bordering on Failure: Canada-US Border Policy and the Politics of Refugee Exclusion”, Harvard Immigration and Refugee Law Clinical Program Harvard Law School (November 2013) at 34, online: <<http://harvardimmigrationclinic.files.wordpress.com/2013/11/bordering-on-failure-harvard-immigration-and-refugee-law-clinical-program1.pdf>>.

your mind is safety and protection and that's it, nothing else.”<sup>76</sup> For this reason, the 1951 Refugee Convention prohibits Canada from imposing sanctions on asylum seekers who are missing travel documents when they are escaping persecution.<sup>77</sup> The British Columbia Supreme Court affirmed this in *R v. Appulonappa* where it held, “Canada, and the international community generally, while not encouraging refugees to make their way to our shores, exempts them from criminal liability for whatever illegal actions they may have taken in order to successfully arrive here. Such illegal actions invariably include arriving here with forged, or completely without, the documentation required for entry.”<sup>78</sup> A similar conclusion was reached in *R v. Uxbridge*, as was noted earlier.

The accusation that persons arriving on boats are “economic migrants”, disguised as “bogus refugees” is often associated with the assumption that people who can afford to pay large amounts for the journey are not eligible for refugee protection – that is, wealthy refugees are not real refugees.<sup>79</sup> Prior to the 2012 reforms, when the government was making plans to unveil the new changes, former Immigration Minister Jason Kenny stated that, “Canada’s refugee system is broken, and too many tax dollars are being spent on bogus refugees.”<sup>80</sup> This kind of negative rhetoric creates a climate of dislike for refugees and may be counter productive. It may make it more difficult for refugee claimants to claim asylum, and increase their chances of using smugglers. Claimants may bypass the determination process altogether, if they believe making a legitimate refugee claim is too difficult.

This is also a problem in other states. One example is Pakistan, where several victims have been detained, fined, or jailed. According to a report by the United Nations Refugee Agency, victims of sex trafficking have often been charged with crimes, as Pakistani government officials often conflate trafficking with human smuggling, resulting in criminal charges and prosecution of those who are the actual victims.<sup>81</sup> Trafficked persons returning to their state of origin may also be subjected to prosecution for using false documents, having left the state illegally, or for having worked in the sex industry. Criminalization limits the victims’ access to justice and decreases the likelihood that they will report their victimization to the authorities. Given the victims’ existing fears for their personal safety, the added fear of prosecution and punishment can only further exacerbate the claimant’s situation.

### **Discussion Questions**

1. Is it possible for a country’s security interests to be reconciled with its commitment to accept more refugees?
2. Should there be mechanisms in place to deny false claimants? How should this be undertaken? Are there legitimate ways to discourage claimants who are believed to be defrauding the refugee system?
3. Should economic migrants be given refugee protection? Why or why not?<sup>82</sup>

## **Children and Refugee Rights**

### **Canada and Protecting the Rights of Refugee Children**

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<sup>76</sup> *Ibid* 31.

<sup>77</sup> *Supra* note 1 at Article 31.

<sup>78</sup> *R v Appulonappa*, 2013 BCSC 31 at para 59, (available on CanLII), (*Appulonappa*).

<sup>79</sup> Van Liempt, I. & Sersli, S, “State Responses and Migrant Experiences with Human Smuggling: A Reality Check”, *Antipode* (27 July 2012).

<sup>80</sup> Tamara Baluja, *The Globe and Mail*, News Release, “Tories unveil bill to thwart ‘bogus’ refugees” (16 February 2012). online : <<http://www.theglobeandmail.com/news/politics/tories-unveil-bill-to-thwart-bogus-refugees/article546604/>>.

<sup>81</sup> “The Cost and Impact of the Interim Federal Health Program Cuts on Child Refugees in Canada”, *PLOS one* (8 May 2014) online: <<http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0096902>>.

United States Department of State, “2013 Trafficking in Persons Report – Pakistan”, United States Department of State (19 June 2013) at 290 online: <<http://www.state.gov/documents/organization/210741.pdf>>.

<sup>82</sup> See “Refugee or Migrant? Why it Matters?” UNHCR (2007) online: <<http://www.unhcr.org/475fb0302.pdf>>

The IRPA seeks to take into account, “the best interests of the child” when making determinations for refugee claimants. There must be consideration given to whether the person’s removal would have an adverse effect on the best interests of a child directly affected.<sup>83</sup> Canada is a signatory to the Convention on the Rights of the Child (CRC), which should have the effect of infusing procedural safeguards for children into the determination process. The CRC is also relevant to age assessment procedures, guardianship and care arrangements, interview and courtroom accommodations, and the provision of legal assistance. The CRC may also provide critical guidance in the interpretation of other parts of the convention definitions, including the alienage criterion, the definition of ‘particular social group’ and the exclusion provisions.

However, the UN Committee on the Rights of the Child has criticized Canada for its failure to reunite refugee families.<sup>84</sup> According to the CCR, refugees in Canada face barriers such as long delays that increase risks to family members overseas, who may be in conflict zones or refugee camps. Families are often subject to the same risk of persecution that caused their spouse or parent to be granted Canada’s protection. Living conditions may endanger the health of family members and affect children’s education, leading to increased social costs when they finally come to Canada. Also, long separations can cause a heavy psychological toll since prolonged family separation can have a significant impact on children.<sup>85</sup> As long as their families remain at risk, refugees cannot fully enjoy the peace and security that they have attained for themselves in Canada.

### **Child Soldiers**

Another area linked to children’s rights is the complex topic of child soldiers. There is a basis in international law to regard child soldiers that are under the age of 18 as ‘protected civilians’ or ‘non-combatants’. However, this determination becomes problematic for refugees, as child soldiers are not entitled to refugee status when there are serious reasons for suspecting they have committed international crimes as defined under Articles 5-8 of the Rome Statute of the International Criminal Court (1998).<sup>86</sup> The exclusion clause of the United Nations Convention Relating to the Status of Refugees states that the Refugee Convention “shall not apply to *any person* in respect to whom there are serious reasons for considering that he has committed a crime against peace; a war crime or a crime against humanity.”<sup>87</sup> Therefore, as there is no age limit on this provision, children may not be given refugee status if there is reason to believe that the child committed an international crime. However, under IHL, child soldiers under 15 are further protected from criminal liability for their soldiering activities and cannot be prosecuted for bearing arms as soldiers under the Additional Protocols of 1977.<sup>88</sup> This is because it is assumed that children do not have the developmental maturity to comprehend the nature and consequences of an international crime and, as all child soldiers are non-combatants, the State must take responsibility for its failure to adequately protect children from such involvement and for

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<sup>83</sup> *Supra* note 70 at s 25 (1.21)(b).

CBC News, News Release, “Federal government to appeal ruling reversing ‘cruel’ cuts to refugee health” (4 July 2014) online: <<http://www.cbc.ca/news/politics/federal-government-to-appeal-ruling-reversing-cruel-cuts-to-refugee-health-1.2696311>>.

<sup>84</sup> UN Committee on the Rights of the Child. Concluding observations: Canada. 27/10/2003. CRC/C/15/Add.215, at para. 46.

<sup>85</sup> “More than a Nightmare Delays in Refugee Family Reunification”, Canadian Council for Refugees (November 2004) at 15 online: <<https://ccrweb.ca/nightmare.pdf>>.

<sup>86</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, online: <<http://www.refworld.org/docid/3ae6b3a84.html>>.

<sup>87</sup> United Nations, Convention Relating to the Status of Refugees (1954)189U.N.T.S.150, entered into force on 22 April 1954 at s 2(iii) (a) online: <<http://www.unhcr.org/3bbb25729.pdf>>.

<sup>88</sup> International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, at Art 77, online: <<http://www.refworld.org/docid/3ae6b36b4.html>>.

the child's activities as a soldier.<sup>89</sup> Furthermore, states parties to the CRC (1989) have an obligation under Article 39 to offer asylum to ex-child soldiers and to take appropriate measures to promote physical and psychological recovery and social reintegration.<sup>90</sup> In Professor Sonja Grover's article entitled, "Child Soldiers as Non-Combatants: The Inapplicability of the Refugee Convention Exclusion Clause", she argues that ex-child soldiers should be accepted as Convention refugees. This should be done irrespective of any atrocities they may have committed in order to prevent their exploitation as participants in armed conflict. Currently however, several children, who are suspected of having committed international crimes, have been refused asylum. Children like this face enormous difficulties in reintegrating into society post-conflict.<sup>91</sup>

On the other hand, Professor Mark Drumbl argues in his book entitled, "Reimagining Child Soldiers" that the approach to simply label child soldiers as victims is unfitting and should be reevaluated. He argues that there are cases of child soldiers that join armed forces and groups in order to simply pursue paths of economic advancement, inclusion in occupational networks, pursuit of political or ideological reform, and professional development.<sup>92</sup> Furthermore, he states that international observations of child soldier's experiences contrasts with what child soldiers **actually** experience. In interviews, for example, former child soldiers often describe themselves as having volunteered for service.<sup>93</sup> These accounts are often discounted as "misleading" on the grounds that children are at an age at which they are not capable of making mature decisions.<sup>94</sup> Drumbl counters this claim on the basis that adolescents are presumed to be competent in many jurisdictions. For example, international human rights law and international family law highlight that adolescents can exercise rights of freedom of association and expression.<sup>95</sup> Moreover, many persons, initially recruited as children, age into adulthood during conflict. In these instances, infantilizing aspects of their actions may become perceived as problematic.<sup>96</sup> For these reasons, he argues that the faultless, passive victimhood label of child soldiers should be dismantled and the problems presented by child soldiers should be looked at more contextually.

### **Discussion Questions**

1. What hurdles are preventing Canada from realizing its commitment to reunite refugee families? How can these hurdles be overcome?
2. Should child soldiers be excluded from gaining refugee status? Why or why not?

## **Syrian Refugee Crisis**

The Syrian Civil war has caused one of the worst humanitarian disasters in history, as it has caused the death of more than 100,000 people and displaced millions. UNCHR chief Antonio Guterres has described it as, "the worst humanitarian problem the world has faced since the Rwandan genocide."<sup>97</sup> An estimated 9 million Syrians who have fled their homes, taking refuge in neighboring countries or within Syria itself. According to the UNHCR, about 2.5 million have fled to Turkey, Lebanon, Jordan and Iraq. There are 6.5 million internally displaced within Syria.

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<sup>89</sup> Sonja Grover, "Child Soldiers as Non Combatants: The Inapplicability of the Refugee Convention Exclusion Clause" (2002) 12:1, *The International Journal of Human Rights* 53 at 58.

<sup>90</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, online: <<http://www.refworld.org/docid/3ae6b38f0.html>>.

<sup>91</sup> M. S. Gallagher, "Soldier boy bad: Child soldiers, culture and bars to asylum", (2002) 13: 3 *Int'l J Refugee L* 311 at 333, online: < <http://ijrl.oxfordjournals.org/content/13/3/310.full.pdf>>.

<sup>92</sup> Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy*, (New York: Oxford University Press, 2012) at 14.

<sup>93</sup> *Ibid* at 14.

<sup>94</sup> P.W. Singer, *Children at War*, (Berkeley and Los Angeles: University of California Press, 2006) at 62.

<sup>95</sup> *Supra* note 84.

<sup>96</sup> *Supra* note 93 at 15.

<sup>97</sup> Ottawa Citizen, News Release, "UN refugee chief urges Canada to open doors to Syrians" (29 May 2014) online: Ottawa Citizen <<http://ottawacitizen.com/news/national/un-refugee-chief-urges-canada-to-open-doors-to-syrians>>.

Meanwhile, fewer than 100,000 have declared asylum in Europe with a small number offered resettlement by countries such as Germany and Sweden.<sup>98</sup> According to the 2014 Regional Response Plan, by the end of 2014, there will be an estimated 4.1 million Syrian refugees, which would make it the largest refugee population in the world.<sup>99</sup> The influx of refugees in Syria's neighboring countries has put an immense strain on the limited resources available in those countries, particularly in Jordan and Lebanon, where many refugees are living in precarious conditions in overcrowded refugee camps or in host communities.<sup>100</sup> In order to provide adequate protection and humanitarian assistance to refugees from Syria and those in need within Syria, the UN made the largest humanitarian appeal in its history, calling for around \$3 billion in assistance to UN agencies and NGOs working with refugees. Only 64% of the \$3 billion had been committed and the UN has warned that funding shortfalls could result in a cutback in aid to refugees.<sup>101</sup> Furthermore, the crisis has made many women the sole providers for one in four Syrian refugee families. These families are struggling to provide food and shelter for their children and often face harassment, humiliation and isolation. According to UNHCR, hundreds of thousands of women have run out of money, face daily threats to their safety, and are being treated as outcasts for no other crime than losing their men to a vicious war.<sup>102</sup>

### Concerns over Europe's Response

In dealing with this crisis, the European Union (EU) member states have employed policies to keep refugees and asylum seekers out of their territories. As a result, it is nearly impossible for refugees to reach Europe lawfully and many are forced into difficult journeys, risking their lives on boats or across land, to seek safety and protection in Europe.<sup>103</sup> Amnesty International has found that refugees attempting to enter the EU in these ways are met with alarming human rights violations. In two of the main gateways to the EU, Bulgaria and Greece, refugees from Syria are met with inhumane treatment. This includes detention for weeks in poor conditions in Bulgaria and life threatening pushback operations in the case of Greece, which may also lead to refoulement, which would amount to a violation of international law.<sup>104</sup> Introducing barriers, like fences or other deterrents, may lead people to undertake more dangerous crossings and further place refugees at increased risk of harm and at the mercy of smugglers.<sup>105</sup>

### Canada's Response

In July 2013, Canada announced its commitment to resettle 1,300 Syrian refugees by the end of 2014. Of this number, only 200 places were committed on behalf of the government, and the remaining 1,100 places were committed on behalf of the private sector (privately sponsored refugees). Not many privately sponsored refugees are expected to arrive in Canada by the end of 2014, since there are delays and barriers in the private sponsorship program.<sup>106</sup> As of October 2013, there were fewer than 400 Syrians that made a refugee claim in Canada and the government of Canada resettled only 9 Syrians. The UNHCR chief met with Immigration Minister

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<sup>98</sup> European University Institute, *Syrian Refugees a Snapshot of the Crisis-In the Middle East and Europe*, online: Migration Policy Centre <<http://syrianrefugees.eu/>>.

<sup>99</sup> "2014 Syria Refugee Regional Response Plan" (2014) at 6. Online: <<http://www.unhcr.org/syriarrp6/docs/Syria-rrp6-full-report.pdf>>.

<sup>100</sup> Amnesty International, Press Release, "An International Failure: The Syrian Refugee Crisis" (13 December 2013) online: Amnesty International Briefing <<http://www.amnesty.org/ar/library/asset/ACT34/001/2013/en/8a376b76-d031-48a6-9588-ed9aee651d52/act340012013en.pdf>>.

<sup>101</sup> UN News Centre, News Release, "UN appeals for funds to avert cut in food aid to Syrian refugees in Lebanon" (17 September 2013) online: UN News <<http://www.un.org/apps/news/story.asp?NewsID=45875&Cr=syria&Cr1=#.U82qaHbrF4z>>.

<sup>102</sup> The Guardian, News Release, "Syria's female refugees facing poverty, harassment and isolation" (8 July 2014) online: World News <<http://www.theguardian.com/world/2014/jul/08/women-head-quarter-syrian-refugee-families>>.

<sup>103</sup> *Supra* note 100 at 5.

<sup>104</sup> *Ibid* at 17.

<sup>105</sup> UNHCR, News Release, "Denied entry and pushed back: Syrian refugees trying to reach EU" (15 November 2013) online: UNCHR Briefing Notes <<http://www.unhcr.org/528618159.html>>.

<sup>106</sup> Canadian Council for Refugees, News Release, "Canadian Immigration responses to the Syrian Crisis-background" (October 2013) online: CCR News <<https://ccrweb.ca/en/syrian-crisis-background>>.

Alexander in May 2014, asking the international community to take in another 100,000 Syrian Refugees.<sup>107</sup>

### **Discussion Questions**

1. How should Syria's neighboring countries deal with this growing refugee crisis?
2. What can Canada do to help alleviate the heavy influx of refugees that are currently seeking asylum?

### **Lesbian, Gay, Bisexual and Transgender (LGBT) Refugee Issues**

According to the Organization for Refugee Asylum and Migration (ORAM), LGBT people are among the most persecuted individuals in the world today. Seventy-eight nations criminalize same-sex relations. Seven of these apply the death penalty for consensual same-sex conduct. In many more countries, LGBT people regularly face harassment, arrest, interrogation, torture and beatings.<sup>108</sup>

Interpreting the 1951 Convention's "membership of a particular social group", gives rise to debate even today, as there is no unanimity on how to fully discern the drafters' intention in respect of this requirement. The UNCHR defines a particular social group as, a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. According to the UNHCR, "the characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."<sup>109</sup> Under this definition, sexual orientation falls under the category of a particular social group.

However, even with this determination, LGBT refugee claimants still face some hurdles. Credibility is very often an issue of significance, as it is particularly important when it comes to asylum claims based on sexual orientation. There are understandable fears of a flood of refugees falsely claiming to be persecuted on account of their sexual orientation, simply to immigrate to other countries. This apprehension has sometimes led to inhumane and degrading methods being used to assess claimants' sexual orientation. For example, in the Czech Republic they practiced phallographic testing, where men were shown both homosexual and heterosexual pornography while sensors monitored the blood flow to the penis.<sup>110</sup> The determination of group membership is complicated as there are usually no external or objective indicators of the applicant's membership in the group. However, the UNCHR nonetheless states that testimony alone should be sufficient in making determinations about a claimant's sexual orientation, if there is no other evidence available.<sup>111</sup> This can be difficult to implement, as there needs to be a demonstrated fear of persecution. Furthermore, the UNHCR has argued that states should be mindful of the fact that claimants may not have had a previous same-sex partner or may have been married previously with a person from the opposite gender. There are numerous stereotypes around sexual orientation, which may shape decision-makers' approaches to sexuality in asylum claims.<sup>112</sup>

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<sup>107</sup> "The Star, News Release, "UN asks Canada to take in Syrian Refugees" (29 May 2014) online: The Canadian Press < [http://www.thestar.com/news/canada/2014/05/29/un\\_asks\\_canada\\_to\\_take\\_in\\_syrian\\_refugees.html](http://www.thestar.com/news/canada/2014/05/29/un_asks_canada_to_take_in_syrian_refugees.html)>.

<sup>108</sup> About LGBTI Refugees, online: Organization for Refugee, Asylum and Migration <<http://www.oraminternational.org/en/about-us/about-lgbti-refugees> <http://www.oraminternational.org/en/about-us/about-lgbti-refugees>>.

<sup>109</sup> "UNHCR Guidelines on International Protection No. 2: 'Membership of a Particular Social Group' within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees", (2002) online: < <http://www.refworld.org/pdfid/3d36f23f4.pdf>>.

<sup>110</sup> Matthew Day, The Telegraph, News Release, "Czechs criticized for homosexual 'sexual arousal' tests", (9 December 2010) online: Telegraph news < <http://www.telegraph.co.uk/news/worldnews/europe/czechrepublic/8191849/Czechs-criticised-for-homosexual-sexual-arousal-tests.html>>.

<sup>111</sup> "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity", at 16 online: (2008) < <http://www.refworld.org/pdfid/48abd5660.pdf>> Protection Policy and Legal Advice Section, Geneva.

<sup>112</sup> "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants" (2010) Journal of Refugee

To ameliorate the situation that LGBT refugees are faced with when making their claims, the IRB has provided, “sexuality training”, to assist decision-makers in understanding the impact of actual or perceived homophobia and heterosexism in the experience of persecution. The use of guidelines on sexual orientation, which specify appropriate ways to examine claimants about their sexual orientation, might help address these shortcomings.

**Discussion Questions**

1. What other methods can be used to ensure the validity of the statements that are made by LGBT refugee claimants?
2. As was stated by ORAM, why are LGBT people among the most persecuted individuals in the world today? What measures can be taken to ameliorate their situation?

**Other Key Discussion Questions**

1. A new category of refugee issues that is arising now is the area of climate change refugees. As they do not fit within the definition of being “persecuted”, how should states deal with this newly emerging crisis?
2. Canada and other western countries have claimed to be sharing the refugee burden in the world today. However, a majority of refugees are currently in developed countries. Why do you think this is the case?

## **CLA Chapter Activities**

1) Invite a panel of local practitioners who work in immigration or refugee law to speak at the University. This panel can also include professors who teach in the area of immigration and refugee law. Discussions from the panel can be included in the University newsletter.

This panel can also include a workshop in which students are given scenarios relating to refugee issues, in order to engage in a discussion about the application of refugee legal principles.

The following example was taken from a report from a UNCHR report entitled, "Teacher's Guide Refugees: A Canadian Perspective"<sup>113</sup>:

### **Activity: Making the Decision**

#### **Goal**

To give students an overview of Canada's refugee determination system.

#### **Situation**

The case study shows the dilemmas faced by the IRB when deciding whether someone is a refugee. Have the students work in groups to review the case study and answer the questions. Discuss their decisions. What was most difficult in making their determinations?

#### **Case Study 1**

Ms. H, who has no political affiliation, belongs to an ethnic minority, many members of which want independence from the ethnic majority governing her country. In support of their ideas, some members of the minority group have undertaken guerilla activities. Each time one of these guerilla actions took place; Ms. H was threatened by some of her neighbors, who belong to the ethnic majority. In addition, she received anonymous phone calls from members of her own ethnic group, who criticized her for not taking their side. She went to the police and asked for protection, but they were so overwhelmed by the events. Tension grew in Ms. H's country, and many people were killed in clashes. Three members of Ms. H's family were killed and the perpetrators were never identified. Frightened, Ms. H obtained a passport, left her country by plane, and arrived in Canada, where she is now requesting asylum.

Is Ms. H. a refugee? Why or why not?

**Answer:** She should be recognized as a refugee.

Although Ms. H was not involved in guerrilla activities, her neighbors still threatened her because she belongs to the minority ethnic group. In this case, her fear of persecution because of her ethnicity is well founded. She is also in the position of being persecuted by certain members of her own ethnic group for not supporting the independence movement. In other words, her perceived political opinion (that is, not being involved at all) is at odds with others in her ethnic community. Her fear of persecution on political grounds is well founded.

- 2) Host a "lunch and learn" or informal pub or coffee shop night to discuss Refugee issues
- 3) Spread the word: Partner with other undergrad clubs or other faculties to implement campaigns and help fundraise for the CLA Student Chapter
- 4) Invite a past CLA intern to speak to your Chapter about their experiences (particularly interns who may have worked on refugee related issues)

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<sup>113</sup> UNHCR Canada, "Teachers Guide-refugees: a Canadian Perspective" (2013) at 7, online: Canadian Resources: <[http://www.unhcr.ca/teachers/documents/teachers\\_guide-e.pdf](http://www.unhcr.ca/teachers/documents/teachers_guide-e.pdf)>.

5) Include a silent auction at any event. Ask local businesses to donate items and gift certificates for students to bid on. Also ask upper year students to donate a few hours of tutoring time for first years to bid on.

### **Further Resources (Key Organizations)**

- [Canadian Association of Refugee Lawyers \(CARL\)](#)
- [Immigration and Refugee Board of Canada \(IRB\)](#)
- [United Nations High Commissioner for Refugees \(UNCHR\)](#)
- [Canadian Council for Refugees \(CCR\)](#)
- [Citizenship and Immigration Canada \(CIC\)](#)
- [Refugee Assistance Project \(University of Ottawa\)](#)

### **Other Sources of Law on Refugees**

- [The 1966 Bangkok Principles on Status and Treatment of Refugees adopted at the Asian-African Legal Consultative Committee in 1966.](#)
- [The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa](#)
- [The 1984 Cartagena Declaration on Refugees for Latin America](#)
- [The 1976 Council of Europe's Recommendation 773 \(1976\) on the Situation of de facto Refugees](#)

## Acronyms

<b>BIA</b>	Board of Immigration Appeals
<b>BOC</b>	Basis of Claim
<b>CARL</b>	Canadian Association of Refugee Lawyers
<b>CBSA</b>	Canadian Border Services Agency
<b>CCR</b>	Canadian Council for Refugees
<b>CIC</b>	Citizenship and Immigration Canada
<b>CLA</b>	Canadian Lawyers Abroad
<b>CRC</b>	Convention on the Rights of the Child
<b>CRDD</b>	Convention Refugee Determination Division
<b>DCO</b>	Designated Country of Origin
<b>EHCC</b>	Expanded Health Care Coverage
<b>EU</b>	European Union
<b>HCC</b>	Health Care Coverage
<b>IDP</b>	Internally Displaced Person
<b>IFHP</b>	Interim Federal Health Program
<b>IHL</b>	International Humanitarian Law
<b>ILNA</b>	Irish National Liberation Army
<b>IRB</b>	Immigration and Refugee Board
<b>IRPA</b>	Immigration, Refugee and Protection Act
<b>LGBT</b>	Lesbian, Gay, Bisexual, Transgender
<b>LRA</b>	Lord's Resistance Army
<b>NGO</b>	Non-Governmental Organization
<b>ORAM</b>	Organization for Refuge Asylum and Migration

<b>PHPS</b>	Public Health or Public Safety Health Care Coverage
<b>POW</b>	Prisoners of War
<b>PRRA</b>	Pre-Removal Risk Assessment
<b>SCC</b>	Supreme Court of Canada
<b>UN</b>	United Nations
<b>UNCAT</b>	United Nations Convention Against Torture
<b>UNHCR</b>	United Nations High Commissioner for Refugees

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