Designated Foreign Nationals and Bill C-31

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by David Matas

I would like to address only one of the many changes proposed by Bill C-31[1] - the amendments to the Immigration and Refugee Protection Act which create the category designated foreign nationals and impose restrictions on them. Designated foreign nationals face up to twelve months detention without review[2]. The detention provisions apply to children aged sixteen and seventeen as well as to parents of younger children, who can remain in detention even though their children are free.

The Bill provides for a five year delay from the making of a refugee protection claim to eligibility to apply for permanent residence[3], as well as the denial of refugee travel documents once granted refugee protection status[4]. The combination of these two provisions means that reunion of designated foreign nationals with non-accompany immediate family members will be impossible for many years whether inside or outside of Canada.

The Bill also denies to designated foreign nationals an appeal from a rejection of a refugee protection claim[5]. Error correction offered others by the Bill becomes impossible for this group.

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[1] Forty first Parliament

[2] Bill section 25 enacting Immigration and Refugee Protection Act section 57.1(1).

[3] Bill section 10 enacting Immigration and Refugee Protection Act section 20.2(1)(a).

[4] Bill section 16 enacting Immigration and Refugee Protection Act section 31.1.

[5] Bill section 36(1) enacting Immigration and Refugee Protection Act 110(2)(a).

I am a former chair of the immigration law section of the Canadian Bar Association, a former president of the Canadian Council for Refugees, and a former legal network co-ordinator of Amnesty International. I endorse the positions of these organizations on Bill C-31.

This afternoon though what I would like to do is not just re-iterate the concerns of these organizations, but rather approach the issue from a different perspective, the inconsistency of the components of the Bill relating to designated foreign nationals with other Government policies. Because there is a majority government now in Parliament, Bill C-31 will pass in its present form unless at least some Government members want it changed. The admittedly daunting task I have tried to set myself here this afternoon is to attempt to achieve just that, to attempt to persuade the Government members that they should want to change Bill C-31 because the provisions in the Bill relating to designated foreign nationals contradict and undermine their own Government policies.

A. The context

Although the designated foreign national provisions of Bill C-31, like the rest of the Bill, are general in nature, their genesis was quite particular. The proposals began with Bill C-49, introduced in October 2010 into Parliament in response to the arrival of Tamil boat people, 76 aboard the Merchant Vessel (MV) Ocean Lady in October 2009 and 492 aboard the Merchant Vessel Sun Sea in August 2010. The Minister of Citizenship and Immigration, the Honourable Jason Kenney, on second reading of Bill C-49 in the House of Commons in October 2010, justified the proposed legislation by reference to these arrivals[6].

The proposed legislation was and still is retroactive to March 2009. The Bill states that a designation of a group for the purpose of mass detention may be made in respect of an arrival in Canada after March 31, 2009[7]. That means that once the law comes into effect

[6] Hansard, October 27, 2010.

[7] Section 81(1).

those who arrived on the Sun Sea and Ocean Lady could be designated.

The very choice of the date March 2009 suggests that the intent was to apply the law to the passengers of the Sun Sea and Ocean Lady. All the provisions in the law relating to designated foreign nationals would apply to these passengers if designated, other than the requirement of detention for those already released[8].

B. Human rights in Sri Lanka

Sri Lanka ended in May 2009 a long brutal civil war between the Government of Sri Lanka and the minority Tamil forces who sought an independent country in the north. The war, which went on for twenty six years, resulted in 80,000 deaths. It culminated in a frenzy of killing and mass detention of Tamil civilians.

Tamils in Sri Lanka continue to be victimized by the victors in the war. The systemic discrimination, harassment and persecution of minority Tamils by elements of the majority continues with a vengeance since the Tamil side lost that war.

There are two Government policies which clash with the designated foreign national provisions in Bill C-31. One is the Government policy on human rights in Sri Lanka.

Canadian Prime Minister Stephen Harper said prior to the Commonwealth Heads of Government Meeting in Perth in October 2011:

> "I have expressed concerns about the holding of the next Commonwealth summit in Sri Lanka ... I intend to make clear to my fellow leaders of the Commonwealth that if we do not see progress in Sri Lanka in human rights I will not as Prime Minister be attending that Commonwealth summit. And I hope others will take a similar

[8] Section 81(3)

position."[9]

The Government of Sri Lanka appointed in May 2010 a Commission of Inquiry mandated to report on the events from the end of the cease fire in February 2002 to the end of the civil war in May 2009. The Commission reported in November 2010. The report was one-sided, setting out in great detail evidence and conclusions on the crimes of the opposition forces, the LTTE, but passing over the substantial evidence of war crimes and crimes against humanity of the government forces.

The Government of Canada backed an independent investigation into war crimes committed by the Sri Lankan army in the final phase of the civil war. Foreign Minister John Baird, according to a Globe and Mail report, told Sri Lanka's Foreign Affairs Minister, G.L. Peiris, at the UN in New York in September that Canada wants progress on human rights and post-civil war reconciliation, pushing back, according to a summary provided by sources, against Mr. Peiris's 'trust us' assurances[10].

The Government of Canada maintained its position, after the release of the Government of Sri Lanka whitewash report, of intending to boycott the Commonwealth Heads of Government meeting in Sri Lanka for 2013, unless real change occurred in accountability for the crimes of the civil war and reconciliation between communities. The Prime Minister of Canada rejected the November 2010 report as failing to address the human rights concerns arising from the end of the civil war in 2009[11].

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[9] "Canada seeks Sri Lanka boycott at Commonwealth meeting", Amanda Hodge, The Australian, September 14, 2011

[10] "In policy shift, Stephen Harper presses Sri Lanka on human rights", Campbell Clark, September 29, 2011

[11] "Sri Lanka report not enough to change PM's mind on summit boycott" Postmedia News, January 12, 2012

If we want to promote human rights, we have to protect refugees. That is obviously true for the individual claimant. If a person has a well founded fear of persecution, and yet the person is returned to the country fled, then there is a real risk that the human rights of the individual will be violated. Protecting the person prevents the infliction of human rights violations on him or her.

Yet, there is more to the linkage in that. There is an overall, aggregate linkage. Protecting refugees will enhance respect for human rights in the country fled. Not protecting refugees increases the overall level of human rights violations in the country fled, not just against the refugee claimant returned, but generally.

Failure to protect refugees shows indifference to the plight of the victims. Protestations of human rights violations coupled with failure to protect refugees is hypocrisy.

When the government on the one hand protests human rights violations in a country and on the other hand fails to offer protection to refugees from that country, the message it sends to violators is that the protestations of human rights violations are mere words, that those who condemn the violations do not really mean what they say. Failure of protection is a license to violators to continue and increase their violations.

When resettlement states say no to refugees, what violators hear is we can do want we want with impunity, without consequences. Saying no to refugees emboldens violators, makes violations more likely.

Refugee protection and resettlement is more than just political. It is legal. Refugee determination is a legal process, applying an international law definition to the facts of the case. Those who are protected and resettled are given legal status.

Failure to protection and resettle refugees is also legal, a legal acceptance of the human rights violations which have generated refugee outflows. Statements by the legal structure of countries against refugees more than counterbalance condemnations by the political structure of human rights violations, because the legal has to be taken more seriously than the political. The consequence of saying no to refugees is acquiescing in violations.

Bill C-31 is bad in principle. But it is even worse in context. It says to the Government of Sri Lanka, go ahead, mistreat the Tamil minority. We don't care.

C. A regional protection framework

The second policy conflict is this. Immigration Minister Jason Kenney said in Parliament in October 2010[12]:

> "we have begun preliminary discussions with our international partners, including Australia, which obviously has a great stake in this issue, and with the United Nations High Commissioner for Refugees to pursue the possibility of some form of regional protection framework in the Southeast Asian region. In part that would entail encouraging the countries now being used as transit points for smuggling and trafficking to offer at least temporary protection to those deemed by the UN in need of protection and then for countries such as Canada to provide, to some extent, reasonable resettlement opportunities for those deemed to be *bona fide* refugees, which is something we are pursuing."

This policy of encouraging the countries now being used as transit points for smuggling and trafficking to offer at least temporary protection to those deemed by the UN in need of protection, again, sounds fine. The notion of a regional protection framework in the Southeast Asian region with some reasonable resettlement opportunities for refugees makes eminent sense. Yet, seventeen months later there is no sign of it happening.

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[12] October 27, second reading Bill C-49

One reason for the mistreatment of asylum seekers in Asia is the pressure put on those countries by resettlement countries. Another reason is the poor example resettlement countries give.

The logic behind the designated foreign national provisions of Bill C-31 is to discourage new arrivals like those aboard the Ocean Lady and the Sun Sea. Aside from the cruelty of the means, it is likely to have a perverse effect, leading countries of proximate refuge to mimic its cruelty and prompting asylum seekers in those countries to flee in much the same way the passengers of the Ocean Lady and Sun Sea did. With Bill C-31, the embarrassing position of the Government of Canada to governments of proximate refuge with whom it is negotiating is - do what we say, not what we do.

The Minister in October 2010 justified the need for the proposed legislation on the basis that his proposed regional solution was mid to long term and something about smuggling had to be done now[13]. Yet, making matters worse for the customers of smugglers in countries of destination is not a workable shortcut. Moreover, by setting a bad example, the designated foreign national provisions of Bill C-31 complicate and delay the possibility of a regional solution.

Seventeen months after the introduction of Bill C-49, the mid term, if not the long term, has already arrived. What has Canada done in the interim to achieve its proposed regional solution? As far as I can tell, nothing.

The mistreatment the refugees receive in their home countries and countries of proximate refugee is real, immediate, experienced. The threat of mistreatment the designated foreign national provisions of Bill C-31 holds out, even if realized, will always be for the

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smuggled only a potential, and one, we can be sure, smugglers will disguise and misrepresent.

Exploitation by smugglers will not end because the smuggled are mistreated in countries of resettlement. On the contrary, that mistreatment will make the exploitation even more pernicious.

The policy behind the designated foreign national provision of Bill C-31 is to discourage asylum seekers from seeking asylum through smugglers. A far better approach is creating incentives, incentives to encourage individuals to stay at home by removing human rights violations which spur their flight, and incentives to encourage individuals to stay in countries of proximate refugees by creating more hospitable environments.

The creation of incentives is as likely to be effective in impacting behaviour as the creation of disincentives. The carrot is as effective as the stick.

Moreover, creating incentives removes the root causes of flight; it improves respect for international law and human rights. Creating disincentives exacerbates the root causes by showing indifference to them; it degrades respect for international law and human rights. The carrot is kind; the stick is cruel.

D. Conclusion

The contrasts amongst the various Government policies dealing with Sri Lankan Tamil refugees and Sri Lankan human rights are so striking that we can legitimately ask, what is going on? It seems, to say the least, disorganized.

One answer is the manner of Government policy development. The arms of government dealing with human rights and refugees are separated. International human rights

promotion is the domain of the Department of Foreign Affairs. Refugee protection falls within the bailiwick of the Departments of Immigration or Public Safety. While there is an administrative logic in this sort of bureaucratic separation, it makes divergence between promotion of respect for human rights and refugee protection all too easy.

Moreover, foreign and refugee policy development operate as isolated silos. Policy advisors in Foreign Affairs and Citizenship and Immigration do not coordinate. If in public it appears that the Government left hand does not know what the Government right hand is doing, there is good reason. Government left hand advisors and right hand advisors do not talk to each other.

The designated foreign national provisions of Bill C-31 should be withdrawn from the Bill for all the reasons given by my colleagues in the Canadian Bar Association, the Canadian Council for Refugees, and Amnesty International. In addition, they should be withdrawn from the Bill because, if one considers the issues of human rights and refugee protection from a larger perspective, the designated foreign national provisions are not consistent with overall government policy. The provisions clash so directly with other Government policies that they need to be reconsidered.

The Government should be presenting a coordinated approach to human rights, refugee protection and refugee resettlement. My hope is that the Government will have the wisdom to abandon its present clash of policies and instead present to Parliament a policy where promotion of respect for human rights abroad and protection of refugees work together.

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