UNHCR
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Universal Periodic Review: *Fourth Cycle, 44th Session*

CANADA

I. BACKGROUND INFORMATION

Canada ratified the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* in 1969 (hereinafter jointly referred to as "the *1951 Convention*").[1] It ratified the *1961 Convention on the Reduction of Statelessness* in 1978. These Conventions are implemented in Canada through the Immigration and Refugee Protection Act ("IRPA") and the Citizenship Act. The Immigration and Refugee Protection Regulations (SOR/2002-227) specify how provisions of the IRPA are to be applied. Canada has not ratified the *1954 Convention relating to the Status of Stateless Persons*.

Canada received a record number of 92,715 asylum claims in 2022, which is 1.5 times higher than the record number of claims received in 2019. This increase is largely due the surge of asylum-seekers crossing the U.S./Canada land border irregularly following the lifting of COVID border restrictions in November 2021. Irregular arrivals currently represent 43% of all asylum claims made in Canada. A total of 39,540 irregular arrivals were intercepted by the Royal Canadian Mounted Police (RCMP) in 2022. As in previous years, the vast majority of irregular arrivals (99%) are entering through the province of Quebec. The increase in asylum claims has led to a 24-month processing delay in registration processing.

The IRPA gives the Immigration and Refugee Board (IRB), an independent administrative tribunal, jurisdiction to hear and decide cases on immigration and refugee matters. It is the main body in Canada that conducts first-instance refugee status determination. Canada's asylum system is, in many fundamental ways, a model of best practices. However, it is a system that can only process a limited number of asylum claims per year and is not as easily adaptable to increases. In some circumstances, a refugee claim may be accepted without a hearing. In most cases, however, the asylum-seeker will be given a date for a hearing to determine whether the asylum-seeker is a Convention refugee (having a well-founded fear of persecution based on the *1951 Convention*) or a person in need of protection (facing a risk of torture, a risk to their life, or a risk of cruel or unusual punishment or treatment). Issues of family separation arise in the process because the Refugee Protection Division (RPD) is not currently mandated to grant derivative status to spouses and dependent children.

An asylum-seeker makes a claim either upon arrival at any official port of entry (an airport, a seaport, or a Canada-United States border crossing), at an unofficial border crossing, or inside Canada. Claims made at a port of entry or between official ports of entry (irregular border crossings) are received by officers of the Canada Border Service Agency (CBSA). Claims made from within Canada ("inland claims") are made to an Immigration, Refugees and Citizenship Canada ("IRCC") office. After a claim is made, the individual is scheduled for an eligibility interview, during which it will be determined if the refugee claim can be referred to the RPD. There is a serious concern about the unsustainable delay for eligibility interviews (currently being scheduled within a two-year delay compared to a few days prior to COVID) due to the record number of applications in 2022.

[1] Accession was made subject to the following reservation with respect to Articles 23 (Public Relief) and 24 (Labour Legislation and Social Security): "Canada interprets the phrase "lawfully staying" as referring only to refugees admitted for permanent residence; refugees admitted for temporary residence will be accorded the same treatment with respect to matters dealt with in Articles 23 and 24 as is accorded visitors generally."

The Safe Third Country Agreement (STCA) between Canada and the U.S., which was signed in 2002 and entered into force in 2004, requires asylum-seekers arriving at official land ports of entry (POE) to make their claims in the first country of arrival (Canada or U.S.). Exceptions exist, including for asylum-seekers who have family members in Canada and for unaccompanied minors. The STCA does not apply to those who cross the border irregularly.

The issue of asylum-seekers entering Canada irregularly often makes headlines, fuelled by increased politicization. The Government has faced growing criticism over the years from opposition parties for its handling of irregular arrivals, which has led to calls to "close the loophole" by extending the STCA to the entire land border, thereby applying it to irregular arrivals. In addition, three public interest litigants launched a challenge to the STCA which has been heard by the Supreme Court of Canada in October 2022. As of March 2023, a decision had not yet been released by the Court. Aside from initiating discussions with the U.S. to renegotiate the STCA, in June 2019 the Government introduced legislative changes mainly affecting asylum-seekers crossing into Canada from the U.S., with the stated goal of preventing "asylum shopping" and restoring public confidence in the Canadian asylum system. The 2019 Budget Implementation Act (BIA) bars asylum-seekers who made a previous asylum claim in a country with which Canada has a data-sharing agreement (U.S., UK, Australia, New Zealand) from having their claim referred to the IRB. Instead, they have access to a pre-removal risk assessment (PRRA), conducted by a government official at IRCC. A positive PRRA decision results in refugee status for the individual. A negative PRRA decision may be judicially reviewed but removal may be initiated prior to decision by the Federal Court.

Canada rolled out its Alternatives to Detention (ATD) program in 2018 and it resulted in a decrease in use of detention. However, asylum-seekers continue to be detained, including on identity grounds or for perceived failure to "cooperate" with authorities. CBSA has put in place a pilot project since November 2021 to address this issue of minors housed in detention. If there are doubts on the identity of a person, CBSA officers are asked to favour reporting conditions as an alternative to detention in cases involving families with children.

II. KEY PROTECTION ISSUES, CHALLENGES AND RECOMMENDATIONS

Challenges linked to outstanding 3rd cycle UPR recommendations

Issue 1: Ratification of the *1954 Statelessness Convention* and lack of a statelessness determination procedure

Linked to 3rd cycle UPR recommendations nos. 142.29 "Consider becoming a party to the 1954 Convention relating to the Status of Stateless Persons (Georgia)", **no. 142.30** "Ratify the 1954 Convention relating to the Status of Stateless Persons (Costa Rica)(Côte d'Ivoire)" and **no. 142.275** "Establish a statelessness determination procedure and a protected stateless person status that facilitates the naturalization procedure for persons in that situation (Chile)".

Canada has ratified the *1961 Convention*, but not the *1954 Convention*. Canada also does not have a specific statelessness determination mechanism, making it challenging to identify and count the number of stateless persons in the country and to ensure that stateless persons have their basic human rights fulfilled. IRPA's definition of a foreign individual includes stateless persons. However, neither the IRPA or its Regulations define statelessness or a stateless person. The key mechanisms through which stateless persons seek to obtain legal status in Canada are applications for permanent residence on humanitarian and compassionate grounds and applications for a discretionary grant of citizenship to the Minister of Immigration, Refugees and Citizenship. Stateless persons who have a fear of persecution have access to the refugee determination system. If their claim is accepted, they become

refugees or protected persons and can apply for permanent residency and eventually for citizenship. Canada grants citizenship based on both *jus soli* and first-generation *jus sanguinis* bases. UNHCR issued a report in 2019 that revealed that while it is likely that there are not large numbers of stateless persons in Canada, and while many stateless persons will have access to remedies to regularize their status, statelessness persists as a problem and has significant impacts on the ability of affected persons to enjoy their basic human rights. A stateless person's ability to access many basic services and conditions necessary for the realization of their human rights in Canada is contingent upon their residency status. Stateless persons have various rights and degrees of access to public services depending on their status as permanent or temporary residents, as well as refugees or rejected asylum-seekers. Interviews with stateless persons in Canada reveal that due to their lack of status, they experience significant limitations to their economic, social and cultural rights, including their right to work, their right to the highest attainable standard of health, their right to adequate housing, and their right to education.

Recommendations[2]:
UNHCR recommends that the Government of Canada:

a) Consider becoming a party to the *1954 Convention relating to the Status of Stateless Persons*;
b) Establish a procedure for the determination of statelessness;
c) Facilitate the naturalization process for stateless persons;
d) Refine data collection to better gather information on stateless persons.

Issue 2: Indefinite immigration detention

Linked to 3rd cycle UPR recommendation no. 142.266 "Give attention to the issue of immigration detention for an indefinite period and seek to amend legislation to set a time limit for detention (Costa Rica)" and **no. 142.267** "Take steps to limit the use and prorogation of immigration detention (Mexico)"

The constitutionality of indefinite immigration detention was unsuccessfully challenged in the Canadian courts. In August 2020, the Federal Court of Appeal held in *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130, that indefinite detention in the immigration context is constitutional. The Supreme Court of Canada dismissed the application for leave to appeal the decision. As such, the indefinite detention of asylum-seekers and immigration detainees remains lawful in Canada. Despite assurances by Canada that immigration detention is used as a last resort and that the State continues to seek alternatives to detention, based on its National Immigration Detention Framework, the lack of limits puts immigration detainees -including asylum-seekers- at risk of indefinite and in some cases lengthy detention, contravening international law and standards. It is often because they are deemed to be a flight risk, meaning the border agency believes they will not appear for immigration processes such as a removal. CBSA can detain them in one of its immigration holding centres or in provincial jails under agreements between the federal and provincial governments. UNHCR has consistently advocated against instances of commingling of immigration detainees with individuals convicted of criminal offenses. CBSA is not overseen by a dedicated, independent complaints and review body, prompting civil liberties advocates, refugee lawyers and parliamentary committees to call for stronger monitoring. In May 2022, the federal government tabled Bill C-20, the *Public Complaints and Review Commission Act,* to create a new oversight body over CBSA. This new body, the Public Complaints and Review Commission (PCRC), would effectively replace the current Civilian Review and Complaints Commission for the RCMP (CRCC), and merge CBSA and RCMP oversight into this new body.

[2] See: UNHCR *Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons* (2020) and UNHCR - Handbook on Protection of Stateless Persons (2014).

Recommendations:
UNHCR recommends that the Government of Canada:

a) Seek to amend legislation to set a time limit for detention of immigration detainees, including asylum-seekers, that would be in line with international refugee and human rights law and standards;[3]
b) Cease agreements with Provincial Governments to send immigration detainees to provincial jails; and,
c) Implement an independent oversight body for the Canada Border Service Agency within the next three years.

Issue 3: Detention and housing of children in detention

Linked to 3rd cycle UPR recommendation no. 142.273 "Put an end to the detention of child refugees and asylum seekers, with alternatives to detention that respect the best interest of the child (Bolivarian Republic of Venezuela)" and **no. 142.274** "Put an end to the detention of refugee and asylum-seeking children, through alternatives that fully take into consideration the best interest of the child (Ecuador)"

Many asylum-seeking parents are detained upon arrival, mainly on the basis of identity (and perceived lack of cooperation to establish identity) and the best interest of the child is rarely properly considered, due to lack of training of the immigration officers and/or lack of relevant tools available to them to make that determination. The mechanisms are also inadequate to facilitate meaningful and empowered child participation, especially at the time of a decision to detain one of the parents or to house the minor child with one or both parents in immigration holding centers.

In addition, another practice that emerged in 2019 was that of detaining one parent and allowing another parent to be released along with the children. This practice ignores the principle of family unity, and in UNHCR's view cannot be considered as the first resort option of an ATD for a family without the use of a fully considered best interests' determination. CBSA currently considers a minor to be "separated" in the following circumstances: when the child is not subject to a detention order; is separated from an accompanying parent and/or guardian who is subject to a detention order; or is released in the care of an entity other than a parent and/or legal guardian.

Since the end of 2017 and prior to the pandemic, CBSA had been working towards reducing immigration-related detention and ending the detention of children and family separation, through its National Alternatives to Detention (ATD) Framework and its National Directive on the Detention or Housing of Minors. Following the implementation of the ATD Framework, statistics show that the number of children asylum-seekers being "housed" had not decreased. The term "housed" minors, refers to cases where the child is kept at an immigration holding centre with a legally detained parent. While the Government amended the Immigration and Refugee Protection Regulations in June 2019 to specifically require that in deciding whether to detain or release a foreign national or permanent resident, a decision-maker must consider the best interests of a child any time that the child is directly affected by a decision to detain their parent or legal guardian, "housed" minors have no independent right of review of their detention as they are not officially detained.

In November 2021 CBSA implemented a pilot project at the land border, referred to as the "New approach for CBSA processing of families with minors'' with the objective of offering ATD measures to families who are unable to provide proof of identity while avoiding detention.

[3] See: UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012.

Since COVID there has been a significant decrease of asylum-seeking children housed or detained in immigration holding centres. We are hoping that this positive trend continues in the future.

Recommendations:
UNHCR recommends that the Government of Canada:

a) Put an end to detention and housing in detention of child asylum-seekers while preserving family unity;[4] and,
b) Ensure that the principle of the best interests of the child is given consistent and fulsome consideration in all detention decisions along the process in line with international law standards.

Additional protection challenges

Issue 4: Lack of recognition of derivative status in the context of refugee status determination

Canada is one of a minority of State Parties to the *1951 Convention* that do not provide derivative refugee status to family members, although the principle of family unity is set out as one of the objectives of IRPA. Instead, Canada chose to provide recognized refugees with the possibility to include family members in their permanent residency application. This includes accompanying family members who have been denied refugee status. Issues of family separation arise in Canada's refugee status determination process because the RPD is not currently mandated to grant derivative status to spouses and dependent children who may not meet the refugee protection definition in their own right. To prevent unnecessary family separation during the landing process, family members must engage separate legal processes, including applications for temporary resident permits, application for permanent residence on humanitarian and compassionate grounds, requests to defer removal, applications for judicial review, and motions for stays of removal. UNHCR supports the Government in implementing innovative processes that are more responsive to natural fluctuations in arrival numbers at national borders, including irregular arrivals. One way in which Canada can succeed in simplifying processes is notably by including the granting derivative status in the asylum process.

Recommendations:
UNHCR recommends that the Government of Canada:

a) Allow for the granting of derivative refugee status to eligible accompanying family members of a recognized refugee in the asylum process, in order to render the system more efficient.[5]

Issue 5: Lack of expeditious access to work permits

Work permits enable asylum-seekers to support themselves and their family members without recourse to provincially funded social assistance programs. This is important not only for their economic self-reliance but also for their mental health, well-being, dignity, and overall integration. In addition, it would assist in addressing the often-erroneous public perception that asylum-seekers rely solely on social assistance. Research has shown that if refugees face employment restrictions during their asylum period, their long-term success in the host countries' labor markets is negatively affected and might have a negative impact on long term local integration. The Immigration and Refugee Protection Regulations (IRPR) s. 206(1) only

[4] See: UNHCR - UNHCR's position regarding the detention of refugee and migrant children in the migration context
[5] See: UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate* (2020), section 5.

allows work permits to be issued once an eligibility assessment is conducted. There is concern about the unsustainable delay for eligibility interviews (currently being scheduled within a two-year delay due to the record number of applications in 2022). The Government has attempted to put into place initiatives to expedite the issuance of work permits for asylum-seekers with some success, however, the backlog of cases awaiting eligibility interviews has increased and delays in processing work permits continues for this backlog.

Recommendations:
UNHCR recommends that the Government of Canada:

a) Provide access to work permits for asylum-seekers, including in advance of eligibility interviews, to enhance their self-reliance during the asylum process and improve their long-term prospects for integration.

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