

Detention in Canada

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The history of asylum seekers using boats to reach Canada's shores is long. In 1914, the government turned away more than 300 Indian nationals on board the Komagata Maru; when the ship eventually arrived back in Calcutta, 20 people were killed in a riot and others were detained and tortured.¹ In late May 1939, over 900 Jewish refugees were sent back to Europe after their ship, the Hamburg-America ocean liner St. Louis, was refused landing in Cuba, the US, and, eventually, Canada. Many of the refugees were arrested upon landing and 254 were later killed in the Nazi concentration camps.² In the twentieth century, eight boats have arrived collectively ferrying about 1500 people: in 1986, 152 Tamils landed off the east coast of Newfoundland; in 1987, 174 Sikhs landed in Nova Scotia, prompting an emergency summer recall of Parliament; 4 boats of just under 600 Chinese migrants came to British Columbia's coast in 1999; and the 2 most recent cases – MV Ocean Lady and MV Sun Sea – that brought 575 Tamils in B.C. in October 2009 and August 2010, respectively. As Alex Neve and Tiisetso Russell point out, these numbers are relatively miniscule in the history of new refugee arrivals to Canada:

So there we have it: eight boats, carrying approximately 1500 people over a span of twenty-five years. ... Taking a ballpark estimate of 25,000 refugee arrivals per year in Canada over those twenty-five years, the 1500 who have arrived on these eight ships reflect just over 1/5 of 1%, .2% of the total. It is as many as would otherwise arrive over the course of just three weeks in any one of those twenty-five years.³

Partially in response to the recent landings of the MV Ocean Lady and MV Sun Sea, and partially for other reasons to be discussed in the "Gaps in the Literature" section below, the Canadian Government has implemented a discretionary policy of mandatory detention. This reform was included under C-31, *the Protecting Canada's Immigration System Act* (as an amendment to, and new provision for, IRPA). The Act was passed in June and received Royal Assent for implementation in December 2012.

How does this new policy work? The Minister of Public Safety can designate two or more people as a group of "irregular arrivals" on the basis that they cannot be examined in a timely manner or on suspicions of "smuggling". They can then be subject to mandatory detention for one year. Such groups are given a two-week review of refugee admissibility. If the "Designated Foreign Nationals" (DFN) classification goes through, the group is liable for a one-year period of mandatory, unreviewable detention for all persons aged 16 or older.⁴ Even if the Immigration and Refugee Board (IRB) finds that they are persons in need of protection, there is a bar on DFNs applying for permanent residence for five years.⁵ DFNs face the following consequences as a result of their designation during this five-year period:

¹ Tourism Culture and Heritage Nova Scotia (2009, 05 November). "Maritime Museum Exhibit on Tragic Voyage of MS St. Louis." News Releases. Retrieved 10 July, 2013, from <http://novascotia.ca/news/release/?id=20091105005>.

² While the Canadian government issued an informal apology in 2008 for what happened with the Komagata Maru passengers, it has yet to issue an official apology for rejecting the SS St. Louis although a memorial for the Jewish refugees was unveiled on January 20, 2011 in Halifax at Pier 21 (Leddy, M. J. (2011, 28 September). "Years from now, Canadians will apologize." Embassy Magazine. Retrieved 28 September, 2011, from <http://www.embassymag.ca/page/view/leddy-09-28-2011>)

³ Alex Neve and Tiisetso Russell (2011). "Hysteria and Discrimination: Canada's Harsh Response to Refugees and Migrants Who Arrive by Sea." University of New Brunswick Law Journal **62**(01): 37 – 46: 40.

⁴ The government has a discretionary power to decide whether to detain children under 16 or to forcibly separate them from accompanying parents for one year

⁵ Canadian Council for Refugees (2013, 21 February). "Overview of C-31 refugee determination process." Retrieved 05 July, 2013, from <http://ccrweb.ca/en/refugee-reform>.

prohibition from family reunification; requirements to report regularly to immigration authorities for questioning and to produce unspecified documents on demand; and a ban from travelling outside Canada for any reason.

As of June 2013, the Minister of Public Safety has used the DFN designation once, on 4 December 2012, for five groups of claimants from Romania numbering about 30 people in total.⁶ They are alleged to have typically spent a few days in Mexico⁷ before crossing the U.S. border without documents and then driving north into Quebec. The Government alleged at the time that all were "smuggled" through the US-Canada border between Derby Line, Vermont, and Stanstead, Quebec. The Minister of Citizenship, Immigration and Multiculturalism, Jason Kenney, characterized the arrestees as "[people] from Europe that go to Mexico, that go through the U.S. to come to Canada and then go to Toronto where many of them got involved in criminal activity".⁸

Former Citizenship and Immigration Canada Minister Kenney justifies the mandatory detention provisions as a means to deter people from taking dangerous sea journeys to Canada:

Every year, thousands of people die in smuggling operations around the world. We need to send a message to the potential customers of smuggling syndicates: 'Don't pay a smuggler to come to Canada -- you're putting your life in jeopardy. Try to come a different way, a legal way.'⁹

Minister Kenney held the view that any non-citizen "can leave detention any time they want -- they just have to leave Canada."¹⁰ These justifications are questionable because there is (i) little evidence that detention deters people from irregularly or migrating,¹¹ and (ii) if the group of irregular arrivals includes someone who is stateless or in any other way undocumented or undeportable, then he or she faces virtually insurmountable difficulties in leaving Canada.

Hints at who will become DFNs can be found in the Designated Countries of Origin (DCO) policy, one of the reforms tabled in C-31 alongside the mandatory detention provision. A DCO is a country declared as "safe" because it is assumed to provide adequate protection to its citizens and therefore not likely to produce refugees. The Minister of Citizenship, Immigration and Multiculturalism designates countries as DCOs on the basis of quantitative factors (a rejection rate of at least 75%, (including withdrawn and abandoned), or a withdrawn and abandoned rate of at least 60%), or on the basis of the Minister's opinion that the country has the hallmarks of a refugee-protecting country, including an independent judiciary, democratic rights, etc.¹² The original December 2012 list of 25 DCOs has since been expanded to 37.¹³

⁶ Canadian Council for Refugees (2013, 21 February). "Overview of C-31 refugee determination process." Retrieved 05 July, 2013, from <http://ccrweb.ca/en/refugee-reform>.

⁷ Since Romanians do not need visas to enter Mexico, it is a route into Canada or the U.S. where pre-entry visas are required. US immigration officials "have documented a spike in the number of Romanians crossing the Mexico-U.S. border illegally [and] have said most are Roma." (Wilson Ring and Rob Gillies (2013, 05 December). "Canada targets Romanians smuggling Gypsies." *Associated Press*. Retrieved 10 July, 2013, from <http://news.yahoo.com/canada-targets-romanians-smuggling-gypsies-013031013.html>.)

⁸ Wilson Ring and Rob Gillies (2013, 05 December). "Canada targets Romanians smuggling Gypsies." *Associated Press*. Retrieved 10 July, 2013, from <http://news.yahoo.com/canada-targets-romanians-smuggling-gypsies-013031013.html>.

⁹ Ball, D. P. (2012, 27 June). "Immigration Minister Jason Kenney besieged by critics during BC visit." *The Tyee*. Retrieved 6 August, 2012, from <http://thetyee.ca/Blogs/TheHook/Federal-Politics/2012/06/27/jason-kenney-critics-visit/>.

¹⁰ Ball, D. P. (2012, 27 June). "Immigration Minister Jason Kenney besieged by critics during BC visit." *The Tyee*. Retrieved 6 August, 2012, from <http://thetyee.ca/Blogs/TheHook/Federal-Politics/2012/06/27/jason-kenney-critics-visit/>.

¹¹ Edwards, A. (2011, April). "Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants." *PPLA/2011/01.Rev.1*. Retrieved 10 July, 2011, from <http://www.unhcr.org/refworld/docid/4dc935fd2.html>: iii.

¹² Canadian Council for Refugees (2013, 21 February). "Overview of C-31 refugee determination process." Retrieved 05 July, 2013, from <http://ccrweb.ca/en/refugee-reform>.

¹³ Arbel, E., J. Beaudoin, and S.J. Silverman (2012, 21 December). "Why Canada's "safe" country scheme offers no refuge for Roma refugees." *The Huffington Post Canada*. Retrieved 30 December, 2012, from <http://www.huffingtonpost.ca/stephanie-j-silverman/roma-refugees-canada>

Hearings on refugee claims of DCO nationals are expected to be held within 30 – 45 days after referral of the claim to the IRB as opposed to the 60-day timeframe for other refugee claimants. Unlike regularly streamed claimants, failed DCO claimants will neither have access to the Refugee Appeal Division nor be permitted to apply for a work permit upon arrival in Canada.¹⁴

immigration_b_2346160.html; Citizenship and Immigration Canada (2013, 30 May). "Designated countries of origin." Government of Canada publications. Retrieved 10 June, 2013, from <http://www.cic.gc.ca/english/refugees/reform-safe.asp>.

¹⁴ Citizenship and Immigration Canada (2013, 30 May). "Designated countries of origin." Government of Canada publications. Retrieved 10 June, 2013, from <http://www.cic.gc.ca/english/refugees/reform-safe.asp>.