1 How to Get to Canada

A person is a victim of human rights violations in their own country. Or the person is afraid they would become a victim if they stay. The person wants to come to Canada for protection. How do they get here?

I. Applying from Home to Be a Temporary Resident

One way is to apply to come to Canada from home as a temporary resident. A person can come to Canada as a temporary resident either to study or to work, or just to visit.

For temporary residents, the Canadian immigration system divides all countries into either visa requirement or non-visa requirement countries. If a person wants to come to Canada as a temporary resident, the person needs a temporary resident visa if the person is not a permanent resident of the United States or a citizen of various countries listed in the *Immigration and Refugee Protection Regulations*,[1] regulation 190(1) to the *Immigration and Refugee Protection Act*.[2] The person cannot get on a plane and just show up.

The Government of Canada does not have visa posts in every country. However, it does have a network of visa posts that together cover every country.

If a person wants to come to Canada to study, a student permit is generally required no matter what the student's nationality. The same is true for workers. It does not matter what the nationality of the worker is. A work permit, with the exception of a few listed types of work set out in IRPR regulation 186, is required.

Can a person who wants to come to Canada for protection apply in good faith for a temporary resident visa, either as a student or worker or visitor? Canadian law recognizes the concept of dual intent, meaning that a person can at one and the same time intend to stay temporarily and want to stay permanently.

What makes those two intentions consistent is the intent also to respect the law. A desire to stay permanently in Canada is consistent with a temporary resident visa as long as the person intends to comply with Canadian law. If the person will leave voluntarily if the law requires that they leave, then the person can in good faith both apply for a temporary resident visa and want to stay permanently.

IRPA section 22(2) provides:

> An intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay.

Visa officers would consider persons seeking refugee protection to have an intention to become permanent residents. That intention is nonetheless compatible with an intent to comply with Canadian law, including Canadian immigration law.

1 SOR/2002-227 [IRPR].

2 SC 2001, c 27 [IRPA].

This issue typically arises not so much at visa posts as at Canada Border Services Agency (CBSA) enforcement offices. At these offices, after refugee protection claimants have exhausted all available recourses and failed, they become subject to removal. The CBSA enforcement officers have to decide whether to detain the failed refugee protection claimants until their removal or to allow them to report voluntarily to the airport for their removal.

The CBSA website states:

> If you fail to appear for a removal interview or a scheduled removal date, the CBSA will issue a Canada-wide warrant for your arrest. Once arrested, the CBSA may detain you in a holding facility before removal.[3]

That statement implies that, if the person does appear for a removal interview and a scheduled removal date, the CBSA would not issue a warrant for the arrest of the person and would not detain the person in a holding facility before removal. That, in fact, is typically the result.

It would be consistent with this CBSA policy and practice for visa offices to issue temporary resident visas to would-be refugee claimants as long as the visa officer is satisfied that, should the refugee protection claim fail, the person would appear for a removal interview and a scheduled removal date. However, there are no visa office manual instructions to that effect and no such existing practice. Even though issuing temporary resident visas to declared refugee claimants would be consistent with the dual intent provision of the IRPA and practice of the CBSA with failed refugee protection claimants, the reality is different. If a would-be refugee claimant were to disclose to a visa office an intent on arrival with a temporary resident visa to make a refugee protection claim, the application for a temporary resident visa would almost certainly be refused.

This leaves a would-be refugee protection claimant with the reality if the intent is to come to Canada to make a refugee protection claim, of the need not to disclose that intention when applying for a temporary resident visa. Is that non-disclosure itself problematic? The answer is both yes and no.

IRPA section 16(1) provides that "a person who makes an application must answer truthfully all questions put to them for the purpose of the examination." Failure to disclose an intent to make a refugee protection claim may be considered a failure to answer truthfully all questions in a temporary resident visa application.

A consideration in the other direction is that misrepresentation, though generally a ground of inadmissibility, is, by way of exception set out in IRPR regulation 22, not a ground of inadmissibility for persons making a refugee protection claim or for protected persons, persons who have succeeded in their refugee protection claims or

3 "Arrests, Detentions and Removals: Removal from Canada—Failure to Leave" (28 August 2020), online: *Canada Border Services Agency* <https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html>.

applications. Similarly, knowing misrepresentation in immigration proceedings is a criminal offence. Yet, according to IRPA section 133, a person cannot be prosecuted for this offence pending refugee protection claim proceedings or if the proceedings succeed and the claimant becomes a protected person.

These provisions apply only to claims in process and successful refugee protection claimants. Failed claimants can be found inadmissible for misrepresentations and can be convicted for knowing misrepresentations at visa posts abroad.

Despite their linguistic and common sense similarity, there is, in immigration law, a difference between not answering truthfully questions put to the person and engaging in misrepresentation. A person can be denied admission for not answering questions truthfully even if the person could not be found inadmissible for misrepresentation.[4]

There is also a difference in the IRPA, again despite the linguistic similarities, between failing to meet the requirements of the IRPA and regulations and being inadmissible. IRPA section 11(1) provides:

> A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

A person guilty of misrepresentation is inadmissible. A person who has failed to answer all questions truthfully has failed to meet a requirement of the IRPA.

There is, in the Canadian immigration system, a duty of candour, a duty to disclose information about which no questions were asked, as long as the applicant can reasonably anticipate that the visa officer would be interested in receiving the information. The failure to comply with the duty of candour could constitute a misrepresentation.[5]

However, a failure to comply with the duty of candour would not necessarily constitute a failure to answer questions truthfully. Answering questions truthfully requires telling the whole truth. As long as that has happened, there would be compliance with the visa office entry requirement of answering questions truthfully.

Formally, a refugee protection claimant can avoid the strict consequences of misrepresentation at a visa post, at least before their claim is determined. Nonetheless, if the claimant did not disclose to the visa office the risk that prompted the application, there is a potential cost. The determination of many refugee protection claims turns on credibility assessment. Misrepresentation at a visa post may be considered adverse to a refugee protection claimant when a credibility assessment is being made.

In principle, that should not happen. The Federal Court has reasoned that "a refugee's overall trustworthiness should not necessarily be judged too harshly for making

4 *Lhamo v Canada (Citizenship and Immigration)*, 2013 FC 692.

5 *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 at para 15.

false statements [to Canadian embassy officials] in order to escape persecution."[6] Nonetheless, it sometimes happens that the CBSA Appeals Unit intervenes in refugee protection claims on credibility grounds and provides in support the visa office notes, which diverge from the narrative that the claimant provides.

There is a reverse risk. There is not only the risk that those who misrepresent to escape danger will be confronted when making their claims with their original misrepresentations. There is also the risk that those who are telling the truth will be denied visas on suspicion that, on arrival in Canada, they will make refugee protection claims, even though they have no intention of doing so.

If one looks at the Regulatory Impact Analysis statements in the *Canada Gazette*[7] published to explain why visa requirements are imposed, a common reason is that a significant number of visitors from the country have made refugee claims in Canada. To grant visas to would-be refugee claimants merely because they want to make refugee claims would frustrate the very purpose of the visa requirement.

Those who face no risk at home and wish genuinely to come to Canada only for a temporary visit fall outside the scope of this book. Nonetheless, they should be aware that difficulties they face in obtaining visas often relate to suspicions that they intend to make refugee protection claims.

Any applicant to Canada has to establish the merits of their application. Part of that effort becomes, for those applying for temporary visas, an effort to establish that they would not be making a refugee protection claim.

Suppose a person applies for a temporary resident visa and is denied the visa for whatever reason, whether because the person is inadmissible or because the person fails to satisfy the visa office that the person meets the requirements either to be a student or worker or visitor. The person still has a recourse—an application for a temporary resident permit, allowed under IRPA section 24(1).

Despite the similarity in terminology, a temporary resident permit is quite different from a temporary resident visa. The purpose of a temporary resident permit is to overcome whatever obstacles might exist to the grant of a temporary resident visa.

There is no form used to apply for a temporary resident permit, just an additional fee. Rather the permit is used to overcome the obstacle to the grant of another application. So, another application, whether for a work or study or visitor visa, needs to be made with the fee paid and receipt issued for both applications, the visa application and the permit application. There also needs to be a written detailed explanation why the discretion to grant the permit, to overcome the obstacle to the grant of the visa, should be exercised in favour of the applicant.

6 *Sabiiti v Canada (Citizenship and Immigration)*, 2016 FC 1411 at para 15.

7 See e.g. Regulatory Impact Analysis Statement (5 August 2014) C Gaz II, vol 143, no 16, which imposed a visa requirement on Mexico (at 1448) and on the Czech Republic (at 1455) for this reason, online (pdf): <https://gazette.gc.ca/rp-pr/p2/2009/2009-08-05/pdf/g2-14316.pdf>.

The grant of a temporary resident permit is discretionary. One basis for the grant of discretion could be the need to escape risk. The visa office may not be prepared to apply the principle of dual intent for a visa applicant who expresses the intent to come to Canada to make a refugee protection claim but also has the intent to appear for a removal interview and a scheduled removal date should the claim fail. Even if that is so, the visa officer could, in theory, still grant a temporary resident permit to the visa applicant to make a refugee protection claim in Canada.

The trouble with this scenario is not so much its legal impossibility as the overall scheme of the IRPA. Generally, the intent of the IRPA is to have refugee protection claimants make their claims through applications for permanent residence. A later chapter discusses this procedure for claims made outside the country of nationality.

An applicant who wants to come to Canada directly from their country of origin through the grant of a temporary resident visa or permit may well be expected to leave their country and apply for permanent residence in Canada from a neighbouring country. There are, nonetheless, many situations where such a procedure, leaving the home country and applying from a neighbouring country, is impractical, even dangerous.

The Canadian legislative scheme did at one time take into account this reality through the source country class. A person was a member of this class if they were a national of listed countries and met other risk-related criteria. The regulation providing for the class was repealed in 2011. At the time of repeal, there were six countries on the list.

Membership in the source country class allowed for permanent, not temporary residence; accordingly, the discussion of the class and what, if anything, replaced it is discussed in the next section of this chapter about permanent residence.

II. Applying from Home to Be a Permanent Resident

For a person to come to Canada as a permanent resident, the person has to be issued a permanent resident visa at a Canadian visa post abroad. There are some programs in the Canadian immigration system which allow people inland to apply for permanent residence. However, these programs are exceptions to the rule that permanent residence must be preceded by a permanent resident visa granted abroad.

Permanent resident visas are required for nationals of all countries. There are no exceptions, as there are for temporary resident visas.

A person cannot apply from their own country to come to Canada as a permanent resident on the basis that the person is a Convention refugee or a person in similar circumstances, as defined in the IRPR. Canadian law, as well as international refugee law, require that a person, to be recognized as a Convention refugee under the United Nations *Convention Relating to the Status of Refugees*,[8] must be outside their country of nationality.

8 14 December 1950, 189 UNTS 137 (entered into force 22 April 1954), online: <https://www.unhcr.org/3b66c2aa10> [Refugee Convention].

As noted earlier, there used to be a class in the regulations which allowed for a permanent resident visa from the country of nationality based on risk considerations. Under former IRPR regulation 148, a person was a member of this now-repealed class if the person needed resettlement because either they were seriously and personally affected by civil war or armed conflict in that country, or had been or were being detained as a direct result of an act committed outside Canada that would, in Canada, be a legitimate expression of freedom of thought or a legitimate exercise of civil rights pertaining to dissent or trade union activity, or had a well-founded fear of persecution for Refugee Convention reasons.

The regulation on the source country class was repealed in part because it turned out to be inflexible. The class was unable to adapt quickly to changing situations, requiring a cabinet decision to add or remove a country from the list.

In principle, the logic behind the source country class remains. However, it should be applied to all countries and all claimants who meet its criteria, not just claimants in countries that at one time received cabinet designation. The repeal of the source country class does not speak to the repeal of the source country principle. On the contrary, it speaks to the need to generalize the source country principle to all countries where relevant.

There is no specific provision in the various permanent resident visa streams that equates to the old source country class in generalized form. That does not mean, however, that the present system does not allow for a generalized source country class principle.

The way that the principle could be realized is through granting of permanent residence on humanitarian and compassionate grounds. IRPA section 25(1) has a specific provision that allows for permanent residence on those grounds.

IRPA section 3(2)(c) provides as one of its objectives with respect to refugees "to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution." Here there is a direct link between refugee protection and humanitarian ideals.

The IRPA, in section 12(3), also provides:

> A foreign national, inside or outside Canada, may be selected as a person who under this Act is a Convention refugee or as a person in similar circumstances, taking into account Canada's humanitarian tradition with respect to the displaced and the persecuted.

A person in similar circumstances, when the source country class existed, was considered by a previous version of regulation 146(1) since amended, to be a member of one of two humanitarian-protected persons abroad classes, one of which was the source country class. A person outside Canada who would fit within the source country class principle generalized to all countries would also be a person in similar circumstances to a Convention refugee, taking into account Canada's humanitarian tradition with respect to the displaced and the persecuted.

Like an application for a temporary resident permit, there is no application form to apply to come to Canada from outside on humanitarian grounds. Instead, some other application procedure needs to be invoked. Unlike the application for a temporary resident permit, there is no separate fee that needs to be paid. The person, at the same time, applies to come to Canada in some category for which they are not eligible and then asks, in writing with documents in support, for humanitarian consideration to overcome either the ineligibility or the failure to meet the requirements of the IRPA and regulations.

Visa officers, when considering humanitarian applications, must, according to IRPA section 25(1.3), consider elements related to the hardships that affect the person. In the case of *Chieu*,[9] the Supreme Court of Canada held in 2002 that the humanitarian jurisdiction of the Immigration Appeal Division of the Immigration and Refugee Board (IRB) on appeal from a removal order encompassed hardship in the likely country of removal. In the 2015 case of *Kanthasamy*[10] in the Supreme Court of Canada, the Court held that an officer, when deciding an inland humanitarian application and considering the hardship factor on return, could address the underlying facts that the applicant could adduce in the refugee determination proceeding.

The reasoning in these cases applies equally to humanitarian applications at visa posts abroad. Practically what that means is that the visa officer can and should take into account, where relevant, whether the person would fit within the old source country class, generalized to all countries in determining whether the circumstances warrant humanitarian and compassionate relief.

It would be incorrect to interpret the repeal of the source country class to mean that its principles no longer apply to any country. Legally, in light of the Supreme Court of Canada's jurisprudence on humanitarian jurisdiction, it means that the principles of the source country class apply to all countries.

A person whose primary motivation for leaving their home country is flight risk can, of course, use other categories to come to Canada than those which specifically address the risk. Risk at home does not preclude an application for permanent residence on other grounds. If a person can come to Canada legally as a permanent resident on economic or family grounds, there would be no need to come to Canada to seek protection or to seek protection to come to Canada, even where the need to seek protection is the primary motivation for immigration.

Any person seeking protection should seek the easiest and most practical means available, provided the means is also legal. The most practical means may well be coming to Canada on economic or family grounds. If there is another shorter and easier route to come to Canada than seeking protection, then, even if the motivation is protection, the easier route should be accessed.

9 *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3. David Matas was counsel for the appellant Chieu.

10 *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61.

As with temporary residence, all that visa posts do abroad is issue visas. The actual grant of permanent residence happens at the port of entry. It is unusual for someone who has been granted a permanent resident visa to be denied permanent residence at the port of entry. But it can and does happen.

The visa posts which grant permanent resident visas for each country are typically the same as the visa posts which grant temporary resident visas for that country. But sometimes, they are different. So one needs to be sure that one is applying to the right visa post for permanent resident visas.

III. Coming to Canada from a Third Country

Part of the definition of a refugee in the Refugee Convention[11] is someone who is outside their country of nationality. Canada has adopted the Refugee Convention definition of refugee into its own legislation. So, if a person wants to apply for a permanent resident visa and receive formal recognition that they are a Convention refugee, the person has to be outside of their country of nationality.

Canada has gone beyond the Refugee Convention to create, by way of IRPR regulation 147, the country of asylum class that allows for the grant of permanent resident visas to those personally affected by civil war, armed conflict, or massive violation of human rights in their own country. Anyone who wishes to come to Canada formally on this basis also has to be outside their own country at the time of application.

Once the person is outside their country, their situation differs depending on whether the person is found in a country signatory to the Refugee Convention or not a signatory to the Convention. To come to Canada from a third country, the person has to demonstrate not only that they are at risk in their home country, but according to IRPR regulation 139(1)(d), they also have to establish that they have no durable solution in the country from which they apply.

Typically, persons in countries that are signatories to the Refugee Convention are considered to have a durable solution in the countries in which they are found. That should, in principle, be the result if the Convention signatory is respecting the Convention. So getting to Canada as a refugee from a third country typically means applying from a country that is not a signatory to the Refugee Convention.

If what was written earlier is correct, that an application for permanent residence on humanitarian grounds from the country of origin includes risk factors, what is the point of leaving the country and applying from a third country to come to Canada as a Convention refugee or a person in similar circumstances? One advantage of applying from a third country is safety. Processing applications for permanent residence from the country of residence will take time that the applicant for permanent residence may not have. Some dangers are immediate, and one cannot wait for an application to be processed at the visa office in the home country.

11 Convention article 1A(2) and Protocol article I(2).

A second advantage is the participation of the Office of the United Nations High Commissioner for Refugees (UNHCR). Because of the nature of the definition of the refugee in the Refugee Convention, the UNHCR can do nothing to assist persons in danger in their own country. The UNHCR often cannot help alleviate internal displacement. Nor can it help with resettlement from the country of nationality.

A third advantage is resettlement itself. The Government of Canada has private sponsorship and government assistance programs for refugees resettling to Canada. Those programs do not apply to persons coming to Canada as permanent residents from their home countries. Any assistance those coming to Canada from their home countries as permanent residents would need, other than the assistance which comes from immediate family sponsorships of spouses, parents, and children, they would have to find on their own.

The legal requirement that there be no durable solution in the country from which a person applies, where the person applies from a third country, is not circumvented in substance by applying for permanent residence from the home country. While there is nothing specifically stated in the law to that effect for persons applying from the home country, a humanitarian application for permanent residence in Canada from the home country based on risk is bound to fail where the applicant has a durable solution in the home country.

Fourth, one has also to consider the safety of visa offices and officers. The old source country class had as a component of the definition of safe country in old regulation 148(2)(d) of the IRPR, that the country is a place where an officer "is able to process visa applications without endangering their own safety, the safety of applicants or the safety of Canadian embassy staff."

Visa offices could legitimately refuse on risk grounds to process humanitarian applications from the country of nationality where that processing would endanger the safety of processing officers, applicants, or Canadian embassy staff. These considerations would not apply to processing applications from a third country.

IV. Coming to Canada Without a Visa

If a person is a national of a visa requirement country and does not have a temporary resident visa, getting to Canada presents not only legal problems. It is also practically impossible because of carrier sanctions.

The IRPA provides that anyone who operates a transportation facility must not carry to Canada a person who is supposed to have a visa but does not have one. The operator must further carry from Canada any person whom it has carried to Canada who should have a visa but does not have one. According to IRPA section 148, transportation companies have to provide the government with security for compliance with these obligations.

The effect of these provisions is that a person who is a national of a country with a visa requirement and without a visa cannot use a commercial carrier to get to Canada.

All commercial carriers—trains, planes, buses, ships—are penalized if they bring to Canada any person who requires a visa and does not have one. Consequently, they make every effort to deny their services to persons who do not have proper documentation.

The problem this presents for a person without a visa but who needs one is not just entering Canada. The problem is leaving from a destination outside Canada with a carrier that offers transportation to Canada.

If a person is a national of a country without a visa requirement, a permanent resident of the United States or a person from a visa requirement country with a visa, the person is not automatically allowed entry on arrival. Entry at the port of entry can still be refused and will be if the person seeks to enter for a temporary purpose, and the port of entry officer concludes that the person does not intend to leave after entry.

Officials consider that claiming refugee protection manifests an intention to remain in Canada permanently. However, any person, other than a person coming by land from the United States, can make a refugee protection claim or application at a port of entry. According to IRPA section 49(2), the person will receive a conditional removal order, conditional on the outcome of the refugee protection claim or application, and will be allowed entry to pursue the claim or application.

V. Coming to Canada from the United States

Canada has entered into an agreement with the United States which makes land arrival from the United States different from arrival from any other country. An agreement between Canada and the United States allocates refugee protection claimants to the country of first arrival.

If a person arrives in Canada and then shows up at a US land port of entry, Canada agrees to take the person back for a refugee protection determination in Canada. If a person arrives in the United States and then shows up at a Canadian land port of entry, the United States agrees to take the person back for an asylum determination in the United States. Canada operationalizes this agreement by denying access to the refugee determination process to anyone who has come from the United States and shows up at a Canadian land port of entry by returning the person to the United States.

There are exceptions within the agreement to the general bounce-back principle. The most significant, set out in IRPR regulation 159.5, is the presence of family members in Canada. Persons coming from the United States with family members in Canada will be allowed to join their family and make refugee protection claims in the country; they will not be sent back to the United States.

The agreement encompasses only land port of entry arrivals. So, if a person enters Canada from the United States at a non-port of entry point or comes to Canada by air or by sea, the situation, as set out in IRPR regulation 159.4(1), is different.

Such a person, if already having made an asylum application in the United States, cannot make a refugee protection claim but can make a refugee protection application. That is to say, the claim of risk in the home country cannot be determined

by the Refugee Protection Division (RPD) of the IRB but, according to IRPA section 101(1)(c.1), can be determined by a pre-removal risk assessment officer. IRPA section 101(1)(c.1) renders ineligible a refugee protection claim to the RPD of the IRB made by those who had earlier made refugee claims in countries with which Canada has an immigration and citizenship information-sharing agreement. Canada has such an agreement with the United States, as well as with the United Kingdom, Australia, and New Zealand.[12] Moreover, unlike most other pre-removal risk assessment determinations, this type of risk determination, according to IRPA section 113.01, has to be done by way of oral hearing. This same variation that claims to the RPD are not possible; that only applications to a pre-removal risk assessment officer are; and that these pre-removal risk assessment applications have to be done by way of an oral hearing, also applies to would-be refugees from the United Kingdom, Australia, and New Zealand.[13]

It is not clear what the point of this change was, replacing oral hearings by the RPD of the IRB with oral hearings by pre-removal risk assessment officers. There is a saying that a camel is a horse designed by a committee. That saying may well apply to this situation.

The government originally proposed, in a budget omnibus bill,[14] though this particular change had more or less nothing to do with the budget, that a category of nationals which now encompasses four countries—the United States, the United Kingdom, New Zealand, and Australia—go immediately into the standard pre-removal risk assessment application process. This proposal generated a good deal of public opposition. The result was an amendment, because this was a budget bill, by the House of Commons Finance Committee (and not the Citizenship and Immigration Committee where the IRPA amendments usually go), tacking on the requirement of an oral hearing, to square the circle—to keep some vestige of the original government proposal as well as to attempt to placate public concern.

12 See IRCC, "Regulations for Automated Biometric-Based Information Sharing with Australia, New Zealand and the United Kingdom" (last modified 1 June 2018), online: *Government of Canada* <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/transparency/access-information-privacy/privacy-impact-assessment/automated-biometric-information-sharing-australia-new-zealand-uk.html>.

13 IRCC, "Pre-Removal Risk Assessment: Who Can Apply" (last modified 8 October 2020), online: *Government of Canada* <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/claim-protection-inside-canada/after-apply-next-steps/refusal-options/pre-removal-risk-assessment/eligibility.html>.

14 Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures*, 1st Sess, 42nd Parl, 2019, s 306 (assented to 21 June 2019), SC 2019, c 29.

VI. Being Smuggled

A person who uses a false document to enter Canada cannot, according to IRPA section 133, be prosecuted for that act while a refugee protection claim is pending or if the claim is successful. However, there is no similar exemption for smuggling. A prosecution for smuggling cannot, also according to the IRPA, be delayed or avoided because a refugee protection claim is pending or successful.

In 2015, the Supreme Court of Canada held in the case of *Appulonappa*[15] that the prohibition against smuggling was unconstitutional insofar as it applied to close family members and humanitarian workers trying to assist refugees voluntarily and not for profit, as well as to refugees attempting to assist other refugees or refugees attempting to aid their own illegal entry. The law against smuggling remains on the statute books to allow for the prosecution of organized crime engaged in smuggling.

A person engaged in people smuggling, according to IRPA sections 37(1)(b) and 101(1)(f), is ineligible to make a refugee protection claim to the RPD of the IRB. In a concomitant ruling to that made in the *Appulonappa* case, the Supreme Court of Canada in the same year, 2015, in the case of *B010* held that provisions for ineligibility of people smugglers did not apply to the same group as the group identified in the *Appulonappa* case—family members and humanitarian workers trying to assist refugees voluntarily and not for profit, as well as refugees attempting to assist other refugees or refugees attempting to aid their own illegal entry.[16]

It follows from these decisions that a refugee who pays a smuggler or engages in tasks that form part of the collective flight to safety cannot be prosecuted or held ineligible to make a refugee protection claim on the basis that the refugee was engaged in smuggling.[17] A refugee does not become a smuggler simply by being smuggled or by helping others being smuggled.

Arranging to be smuggled, even if it puts to one side the risk of conviction or being found ineligible to make a refugee protection claim for participation in a smuggling scheme, is practically unwise. Smuggling contracts are unenforceable. A smuggler who does not deliver what was promised cannot be sued in court for breach of contract. Smugglers can and often do take advantage of the desperate.

Those smuggled also can and often do end up in immigration detention in Canada for long periods of time. One ground of immigration detention is that the person is a flight risk. The fact that the person participated in smuggling is evidence that the person is a flight risk, justifying immigration detention.

15 *R v Appulonappa*, 2015 SCC 59.

16 *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58.

17 *X (Re)*, 2019 CanLII 130865 (IRBIAD).