



THE MACDONALD-LAURIER INSTITUTE



COMMENTARY

THE 'SUN SEA' TAMIL MASS REFUGEE CLAIM: AN OPPORTUNITY FOR NEEDED REFORMS

By Scott Newark

Executive Summary

The emotional reaction to 490 Tamil refugee seekers arriving on the MV Sun Sea should not prevent a rational look at the weaknesses in our immigration and refugee system. Certain obvious flaws need fixing, starting with ensuring that the regular process of delay and repeated appeals does not result in the release and disappearance of persons who do not qualify for entry into Canada.

We should establish offshore processing facilities for specified types of migrants who seek to avoid regular screening, and prohibit or restrict the issuance of Temporary Residence Permits (TRPs) to such claimants that would allow them to live in the community while engaging in lengthy “inland appeals” or simply vanishing.

Canada should also deny TRPs and

inland appeals to anyone subject to an initial finding of inadmissibility due to serious organized criminality, security threats, human rights violations and defined misrepresentation or failures to comply with Canada’s laws while seeking admission.

We must strengthen the deterrent to organized human trafficking by establishing a minimum five-year sentence for it, with increased penalties if a people smuggling attempt results in death or serious injury to passengers or involves persons inadmissible on defined criminality or security grounds.

Through these and other changes we can preserve our humanitarian traditions while rewarding those who play by the rules and deterring or punishing those who do not.

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The obviously organized and for-criminal-profit arrival of 490 Tamil refugee seekers aboard the Thai-flagged MV *Sun Sea* is rightly upsetting to Canadians. The event also offers an opportunity, however, to analyze whether reforms to our immigration and refugee determination process are required. The goals in such reforms should be to dramatically reduce the likelihood of such an event re-occurring, without violating Canadians' sense of fairness or commitment to the rule of law.

Relevant facts

1. The people who choose to arrive in this fashion have deliberately sought to avoid the existing screening measures that would arise either from an overseas refugee application or from applying for the visa Canada requires for visitors from Sri Lanka including those who then make a refugee application at a Canadian port of entry. It is also reported that some people may be without any documentation whatsoever which is suspect given that each passenger allegedly somehow paid between \$30,000 and \$50,000 to make this deliberately illegal voyage to Canada. How many people have those resources but no ID?

2. The activity of covert mass transportation of persons to Canada in such circumstances is a violation of the Immigration and Refugee Protection Act. It is also an identified criminal enterprise associated with organized crime groups generally and the Tamil Tigers (LTTE) specifically who are a listed terrorist organization pursuant to the Criminal Code of Canada. For passengers who were unable to pay the transit fee, this directly raises the possibility of human trafficking, exploitation of the most vulnerable and other criminality within Canada to repay the cost of their trip with, no doubt, hefty interest. It is also a criminal offence for anyone within Canada to provide funds to a listed terrorist entity such as the LTTE, including to engage in such people smuggling activities.

3. With the exception of some limited provisions dealing with those that organize people smuggling,

there are no specific measures within the Immigration and Refugee Protection Act (IRPA) that permit separate handling of refugee claims that arise from such clearly premeditated, large-scale attempts to evade Canadian law. As a result, when such an incident occurs our already cumbersome, overloaded system becomes inundated with immediate claims that require processing in the usual slow and inefficient way. This system "overload" and anticipated response is clearly a factor counted on by the people who seek to benefit or profit from this means of arrival. Targeted reforms to that system can make Canada a far less attractive target for this abuse.

4. The inherent international context to this sort of human smuggling will almost certainly preclude a unilateral Canadian "solution" that will guarantee the elimination of such arrivals in the future. Agreements should be tailored to target and prevent human smuggling activities where passengers or supplies are taken aboard in a third country. These actions, in combination with domestic improvements, should significantly reduce Canada's attraction as a safe haven for human smugglers and those who would abuse our refugee system.

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Areas of Recommended Action

The following recommendations would help deal with these obvious deficiencies.

1. Amend the IRPA to permit the Minister to declare "special circumstances" and thereafter direct the relevant authorities to intercept and detain such persons offshore at a special processing facility. By explicitly recognizing such arrivals as meriting special measures, like offshore interception and detention (within Canada) on defined grounds, other systemic consequences can be tailored to the circumstances. These could also be triggered if such processing was conducted at a non-Canadian facility such as a UN Refugee Processing Center, as has



been suggested, although it must be stressed that refugee screening for entrance to Canada must *not* simply be delegated to the UN.

2. The IRPA should be amended to create specialized, expedited screening and refugee determination at the offshore facility with no Temporary Residence Permit (TRP) possible for inland appeals (or with exceptions for release that includes electronic monitoring) or reduced or mandatory out of country appeals for persons choosing to arrive in this fashion. This approach would create extra obstacles for those who have sought to avoid regular screening

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ing and processing measures, rather than the existing situation which actually rewards such open attempts to evade Canadian law.

3. Prohibit TRPs for anyone arriving in defined circumstances, including determined

(and currently existing) inadmissibility grounds: serious and organized criminality, security, human rights violations, misrepresentation and specified non-compliance with Canada's laws while seeking admission. This would mean that persons found inadmissible at initial examination in these circumstances would be free to appeal but not from within Canada where they can delay... or disappear.

4. Strengthen existing provisions to deter human trafficking efforts by creating a greater deterrent penalty of, for example, five years mandatory minimum incarceration with increased penalties in defined circumstances (death or injury in transit, security/criminality inadmissible persons transported). The current provisions contain traditional broad sentencing discretion, including probation, when the circumstances require a strong and unambiguous deterrent for people smugglers.

5. Review ancillary legislation to support deterrence, such as asset seizure backed up by Mutual

Legal Assistance Treaties and prioritized enforcement. These measures should also include amending s. 8 of the International Transfer of Offenders Act to permit (fully funded) prisoner transfer to their home country to serve their sentence *without offender consent* upon conviction for scheduled offences including persons engaged in organization/transportation/human trafficking under the IRPA. Knowing that human smuggling carries the potential consequence of five years in a non-Canadian, non-“Club Fed” prison should help produce the desired deterrent effect.

6. Strengthen existing provisions of the IRPA and Citizenship Act to permit expedited removal or discretionary revocation of acquired citizenship for persons in Canada who are convicted of providing assistance to a listed terrorist entity, including organizing and carrying out human trafficking.

7. Proactively construct purpose-specific immigration and refugee screening, determination and enforcement legislative reforms based on the Supreme Court of Canada principle enunciated by Mr. Justice Sopinka in the landmark *Chiarelli* ruling in 1992,

“The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.” (p.24)

This principle was reaffirmed 15 years later by Chief Justice McLachlin in the *Charkaoui* decision when she noted,

“However, s. 6 of the Charter specifically allows for differential treatment of citizens and non-citizens in deportation matters: only citizens are accorded the right to enter, remain in and leave Canada (s. 6(1)). A deportation scheme that applies to non-citizens, but not to citizens, does not, for that reason alone, violate s. 15 of the Charter...” (p.74)

The government should therefore not be unduly



concerned by theoretical perceptions of Charter vulnerability expressed by the Department of Justice; the Charter is no bar to the government seeking pragmatic, effective and properly balanced reforms. Rather than assume the worst, carefully drafted amendments with a clearly articulated rationale expressed in the form of a legislative Preamble should be included in a Bill and taken as a reference to the Supreme Court of Canada for determination of constitutional validity if necessary.

8. Seek to extend the Safe Third Country Agreement to select countries so as to return refugee claimants, without processing, if they arrive from that location and claim refugee status. This reform is based on the Canada-U.S. Agreement in which both countries recognized that people who claimed refugee status based on fears of mistreatment in their homeland, but who had arrived in Canada via the U.S. or vice versa, were not in need of protection but were simply expressing their preference to be a refugee in one country rather than the other. Extending this basic “no risk” principle to the EU and appropriate countries in the Pacific region will go a long way towards eliminating “asylum shopping” and long distance human smuggling voyages. Such an approach should avoid placing an undue burden on any country that simply happens to be close to a source country like Sri Lanka. Done properly, however, extended Safe Third Agreements should encourage international investigation, interdiction and enforcement operations which Canada should assist, including through funding as appropriate.

9. Proactively build international efforts to work with countries where these voyages are being organized, financed, passengers are picked up, etc., to disrupt them before they depart or before they arrive on our

coast or in our territorial waters. There is an obvious intelligence, investigative and enforcement component to this approach, which would build on Canada’s traditional intelligence-led enforcement model and the Government’s recently announced Five Party Conference Agreement (Canada/U.S./U.K./New Zealand/Australia) to share biometric information to prevent immigration fraud. Deployment of a similar enhanced face recognition and fingerprint biometric lookout system with a common international database, that includes designated security and criminality inadmissibles as well as fraudulent or denied refugee claimants, would further support border integrity and deter such people smuggling activity.



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In addition to the enforcement priorities described above, there is a need for some kind of regional international refugee processing center where screening can occur in properly secure circumstances that prevent flight and disappearance but are appropriate for the screening of legitimate refugees. This return to greater proactive search and determination of refugees abroad rather than waiting for the next plane or boat to arrive, or visa to be overstayed, was promoted in the recently passed Bill C-11 (the IRPA) which is designed to begin refugee determination reform and is definitely worth pursuing.

Whether done regionally or even through the United Nations, such a screening and processing approach would be a valuable addition to reforms that seek to prevent hundreds of unscreened refugee claimants arriving at our border as a result of organized crime... or worse.

Conducting ongoing analysis of specific country circumstances is also worthwhile so that timely and objectively validated information is available including the experiences and practices of other nations with similar refugee claimants where relevant. Fi-



nally, Canada should promote the notion and practice of international cooperation and information sharing through its participation in border-focused organizations and groups including, most notably,

the World Border Organization or BORDERPOL (in the interest of full disclosure, the author of this Commentary is a member of the BORDERPOL Administrative Council).

Conclusion

The *Sun Sea* arrival is not merely an irritating or embarrassing incident. It presents significant operational challenges but also an equally significant opportunity for systemic reform. One thing is certain: Inaction is not an option because failure to act will ensure more ships on the horizon.





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*Allan Gotlieb, former Deputy Minister of
External Affairs and Ambassador to Washington*

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*Hon. James S. Peterson, former Minister of International Trade and Member of
Parliament for 23 years*

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