



FAMILY SERVICE ASSOCIATION OF TORONTO

THINK OF THE FAMILIES, THINK OF THE CHILDREN

Brief to the Standing Committee on the Immigration and Refugee Protection Act

Countries that accept new arrivals -- be they needed workers or refugees fleeing persecution -- yet who deny them the possibility of citizenship, in effect offer a tentative form of welcome that has consequences for social cohesion, and for the commitment that those new arrivals will feel for their new country and for the other members of their community.

Elinor Caplan, Oct. 20, 2000

Introduction

Drawing on our extensive experience with immigrants and refugees, Family Service Association of Toronto (FSAT) strives to achieve public policy framed in social justice that strengthens individuals, families¹ and communities. Recent FSAT priorities are child and family poverty, as they relate to immigrants and refugees. Each year we work with 20,000 families of all ages and stages, in more than 34 languages.

FSAT enhances community capacity building in new and emerging communities, including the Somali, Tamil, Iranian and former Yugoslavian communities, working to strengthen social networks, increase participation in community life and increase supports to community members. Our work with other newcomer communities is developed as needs arise and opportunities are created.

FSAT shares with the Government of Canada, as recently expressed in the Speech from the Throne, the goal of “creating a more inclusive society where children get the right start in life, where quality health services are available to all, and where Canadians enjoy strong and safe communities.” (January 30, 2001, p. 3). We know that visible minority children (0-14 years), many of whom are in newcomer communities, are more likely to be poor than all Canadian children. Through the lens of community development and social reform, FSAT combines its commitment to address child and family poverty, its experience of newcomer communities and its goal of building an inclusive society.

¹ FSAT defines a family as two or more people, whether living together or apart, related by blood, marriage, adoption or commitment to care for one another.

FSAT views Bill C-11 as a significant piece of legislation that addresses major concerns of the newcomer communities that we serve. Although we applaud the government on the many positive changes that the Bill introduces, we will focus our comments on those aspects of the Bill that have a direct impact on the well being of children and families. We will be addressing some key aspects of the Bill, focusing on family reunification, the detention of children and children's access to social services, all framed within the context of Canada's international legal obligations. We are concerned that some of the shortcomings of the Bill will have a negative impact on children and families, and we appreciate the opportunity to voice these concerns.

Bill C-11: some welcomed changes

The Immigration and Refugee Protection Act, known as Bill C-11, is a welcomed piece of legislation in many respects. Bill C-11 replaces the old Immigration Act, which was lengthy and confusing at best. The new Act simplifies the language and the content, and moreover, divides issues related to immigration from those related to refugees, making for clarity and distinctness.

Positive changes in Bill C-11 reflect some recent phenomena in Canadian society. For instance, the decision to expand the category of family to include same sex couples brings the bill in line with the Canadian Charter of Rights and freedoms. The inclusion of the *Convention Against Torture* as a grounds for refugee applications logically follows Canada's signature of the United Nations document in 1984. The increased penalties and fines for those who orchestrate illegal human trafficking is a positive step in the battle against the exploitation of innocent peoples seeking a better life.

Other changes signify legal victories for those who have advocated for a humanitarian and compassionate immigration and refugee policy. On November 22, 2000 Judge James K. Hugessen, of the Trial Division of the Federal Court, ratified an agreement between Citizenship and Immigration Canada and Hussein Jama Aden, representing the plaintiffs. The decision will now make it possible for undocumented refugees to swear declarations attesting to their identity in order to apply for landed status without having to wait three or more years. This landmark decision will greatly facilitate the reunification of families and the integration of refugees into Canadian society, both objectives of Bill C-11.

The federal government has stated its intention to allow Canadian citizens who are receiving social assistance to sponsor a family member with the help of a guarantor. This is an important step in recognizing the equality of rights that should be enjoyed by all members of our society. However, FSAT feels that this provision is too important to be left to the Regulations of the Bill; instead, we strongly urge the government to include it in the Bill.

Removing the \$975 head tax for refugees, lowering of the age of sponsorship from 19 to 18, doing away with *student authorizations* for all but the children of temporary residents whose permits have expired, raising the age of dependents from 19 to 22, and exempting sponsored spouses and dependents from the "excessive demand on health or social services" clause (Section 34 c):

these are all positive changes that bring Canada's immigration and refugee policy closer to the realities of Canadian life. Nonetheless, we believe that Bill C-11 could go even further than it does.

Bill C-11: Required Action

The Bill clearly states that among its objectives is the need to "fulfil Canada's international legal obligations with respect to refugees" (Sec. 3(2)(b)) and to facilitate the reunification of families (Sec. 3(1)(d) and 3(2)(f)). However, many aspects of the Bill constitute direct violations of the *Convention on the Rights of the Child* and the *Convention relating to the Status of Refugees*², both ratified by Canada. If, as noted above, one of the objectives of the Bill is "to fulfil Canada's international legal obligations," then some changes must clearly be made.

Bill C-11 states that with respect to certain decisions, one must take into account the best interests of the child. However, nowhere does it state clearly that the best interests of the child shall be the *primary consideration*, as stated in Article 3 of the Convention on the Rights of the Child:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Supreme Court of Canada recently ruled on a case involving the deportation order of a Jamaican woman, mother of four children born in Canada (**Baker v. Canada**). The Court ruled that since the *Convention on the Rights of the Child* has not been implemented by statute, it is not part of Canadian law. Nonetheless, Justice L'Heureux-Dube stated that "the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read." (1999, 2 S.R.C.)

Justice L'Heureux-Dube went on to say that although humanitarian and compassionate decisions could be rejected even when the interests of children are being considered, "where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable." (Ibid.)

Clearly, then, If we wish to affirm our commitment to the *Convention* and to the well being of children, **Bill C-11 should clearly state that primary consideration shall be given to the best interests of the child**, when making decisions that have an impact on children. This is in fact the same language that was adopted by the Immigration and Refugee Board in its 1996 *Guidelines on Child Refugee Claimants*. In it, the Guiding Principle stated that "in determining the procedure to be followed when considering the refugee claim of a child, the

² The word *Convention*, in this document, shall refer to the *Convention on the Rights of the Child*.

CRDD³ should give primary consideration to the “best interests of the child”³. FSAT urges the government to apply the same language throughout Bill C-11, when dealing with children.

Family reunification

Bill C-11 claims to facilitate the reunification of families but still creates many barriers. The Bill imposes a three-year wait for undocumented refugees, thus putting a strain on families. It is estimated that there are over 13 000 undocumented refugees currently in Canada. Despite the recent Federal Court ruling regarding undocumented refugees who can provide a sworn declaration attesting to their identity, those who are not able to do so will still have to wait three or more years before they can obtain identification papers.

In the meantime, these individuals cannot sponsor family members, thus keeping parents and children apart, and often depriving the family of the breadwinner. The effects of this have been well documented. Human Resources Development Canada, in a 1998 study⁴, showed that the rate of poverty among new immigrant families with children between the ages of four and eleven was more than double that of Canadian families with children in the same age group. Also, Michael Ornstein's report⁵ for the city of Toronto, using the 1996 Canadian Census statistics, reveals family poverty levels as high as 87% among immigrant communities. FSAT firmly believes that this Bill could do much more to help new immigrants and refugees avoid the debilitating effects of poverty.

Adding to the hardship, while waiting for their papers, refugees are unable to leave the country to visit with family, nor is their family allowed to visit them in Canada, creating unnecessary strain. The United Nations Committee on the Rights of the Child, in its 1995 *Concluding Observations* on Canada, stated that they were "particularly worried ... by the insufficient measures aimed at family reunification with a view to ensuring that it is dealt with in a positive and, humane and expeditious manner" (p. 2). These insufficient measures clearly violate the *Convention relating to the Status of Refugees* (articles 27 and 28) and the *Convention on the Rights of the Child* (articles 9 and 10).

Convention relating to the Status of Refugees:

Article 27: The contracting states shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28 (1): The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside

³ Convention refugee Determination Division

⁴ Growing Up Canadian -- a Study of New Immigrant Children, by Morton Beiser, Feng Hou, Iline Hyman and Michel Tousignant.

⁵ Michael Ornstein, Ethno-Racial Inequality in Toronto: Analysis of the 1996 Census, March 2000.

their territory unless compelling reasons of national security or public order otherwise require. ... The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

Convention on the Rights of the Child:

Article 9: States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

Article 10: A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents.

Bill C-11 states that immigration officials shall take into consideration whether or not refugee claimants possess valid identification documents in determining her/his credibility (Sec. 101). However, this is clearly in violation of the above Article 28 of the *Convention relating to the Status of Refugees*.

We all know that refugees often come from countries in turmoil and leave under precarious circumstances; this often means that they lack documentation or have to abandon their documents upon leaving. To hold this against them upon entry into Canada is unreasonable, and should not be used to keep them out. If, as the Honourable Elinor Caplan said (see above), we want to send a clear message to newcomers who come to Canada under less than optimal circumstances that they are welcome in this country, we *must* provide them with identification documents. Unfortunately, this Bill falls short on this promise.

Recommendations:

- ◆ That Bill C-11 clearly state **that primary consideration shall be given to the best interests of the child**, when making decisions that clearly have an impact on children.
- ◆ That Bill C-11 **put an end to the discrimination of undocumented refugees** by providing them travel documents and enabling their family members to come to Canada.
- ◆ That **refugees awaiting landed status be permitted out-of-country travel to see their family**, and to enable their dependents and spouses to visit them in Canada.

- ◆ That the **Federal Court of Canada ruling (November 22, 2000) regarding undocumented refugees be incorporated into the Bill.**
- ◆ That the **decision to expand the category of family to include same-sex couples be incorporated into the Bill.**

The Detention of Children

Bill C-11 grants immigration officials wide-ranging measures to arrest and detain foreign nationals for a variety of reasons, including the inability to prove one's identity. FSAT is particularly concerned about the potential for detaining children within this context. Unfortunately, the Bill does not spell out the conditions under which children will be detained. Instead, the it states that "special considerations that may apply in relation to the detention of minor children" (Sec. 55 (c)) will be left up to the Regulations.

We welcome the government's decision to use the detention of minor children "as a last resort", as it complies with Article 37 (b) of the *Convention on the Rights of the Child*. It states:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

However, we are concerned that the rights of children to be separated from adults, while in detention, should be of primary importance, as stated in article 37 (c) of the *Convention*:

In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

FSAT feels that the provisions around the detention of children are too important to be left to the Regulations, but instead should be included in the Bill. Moreover, we are aware that when Canada signed the *Convention*, it objected to the article 37 (c). We would like to take this opportunity urge the federal government to remove its reservations.

FSAT is concerned that unaccompanied refugee youth are not given the same rights and respect as are children who are wards of the state. Children in Canada must be treated with the special care that children need, regardless of how they enter the country. As Judith Kumin, Representative in Canada of the United Nations High Commissioner for Refugees, recently recommended, "referral to child welfare authorities at the provincial or territorial level should take place as soon as possible after the arrival of a separated child and regardless of

the mode of arrival".⁶ This recommendation also forms part of the Immigration and Refugee Board's 1996 *Guidelines on Child Refugee Claimants*. However, looking back at the experience of the Chinese youths who arrived in February 2000, it is obvious that these rights are not always respected.⁷

It is our understanding that some of these youths were detained for over a year, and were denied access to an interpreter, and to education and basic health care. FSAT strongly believes that Canada should not criminalize children who arrive here as part of illegal operations. Furthermore, article 37 b of the *Convention* states that the detention of youth should be used as a last resort and "for the shortest appropriate period of time". The fact that these youth were detained for such a long period is unacceptable, and demonstrates why we need to have the provisions concerning youth in detention spelled out clearly in the Bill and not in the Regulations.

FSA is pleased to learn that Citizenship and Immigration Canada (CIC) is working with the Ministry of Community and Social Services, the Children's Secretariat, and the Children's Aid Society of Toronto in trying to devise a protocol relating to the detention of unaccompanied children. While it is our belief that children must not be detained under any circumstances, if CIC decides that they must be detained, then, we would encourage the adoption of the United Nations High Commissioner for Refugees' (UNHCR) guidelines regarding the treatment of unaccompanied children.

The *Separated Children in Europe Program* was instituted by the UNHCR in October 2000 with the intent of helping European countries establish a protocol when dealing with unaccompanied refugee or migrant children. Largely inspired by the *Convention on the Rights of the Child*, the "Statement of Good Practice" lists eleven principles that, if abided by, ensure that children's rights will be respected by all states. FSAT strongly recommends that Canada adopt such a document to ensure that all levels of government and the judiciary deal with children in an appropriate way.

Recommendations:

- ◆ That **children under the age of 18 not be detained.**
- ◆ That if **children are detained**, it should be **done strictly in accordance with the Convention on the Rights of the Child.**
- ◆ That the **provisions around the detention of children be incorporated into Bill C-11** and not left to the Regulations.
- ◆ That **unaccompanied refugee and migrant youths be accorded the same rights and respect** as are children who are wards of the state.

⁶ *Refugee Children: Among the Most Vulnerable*, in **Canada's Children**, Child Welfare League of Canada, Fall 2000.

⁷ Much of the information on this case was provided by Avvy Go, the lawyer who worked with these youths.

- ◆ That **Canada withdraw its reservations to Article 37** (Detention of Children) of the *Convention on the Rights of the Child*.

Children's Access to Services

Education

FSAT firmly believes that all children need to be in school. Therefore, we welcome the government's decision to do away with the "student authorization" permits, which until now were required for all non-Canadian residents. These permits led to bureaucratic delays, which kept children out of school and contributed to academic problems. According to Section 26 (2) of Bill C-11, these authorizations will only be required from children of temporary residents who are not allowed to work or study in Canada.

We understand that the Toronto District School Board is currently working on a protocol on integrating children of immigrants and refugees into the school system. This protocol, along with other school board policies across Canada, will surely be informed by the above change to Bill C-11. However, FSAT is concerned that the same right to schooling be accorded to unaccompanied migrant and refugee children, whether they are detained or not.

FSAT would like to emphasize that the Ontario Education Act states that no child shall be kept out of school (sec. 49 (1)). Moreover, by signing the *Convention on the Rights of the Child*, Canada has committed itself to ensure that all children have access to free elementary and secondary education (article 28). There is no reason why refugee and migrant youth should be denied these basic rights, rights to which Canadian youth in detention are entitled.

Article 28: States Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all.

Health

Health care is available to all Canadian citizens, permanent residents and holders of certain temporary permits. Although refugees are eligible for health care, certain provinces institute three-months delays in obtaining such health coverage, during which refugees depend on the discretion of community health agencies. This is an unacceptable situation for individuals and families who often come to Canada needing urgent mental and physical health services.

FSAT is particularly concerned about the health needs of children of new immigrants and refugees, and the impact on their schooling. Many of them come to Canada with hearing and sight problems, both of which often contribute to learning disabilities if left untreated.

Dr. David Wong of St. Michael's Hospital is currently conducting a study on the relationship between visual impairment and academic performance of students in grades three and six. In the initial stage of this study, he has found that the prevalence of serious visual impairment in children of an inner city school (primarily immigrant and refugee children) is four times greater than that of children from a non-inner city school. Dr. Wong expects that this difference will be correlated with their scores on the standardized tests. Given the language barriers that these children already face upon entry into the school system, it is crucial that these children have immediate access to health care services to prevent their falling behind.

The current system also permits for children to be accepted into Canada only to be denied crucial medical services once in the country. This is the case of Raja Irshad, a 13 year-old boy suffering from cerebral palsy, who was granted entry under Humanitarian and Compassionate grounds only to be denied medical attention while in Canada. In his February 28, 2001 Ontario Court of Appeal ruling (*Irshad v. Her Majesty The Queen*), Mr. Justice David Doherty said the following:

It seems inherently contradictory, if not cruel, to permit a young boy like Raja to enter Canada on compassionate grounds so that he might live with the rest of his family who have been allowed to settle in Canada, while at the same time not taking cognizance of Raja's need to access expensive medical services that can, to some degree, at least alleviate his severe physical disability.

While this can no longer happen to children whose family is already in Canada, since the new Bill exempts them from the "excessive demands on health and social services" clause (S. 34C), other children accepted on Compassionate and Humanitarian grounds (or certain Minister's permits) could suffer the same fate. This is in clear violation of the *Convention on the Rights of the Child*, which states that all children are entitled to proper health care.

Article 24: States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

It is becoming increasingly apparent that many of the complicating factors affecting the integration of refugee and immigrant children, and their access to social services is due to the lack of coordination between the federal and provincial governments in Canada. Unfortunately, when disputes arise around jurisdiction and funding, children lose out. As Judith Kumin wrote, at the very least, the "federal, provincial and territorial authorities need to come to an understanding about funding and other supports for these children" (see note 3, above).

The Irshad case seriously questions Canada's generosity and succinctly highlighted some of the problems of our immigration policy. If, as Minister Caplan said, Canada is serious about *not* offering "a tentative form of welcome" to all new arrivals, then the closing words of Mr. Justice David Doherty are particularly important:

I would think that the federal and provincial authorities could work together to find some way to extend our country's compassion beyond permission to enter Canada to include access to medical services available through OHIP to persons like Raja.

FSAT would add that for the well being of children and their families, these services must include health care, education, legal aid and other culturally appropriate community services.

Recommendations:

- ◆ That **all children** entering Canada, regardless of their status, whether they are accompanied or not, **have access to health care services** and culturally appropriate services.
- ◆ That the federal government establish an ongoing process to work with the provinces and territories to **ensure that publicly funded education is available free to all children.**
- ◆ That Citizenship and Immigration Canada work with Health Canada and the provinces and territories in order **to eliminate the three months delay in receiving health care coverage.**
- ◆ That **all Minister's permits**, including type 90, **enable immigrants to claim health care coverage** in their resident province.
- ◆ That **all families with children who have special needs, be exempt from the "excessive demand on health and social services"** (Section 34C)
- ◆ That **the federal government renew its commitment to continue funding**, either alone or in collaboration with the province of Ontario, **free legal aid services for immigrants and refugees.**