



Vulnerability in the Canadian Protection Regime: Research Report on the Policy Framework

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About this Publication

Document History

Version	Date	Description
1.0	11 December 2020	Issued for consortium review
	24 December 2020	Consortium review
1.2	21 January 2021	Revised version issued for formatting
1.3	25 January 2021	Formatted version submitted to the EU for external review
	08 June 2021	External review
1.4	22 June 2021	Revised version issued for formatting
1.5	28 July 2021	Formatted version submitted to the EU


Acknowledgement

This report is a result of a research project funded by the Canadian Research Council SSHRC/CRSH and the Fonds de recherche du Québec – Sociétés et Cultures (FRQSC) as part of the VULNER project, an international research initiative, which has received funding from the European Union’s Horizon 2020 research and innovation programme under grant agreement No 870845 (www.vulner.eu).

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Suggested Citation

Kaga, M., Nakache, D., et al., *Vulnerability in the Canadian Protection Regime: Research Report on the Policy Framework*. 2021. VULNER **Research Report 1**. [doi: 10.5281/zenodo.5525795](https://doi.org/10.5281/zenodo.5525795)



Social Sciences and Humanities
Research Council of Canada

Conseil de recherches en
sciences humaines du Canada



Project: VULNER - Vulnerability Under the Global Protection Regime: How Does the Law Assess, Address, Shape and Produce the Vulnerabilities of the Protection Seekers?
GA: 870845
Horizon 2020: H2020-SC6-MIGRATION-2019
Funding Scheme: Research and Innovation Action
Dissemination Level: PU

Vulnerability in the Canadian Protection Regime: Research Report on the Policy Framework

Work Package 6 | Deliverable 6.1

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EXECUTIVE SUMMARY

This research report has been published as part of the EU Horizon 2020 VULNER research project (www.vulner.eu). The VULNER research project is an international research initiative, which objective is to reach a more profound understanding of the experiences of vulnerabilities of migrants applying for asylum and other humanitarian protection statuses, and how they could best be addressed. It therefore makes use of a twofold analysis, which confronts the study of existing protection mechanisms towards vulnerable migrants (such as minors and victims of human trafficking), with the one of their own experiences on the ground.

This research report presents some of the intermediary results of the VULNER project based on the first phase of the project, which consisted of mapping out the vulnerability assessment mechanisms developed by state authorities in Canada. Given the massive amount of documentation that the Canadian team had to review in the first phase of the project, this first report only includes a presentation and analysis of desk research data. At the time of writing (December 2020), interviews with civil servants and practitioners had not begun and were expected to begin shortly.

The following research questions are addressed: What do the relevant domestic legislation, case-law, policy documents, and administrative guidelines reveal about how “vulnerabilities” are being assessed and addressed in the countries under study? Do the relevant state and/or aid agencies have a legal duty to assess migrants’ vulnerabilities, and if yes, using which procedures, when and how? Following which legal and bureaucratic criteria?

In Canada, there are a variety of pathways for vulnerable migrants to gain legal status and protection. Each pathway has its own specific criteria as to who can apply and under which conditions protection is granted. Additionally, protection can be granted from abroad (as in the case of refugee resettlement) or from within Canada. Therefore, **this research covers a much broader range of protection procedures currently in place in Canada compared to the EU:**

- **Refugee protection**, granted to individuals who meet the strict 1951 Geneva Convention definition of a refugee, who are in circumstances considered similar to those of a Convention refugee, or whose removal to their country of origin would subject them to torture or inhumane and degrading treatment according to the Convention Against Torture (permanent residency status, with pathway to citizenship).
- Permanent residency (with pathway to citizenship), granted to individuals who are about to be removed from Canada and who demonstrate an imminent danger of torture, risk of persecution or of cruel and unusual treatment or punishment if sent back to their country of origin (**Pre-Removal Risk Assessment (PRRA)**).
- Permanent residency (with pathway to citizenship), granted to individuals who are inadmissible or who do not meet the requirements of the immigration legislation, but have compelling Humanitarian and Compassionate (H&C) grounds to remain in Canada (**Humanitarian and Compassionate Grounds (H&C)**).
- Permanent residency (with pathway to citizenship), granted to individuals who are inadmissible or do not meet the requirements of the existing immigration legislation, but are justified by public policy considerations to remain in Canada (**Public Policy Grounds**).

- Temporary protection granted to migrant workers on a valid employer-specific work permit who demonstrate experiencing abuse - or being at risk of abuse- in the context of their employment in Canada (**Vulnerable Worker Open Work Permit (VOWWP)**).
- Temporary protection granted to individuals recognized as victims of human trafficking or of family violence (**Temporary Resident Permit (TRP)**).

In addition, the Canadian government will take into account the specific situation of certain categories of migrants – such as immigration detainees, unaccompanied minors, stateless persons, or individuals from countries to which there is a moratorium on removals – who are likely to experience heightened vulnerability in immigration/asylum proceedings. **Such categories are also the focus of our study.**

In Canada, there are three key immigration “players”: the Canada Border Services Agency (CBSA), Immigration, Refugees and Citizenship Canada (IRCC) and the Immigration and Refugee Board (IRB). CBSA manages Canada’s border, including determining an individual’s initial admissibility at ports of entry and carrying out enforcement duties (detention, removal, etc.). IRCC is responsible for developing and administering all of Canada’s immigration programs from economic to humanitarian admission, including Canada’s overseas refugee resettlement programs and applications to remain in Canada on humanitarian and compassionate grounds. The IRB is an independent tribunal with four distinct divisions, including the Refugee Protection Division (RPD), which is responsible for adjudicating eligible inland claims for refugee protection, and the Refugee Appeal Division (RAD), which reviews most denials of protection by the RPD. Additionally, there are six main sources of immigration and refugee law (and policy) in Canada: the *Immigration and Refugee Protection Act* (RSC 2001, c 27 [IRPA]), the *Immigration and Refugee Protection Regulations* (SOR/2002-227 [IRPR]), Ministerial Instructions, Ministerial Guidelines (IRCC and CBSA), Chairperson’s Guidelines (IRB) and case law. Much of the operation of law takes place through Ministerial Guidelines (i.e., operational manuals, program delivery instructions etc.), which provide details on the interpretation of the IRPA and IRPR to IRCC’s and CBSA’s officers. Furthermore, the IRB’s Chairperson’s Guidelines provide guiding principles for IRB personnel who manage and adjudicate cases. IRB’s Guidelines are not mandatory but board members do need to justify any non-compliance in their written decisions (IRB, 2018b). As for IRCC’s and CBSA’s Ministerial Guidelines, “... they are ‘not legally binding’ (...) Officers can (...) consider [them] in the exercise of their (...) discretion but should turn [their] mind[s] to the specific circumstances of the case” (*Kanhasamy v. Canada*, 2015 SCC 6, at para. 32).

This report examined **over 377 legal and policy documents**, including legislation and regulations, guidelines and ministerial instructions produced by the IRB, the IRCC and the CBSA. Our study was complimented by an analysis of **over 884 cases** of the Supreme Court, the Federal Court, Provincial Courts, and the IRB. **Over 100 secondary sources** from UN agencies, NGOs, lawyers, and academic scholarships were also analysed. The aim of these multiple research efforts was to understand how the concept of vulnerability is approached in these documents; what obligations (if any) this recognition of ‘vulnerability’ provides to migrants; if there is a focus on the vulnerabilities of certain migrants, and if so, what consequences are attached to this recognition of vulnerability.

It is important to take note of the many positive advancements that are unique to the Canadian protection regime. Among these is a growing recognition in government documents of ‘vulnerability’ among migrants, and the development of guides aimed at assisting decision-makers in proceedings concerning ‘vulnerable’ migrants. Since 2018, Canada has also been the world leader in refugee resettlement. Despite such important efforts, we find ‘vulnerability’ an elusive concept that is rarely defined, difficult to under-

stand and consequently, not always properly addressed in Canadian documents. More particularly, there is a lack of clarity on *who* is a vulnerable person, and *how* exactly their vulnerability must be addressed. This raises critical questions regarding how officials use their broad discretionary powers to address such vulnerabilities in practice. Additionally, while there are procedural accommodations available for most 'vulnerable' migrants in immigration/asylum proceedings, being identified as 'vulnerable' does not lead – on its own – to obtaining protection status (an exception to this is found in the administration of Canada's overseas resettlement program). Equally, a recognition of vulnerability is rarely paired with the promise to address the underlying issues that contribute to the vulnerability. The findings presented in this report will be refined in the next phase of the research through interviews with civil servants and practitioners.

RÉSUMÉ EXÉCUTIF

Ce rapport de recherche est publié dans le cadre du projet de recherche européen Horizon 2020 VULNER (www.vulner.eu). Le projet de recherche VULNER est une initiative de recherche internationale dont l'objectif est de parvenir à une compréhension plus approfondie des expériences de vulnérabilité des migrants qui demandent l'asile et d'autres statuts de protection humanitaire, et de la manière dont ces dernières pourraient être traitées. Il utilise donc une double analyse, qui confronte l'étude des mécanismes de protection existants envers les migrants vulnérables (tels que les mineurs et les victimes de la traite des êtres humains), à celle de leurs propres expériences sur le terrain.

Ce rapport de recherche présente certains des résultats intermédiaires du projet VULNER, basés sur la première phase du projet, qui consistait à recenser les mécanismes d'évaluation de la vulnérabilité développés par les autorités étatiques Canadiennes. Compte tenu de la quantité massive de documents que l'équipe canadienne a dû examiner lors de la première phase du projet, ce premier rapport ce premier rapport inclut uniquement une présentation et analyse des données de la recherche documentaire. Au moment de la rédaction (décembre 2020), les entretiens avec les fonctionnaires n'avaient pas encore commencé et devaient commencer sous peu.

Les questions de recherche suivantes sont abordées : Que révèlent la législation nationale, la jurisprudence, les documents de politique générale et les directives administratives pertinentes sur la manière dont les « vulnérabilités » sont évaluées et traitées dans les pays étudiés ? L'État et/ou les organismes d'aide concernés ont-ils l'obligation légale d'évaluer les vulnérabilités des migrants, et si oui, en utilisant quelles procédures, quand et comment ? Selon quels critères juridiques et bureaucratiques ?

Au Canada, il existe une variété de voies d'accès à un statut légal et à une protection, que cette protection soit temporaire ou permanente. Chacune de ces voies a ses propres critères spécifiques quant aux personnes qui peuvent faire une demande et quant aux conditions sous lesquelles la protection leur sera accordé. De plus, la protection peut être accordée depuis l'étranger (comme dans le cas de la réinstallation des réfugiés) ou depuis le Canada. Par conséquent cette recherche inclut, par rapport à l'UE, un plus large éventail de procédures de protection:

- La **protection des réfugiés**, accordée aux personnes qui répondent à la définition stricte de réfugié contenue dans la Convention de Genève de 1951, mais également aux personnes qui se trouvent dans des circonstances considérées comme similaires à celles d'un réfugié au sens de la Convention, ou dont le renvoi dans leur pays d'origine les exposerait à la torture ou à un traitement inhumain et dégradant selon la Convention contre la torture (statut de résident permanent, avec voie d'accès à la citoyenneté).
- Résidence permanente (avec voie d'accès à la citoyenneté) accordée aux personnes qui sont sur le point d'être renvoyées du Canada et qui démontrent un danger imminent de torture, de persécution ou de traitements ou peines cruels et inusités advenant leur renvoi dans leur pays d'origine (**examen des risques avant renvoi (ERAR)**).

- Résidence permanente (avec voie d'accès à la citoyenneté), accordée aux personnes qui sont interdites de territoire ou qui ne satisfont pas aux exigences de la législation sur l'immigration, mais qui ont des motifs d'ordre humanitaire impérieux de rester au Canada (**motifs d'ordre humanitaire (CH)**).
- Résidence permanente (avec voie d'accès à la citoyenneté) accordée aux personnes qui sont interdites de territoire ou qui ne satisfont pas aux exigences de la législation existante en matière d'immigration, mais qui ont des raisons d'ordre public de rester au Canada (**motifs d'ordre public**).
- Protection temporaire accordée aux travailleurs migrants titulaires d'un travail relié à un employeur unique et qui démontrent qu'ils ont été victimes d'abus - ou qu'ils risquent de l'être - dans le cadre de leur emploi au Canada (**Permis de travail ouvert pour les travailleurs vulnérables (PTVA)**).
- Protection temporaire accordée aux personnes reconnues comme victimes de la traite des personnes ou de la violence familiale (**permis de séjour temporaire (PST)**).

En outre, le gouvernement canadien tient compte de la situation particulière de certaines catégories de migrants qui sont susceptibles de connaître une vulnérabilité accrue dans le cadre des procédures d'immigration ou d'asile - tels que les détenus en matière d'immigration, les mineurs non accompagnés, les apatrides, ou les personnes originaires de pays à l'égard desquels il existe un moratoire sur les renvois - . **Ces catégories font également l'objet de notre étude.**

Au Canada, il existe trois «acteurs» clefs en matière d'immigration: l'Agence des services frontaliers du Canada (ASFC), Immigration, Réfugiés et Citoyenneté Canada (IRCC) et la Commission de l'immigration et du statut de réfugié (CISR). L'ASFC gère la frontière canadienne, notamment en déterminant l'admissibilité initiale d'une personne aux points d'entrée et en effectuant des tâches d'exécution de la loi (détention, renvoi, etc.). L'IRCC est responsable de l'élaboration et de l'administration de tous les programmes d'immigration du Canada, de l'admission économique à l'admission humanitaire, y compris les programmes de réinstallation des réfugiés à l'étranger et les demandes de séjour au Canada pour des raisons humanitaires. La CISR est un tribunal indépendant composé de quatre sections distinctes, dont la Section de la protection des réfugiés (SPR), qui est chargée de statuer sur les demandes d'asile recevables présentées au Canada, et la Section d'appel des réfugiés (SAR), qui examine la plupart des refus de protection par la SPR. De plus, il existe six sources principales du droit (et des politiques) de l'immigration et des réfugiés au Canada : la *Loi sur l'immigration et la protection des réfugiés* (L.R.C. 2001, ch. 27 [LIPR]), le *Règlement sur l'immigration et la protection des réfugiés* (DORS/2002-227 [RIPR]), les instructions ministérielles, les directives ministérielles (IRCC et ASFC), les directives du président (CISR) et la jurisprudence. Une grande partie de l'application de la loi se fait par le biais des directives ministérielles (c.-à-d. les manuels opérationnels, les instructions sur l'exécution des programmes, etc.), qui fournissent des détails sur l'interprétation de la LIPR et du RIPR aux agents de l'IRCC et de l'ASFC. En outre, les Lignes directrices du président de la CISR fournissent des principes directeurs au personnel de la CISR qui gère et tranche les cas. Les lignes directrices de la CISR ne sont pas obligatoires, mais les membres de la commission doivent expliquer dans leurs décisions écrites pourquoi ils s'en sont écartés (CISR, 2018b). Quant aux directives ministérielles de l'IRCC et de l'ASFC, « ... elles ne sont pas juridiquement contraignantes » (...). Les agents peuvent (...) les prendre en considération dans l'exercice de leur pouvoir discrétionnaire, mais ils doivent tenir compte des circonstances particulières de l'affaire ». (*Kanthasamy c. Canada*, 2015 CSC 6, au paragraphe 32).

Dans ce rapport, nous avons examiné **plus de 377 documents juridiques et politiques**, y compris les lois et règlements, les lignes directrices et les instructions ministérielles produites par la CISR, IRCC et l'AS-FC. Notre étude a été complétée par une analyse de **plus de 884 décisions** rendues par la Cour suprême, la Cour fédérale, les tribunaux provinciaux et la CISR. **Plus de 100 sources secondaires** de rapports écrits par des agences onusiennes, des ONGs, des groupements d'avocats et de travaux universitaires ont également été analysées. L'objectif de ces multiples efforts de recherche était de comprendre comment le concept de vulnérabilité est abordé dans ces documents ; quelles obligations (le cas échéant) cette reconnaissance de la «vulnérabilité» entraîne pour les migrants ; si l'accent est mis sur les vulnérabilités de certains migrants, et si oui, quelles conséquences sont attachées à cette reconnaissance de la vulnérabilité.

Il est important de noter les nombreuses avancées positives qui sont propres au régime de protection canadien. Parmi celles-ci, on note une reconnaissance croissante dans les documents gouvernementaux de la «vulnérabilité» des migrants, ainsi que l'élaboration de guides visant à aider les décideurs dans les procédures concernant les migrants «vulnérables». Depuis 2018, le Canada est également devenu le leader mondial dans la réinstallation des réfugiés. Malgré ces efforts importants, nous constatons que la «vulnérabilité» est un concept abstrait, rarement défini, difficile à comprendre et, par conséquent, qui n'est pas toujours appréhendé correctement dans les documents Canadiens. Plus particulièrement, la réponse à la question de savoir qui est une personne vulnérable, et comment sa vulnérabilité doit être abordée est loin d'être claire. Cela soulève des questions cruciales quant à la manière dont les fonctionnaires utilisent leurs larges pouvoirs discrétionnaires pour traiter de ces vulnérabilités en pratique. En outre, bien que des aménagements procéduraux soient disponibles pour la plupart des migrants «vulnérables» dans les procédures d'immigration ou d'asile, le fait d'être identifié comme «vulnérable» ne conduit pas - en soi - à l'obtention d'un statut de protection (une exception à cette règle se trouve dans l'administration du programme canadien de réinstallation à l'étranger). De même, la reconnaissance de la vulnérabilité est rarement accompagnée de la promesse de traiter les problèmes sous-jacents qui contribuent à cette vulnérabilité. Les conclusions présentées dans ce rapport seront affinées dans la prochaine phase de la recherche par des entretiens avec des fonctionnaires et des praticiens.

ABBREVIATIONS

ADR Administrative Deferral of Removals

ATD Alternative to Detention

BIOC Best Interests of the Child

CBSA Canada Border Services Agency

CIMM Standing Committee on Citizenship and Immigration

CCMS Community Case Management Services

CRCS Canadian Red Cross Society

ESDC Employment and Social Development Canada

GSR Government Sponsored Refugees

Guideline 8 OR Vulnerable Persons Guideline Chairperson Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB

Guideline 9 OR SOGIE Guideline Chairperson Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression

H&C Humanitarian and Compassionate

IAD Immigration Appeal Division

ID Immigration Division

IRB Immigration and Refugee Board of Canada

IRCC Immigration, Refugees and Citizenship Canada

IRPA Immigration and Refugee Protection Act

IRPR Immigration and Refugee Protection Regulations

OAG Office of the Auditor General

POE Port of Entry

PRRA Pre-Removal Risk Assessment

PSEP Public Safety and Emergency Preparedness

PSR Privately Sponsored Refugee

RAD Refugee Appeal Division

RPD Refugee Protection Division

STCA Safe Third Country Agreement

SOGIE Sexual Orientation and Gender Identity and Expression

TFW Temporary Foreign Worker

TRP Temporary Resident Permit

TSR Temporary Suspension of Removals

UNHCR United Nations High Commissioner for Refugees

VHT Victims of Human Trafficking

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I. INTRODUCTION

From the perspective of Canada's immigration law, any non-Canadian citizen needs permission to enter and remain in Canada, even vulnerable migrants seeking protection. Canadian officials grant permission to enter – either permanently or temporarily – in form of a visa or a permit in accordance with the Immigration and Refugee Protection Act (S.C., 2001, c. 27 [IRPA]). IRPA came into effect on June 28 2002 and replaced the previous Immigration Act (first enacted in 1976). The IRPA is a framework legislation designed to entrench core principles, rights and obligations, and leaves procedural and administrative matters to the regulations, chiefly the Immigration and Refugee Protection Regulations (SOR/2002-227 IRPR)¹.

Under the IRPA, responsibility to administer entry and immigration to Canada is jointly managed by two federal government departments, the Canada Border Services Agency (CBSA) and Immigration, Refugees and Citizenship Canada (IRCC). CBSA manages Canada's border, including determining an individual's initial admissibility at official ports of entry and carries out enforcement duties. IRCC is responsible for developing and administering all of Canada's immigration programs, from economic to humanitarian admission, including Canada's overseas refugee resettlement program and applications to remain on humanitarian and compassionate (H&C) or on public policy (PP) grounds, plus Canadian citizenship applications in conjunction with the Citizenship Act (R.S.C., 1985, c. C-29). The third key actor governed by the IRPA (s. 151 ff.) is the Immigration and Refugee Board (IRB), which was created in 1989 and is Canada's largest independent, quasi-judicial administrative tribunal. Its busiest division, the Refugee Protection Division (RPD), is responsible for adjudicating eligible inland claims for refugee protection (or the 'In-Canada Asylum Program'). Most (but not all, see s. 110(1)&(2) IRPA and Appendix F for more on this topic) denials of protection may be appealed to the IRB's second division, the Refugee Appeal Division (RAD). The RAD has only been in operation since 2012, when the IRPA and the IRPR underwent significant reforms with amendments through the Balanced Refugee Reform Act (S.C. 2010, c. 8) and the Protecting Canada's Immigration System Act (S.C. 2012, c. 17) as well as related accompanying regulations (Anderson & Soennecken, 2018, p. 291; Atak et al., 2019). The RAD has the power to set aside the decision of the RPD and substitute it with a new one or refer the matter back to the RPD. The IRB's third division, the Immigration Division (ID) is responsible for detention reviews and admissibility matters, while the IRB's fourth division, the Immigration Appeal Division (IAD) rules on appeals regarding family sponsorship rejections (from citizen and permanent resident sponsors)² and loss of permanent residence decisions as well as deportation (or 'removal') orders and admissibility decisions of the ID (if appealed by the Minister responsible for the CBSA).

Most claims for protection are settled before the IRB or by IRCC. Migrants receiving a negative decision on their immigration application or asylum claim may be eligible for a judicial review of that decision; however, access to the courts is very limited (Anderson & Soennecken, 2018, p. 296). First, access to the Federal Court (FC) of Canada is only granted by permission ('leave') of the court, which occurs infrequently (Rehaag, 2008). Second, the FC does not re-adjudicate the case *de novo*. The Court only performs a judicial review function (s. 72 IRPA), which means that it focuses on whether the administrative process before the IRB (or the IRCC) was fair and the law was applied correctly. Third, access to the Federal Court

of Appeal (FCA) is further limited by a special ‘certification’ requirement (i.e., the Court must certify, upon request of counsel, that the case contains a “question of general importance” that can only be resolved by putting the matter to the FCA (s. 74(d) IRPA). Fourth, access to the Supreme Court of Canada (SCC) is equally limited by a ‘leave’ process (s. 40(1) Supreme Court Act, R.S.C., 1985, c. S-26).

This report examines various pathways for migrants to gain legal status and protection in Canada (be it temporary or permanent), with the aim of understanding how the Canadian protection regime responds to and addresses the particular needs of vulnerable migrants. In Canada, protection can be granted from abroad (e.g., refugee resettlement) or from within the country. Further information about the structure of Canada’s immigration protection regime is found in the introduction to Part III, however for reference, the following protection mechanisms are examined in this study:

1) From abroad

- Permanent residency (with pathway to citizenship) granted to Convention Refugees and Humanitarian-Protected Persons Abroad Classes (s. 95 (1)(a) IRPA and s. 146 IRPR; s. 99(1) and (2) IRPA; s. 144 IRPR³)

2) In Canada

- Permanent residency (with pathway to citizenship) granted to ‘Convention refugees’ or ‘Persons in in need of protection’ (ss. 96- 97 IRPA).
- Permanent residency (with pathway to citizenship) granted to successful Pre-Removal Risk Assessment (PRRA) applicants (s.112 IRPA).
- Permanent residency (with pathway to citizenship) granted following a successful application based on Humanitarian and Compassionate (H&C) or public policy (PP) grounds (ss.25, 25.1 and 25.2 IRPA).
- Temporary protection granted following a successful application for an Open Work Permit for Vulnerable Worker (s.207.1 IRPA)
- Temporary protection granted to individuals who have been recognized as victims of human trafficking and of family violence (Temporary Resident Permit (TRP), s. 24(1) IRPA).

In addition to existing protection mechanisms, specific considerations have also been adopted with regards to several categories of migrants considered by the Canadian government as particularly “vulnerable” or “at risk” in immigration/refugee proceedings. Therefore, the following categories are also studied in our research:

- Refugee claimants awaiting a decision.
- Immigration detainees.
- Unaccompanied minors (and their designated representatives).
- Stateless persons.
- Persons falling under the Canada-US Safe Third Country Agreement (STCA)’s exceptions;- exceptions.
- Individuals from countries to which there is a moratorium on removals.

Our report seeks to address a central research question: *how are the ‘vulnerabilities’ of migrants understood/conceptualized in the legal and policy framework of the protection regime under study, and which protection mechanisms have been set in place to assess and address these vulnerabilities?*

We address this research question through a comprehensive mapping and assessment of over 350 legal and policy documents, guidelines and manuals mainly from the key agencies involved in Canada's protection regime: the Immigration and Refugee Board of Canada (IRB), the Immigration, Refugees and Citizenship Canada (IRCC), and the Canada Border Services Agency (CBSA). Our study is further supported by a case law analysis from over 850 decisions drawn mainly from the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court, Provincial Courts, and the Immigration and Refugee Board of Canada. By examining how the concept of vulnerability is defined, understood, and employed in the Canadian refugee/immigration/citizenship context, we can better identify potential gaps and opportunities for improvement in the Canadian protection regime. This is in line with the VULNER project's objective of expanding knowledge around how the concept of vulnerability can be used as a tool to better respond to, and protect the human rights of, vulnerable migrants.

Based on the results of our research, we find that 'vulnerability' is an elusive concept that is rarely defined, difficult to understand and not always properly addressed in Canadian legal and policy documents. Our research demonstrates that there is a lack of clarity on *who* is a vulnerable person, and *how* exactly their vulnerability must be addressed. Moreover, IRCC or CBSA officers and IRB decision-makers generally have wide discretionary powers when dealing with vulnerable migrants, raising numerous questions around how they use their powers in practice to address such vulnerabilities. Additionally, simply because a foreign national is identified as vulnerable (or as potentially vulnerable) does not mean that protection is automatically granted (or granted permanently). In most instances, the 'vulnerable' label is used primarily as a procedural override (i.e., it allows for a modification of or exemption from standard procedures and requirements; for instance, regarding the admission of individuals with higher medical needs, or in granting the decision maker a larger scope of discretion). These discretionary accommodations, which take place mainly in the adjudication of in-Canada refugee claims, aim to address the potential inequalities faced by persons recognized as vulnerable to present their case and have a fair hearing. They are not aimed at addressing the underlying issues that contribute to a situation of vulnerability, such as by leading to the granting of a protective status. An exception to this is in the administration of Canada's overseas resettlement program, wherein the recognition of vulnerability can substantively influence decisions around refugee resettlement and contribute to a durable solution to address the vulnerabilities experienced by these refugees.

The report is structured in the following way. **Part II** explains our methodology and the specific research questions that we employed to assess and analyze the Canadian legislative and policy documents and case law. **Part III** starts with a brief overview of the Canadian immigration system and how the various protection mechanisms fit into this system. This is followed by a presentation of our main findings. More particularly, Part III explains how the concept of vulnerability is approached in Canadian legal and policy documents and analyzes the treatment of vulnerability with respect to various categories of migrants under study. It also explores several governmental measures that are seen as creating or exacerbating vulnerability among migrants ('administrative vulnerability'). Finally, **Part IV** summarizes our findings and concludes by highlighting which aspects of our study need to be clarified (through interviews) or further investigated.

II. METHODOLOGY

For this first phase of the project, the Canadian team focused its research activities on compiling and analysing Canadian government documents and court cases pertaining to the vulnerability of migrants. At the time of writing this report, we had not started interviewing yet. There are several reasons for this. First, in comparison to most EU countries, Canada offers more protection mechanisms to vulnerable migrants, be they temporary or permanent. There are also a series of special considerations for specific categories of vulnerable migrants that need to be examined. This means that the scope of our study is necessarily broader than in the case of most (if not all) other countries examined in this project. Second, the Canadian team is funded entirely by a matching Social Science and Research Council of Canada (SSHRC) grant and not by the EU. As a result, the Canadian team's budget is approximatively two-thirds smaller than that of other teams involved in this project and funded by the EU: our smaller research budget necessarily limits our research activities, especially when the documentation to review at the first phase of the project is so massive. Third, despite tremendous efforts on our side, seeking the collaboration of the three key federal agencies to conduct interviews with civil servants has been more difficult and complicated than initially anticipated, especially because of the ongoing global pandemic. We finally made encouraging progress in that area during the last few months.

As a reminder, our research includes an analysis of the following protection mechanisms (for an overview of the Canadian immigration system and its existing protection mechanisms, see the first section of Part III):

- **Refugee protection** granted to individuals who meet the strict 1951 Geneva Convention definition of a refugee, who are in circumstances considered similar to those of a Convention refugee, or whose removal to their country of origin would subject them to torture or inhuman and degrading treatment according to the Convention Against Torture) (permanent residency status, with pathway to citizenship).
- Permanent residency (with pathway to citizenship) granted to individuals who are about to be removed from Canada and who successfully invoke an imminent danger of torture, risk of persecution or of cruel and unusual treatment or punishment if they are sent back to their country of origin (**Pre-Removal Risk Assessment (PRRA)**).
- Permanent residency (with pathway to citizenship) granted to individuals who are inadmissible or who do not meet the requirements of the existing immigration legislation, but who are considered as having compelling H&C grounds to stay in Canada (Humanitarian and Compassionate (H&C) grounds (**Humanitarian and Compassionate Grounds (H&C)**)).
- Permanent residency (with pathway to citizenship) granted to individuals who are inadmissible or who do not meet the requirements of the existing immigration legislation, but who are justified by public policy considerations to stay in Canada (**Public Policy Grounds**).
- Temporary protection granted to migrant workers on a valid employer-specific work permit who successfully demonstrate that they are experiencing abuse - or are at risk of abuse- in the context of their employment in Canada (**Vulnerable Worker Open Work Permit (VWOWP)**).

- Temporary protection granted to individuals who have been recognized as victims of human trafficking and of family violence (**Temporary Resident Permit (TRP)**).

In addition to existing protection mechanisms, specific considerations have also been taken with regards to several categories of migrants considered by the Canadian government as particularly “vulnerable” or “at risk” in immigration/refugee proceedings. **Therefore, the following categories are also studied in our research:**

- Refugee claimants awaiting a decision.
- Immigration detainees.
- Unaccompanied minors (and their designated representatives).
- Stateless persons.
- Persons falling under the Canada-US Safe Third Country Agreement (STCA)’s exceptions.
- Individuals from countries to which there is a moratorium on removals.

Our methodology was based on a two-step process. First, we undertook a broad search through the legal and policy documents publicly available on the relevant government websites and from other stakeholders (human rights organizations, migrant community organizations, UN agencies, academics, lawyers, etc.) and identified any that potentially pertained to the vulnerability of migrants. We then conducted a content analysis. We initially searched for occurrences of the following key words: “vulnerab” and/or “precar”. This step allowed us to get a general idea of the treatment of our key words in a selected document (e.g. if it was used substantively or stereotypically).

Documents included: case law (which is discussed separately below), legislation and regulations, administrative/procedural guidelines, operational manuals, ministerial instructions and policy documents, annual reports to Parliament as well as program evaluations. The documents mainly originated from: the IRB, IRCC, and CBSA; however, we also examined relevant policy documents from other agencies, such as the Employment and Social Development Canada (ESDC), Public Safety Canada, the Standing Committee on Citizenship and Migration (CIMM), and the Office of the Auditor General of Canada (OAG). The date ranges for these legal and policy documents were from 2002 (i.e., when the Canadian government brought in its new immigration and refugee legislation, the IRPA) to 2020. We tried to go back as far back as possible for publicly available government documents to understand how the concept of vulnerability has been used, and changed, over time.

In the second step of this process, we conducted an in-depth content analysis of the legal or policy document in its entirety, even in cases where the initial key words were completely absent. This was important because, while the term ‘vulnerability’ may be missing (especially in older documents), the idea of recognizing and addressing the particular needs of certain groups (e.g. women, children, persons ‘at risk’) may be present nonetheless. Particular attention was given to related terms such as ‘at risk’, ‘abused’, ‘special needs’, and ‘trauma’. In examining these documents, we sought to gain insight on recommended interpretations of vulnerability (or analogous terms), any instructions given to staff, or difficulties found in applying the law in the respective categories by internal program evaluations. We also reviewed government reports to understand the discourse of vulnerability and searched for examples of any particular groups highlighted in government communications. This analysis was supplemented by secondary resources from UN agencies, NGOs, lawyers and academic scholarship. **In total, we consulted 377 legal and policy documents that were publicly available on the government’s websites.**

In our examination of the above-mentioned documents, we sought to answer a set of questions, some linked to the project's objectives and others that were identified during the course of our research. These questions were used to structure our analysis:

- How is 'vulnerability' defined/approached in the selected legal documents? What are the other terms used ('vulnerable', 'precarious', 'at risk', 'abused', etc.)?
- Do the documents provide an obligation to address vulnerabilities? If so, how?
- Is there a focus on the vulnerabilities of certain migrants and not others?
- Is there a focus on specific groups of migrants?
- What specific consequences attach to certain vulnerabilities? Is it more of an obligation to accommodate the person during a specific procedure or can it lead to a specific entitlement/status?
- Is it possible to identify Canadian measures that create or exacerbate vulnerability among migrants?

The case law analysis followed a similar methodology. Given the potentially high number of relevant cases and the challenges associated with conducting a qualitative analysis of these cases, the case law review was limited to those that were publicly available through the Lexis Advance Quicklaw database (not all cases are publicly reported). Of these, initially **over 1500 cases were identified** that contained the term "vulnerab" and/or "precar" and "Immigration and Refugee Protection Act". These cases were drawn from the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court, Provincial Courts, and the Immigration and Refugee Board of Canada (the Refugee Protection Division - RPD, the Refugee Appeal Division - RAD, the Immigration Division - ID, and the Immigration Appeal Division - IAD). A few cases were identified from other administrative tribunals, including the British Columbia Human Rights Tribunal, the Ontario Human Rights Tribunal, and the Law Society Tribunal (Ontario).

After removing cases where key terms were not referenced in the text of the decision and conducting an additional search for specific categories that were not found in initial key word search (e.g. human smuggling and trafficking, family sponsorship, statelessness), **884 cases were examined in detail**. The date range for the search was from June 2002 to June 2020 (June 2002 is the implementation date of the new immigration and refugee legislation - IRPA). The main questions addressed for our case law search were as follows:

- Who introduces the concept of vulnerability? (Is the concept raised by the decision-maker or by one of the parties and, if so, in what context?)
- How is vulnerability addressed by the decision-maker? (Is vulnerability considered and if so, how? What does the decision-maker use in terms of guidelines or law in order to make decisions pertaining to vulnerable persons?)
- For what purpose is vulnerability used? (Under what circumstances is a person considered to be vulnerable by a decision-maker? How much, and in what ways, do the guidelines influence the court cases?)

These questions guided our analysis and structured our research findings, to which we now turn.

III. FINDINGS

This part starts with an introduction providing key background information on available permanent protection mechanisms in Canada. This is followed by a presentation of the results in three parts. Part A provides an overall assessment of the concept of vulnerability in the relevant legal and policy documents. Part B engages with this concept with regards to specific categories of migrants to reveal some of the implications of the findings from Part A. Part C examines some of the consequences of governmental measures and how they create or contribute to the vulnerability experienced by migrants.

BRIEF INFORMATION ON KEY PERMANENT PROTECTION MECHANISMS AVAILABLE IN CANADA

As mentioned earlier, Canadian law provides pathways to permanent protection status and to temporary protection status. The focus of this introductory section is on the key permanent protection mechanisms currently available for vulnerable migrants in Canada. Temporary protection mechanisms are explained and analyzed in subsequent sections of this part.

1. Refugee protection

There are two main processes by which refugee claimants can make a claim for protection and have their claim determined by the Canadian government: either through Canada's overseas resettlement program or through in-Canada asylum procedure.

1.1 Process for persons making a protection claim abroad

The principles of Canada's commitment to refugee resettlement are affirmed in the objectives of the IRPA (s. 3(2) IRPA). More precisely, Canada's contemporary overseas resettlement program is intended for those for whom no other "durable solution" in a country other than Canada can be found (s. 139(1)d IRPR), who are currently outside of Canada, and who either:

- a) meet the narrower, 1951 Geneva Convention definition of a "refugee" (see s. 96 IRPA, "Convention Refugee Abroad," and s. 144 IRPR "Convention Refugee Abroad class") or
- b) are in circumstances considered similar to those of a Convention refugee (S. 146 IRPR, "Humanitarian-Protected Persons Abroad Class").

While the former must satisfy the definition of a Convention Refugee in s. 96 of the IRPA, the latter must be individuals who "have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries" ("country of asylum class" (s. 147 IRPR); s. 147 b IRPR)⁴.

⁴ This is the only class currently listed, although there were others in the past, for instance, the "designated classes framework, or the "source country class," the latter was eliminated in 2011. For an in-depth discussion, see (Batarseh, 2016; Labman, 2019, p. 251).

Canadian (IRCC) immigration and visa officers decide all resettlement cases based on a ‘referral’ system, which means that individuals cannot apply themselves directly to the IRCC. Applicants seeking protection through this pathway must be referred by the Office of the United Nations Commissioner for Refugees (UNHCR), by a private sponsor, or by a referral organization. Once applicants are referred, they undergo an interview with an IRCC officer as part of a preliminary assessment to ensure they meet the eligibility requirements (with the help of an interpreter, if needed). These requirements include a medical exam, security screening, and the “successful establishment”⁵ requirement.

Finally, all candidates for resettlement must either be financially self-supporting or have a sponsor. While Canada’s resettlement program for refugees continues to be primarily government-lead and sponsored (GSR), it is unique from an international perspective because it has been complemented by private (or ‘community’) sponsorship arrangements for refugees (PSR) since the mid-1970s (Bond & Kwadrans, 2019, p. 89). Indeed, overseas resettlement has increasingly shifted towards private resettlement in recent years to the extent that refugee advocates worry about a trend towards “privatization” of protection, a trend that may further disadvantage some migrants over others, namely those labelled as security risks – e.g. single, young men (Hyndman et al., 2016, p. 13). The shift towards private sponsorships, critics have noted, may also serve to marginalize more vulnerable refugees in favour of those who already have stronger connections to Canada (e.g., because they are identified for resettlement by family already in Canada) or because of their potential to establish themselves better after arrival in Canada). Studies consistently identify PSRs as being able to integrate more successfully than GSRs (e.g., IRCC, 2016).⁶

Once resettled refugees are landed in Canada, whether Government or privately sponsored, they are considered permanent residents and have full access to health care, education, social services, language classes, and are provided with a stipend for at least one year, which they can use to pay for housing and their living expenses (IRCC, 2016a).

1.2 Process for persons making a protection claim in Canada

Individuals can make a claim for refugee protection from a Port of Entry when they arrive in Canada, or at an inland office. Immigration officers must first decide whether their claim is eligible to be referred to the Immigration and Refugee Board of Canada (IRB). If an applicant’s claim is eligible, it will be sent to the Refugee Protection Division (RPD) of the IRB to start the claim for refugee protection process. There are seven grounds for ineligibility (IRPA, s.101):

- Refugee protection has already been conferred to the applicant under IRPA.
- The IRB already rejected a refugee claim from the applicant (this includes the situation where parents of the applicant applied for a refugee claim in the past (when the applicant was a minor and a dependent child)

⁵ Applicants must demonstrate that they are able to “successfully establish themselves in Canada” within a three-to-five-year time frame (IRPR, s. 139(1)g). Canada has repeatedly been criticized for this specific requirement over the years, but practitioners informally report that this requirement is currently not the obstacle to resettlement it once was. Canadian government communications also emphasize that Canada has shifted away from emphasizing the need to successfully establish oneself with the implementation of the IRPA in 2002 towards a broader emphasis on ‘protection’ (UNHCR, 2018a, p. 3; see also, Casasola, 2001). Regardless, the provision remains in the regulations.

⁶ The current scheme distinguishes between three types of PSRs: a) so called “groups of five” (composed of individuals), b) community sponsors and sponsorship agreement holders (SAHs), for example those connected to a faith-based organization, and c) joint-assistant sponsorships (JAS) between individuals and a group, following specific government criteria (for a limited number of cases). Separate rules apply for resettlement to Quebec throughout.

- There is a decision declaring a previous application inadmissible, abandoned or withdrawn.
- The applicant has, before making a claim for refugee protection in Canada, already made a claim for refugee protection in the United-States, Australia, New Zealand or the UK.
- The applicant has already been recognized as a Convention refugee by another country and can be sent or returned to that country.
- The applicant comes directly or indirectly to a Canadian land border from a country designated by the regulations (i.e., Canada-US Safe Third Country Agreement);⁷
- The applicant is found to be inadmissible on grounds of serious criminality (under ss. 35(1) c) & 101(2)(a)(b) of IRPA).

Once a claim is deemed eligible and has been referred to the IRB, claimants who initiated their refugee claims at a port of entry have 15 days thereafter to complete and submit their Basis of Claim Form (BOC Form) to the IRB (IRPA, s. 100(4); IRPR, s. 159.8(2)). Other claimants, who initiated their claims from within Canada, must give their completed BOC Form to the immigration officer who decides whether their claim is eligible (IRPA, s. 99(3.1); IRPR, s. 159.8 (1)). The BOC Form is a key document in the refugee claim as applicants are asked to give details about themselves (their identity, family, documents and travel history) and about their reasons for claiming refugee protection in Canada. At a later date, the RPD will send them a Notice to Appear for a Hearing document, which outlines their hearing date and other dates for abandonment of proceedings if deadlines are missed. While awaiting their refugee hearing, refugee claimants can apply for an open work permit (i.e., not restricted to a specific employer) and are provided with health care through the Interim Federal Health Program (IFHP) for refugees.

At the IRB hearing, a Refugee Protection Division (RPD) decision-maker (called a 'board member') will decide whether the applicant's claim should be granted or not. To do so, the Board will use the information in the BOC form, together with the applicant's testimony and other evidence. Refugee hearings are held in private and usually last two to four hours. Under IRPA, refugee protection is given to claimants who are found to be either a 'Convention Refugee' or a 'Person in need of Protection'. These terms are defined under Sections 96 and 97 of IRPA and together are known as the "consolidated grounds". Once a person is found to meet either definition, they are often called simply a 'Protected Person'. The RPD has the authority not only to determine whether someone is a Convention Refugee, but also to decide whether a person is a 'Person in need of Protection'. There is a single hearing at which all of these grounds will be considered. IRPA provides the following definitions for 'Convention Refugee' and "Person in need of Protection":

96. A **Convention refugee** is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

- a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
- b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97.(1) **A person in need of protection** is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally:

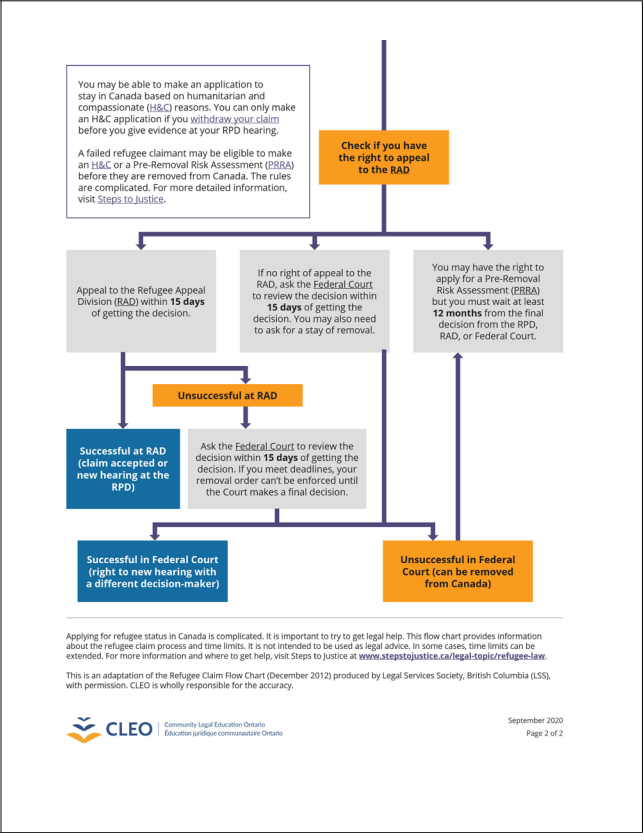
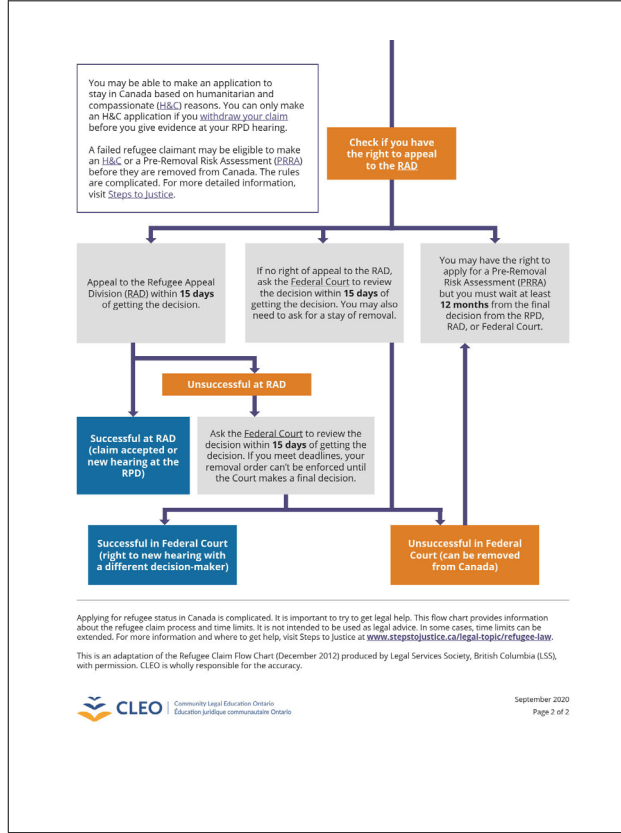
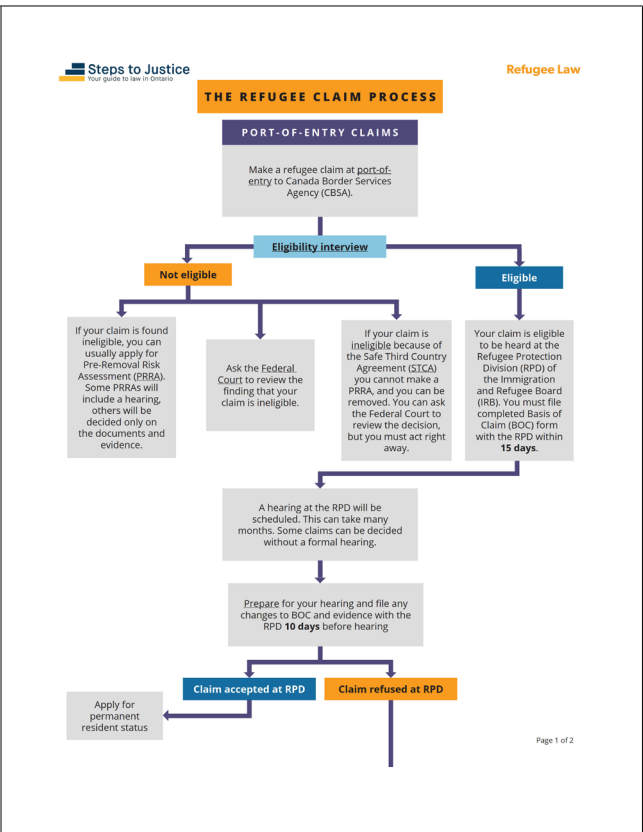
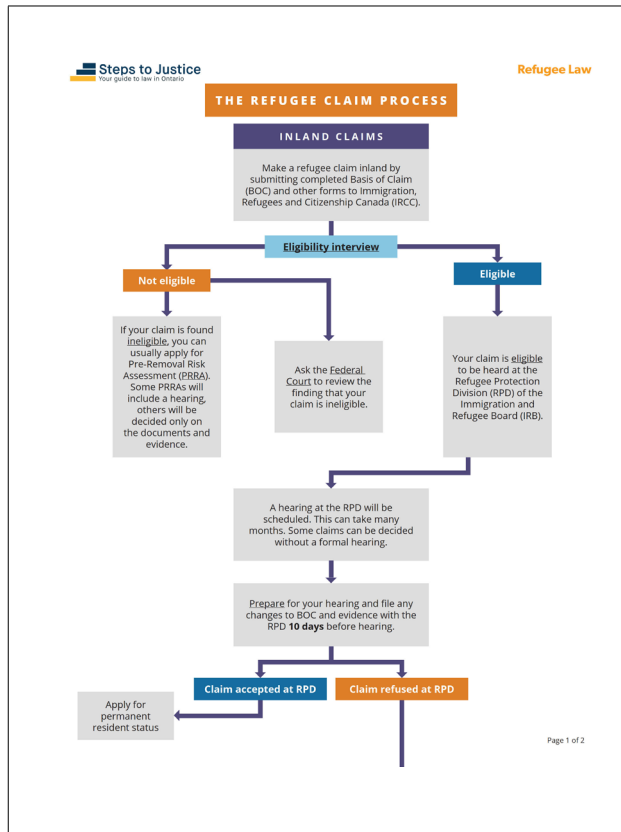
- c) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture;

or

- (d) to a risk to their life or to a risk of cruel and unusual treatment or punishment if:

- a. the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
- b. the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
- c. the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
- d. the risk is not caused by the inability of that country to provide adequate health or medical care.

If the refugee claim is accepted (i.e., the decision is positive), claimants are given protected person status and can immediately apply for permanent residency. If the refugee claim is rejected (i.e., the decision is negative), in most circumstances, claimants will have the right of appeal to the Refugee Appeal Division (RAD, IRPA s. 110(1)&(2), see Appendix F for more on this topic). What the RAD can consider in making their determination is somewhat restricted (e.g., they cannot consider new evidence that was not submitted to the RPD unless this evidence was not available to the appellant or did not exist at the time of the RPD hearing). The RAD hearing is generally a paper process, and only in certain circumstances will there be an oral hearing (*Refugee Appeal Division Rules*, SOR/2012-257). Those who do not have a right of appeal to the RAD have the option to seek leave to judicially review the RPD decision at the Federal Court. They may also apply for a Pre-Removal Risk Assessment (PRRA, IRPA ss. 112-116) or for permanent residency based on Humanitarian and Compassionate (H&C) considerations, discussed further below.



(Steps to Justice, 2020a & b)

2. Permanent residence status: Pre-Removal Risk Assessment (PRRA) applications, Humanitarian and Compassionate (H&C) applications, Public Policy (PP) considerations applications

Under s.112(1) IRPA, persons in Canada may apply for a Pre-Removal Risk Assessment if they are subject to a removal order that is in force. A PRRA is thus the last formal risk assessment given to individuals before they are removed from Canada. Notification of an entitlement to PRRA is done by a Canada Border Services Agency (CBSA) removals officer, who provides the candidate with a PRRA application kit. However, PRRA assessment is made by an IRCC officer (for more on this topic, see Atak et al., 2019). IRCC immigration officers assessing PRRA applications are required to determine whether individuals would be at risk of persecution or *at risk* of torture, or other cruel and unusual treatment or punishment, if returned to their country of origin. In the context of failed refugee claimants, they must also consider any new, credible, relevant, and material evidence of facts that might have affected the outcome of an appellant's refugee claim hearing had this evidence been presented. With the exception of refugee claimants coming from a designated 'safe third country' (i.e., the United States of America, see 112(2)(b) IRPA), in general, all other refused refugee claimants have a right to a PRRA, but not until one year has passed since the final determination of their refugee claim or previous PRRA application (IRPA 112(2)(b.1) & 112(2)(c)). This 'PRRA bar' raises serious concerns that persons could be removed to countries without having a timely risk assessment done, based on new evidence or new risks that may have arisen, or on evidence that only reasonably became available since their refugee hearing.⁸ If a PRRA is approved, the person will be granted protected person status and, in most cases, will be entitled to apply for permanent resident status.

Pursuant to s.25(1) IRPA, persons in Canada who do not qualify in any class may also apply for permanent residence if there are enough compelling humanitarian and compassionate grounds. H&C applications are for people who have lived in Canada with an uncertain status but who have still made Canada their home. Very specific criteria must be met in order to qualify, such as evidence that the applicant is sufficiently established in Canada, and whose circumstances are considered as outstanding and extraordinary enough to make an exemption from standard procedure (IRCC, 2016d & e, 2017b).⁹

Migrants may also be admitted as permanent residents under s.25.2 IRPA if the Minister considers that it is justified by public policy considerations (IRPA, s.25.2). Two interesting initiatives have been implemented in the last few years under s. 25.2. The "Temporary public policy for out-of-status construction workers in the Greater Toronto Area" has been put in place to "regularize individuals who have been contributing to the Canadian economy by filling regional labour market need" and to address "the vulnerable position of these workers due to their lack of immigration status" (IRCC, 2019j). The "Public Policy to reinstate an interim pathway for caregivers" has been developed as "a recognition of the significant contributions that these caregivers have made to Canadian families" as well as to "mitigate the unique vulnerabilities that in-Canada temporary foreign worker caregivers faced because they were not eligible under a current pathway to permanent residence" (IRCC, 2019d).

Sometimes, people submit both PRRA applications and H&C applications at the same time, however, the two applications should be assessed differently.¹⁰ Most applicants with a successful PRRA receive a protected person status and can apply for permanent residency (unless they are inadmissible to Canada for certain reasons, for example, they are considered a security risk. In that situation, they are not ordered to leave Canada, but CBSA can review the decision to let them remain in Canada). Successful H&C applicants

¹⁰ For more on this topic, see: *Ramsawak v Canada (Minister of Citizenship and Immigration)*, [2009] FC 636; *Paul v. Canada (Citizenship and Immigration)*, [2009] FC 1300; *Miyir v. Canada (Citizenship and Immigration)*, [2018] FC 73

are automatically granted permanent resident status. PRRA and H&C applications are assessed by IRCC, although recent legislation (Library of Parliament, 2019) indicates that the PRRA process is to be migrated to the IRB. As discussed below, Canada also grants temporary protection to certain people in need of protection, such as migrant workers experiencing abuse in the context of their employment or victims of human trafficking.

PART A– THE CONCEPT OF VULNERABILITY IN LEGAL AND POLICY DOCUMENTS

1. ‘Vulnerability’, an elusive concept rarely defined

The notion of ‘vulnerability’ is rarely defined in Canadian legal and policy documents, whether they are produced by the IRB, IRCC, or CBSA, and very few of these documents engage substantively with the concept of vulnerability. The case law review echoes these findings wherein, despite frequent use of this concept and related terms, the “vast majority of cases reviewed included no more than a single reference to ‘vulnerability’ (Purkey, 2020, p. 3). Additionally, there is no meaningful engagement with this concept or what this means to decision-makers, particularly at the RPD [Refugee Protection Division] and RAD [Refugee Appeal Division]¹¹ (*ibid*). In fact, in our examination of legal and policy documents, the terms ‘vulnerability’ and/or ‘vulnerable persons’ were only defined at four different occasions: 1) in the context of procedures before the IRB; 2) in the context of a PRRA hearing (IRCC); 3) in the context of the refugee eligibility examination (CBSA and IRCC–abroad and inland applications); and 4) in the context of immigration detention (CBSA). In these four cases, the definition of ‘vulnerability’ is strictly limited to a specific context, which makes it difficult to conclude that this also applies in the broader immigration or refugee law context. In all other legal and policy documents, this concept is either absent or it is used, without being defined, as a vague term attached to a broad group (e.g., the government’s “priority to address the vulnerability of women in the immigration context”) (IRCC, 2015c).

The few definitions of ‘vulnerability’ and/or ‘vulnerable persons’ used by the IRB, IRCC, and CBSA vary substantially in relation to these agencies’ different responsibilities and decision-making roles in specific contexts, which contributes to a lack of clarity and consistency around this concept. A key distinction can be found between how vulnerability is conceived for refugee claims abroad and for those made from within Canada¹². For instance, IRCC’s main responsibility is with resettling refugees from abroad and its conception of vulnerability, is closely linked that of the UNHCR and focuses on a heightened risk to physical safety. The definition of ‘vulnerable’ members of the ‘Convention Refugees Abroad Class’ (s. 138 of IRPR, see Appendix B) is found in UNHCR’s Resettlement Handbook (UNHCR, 2018c), and frequently, the IRCC and UNHCR use the language of vulnerability and urgency interchangeably.¹³ For its overseas operations, the IRCC employs the concept of vulnerability mainly as a tool to help identify cases for its resettlement categories. While Canada admits refugees for resettlement based on the criteria that they have demonstrated an ability to be self-sufficient within a few years (see Part II above), refugees with specific vulnerabilities who fit within Canada’s special resettlement categories are provided greater flexibility on this requirement to be self-sufficient. This creates some space for vulnerable refugees who may not have otherwise qualified for resettlement to Canada under the general category to become eligible.

In contrast, for in-Canada processes to determine refugee eligibility completed by either IRCC or CBSA, a vulnerable person is defined (in processing manuals) as an individual “who has significant difficulties coping with the refugee eligibility examination, due to a specific condition or circumstance” (IRCC, 2019e). Vulnerable persons are then divided into two subcategories: 1) individuals “who may be identified as vulnerable” (e.g., elderly); and 2) individuals “who may display less obvious symptoms of a vulnerability” (e.g., victims of trauma) (see Table 1 below). This categorization seeks to remind officers that some vulnerabilities are less obvious than others and “may not become apparent until the eligibility examination”, but it may also suggest the existence of an internal hierarchy where the first category of refugee claimants is more vulnerable than the second. For CBSA, vulnerability is linked to this agency’s responsibilities

around detention and removals, and the treatment of children, victims of human trafficking and persons with mental illness in these situations. For instance, in the context of immigration detention, CBSA defines a vulnerable person as an individual “for whom detention may cause particular hardship” (IRCC, 2020d, para 6.13). This definition focuses on the effects of detention on migrants, while the definition of vulnerability in the other contexts mostly exist to provide procedural accommodations to migrants, as is highlighted in Table 1.

In the context of subsequent refugee determination hearings, all four divisions of the IRB are required to follow the Chairperson Guidelines (159(1)(h) IRPA), Chairperson’s Guideline 8 is of particular relevance here since it provides a definition of vulnerable persons as “individuals whose ability to present their cases before the IRB is severely impaired” (IRB, 2012b, para 2.1), and it includes procedural accommodations that may be offered to claimants who have been identified as being vulnerable. However, Chairperson’s Guideline 8 is not intended to apply to any person who might be vulnerable in one way or another, but rather “to the most severe cases of vulnerability” (IRB, 2012b, para 2.3). This results in a situation whereby the IRB seems to accept that all refugee claimants are inherently vulnerable, but recognizes that only the ‘most vulnerable’ warrant special attention and leaves broad discretion to its members to decide which refugee claimants are more vulnerable than others. This distinction— between vulnerability that is common to refugee applicants and those whose vulnerability is so profound that it impedes their ability to present their claim— is further confirmed by the Federal Court.¹⁴ It should also be underlined that Chairperson’s Guideline 8 provides the basis upon which vulnerable claimants from certain groups (see Table 1 below) may warrant procedural accommodations before a Division. These restricted criteria have contradictory consequences, such as in a case where a member provided a claimant with procedural accommodations but “refused to identify her as vulnerable under Chairperson’s Guideline 8 for the sole reason that she was no more vulnerable than many other claimants” (Cleveland, 2008, p.122-123). In addition to the Vulnerable Persons Guideline, IRB members are also directed to follow other Chairperson Guidelines (including Guideline 4, 9 or 3) when hearing cases from individuals whose vulnerability is related to gender-based persecution, sexual orientation, gender identity, or age (minors).

¹⁴ For instance, as Anna Purkey notes, “the Federal Court in *Hurtado*... drew attention to the fact that the Guidelines distinguish between ‘ordinarily vulnerable refugee claimants and those who are severely vulnerable and therefore in need of particular accommodations. It goes on to cite the UNHCR Handbook and asserts that ‘a duty to accommodate above and beyond those [accommodations] already built into IRB processes is triggered only in cases of severe vulnerability where an applicant’s ability to present their cases is significantly and considerably impaired’” (Purkey, 2020, discussing *Hurtado v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ No 345).

Table 1: Examples of vulnerable persons at the IRB, IRCC and CBSA (as of June 2020)

Document	<i>Processing in-Canada claims for refugee protection</i> (IRCC, 2019e)	<i>Chairperson's Guideline 8</i> (IRB, 2012b)	<i>ENF 20: Detention</i> (IRCC, 2020d)
Agency	IRCC/CBSA	IRB	CBSA
Context	Refugee eligibility examination	Procedures before the IRB (RDP, RAD, ID or IAD)	Where detention may be warranted under the IRPA and the IRPR
Definition, intention and principles	<ul style="list-style-type: none"> ➤ Individuals who have significant difficulties coping with the refugee eligibility examination, due to a specific condition or circumstance. ➤ Provide procedural accommodation(s) or keep special considerations in mind during an examination. ➤ Includes persons who may be identified as vulnerable (1) or who may display less obvious symptoms of a vulnerability (2), which may not become apparent until the examination. 	<ul style="list-style-type: none"> ➤ Individuals whose ability to present their cases before the IRB is severely impaired. ➤ Provide procedural accommodation(s) for individuals who are identified as vulnerable persons by the IRB. ➤ Addresses difficulties that go beyond those that are common to most persons appearing before the IRB; applies to the more severe cases of vulnerability. 	<ul style="list-style-type: none"> ➤ Individuals for whom detention may cause a particular hardship. ➤ Officers should apply the principle that where there is no danger to the public, detention is to be avoided.
Exhaustive or non-exhaustive list?	Non-exhaustive list	Non-exhaustive list	Exhaustive list ¹⁵
Groups of people who may be considered vulnerable	X	Mentally ill	Persons with a suspected or known mental illness (includes suicidal and self-harmful)

15 The operational manual *ENF 34* on alternatives to detention suggests that this list may not be exhaustive (IRCC, 2018d). According to this document: "Vulnerable persons may include but are not limited to individuals with health, mental health or addiction issues; the elderly; minors; and victims of trafficking" (para 9).

	Unaccompanied minor children (1) and children in general (2)	Minors	Minors
	Elderly (1)	Elderly	X
X		Victims of torture	X
X		Survivors of genocide and crimes against humanity	X
	Victims of gender-based violence (2)	Women who have suffered gender-related persecution	X
X		Victims of persecution based on sexual orientation and gender identity	X
X		Close family members of a vulnerable person who have been affected by their loved one's condition	X
	Pregnant women (1)	X	Pregnant women and nursing mothers
	Individuals with physical disabilities or injuries (1)	X	Persons suffering from a severe medical condition or disability or suffering from restricted mobility ¹⁶
	Victims of trauma (2) ¹⁷	X	X
X		X	Victims of human trafficking

As Table 1 indicates, the groups of people who may be considered vulnerable vary substantially between the IRB, IRCC, and CBSA, which has important implications for migrants. This means, for example, that a vulnerable person's claim for refugee protection may not be processed in the same manner from the beginning to the end¹⁸. This also means that an individual from a specific group could be recognized as 'vulnerable' during a refugee eligibility examination completed by CBSA (e.g., pregnant woman), and yet not be identified as such by the RPD (IRB) during the evaluation of a claim for refugee protection.

Finally, other terms, such as 'at risk' and 'abused', are also used in legal/policy documents. The expression 'at risk' often appears where the subject is an unaccompanied child or a child accompanied by persons without legal custody or guardianship, meaning that such children may have been exploited or abducted and should be referred to the appropriate child protection agency (IRCC, 2019e). It is also frequently used in PRRA cases to describe individuals who may be "at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment" (IRCC, 2019h). The term 'abused' generally appears in reference to open work permit applicants, since 'vulnerable workers' on an employer-restricted work permit

¹⁶ "To assess if a person's medical condition, disability or restricted mobility is severe enough to cause a particular hardship, the officer must take into account the detention facility and available services. The officer must believe that the person cannot be properly managed within the detention facility in comparison with another detainee without the vulnerability (for instance, a person requires a walker but the detention facility does not offer this kind of service)" (IRCC, 2020d, para 6.13).

¹⁷ May include victims of torture and survivors of genocide, as well as other victims of persecution.

¹⁸ For more details on the in-Canada asylum system process flow, see Appendix D.

may apply to IRCC for an open work permit if they “are experiencing abuse, or [...] are at risk of abuse” (IRPR, s. 207.1(1); IRCC, 2020f), or in reference to victims of family violence, since individuals “abused” by their partner may be issued a Temporary Residency Permit (TRP) (IRCC, 2019i). In these cases, it seems that being ‘abused’ leads to a special temporary permit/status to ensure a person’s protection. This term is also used in IRCC policy documents to describe particularly ‘vulnerable’ groups for resettlement, such as women at risk, LGBTQ+ or certain groups of refugees, for instance Yazidi women (IRCC 2018a).

Surprisingly, the concept of ‘precarity’ does not appear often in the legal/policy documents reviewed and is generally only linked to temporary migrant workers, such as in annual IRCC departmental performance reports and in a report of the Standing Committee on Citizenship and Immigration, as the Committee recognized the “precarious situation of [migrant workers]” in Canada (CIMM, 2019, p.101). It is possible that the conjoining of ‘precarity’ with migrant workers is influenced by the use of this term in academic, non-profit and advocacy work on temporary migrant workers¹⁹.

As seen above, the definitions of ‘vulnerability’ or ‘vulnerable persons’ rely heavily on stereotypes of people who fit into this concept (e.g., the mentally ill, elderly, minors, or women who experienced gender-based violence). This finding is reiterated in the case law analysis, which finds that “vulnerability is mainly addressed...as a characteristic of the person, something that is ‘inherent’ or ‘personal’ to the individual. There is very little recognition of the structural vulnerability inherent in the process of protection-seeking and in those cases where it is recognized that vulnerability is frequently taken for granted” (Purkey, 2020, p. 4). This is problematic because it risks locating vulnerability within these persons due to their gender or age (for instance), rather than understanding how these intersectional identities engender (and can compound) different experiences of vulnerability (Kaga, 2020). Additionally, this categorization of vulnerability inevitably excludes persons who do not fit into these pre-determined categories, such as men, for example. This can clearly be seen in Chairperson’s Guideline 4, which advises on how to consider gender-related claims yet focuses entirely on women and fails to understand how men can also be persecuted because of their gender (IRB, 2018h).

2. Different consequences attached to the recognition of vulnerability for refugee claimants abroad and in-Canada

When an officer (IRCC or CBSA) or a decision-maker (IRB) recognizes that a refugee applicant is ‘vulnerable’, the process or the outcome may not always be impacted by this recognition. Generally, there are three categories of consequences flowing from the identification of an individual as ‘vulnerable’: 1) an impact on the assessment of the *substance* of a claim, which may lead to a specific entitlement/status; 2) an impact on the *process*, where procedural accommodations may or must be provided; 3) *no particular outcome*, but ‘special considerations’ that must be kept in mind by officers or decision-makers while reviewing a case.

In the first category of consequences, we find that, for refugees abroad, when there is recognition that a claimant falls under an ‘urgent’ or ‘vulnerable’ category, the particular consequences attached to this recognition is the increased likelihood of resettlement. This is a rare instance in which the recognition of vulnerability has an impact on the *substance* of the decision to resettle a refugee. For example, in some cases, (e.g., the women at risk program), this may result in not having to establish the ability to successful-

¹⁹ See for example, Goldring et al. (2009) who discuss the Live-in Caregiver Program as a “pathway to precarious status” (p.248; also, McLaughlin & Hennebry, 2013). For more on this topic, see also Nakache (2018).

ly resettle like persons within the normal priority level. In most cases, the identification of vulnerabilities is to accommodate refugees who may otherwise not qualify for resettlement, and for resettlement actors to arrange and match their needs to available resources and services. However, a notable factor for the Refugees Abroad Class– and in contrast to the in-Canada asylum procedures– is that there appears to be no clear guidelines for offering *procedural* accommodations based on identified vulnerabilities, aside from offering faster processing of some files and waiving some requirements. The purpose of identifying vulnerabilities allows these applicants to qualify under special programs, where they may not have normally qualified due to their particular resettlement needs. Yet, there appears to be little engagement with the question of how a specific vulnerability may impact an applicant’s ability to appear credible in their interviewing process, which could negatively affect their selection by an IRCC officer. These preliminary findings will be clarified in interviews with IRCC and CBSA officers and IRB decision-makers.

By comparison, in the legal and policy documents reviewed for in-land asylum procedures, the identification of a refugee claimant as ‘vulnerable’ does not mean that this person will automatically receive a specific status. This recognition may open the door for officers or decision-makers to provide *procedural* accommodations (e.g., priority processing of application, allowing a support person, or varying the order of questioning), but it does not *substantially* impact the outcome of the decision. As an example, the IRB Chairperson’s Guideline 8 aims to ensure that people who would have difficulty testifying are given appropriate accommodations²⁰ to do so, to ensure procedural fairness. However, the guide is clear that this recognition of vulnerability is not a compelling enough reason on its own to warrant protection²¹ (IRB, 2012b, section 5.2). This draws attention to two critical issues with Chairperson’s Guideline 8: first, the strict criteria that limits the recognition of vulnerability to the most ‘severely impaired’ (IRB, 2012b, para 2.1), and second, the contradiction between finding someone vulnerable enough to merit procedural accommodations, but that this finding should not automatically be considered by the member when making their decision. For instance, when claimants are recognized as vulnerable, but their overall claim is refused, the issue tends to turn on the credibility of the claimant (Purkey, 2020). However, there is little recognition that the trauma and PTSD experienced by a claimant who is identified as vulnerable will inevitably influence the claimant’s testimony (such as their ability to recall precise details). This is problematic as there is abundant evidence that persons who have experienced severe trauma have difficulty recalling precise details and that “they retain a very different and at times distorted-fragmented picture of the events” (Gojer & Ellis, 2014, p. 11; also, Cleveland, 2008).²²

In comparison, the SOGIE guideline 9 is very comprehensive and moves beyond stereotypes. It recognizes that the vulnerability LGBTQ claimants experience is not based on an innate quality but on the environment in which they live, which stem from cumulative discrimination, limited access to resources due to their LGBTQ identity, and the intersectionality of their other identities (religions, age, disability, race,

20 Pursuant to the Vulnerable Persons Guideline, the IRB “has a broad discretion to tailor procedures to meet the particular needs of a vulnerable person” (IRB, 2012b, para 4.2), including varying the order of questioning (RPD Rules, rule 10(5)); changing the location of a proceeding (RPD Rules, rule 53(4)(f)); changing the date or time of a proceeding (RPD Rules, rule 54(4)(a)).

21 For example, Chairperson’s Guideline 8 clearly states that while a person may be identified as vulnerable based on alleged underlying facts and evidence that are central to the determination of the case, “the identification of a person as vulnerable does not predispose a member to make a particular determination of the case on its merits” (IRB, 2012b, para 5.2).

22 In fact, even the IRB’s own instructions recognize this, such as the Training Manual on Victims of Torture, or in its Assessment of Credibility in Claims for Refugee Protection, which states: “The following factors or circumstances may influence the claimant’s ability to observe and recall events in the course of a hearing: nervousness caused by testifying before a tribunal; the claimant’s psychological condition (such as post-traumatic stress disorder) associated with traumas such as detention or torture; the claimant’s young age; cognitive difficulties and the passage of time; gender considerations; the claimant’s educational background and social position; and cultural factors. The RPD must therefore take into account all of these ‘unusual’ characteristics when assessing the credibility of the claimant’s or a witness’s evidence” (IRB, 2004, p. 83-84).

social class, etc.) (IRB, 2018f). Similarly, Guideline 4 provides IRB members with focused considerations for evidentiary matters, including the special problems women refugee claimants experience in demonstrating their claims. However, even the provisions in Chairperson’s Guideline 9 and 4 do not necessarily lead to a specific entitlement, nor do they provide a list of procedural accommodations that could benefit SOGIE or women refugee claimants. They mostly exist to ensure that decision-makers understand the unique challenges pertaining to these claimants and that they avoid any stereotypes or inappropriate assumptions in their decisions (IRB, 2018f, para 1.4).

Lastly, the third category, in which a recognition of (potential) vulnerability results only in ‘special considerations’, applies particularly to different considerations that IRCC officers must take when assessing PRRA and H&C cases or CBSA officers/ ID members when reviewing cases for detention. One notable example is the Best Interest of the Child (BIOC), which must be considered in any case involving a minor, but which may not warrant any specific consequence. These examples are discussed in more detail in the section below.

3. A wide discretionary power for officers (IRCC, CBSA) and members (IRB) in recognizing, addressing, and assessing vulnerability

Our research shows that officers (IRCC and CBSA) and members (IRB) have wide discretionary powers in recognizing, addressing, and assessing ‘vulnerability’. This is essential to render independent decisions on a case-by-case basis, but this may also result in inconsistencies for migrants in the assessment of their vulnerability.

3.1 Immigration, Refugees and Citizenship Canada (IRCC) and Canada Border Services Agency (CBSA)

Regarding IRCC and CBSA officers, the legal and policy documents reviewed provide no clear answer to the question of how they are expected to deal with vulnerable migrants. This is especially true in the program delivery instructions and operational manuals consulted, where it is not stated how ‘vulnerabilities’ should be accounted and on what criteria. Generally, in proceedings which include a hearing or an examination (e.g., refugee eligibility examination or PRRA), it is specified that officers may encounter vulnerable persons who might have to be treated differently. However, it is not clear who should be recognized as vulnerable and how an officer should assess such vulnerability. For instance, in the case of a PRRA hearing, the program delivery instructions state that IRCC officers should be aware that some applicants (“minors; vulnerable persons; women fearing gender-related persecution; SOGIE minorities”) may require procedural accommodations (IRCC, 2019g & 2020e). But it remains unclear what exactly this involves. In addition, officers do not have to follow a specific guideline once they recognize a person is vulnerable, and vulnerable persons do not have to make any type of formal application to be accommodated. This results in situations where procedural accommodations may be provided to some vulnerable claimants, but not to others. For example, in the case of the vulnerable worker open work permit (VWOWP), an interview may be required by IRCC officers if there are concerns related to the eligibility of migrant workers applying for an open work permit on the basis that they are experiencing abuse (or at risk of abuse) (IRCC, 2020o). When an interview is arranged, officers should consider that “[p]eople who are vulnerable may require special accommodations during the interview” (IRCC, 2020o). However, officers are not obliged (they are only “encouraged”) to consult the program delivery instructions on interview considerations, nor do the instructions indicate to officers how they should assess vulnerability among migrants, nor do they list accommodations that could be provided (IRCC, 2020f).

This lack of guidance also inevitably creates inconsistencies for migrants in the assessment of their vulnerability. Some officers might choose to address a specific situation, while others might not be as open-minded.

For example, vulnerable persons who make a claim for refugee protection in-land (responsibility of IRCC) and those who make a claim for refugee protection at a Port of Entry (responsibility of CBSA) may face inconsistent intake procedures. According to an independent review of the in-Canada asylum system, the result may be “that the port of entry [eligibility] examination by CBSA is more exhaustive than the intake interview of IRCC, giving rise to the concern that one process is too detailed and invasive for vulnerable persons presenting claims at the port and the other less rigorous and value-added” (Yeates, 2018, p. 61).

Another example is H&C applications. In a H&C application, migrants may base their requests on *any* relevant factors including – among others– how they are established or settled in Canada, their ties (including family ties) to Canada, their physical or mental health concerns, the impact on their lives of family violence they have experienced, or the best interests of any children directly affected by the H&C decision. However, the assessment by IRCC officers of the H&C application focuses on a *global* assessment of factors presented in the application. This means that IRCC officers have a lot of freedom in assessing these applications, and in prioritizing one factor over the other. Moreover, while a decision on a H&C application “must include an assessment of the best interests of any child directly affected by the decision” (IRCC, 2016e), whether they are in Canada or not, in Canadian immigration law, the BIOC assessment does not outweigh all other factors, as “the best interests of a child is only one of many important factors that the decision maker needs to consider when making an H&C decision that directly affects a child” (*ibid*). This means that the weight given to the different factors, including BIOC, is at the officer’s discretion. Finally, IRCC officers are not limited to assessing factors submitted by applicants and can consider and weigh any information before them including, for example, the applicant’s immigration history or criminal record. The flexibility provided by H&C applications allows the Canadian government to address the vulnerabilities of migrants and to provide legal protection to individuals who would otherwise fall through the cracks of the system. However, as outlined in program delivery instructions, “[t]he highly discretionary” decision-making process creates space for potentially subjective and unpredictable decisions (IRCC, 2017g).²³ Not surprisingly, a study comparing similar H&C applications (all applicants were self-reliant and living in Canada for over 4 years) from nationals of moratorium countries (the DRC, Zimbabwe and Rwanda) found wide variations in how officers applied the ‘significant degree of establishment’ factor, resulting in “a discretionary process that is inherently inconsistent and that leaves some people in long-term legal limbo” (Canadian Council for Refugees, 2006, p.2). Similarly, in *Kanthisamy v. Canada* (2015 SCC 61), the Supreme Court highlighted challenges with how the IRCC officer interpreted the H&C guidelines but also with the H&C factors themselves.²⁴

23 Additionally, there are concerns associated with the accessibility of H&C applications, including the expensive application fees and the fact that, in recent years, access to H&C has been increasingly restricted through legislative changes to IRPA in 2012 and 2019, among others (Canadian Council for Refugees, 2019; IRCC, 2020n).

24 In this case the judges found that the IRCC officer “failed to give sufficiently serious consideration to K’s youth, his mental health, and the evidence that he would suffer discrimination if he were returned to Sri Lanka. Instead, she took a segmented approach, assessing each factor to see whether it represented hardship that was ‘unusual and undeserved or disproportionate’”. Of note, since the *Kanthisamy* decision, hardship continues to be an important consideration in determining whether sufficient humanitarian and compassionate considerations exist to justify granting an exemption and/or permanent resident status, but there is no longer any hardship “test” for applicants under subsection 25(1): the determination of whether there are sufficient grounds to justify granting an H&C request must now include an *overall* assessment of hardship.

The same holds true for IRCC visa officers deciding on refugee applications for resettlement. Even if an applicant has been pre-screened and deemed a Convention refugee by UNHCR before being referred to IRCC, the visa officer is not obliged to accept their recommendation.²⁵ In all cases, however, officers need to provide reasons for their decision. Denials can be revisited, although, this is difficult in practice.

These above examples highlight the challenges of achieving consistent and fair decisions within discretionary immigration processes. They also illustrate the need to investigate whether immigration officers are provided with adequate and consistent training to assess the various factors of vulnerability and weigh them appropriately (CIMM, 2007; OAG, 2017; OAG, 2011).

3.2 Immigration and Refugee Board

While the IRB provides the clearest guiding principles to its decision-makers to address ‘vulnerabilities’, it also provides them with wide discretionary powers and a broad margin of action in recognizing, addressing, and assessing ‘vulnerability’ within existing proceedings. As it is stated in the Regulatory Impact Analysis Statement regarding the RPD and RAD Rules:

Because considerations of natural justice and fairness are always paramount, the IRB member is always able to exempt a party, when appropriate, from the specific requirement of any rule, with proper notice to parties. Members will remain alert to the specific challenges faced by these persons and will use their discretion to ensure that all those who appear before the IRB are provided with a fair and just resolution of their case (IRB, 2018e).

On the one hand, the Rules of the IRB’s four Divisions (RPD, RAD, ID and IAD) are binding and decision-makers must follow them, while at the same time emphasizing that “certain rules expressly grant discretion” (IRB, 2020a). On the other hand, the Chairperson’s Guidelines are not mandatory, but “decision-makers are expected to apply them or provide a reasoned justification for not doing so” (IRB, 2019d; see also IRB, 2003). This discretion is further supported by Canadian courts, which have ruled that, by itself, a decision-maker’s departure from or failure to apply the IRB Guidelines on vulnerable persons (Chairperson’s Guideline 8) does not necessarily constitute grounds for judicial review²⁶. Conversely, a person does not necessarily have to be identified as ‘vulnerable’ to be accommodated. Indeed, the board member must be sensitive to the barriers created by formal requirements and “waive or modify the requirements or time limits set out in the Rules, as appropriate” (IRB, 2012b, para 7.4). In practice, IRB members often do provide procedural accommodations even if they do not formally recognize the claimant as ‘vulnerable’ (Purkey, 2020; also, Cleveland, 2008, p.122-123).

²⁵ Upon assessing an applicant’s ‘well-founded fear of persecution’, the IRCC officer has the duty to identify if the applicant’s fear is reasonable on one or more grounds of persecution. Next, the immigration officer must consult any applicable international agreements and covenants such as the UNHCR Resettlement Handbook. The UNHCR Handbook’s Canada chapter offers further guidance to the immigration officer in cases where a person may need an expedited process due to their unique vulnerability (UNHCR, 2018a). They may then flag such vulnerable cases as ‘urgent cases’.

²⁶ *Hernandez v Canada (Minister of Citizenship and Immigration)*, [2009] FCJ No 109; *Higbogun v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ No 516; *Bolombu Ndomba v Canada (Minister of Citizenship and Immigration)*, [2014] FCJ No 188.

This results in a system where IRB members are provided with many guiding principles, but a lot of flexibility to address them in the context of each case²⁷. For example, in the case of the Guideline 4 for Women Refugee Claimants, IRB members are advised that “clear and convincing proof” may not necessarily be available in determining the quality of state protection and that more standard forms of evidence may be unavailable (i.e., statistical data in her country of origin) (IRB, 2018h, section C). Instead, members are directed to rely on claimant’s personal testimonies, or the testimonies of other women in similar situations. However, the varying standards of proof required for IRB members to make their decisions and the flexibility by which these members rely on this evidence, leaves open the possibility for uneven interpretations of refugees’ claims. As highlighted by the case law analysis, this can have “perverse” implications, particularly when only a narrow conception of vulnerability as ‘severely’ impaired is strictly applied (Purkey, 2020, p. 7). For example, Purkey notes that “in an application [at the Federal Court] for a stay of removal on Humanitarian and Compassionate grounds, a refugee claimant who was a diagnosed schizophrenic was found not to be a vulnerable person for the purposes of the Chairperson’s Guidelines²⁸” (*ibid*). The case law suggests that the IRB tends to apply strict interpretations of Chairperson’s Guideline 8, likely due to members’ disinclination towards setting legal precedents. For instance, by itself, an applicant’s old age has rarely been found to be a sufficient threshold for establishing vulnerability, though it might be in combination with other factors (illiteracy, abuse, etc.) (Purkey, 2020²⁹). Similarly, the Federal Court has ruled that the IRB is not obliged to investigate whether the claimant understands the status determination process even if said person has been diagnosed with mental illness, which further affirms decision-makers’ discretion to assess vulnerability³⁰.

IRB board members may also, “on [their] own initiative”, identify a person as vulnerable (see for example Refugee Protection Division Rules, rules 50 and 70(a)). However, case law suggests that the burden of raising vulnerability falls more on counsel³¹ and, while they may do so at any time during the process, they are advised to identify such issues early in hearings,³² and ideally at the first-instance (because decision-makers at the RAD tend to be more skeptical otherwise)³³ (Purkey, 2020). To apply for an application under the Rules of the Division, the claimant “must specify the nature of the vulnerability, the type of procedural accommodations sought and the rationale for the particular accommodations” (IRB, 2012b, para

27 This observation is corroborated by the case law research, which demonstrated that the Guidelines are not binding and thus a failure to apply them does not necessarily give rise to grounds for judicial review or appeal if there is no breach of procedural fairness (see Purkey, 2020; also, *Hernandez v Canada (Minister of Citizenship and Immigration)*, [2009] FCJ No 109; *Higbogun v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ No 516; *Bolombu Ndomba v Canada (Minister of Citizenship and Immigration)*, [2014] FCJ No 188.

28 *Gardner v Canada (Minister of Citizenship and Immigration)*, [2008] IADD No 767.

29 See: *Duversin v. Canada (Minister of Citizenship and Immigration)*, [2018] FCJ No 466; RAD File No MB7-21421, [2018] RADD No 333. See also: In *El Romhaine v. Canada (Minister of Citizenship and Immigration)*, [2011] FCJ No 693, the claimant was found to be vulnerable not just because of her old age but because of her age in conjunction with her illiteracy and her dependence on a son who was abusing her. In *Kandiah v. Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No 1817, old age was a critical factor but exacerbated by the claimant’s lack of education. In *Nwaeme v. Canada (Minister of Citizenship and Immigration)*, [2017] FCJ No 757, the claimant was found to be vulnerable not just because of her age but because she was an unmarried, childless woman with mental health problems.

30 *Hillary v. Canada (Citizenship and Immigration)*, [2011] 4 FCR 440.

31 According to Chairperson’s Guideline 8, the “[c]ounsel for a person who wishes to be identified as a vulnerable person must make an application under the Rules of the Division” (IRB, 2012b, para 7.4) (RPD rule 50; RAD rule 35; ID rule 38; IAD rule 43). Although IRB members and the counsel for the Minister may identify vulnerabilities, the job mostly rests on the vulnerable person’s counsel, as he/she “is best placed to bring the vulnerability to the attention of the IRB” (IRB, 2012b, para 7.3).

32 *Gilles v. Canada (Minister of Citizenship and Immigration)*, [2011] FCJ No 6; RAD File No MB5-02903, [2016] RADD No 74; RAD File No TB4-04948, [2014] RADD No 586.

33 See e.g., *Shmagin v. Canada (Minister of Citizenship and Immigration)*, [2010] FCJ No 1345: The applicant’s “supposed vulnerability was never raised at the hearing to justify the taking of special measures...It is not enough to raise the applicant’s vulnerability after the fact and age is not in itself a sufficient ground for concluding that he was vulnerable and that that vulnerability should be considered when assessing testimony.”

7.4). Counsel may provide evidence such as a medical, psychiatric, psychological or other expert report to demonstrate that an individual is in fact vulnerable (IRB, 2012b, para 8.1). However, the IRB will not pay for such report and it can be very expensive (IRB, 2012b, para 8.2; Gojer & Ellis, 2014, 2014). Moreover, decision-makers are encouraged to be critical of such expert reports because of misconceptions that some claimants could ‘trick’ medical professionals into giving a favourable diagnosis (*ibid*)³⁴. Thus, an expert report is not determinative but rather is “one element among many...and it is up to the decision-maker to assess the evidence provided and make a determination as to whether, taking into account all of the circumstances, the claimant should be granted ‘vulnerable person’ status” (Purkey, 2020, p. 11). Thus, “[t]he absence of expert evidence does not necessarily lead to a negative inference about whether the person is in fact vulnerable”, but neither does the existence of an expert report assure a recognition of a claimant’s vulnerability (IRB, 2012b, para 8.6). This raises questions about what exactly leads a member to find that a claimant is vulnerable. A related problem is that some claimants do not have counsel and are self-represented (the reasons for this are discussed in part C), raising the question of whether self-represented claimants who are vulnerable are even aware of the Chairperson’s Guideline 8 and able to use it effectively to obtain procedural accommodations. This may explain why, in practice, very few claimants apply for considerations under Chairperson’s Guideline 8³⁵.

The flexibility and discretion that IRB decision-makers enjoy necessarily draws our attention to what kind of training and oversight these members receive in order to ensure that these procedures are fair and consistent for all applicants. While training offered at the IRB appears to be quite exhaustive (see Appendix G for more detail), questions remain concerning the monitoring of decision-makers. At the RPD, “[n]ew members are monitored and evaluated during the training period and during their first year as a member” (CIMM, 2018, p. 29). After that period, members may receive specific training as a result of a formal complaint made against them, but they are not evaluated to ensure that the training has been properly assimilated (CIMM, 2018, p. 39). Therefore, “in the absence of an evaluation after such training, the subsequent claimants in front of the same decision-maker could find themselves at the mercy of whether or not the training was effective” (*ibid*). This is problematic, since decision-makers may be rendering decisions with respect to vulnerable persons that are inconsistent. And in fact, a number of studies have illustrated the great variations in refugee recognition rates across board members, which stand regardless of the claimant’s country of origin (Rehaag, 2018; Grant & Rehaag, 2015). While these varying rates have improved dramatically since recent reforms to the IRB, around the appointment of members and the creation of RAD, important inconsistencies between members persist. Providing ongoing training and monitoring of decision-making is thus essential to ensure that all cases receive the same considerations of natural justice and fairness. This is especially important knowing that “hearings can lead to re-traumatization of vulnerable claimants” (CIMM, 2018, p. 33).

34 This problem goes beyond the IRB. In *Kanthisamy v. Canada*, the judges found that “while the Officer did not dispute the psychological report presented, she found that the medical opinion rested mainly on hearsay because the psychologist was not a witness to the events that led to the anxiety experience by K. This disregards the unavoidable reality that psychological reports like the one in this case will necessarily be based to some degree on hearsay...To suggest that applicants for relief on humanitarian and compassionate grounds may only file expert reports from professionals who have witnessed the facts or events underlying their findings, is unrealistic and results in the absence of significant evidence”. *Kanthisamy v. Canada* (Citizenship and Immigration), 2015 SCC 61, [2015] 3 S.C.R. 909.

35 For instance, in an evaluation of the quality of decision-making at the RPD, only 3 out of the 24 cases studied used Chairperson’s Guideline 8 (IRB, 2018c), and the RAD (IRB, 2019h) and IAD evaluations (IRB, 2019e) could not measure the indicator for Chairperson’s Guideline 8 (member accommodates needs of vulnerable participants) because there were not enough cases to draw any conclusions from.

Recently, in 2017, the IRB's SOGIE Guideline 9 came into force. Persons with diverse SOGIE "are individuals with, or who are perceived to have, a sexual orientation or gender identity or expression that does not conform to socially accepted norms. Such individuals include, but are not limited to, lesbians, gay men, and bisexual, trans, intersex and queer individuals" (IRB, 2018f, para 2.1). As highlighted earlier, this Guideline "takes admirable steps towards improving claim assessment and offers a model for practitioners elsewhere" (Dustin & Ferreira, 2017, p. 80). It is considered an innovation from Canada in a context where concerns about refugee claims based on SOGIE have been common reasons for refusing refugee protection around the world (*ibid*). By insisting that "[d]ecision-makers should not rely on stereotypes or inappropriate assumptions in adjudicating cases involving SOGIE", Chairperson's Guideline 9 provides a common basis for all IRB members to promote sensitivity in their decision-making (IRB, 2018f, para 6.1). The training on Chairperson's Guideline 9 includes legal components and practical skills of how to question claimants for all IRB members, as well as the further training incorporated within each Division, which gives decision-makers appropriate tools for adjudicating cases involving SOGIE. Additionally, the first evaluation of how RAD members are applying SOGIE in practice found encouraging results, including that "most decisions avoided stereotypes or inappropriate assumptions when making findings. Most decisions also considered cultural, psychological or other barriers to explain inconsistencies in the evidence. The RAD generally not only avoided stereotypes and inappropriate assumptions in its decisions but found errors in the RPD for precisely these actions" (IRB, 2019e, para 2.1). Moreover, cases where RAD members did use stereotypes or failed to adequately apply SOGIE in their findings were flagged in the report and the IRB then acknowledged this, spoke with those particular members, and said it would undertake more training on SOGIE (IRB, 2020b, p. 8). At this stage, it is unclear why the SOGIE Guideline leads to a more comprehensive understanding of a migrants's vulnerability compared with Chairperson's Guideline 8— a question that will be addressed in future interviews. However, a key factor may be found in the stark contrast between how vulnerability is framed in these two guidelines (Chairperson's Guideline 8, relying heavily on simplistic categories of vulnerability vs. Chairperson's Guideline 9 emphasizing avoiding stereotypes and examining the circumstances of the claimant). Interestingly, our case law search also suggests that administrative appeals or judicial reviews based on a failure to apply Guideline 4 are more likely to be successful than those based on a failure to apply Chairperson's Guideline 8³⁶. This could be because, in contrast with Chairperson's Guideline 8, Guideline 4 deals more with substantive issues that may have implications for credibility assessment—though neither guideline is designed to tip the scales either way in terms of credibility assessment (IRB, 2018h; Purkey, 2020, p. 13). This hypothesis will have to be verified at the interview stage.

The above discussion raises numerous questions as to how decision-makers use their powers in practice, questions that we aim to answer in the next research phase through interviews with these decision-makers.

4. Impact of COVID-19 on vulnerable migrants

As of December 2020, a number of measures had been implemented to address the specific challenges experienced by vulnerable migrants in the context of the COVID-19 pandemic. While many of these measures are welcome and address some of the issues identified in this report, it is important to note that they are only temporary and must be renewed every few months based on the evolving COVID-19 situation. These measures are highlighted below, some of which are discussed in greater detail in part C.

³⁶ E.g., *Ndjizera v. Canada (Minister of Citizenship and Immigration)*, [2013] FCJ No 521; *Abbasova v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ No 40; *Bibby-Jacobs v Canada (Minister of Citizenship and Immigration)*, [2012] FCJ No 1258.

» *Flexibility regarding the evaluation of applications made to identify a person as vulnerable under Chairperson's Guideline 8 (IRB)*

Across the IRB's four Divisions, the Board recognizes the necessity to "be flexible with respect to the application of its rules where the parties have difficulty complying with them due to the COVID-19 situation" (Wex, 2020). It is especially true at the RPD, where the Division "will consider the difficulties a person faces in obtaining evidence to support an application to be declared a vulnerable person pursuant to *Chairperson's Guideline 8*" (IRB, 2020c). For example, vulnerable persons should not be penalized if they are not able to obtain expert evidence supporting their vulnerability.

» *Release of vulnerable immigration detainees (CBSA)*

Amid the COVID-19 pandemic, vulnerable persons who were previously detained have been released because of the risks posed by the virus. According to CBSA, the number of immigration detainees has drastically dropped and this trend continues to this day (Browne, 2020; CBC, 2020). Detention review decisions from the ID also indicate that the COVID-19 situation "is being factored into determining whether or not to release someone from immigration detention" (*ibid*). Indeed, prior to the outbreak of COVID-19, ID members generally refused to hear arguments related to conditions of detention, and rarely ordered release on that basis. With the onset of the pandemic, however, ID members have not only entertained arguments identifying COVID-19 as a condition of detention, but more significantly, have explicitly relied on this condition as a basis for release (Arbel & Joeck, 2020).

» *New grounds for vulnerable migrant workers to apply for an open work permit (IRCC)*

Migrant workers on a closed-work permit (i.e., an employer-specific work permit) may apply directly to IRCC for an open work permit if they are victims of abuse in the context of their employment in Canada, whether it is physical, sexual, psychological or financial abuse (IRPR, s.196.2). IRCC's program delivery instructions now recognize that in the context of the COVID-19 pandemic, an employer's violation of certain working conditions (e.g., forced to work when showing symptoms of COVID-19, not being paid during mandatory quarantine period, not being provided with adequate tools to implement social distancing protocols, etc.) are sufficient grounds for an individual to apply for an open work permit under s.207.1(1) IRPR (IRCC, 2020f).

» *Temporary extension of time limit for filing a Basis of Claim*

Previously, the deadline for submitting a Basis of Claim (BOC) form with the RPD was 15 days, but due to COVID-19 this has been extended to 30 days for claimants who submitted a refugee claim on or after March 15, 2020 (IRCC, 2020j).

» *Temporary extension for filing an appeal to RAD*

This practice notice extends the deadline for submitting an appeal to 45 days after the appellant has received the written reasons from RPD for their refused refugee claim (IRCC, 2020l). Normally, the deadline to file is 30 days. This extension is due to the difficulty appellants may face in preparing evidence and documentation for their appeal due to COVID-19, as well as a broader recognition that 30 days is insufficient for appellants to prepare and perfect their appeals.

» *Temporary public policy changes for sponsoring of parents and grandparents*

Recognized refugees and protected persons (who have permanent residency or citizenship) can sponsor their spouse and/or dependents with few restrictions (no medical inadmissibility, no minimum income, etc.). However, in order to sponsor their parents or grandparents they must apply through a specific family sponsorship program with restrictive rules. This includes a minimum necessary income plus 30% and a commitment to sponsor the parent/grandparents for 20 years (IRCC, 2019c). In recognition of the financial difficulties that families are currently experiencing due to COVID-19, a temporary public policy has been issued that maintains the minimum necessary income requirement but eliminates the additional 30% for this year (IRCC, 2020m).

It is also worth highlighting a measure that was announced by the federal government in August 2020 that will provide a temporary pathway to permanent residency for refugee claimants (and their family members) working in the health-care sector during the COVID-19 pandemic (IRCC, 2020k). At the time of writing this report, the government had not yet developed the application process and it was not possible to apply. It is therefore not clear what evidence applicants will need to submit. It is stated in the government's news release that only individuals "working on the front lines providing direct care to patients in health-care institutions will be able to apply" (IRCC, 2020j), which excludes a large number of migrants working in other essential services. This exclusion seems to contradict the initial intention of the program, where it is emphasized that "[t]his approach recognizes those with precarious immigration status who are filling an urgent need and putting their own lives at risk to care for others in Canada" (IRCC, 2020j).

Lastly, while all the measures noted above are important responses to the COVID-19 pandemic, the overall impact of this situation on Canada's protection regime cannot be overlooked. All three agencies (in particular the IRB and IRCC) had to halt a large portion of their operations, and many cases (asylum claims, PRRA applications, H&C considerations) and appeals were put on hold for months. Additionally, the border with the USA remains closed, except for essential travel, meaning that many migrants who were making their way to Canada are not able to cross at formal border entry-points. The impact that this situation has had on vulnerable migrants is currently unknown and will be explored in our interviews with migrants themselves.

PART B – ‘VULNERABILITY’ IN SPECIFIC CONTEXTS

This section focuses on some of the implications of the findings from part A for specific categories of migrants.

1. Statelessness³⁷ as vulnerability in the Canadian context

The stateless population in Canada is a diverse cohort including refugee claimants, permanent and temporary residents, people without migration status, and second-generation children born abroad. While Canada has ratified one of the key international accords on statelessness (the 1961 Convention on the Reduction of Statelessness), there remains a significant gap between international law and Canadian practice. In Canadian law, stateless persons fall within the broad category of ‘foreign nationals’, which includes anyone who is not a Canadian citizen or a permanent resident (IRPA, s. 2(1)). Neither the IRPA and its regulations nor the *Citizenship Act* and its regulations define statelessness (Kane, 2019, p. 4, referencing Erauw, 2015, p. 8). There is no particular mechanism for identification of statelessness or specific policies for providing permanent protection to these persons. As a result, their experience in gaining legal status is marked by highly discretionary decision-making processes.

While there is no definition of stateless in Canadian law, in 2017, along with a number of other reforms, the IRCC included a definition of statelessness in its Operational Bulletin³⁸ and added to its guidelines on humanitarian and compassionate (H&C) applications information for establishing proof of statelessness, including what documentation and correspondence serve as evidence (IRCC, 2017i). In addition, statelessness was added in 2015 (through Bill C-6) as a ground that can be considered for a discretionary grant of citizenship (*Citizenship Act*, subs. 5(4)). This is relevant and important because, before the only mechanisms to legalize status in Canada for stateless persons was through an application for permanent residence on humanitarian and compassionate (H&C) grounds (IRPA, s. 25(1)). Moreover, adding statelessness to the scope of this potential remedy is an implicit acknowledgement of the uniquely vulnerable status of stateless people. However, decisions under subs. 5(4) are discretionary and citizenship under this subsection is only granted in very exceptional cases. Between 2015 and 2017, for instance, IRCC received only three applications for a discretionary grant of citizenship based on statelessness and, as of 2017, none of these applications had been granted. The government explained that these applications were rejected because applicants were not able to successfully establish their “special and unusual hardship” or that they were stateless (Kane, 2019, p 14). Given the limited data available on stateless persons³⁹, these numbers indicate that the protection needs of stateless persons may not be met by current practices.

In our case law review, we found 14 cases involving stateless persons where ‘vulnerability’ was mentioned/invoked. Those cases involved appeals of refugee status determination (at the RAD), judicial reviews of H&C claims, findings of inadmissibility and removal orders. These cases reveal that “the vulnerability associated with statelessness seems generally to be recognized by the decision-makers; [however,] it is not consistently a determining factor in the cases” (Purkey, 2020, p. 17-18). In *Kalil v. Canada*, for example, the claimant’s argument that a determination that she was inadmissible to Canada ‘perpetuates and compounds her vulnerability’ was accepted in the first instance but rejected on appeal.⁴⁰ However, in *Abeleira v. Canada*, “the Federal Court twice found in favour of the claimant, noting that in assessing

³⁷ In international law a person is “stateless” if no state considers him or her to be a citizen under the “operation of its law” (UNHCR, 1954).

⁴⁰ *Khalil v Canada (Minister of Public Safety and Emergency Preparedness)*, [2014] FCJ No 964

his application on Humanitarian and Compassionate grounds, the immigration officer failed to examine the claimant's status as a stateless person and 'the indefinitely legal limbo he is in in Canada as there is no country to which he can be removed'⁴¹ (Purkey, 2020, p. 17-18). This points to a gap created by the lack of clear definitions, directives, and legal obligations to provide protection to this group of migrants, as well as a lack of understanding of how living without legal status can create or exacerbate the vulnerabilities experienced by stateless persons, both of which open the doors for uneven decision-making processes.

Lastly, because stateless persons are considered 'foreign nationals' who have not secured a legal status in Canada, they are subject to removal and often to immigration-related detention. They are particularly vulnerable in this context, because of the inability to prove their identity, or obtain travel documents that would allow for their removal. An updated review of the CBSA's statistics on detention (by grounds for detention, 2018-2019 fiscal year) reiterates findings from other studies: that the large majority of immigration-related detainees were detained (a) either because they were considered unlikely to appear "for an examination, an admissibility hearing, removal from Canada or a proceeding that could lead to their removal"; or (b) they could not prove their identity (CBSA, 2019, p. 54). Kane (2019) suggests that stateless people would most likely be detained under these grounds, which is particularly troubling given the issues on the correlation between immigration detention and migrant vulnerability (see below).

2. Immigration detention: a paradoxical understanding of 'vulnerability'

In the immigration detention context, a vulnerable person "is defined as a person for whom detention may cause particular hardship" (IRCC, 2020d, para 6.13). It includes pregnant women and nursing mothers, minors, persons suffering from a severe medical condition or disability, persons suffering from severe mobility, persons with a suspected or known mental illness or suicidal persons, and victims of human trafficking (IRCC, 2020d). In addition, the IRB's detention guidelines (its ID is responsible for detention reviews) further mentions the elderly, individuals with diverse sexual orientation and gender identity and expression, survivors of torture, survivors of genocide and crimes against humanity, survivors of gender-related violence, and survivors of violence based on sexual orientation and gender identity (IRB, 2010). When considering the detention of a vulnerable person, "officers should apply the principle that where there is no danger to the public, detention is to be avoided" (IRCC, 2020d, p.26). The operational manual ENF 34 reiterates to officers that "detention has a greater impact on vulnerable persons, and detention should be minimized to the extent possible for such groups" (IRCC, 2018d, para 9). This is especially true for minors, who shall be detained only as a measure of last resort (IRPA, s.60).

In recent years, the CBSA has made major positive changes to their immigration detention practices and procedures, particularly regarding the detention of minors⁴². Following a Ministerial Direction issued by the Minister of PSEP in November 2017 (PSEP, 2017a), the CBSA released a National Directive for the Detention or Housing of Minors for its officers (CBSA, 2017). The elaboration of this Directive rests on the idea that children are particularly vulnerable and that their detention must be a measure of last resort (IRPA, s. 60), after all Alternatives to Detention (ATDs) have been considered; in fact, the first objective of this Directive is "to stop detaining and housing minors and family separation, except in extremely limited

41 *Abeira v Canada (Minister of Citizenship and Immigration)*, [2015] FCJ No 1435; *Abeira v Canada (Minister of Immigration, Refugees and Citizenship)*, [2017] FCJ No 1039.

42 For example, ENF 20 was updated to include additional information on vulnerable groups, mental illness, minors and the addition of a detention checklist (IRCC, 2020d, p. 4-6). Additionally, the CBSA's annual Departmental reports emphasize their efforts to improve detention procedures, alternatives to detention (including establishing a community release program) and a focus on BIOC and minors (CBSA, 2018 & 2019b).

circumstances” (CBSA, 2017, section 4). This is clearly a major shift by the Canadian government, as the detention and housing of children was much more common in the previous years, despite the known detrimental effects on their mental, physical and emotional health (on this subject, see Ward & Raphael, 2019; also, Kronick et al., 2017). Moreover, for detention decisions and reviews that impact minors, both the CBSA and ID (IRB) must take the BIOC into “primary consideration” and provide explanations in their written decisions as to how they did so⁴³ (CBSA, 2017, section 7.1.; also, IRB, 2019c, para 4.1.5).

Progress regarding the detention of children has been made, but important concerns remain regarding detention of individuals with mental health issues. More particularly, there seems to be a contradictory understanding of ‘vulnerability’ in operational manuals intended for CBSA officers regarding such individuals (IRCC, 2020d, para 6.13). Indeed, detention is usually warranted if alternatives to detention may not sufficiently mitigate the risk posed by an individual (IRCC, 2018d, para 8.4). For instance, operational procedure *ENF 20* highlights that “[t]here may be reasonable grounds for thinking that an individual suffering from an untreated mental illness is a danger to the public” (IRCC, 2020d, para 6.4), and *ENF 34* underlines that “[t]he risk posed by individuals with mental health concerns depends largely on the available treatment options and the individual’s ability and willingness to participate in the treatment” (IRCC, 2018d, para 8.2.4). Thus, during the risk identification process, a vulnerable person could be perceived as posing more of a risk *because* of their vulnerability. Moreover, an external audit of IRB’s detention review hearings reveals that immigration detainees with mental health issues tend to stay longer in detention because ID board members link their mental illness with a greater likelihood of criminality and/or violence, and then use these detainees’ mental state as grounds for their continued detention (CRCS, 2018; IRB, 2018i).

This complex and paradoxical understanding of ‘vulnerability’ in the immigration detention context results in a somewhat vicious circle. It is recognized that vulnerable individuals should not be detained because of the detrimental effects that detention has on them. At the same time, individuals with mental health issues, which are explicitly categorized as ‘vulnerable’ in the operational manuals, are disadvantaged in the risk analysis, which may lead to their detention, and the continuation of their detention. This is in addition to the many problems that have long persisted in the area of immigration detention, including lack of legal representation among immigration detainees and a lack of access to physical and mental health care (Canadian Red Cross Society, 2018; Nakache, 2011)⁴⁴.

43 Even though the BIOC are a primary consideration in all cases where a child is directly affected by a detention decision, it remains that the BIOC may “be outweighed by other significant considerations such as public safety...or national security” (CBSA, 2017, section 6.4).

44 Canadian Red Cross Society (CRCS) are contracted to provide independent annual immigration detention reviews for CBSA and this is the first time CBSA has publicly released this report. The issues found include: that detainees who are held in correctional facilities are treated similarly to, and living among, inmates; detainees do not know their rights and have difficulty accessing legal support and other services (e.g., phone services) including when they have detention reviews; detainees have inadequate access to medical and mental health care (with “perceived delays in receiving care [that] are due to the high volume of the general criminal detained population requiring medical assistance”) and staff who are not used to dealing with the particular needs of refugees; they have limited time outdoors or conducting recreational activities; face challenges remaining in contact with family due to the location of the correctional facility (far from relatives, limited visitation hours) and inability to call long-distance (for calling family internationally); and correctional officers and medical staff have insufficient training on how to address the particular needs of these detainees and recognize when they need support (Canadian Red Cross Society, 2018, p.8).

3. Convention refugees abroad: limited recourses for seeking legal redress against negative resettlement decisions

The legal and policy documents regarding refugees selected abroad are some of the most explicit in their use of the concept of vulnerability, and there are clearly efforts made to identify and resettle the most vulnerable ones. For instance, one of IRCC's operation manuals states that "refugee applications classified as urgent or vulnerable should...receive priority processing" (IRCC, 2017f, p. 17). The government of Canada even has a special program to proactively find a sponsor for so called "special needs"⁴⁵ cases for private sponsorship, under s. 157(1) and (2) IRPR. However, two issues come to light from the research. First, the concept of vulnerability falls largely on stereotypical ideas of who is vulnerable (women at risk, children, LGBTQ+, victims of torture, victims of genocide, elderly refugees) and appears to be partly influenced by government priorities (CIMM 2007 & 2016; IRCC, 2018 & 2019). This over-reliance on pre-determined ideas of 'vulnerability' may neglect the particular vulnerabilities experienced by refugees who do not fit into these neat categories. Second, it is difficult to seek legal redress against resettlement questions made by Canadian (IRCC) visa officers abroad. This is because there is no legal right to resettlement (and no legal right to claim refugee status overseas); therefore, there is also no right to a reassessment at either the administrative or the judicial level. Additionally, while UNHCR can request that refusals by visa officers be reconsidered (UNHCR, 2018a, s. 6.5; Labman, 2019, p. 69),⁴⁶ it is not clear under what conditions such requests are entertained, as doing so is a discretionary act, albeit subject to a duty of fairness. The wide scope of officer discretion was confirmed by the Federal Court (e.g., *Zakia Balkhi and others v MCI* [13 May 2014], IMM-670-13 (Fed Ct)).⁴⁷ The only other possibility for recourse is a formal (leave) request for judicial review from the Federal Court. This is an important contrast to the process for an unsuccessful inland refugee claim, where an option for reassessment on the substance of the claim (before the IRB's RAD division) has existed since 2012.

4. Pre-Removal Risk Assessment (PRRA)⁴⁸: a safety net for the vulnerable?

As discussed earlier (Part A), it is not always clear in program delivery instructions intended for CBSA or IRCC officers who should be recognized as a vulnerable migrant and how an officer should assess such vulnerability. The PRRA oral hearing process illustrates this point. Although the PRRA analysis is primarily a paper-based process, an oral hearing may be required in certain circumstances⁴⁹. When PRRA officers

45 "Special needs" means that a person has greater need of settlement assistance than other applicants for protection abroad owing to personal circumstances, including

- (a) a large number of family members;
- (b) trauma resulting from violence or torture;
- (c) medical disabilities; and
- (d) the effects of systemic discrimination" (IRPR, 2002)

46 Labman (2019) writes further that "in such cases, the immigration and program manager at the responsible visa office is contacted." However, she references section 5.4 of the 2004 version of "Canada chapter" in the UNHCR Handbook in the accompanying footnote 68. This section no longer exists in the 2008 version. While the respective section in the 2018 chapter still mentions that the Migration Program Manager along with the Ottawa UNHCR Branch Office should be contacted, it contains no other procedural details.

47 Many thanks to Pierre-André Thériault for this case reference.

48 Under s.112(1) IRPA, a migrants in Canada may apply for a PRRA if this person is subject to a removal order that is in force. On average, a PRRA takes 10 months to be completed, and less than 5% of the applications are successful. For more information, see IRCC, 2016f, p.12; OAG, 2020, para 1.16. Some countries are exempted from the 12-month bar on PRRA applications; see Appendix E for the complete list.

49 An interview may be required by an officer if the evidence raises serious issues of credibility or for a PRRA applicant whose refugee claim has been found ineligible to be referred to the RPD under s.101(1)(c.1) (that is, individuals who previously applied for asylum in another country with which Canada has an information-sharing agreement) (IRPA, ss.113(b), 113.01; IRPR, s.167; and IRCC, 2019g).

conduct an oral hearing, they must “be sensitive to any particular circumstances (such as when the applicant is an unaccompanied minor or a vulnerable person)” (IRCC, 2019g). This is especially true for vulnerable persons, as their vulnerability “requires special consideration to ensure they are identified and that appropriate procedural accommodations are made for them” (IRCC, 2019g). While the instructions clearly provide PRRA officers with the possibility to accommodate vulnerable applicants, it remains unclear to what extent. This can result in situations where procedural accommodations may be provided to some vulnerable claimants, but not to others. Moreover, PRRA officers are invited to consult the applicable IRB Chairperson’s Guidelines “for further information” on how to identify or accommodate vulnerable persons, but the wording of the instructions suggests that this is not an obligation (IRCC, 2019g). Therefore, it is unclear if officers effectively and routinely rely on the IRB Guidelines in practice.

Additionally, amendments to IRPA in December 2012 have increasingly restricted access to PRRA, preventing applicants from applying for a PRRA until one year has passed since the final determination of their refugee claim or refugee appeal, or since a previous PRRA application. While originally intended as a “safety net to capture exceptional cases where country conditions or circumstances have recently changed”, these increased restrictions may be delaying protection by a year for claimants who would otherwise qualify for a PRRA (IRCC, 2009).

5. Open work permit applications: a challenging process for some vulnerable workers

Migrant workers –especially those under an employer-specific work permit– have been recognized in scholarly works and Canadian courts as “highly vulnerable [to abuse] given the tenuous circumstances of their employment which lack the normal safeguards preventing abuse otherwise available to most Canadian workers” (*Farms v Canada (Employment and Social Development)*, 2017 FC 302, para 31).⁵⁰ Likely influenced by these scholarly works, the precarious experience of migrant workers in Canada, and their risk of abuse by employers, has also been recognized as problematic in many policy documents (see for example IRCC, 2007b, 2013b, 2014a, 2015a & 2019b; CIMM, 2019). In 2019, the Canadian government implemented new regulatory provisions to better protect migrant workers hired on an employer-specific work permit experiencing abuse. More particularly, under s.207.1(1) IRPR, an open work permit may be issued to a migrant worker “if there are reasonable grounds to believe that [he or she] is experiencing or is at risk of experiencing abuse in the context of their employment in Canada”⁵¹. It is a rare example in legal documents where a recognition that a person is ‘abused’ and therefore ‘vulnerable’ leads to a temporary protection status. Between June 1, 2019 and May 31, 2020, IRCC received 952 applications and, of the 853 that were finalized by that date, had approved 451 open work permits for vulnerable workers (53%) (Caouette, 2020).

While a great initiative, the process for obtaining an open work permit is problematic in many ways. For example, IRCC officers are not obliged to follow the existing program delivery instructions for victims of abuse. Thus, when they receive applications, they “may use their discretion” to determine whether an interview (instead of a paper-based review) is necessary (IRCC, 2020f; IRCC, 2020o). In cases where an interview is conducted, “officers are encouraged to consult” specific instructions on victims of abuse (IRCC, 2020f), but they are not obliged to do so. And yet, this document reminds officers that individuals “who

⁵⁰ For more on this topic, see also: Nakache, 2018 and Nakache & Perera, 2015.

⁵¹ Pursuant to s.196.2 IRPR, abuse can be physical, sexual, psychological or financial. The family members of a vulnerable worker may also receive an open work permit (IRPR, 207.1(2)). By ‘open work permit’, we refer to a permit that is exempt from the Labour Market Impact Assessment process completed by ESDC and that is not specific to one employer (See IRCC, 2020c).

are vulnerable may require special accommodations during the interview” and that “victims of severe trauma may have difficulties coping with the interview process because they are confined to a closed room with the interviewer” (IRCC, 2020o). Thus, these instructions provide important information to officers to ensure that they remain sensitive to the applicant and that they do not re-victimize them. Not surprisingly, in a program update e-mail, IRCC admitted recently that the application process “has been challenging for some clients” (IRCC, 2020g).

6. Temporary protection for Victims of Human Trafficking (VHTs)

Although VHTs (who are foreign nationals) may be recognized as refugees or granted permission to remain in Canada permanently on humanitarian and compassionate grounds (H&C) (see Dauvergne, 2008, p. 87 ff.), we have thus far not found any publicly available data to substantiate how frequently this protection is in fact granted. Nor is it mentioned or promoted as a path to permanent protection in government documents we surveyed.

Currently, the only avenue for foreign nationals who are VHTs to gain legal status in Canada (and to have their vulnerability recognized) is through the issuing of a Temporary Residence Permit (TRP) under s. 24(1) IRPA, which is initially only valid for 180 days, although longer term TRPs can be issued (IRCC 2007a). With this permit, they gain access to health care and an authorization to work. Note that assisting in the investigation or prosecution of their traffickers is not a condition for being granted such a permit (unlike in other countries, e.g., Australia). TRPs holders may subsequently be eligible to apply for permanent residence (IRCC 2017d).⁵²

7. Designated representative: a special role needed for all vulnerable persons

Pursuant to s.167(2) IRPA, the IRB must appoint a ‘designated representative’ to assist an unaccompanied child⁵³ or an adult who is unable to appreciate the nature of the proceedings due to mental illness or cognitive issues.⁵⁴ A designated representative is responsible for “perform[ing] many functions to assist vulnerable persons in immigration and refugee matters: deciding whether to retain counsel; instructing counsel; making decisions about the claim; advising about various stages and procedures in processing their case; helping to gather evidence; acting as witnesses and generally protecting the interests of the person” (Canadian Bar Association, 2015, p.7).

⁵² For an early proponent of granting status to victims of trafficking see Macklin, 2003.

⁵³ Even though the IRPA provision on the designation of a representative is meant to apply to all children under the age of 18, the IRB Rules mostly focus on unaccompanied minors, as there is a presumption that the accompanied minors’ representative is one of their parents. RPD rule 20(2) even insists that rule 20(1), which describes the process for designating a representative, “does not apply in the case of a claimant under 18 years of age whose claim is joined with the claim of their parent”. It may be surprising for many, because the fact that a child is accompanied does not mean that their parent is best placed to assist them regarding their case. For example, “when there are issues such as forced marriage or the young person’s identification as LGBT, a parent’s values can impede the child from fully presenting a case” (IRB, 2018d; RPD Rules, rule 20(2); and Canadian Bar Association, 2015, p. 3).

⁵⁴ According to the *Commentaries to the ID Rules*, a person who is unable to appreciate the nature of the proceedings means that an individual “cannot understand the reason for the hearing or why it is important or cannot give meaningful instructions to counsel about his or her case” (IRB, 2018a). To make this determination, the Division must consider any relevant factors, including “expert evidence, if any, on the person’s intellectual or physical faculties, age or mental condition”. This does not mean that only expert evidence may lead to such determination; however, “representatives bear the burden of convincing the IRB that a claimant cannot understand the nature of a proceeding, without the IRB necessarily sharing responsibility” (IRB, 2018a; also, RPD Rules, rule 20(5)(c); and Canadian Bar Association, 2015, p.3).

The process for designating and monitoring ‘designated representatives’ at the IRB is not perfect, and as such, requires improvements (for more on this topic, see IRB, 2018a, Canadian Bar Association, 2015, p. 3, IRB, 2019c, para 6.1.2). However, designated representatives are essential players to ensure that vulnerable persons understand the process and make decisions in their best interests, and as such, they should be available in *any* immigration proceeding, not only at the level of the IRB. It is problematic, for example, that persons recognized as ‘vulnerable’ in policy and legal documents must prepare their PRRA application alone, without the help and assistance of a ‘designated representative’. Or again, that vulnerable persons in immigration detention, who often lack legal representation, must navigate complex immigration proceedings by themselves. The consequences of a lack of proper representation can be devastating in such circumstances.

PART C – ADMINISTRATIVE VULNERABILITY

This section examines some ways in which the Canadian protection regime creates or increases the vulnerabilities experienced by migrants (i.e. ‘administrative vulnerability’).

1. Statelessness as administratively generated vulnerability

Statelessness can be viewed in and of itself as an administratively generated vulnerability. This arises from 1) the lack of engagement with and efforts to address the issue of statelessness, and 2) Canadian measures that in fact create new categories of stateless persons.

In the first instance, as discussed in Part B, the administrative vulnerability experienced by stateless persons in Canada is generated by the extent to which the state does not currently provide any specific avenue for formalization of status to stateless persons. Stateless persons may also find their rights limited in the context of immigration enforcement, removal proceedings and detention, mostly due to lack of proof of identity. Thus, the very fact of unremedied statelessness and its ramification for access to basic human rights, such as being able to obtain status, access to employment, health care etc., is a facet of such ‘Canadian measures’ or lack of measures to gain legal status in Canada.

In the second instance, changes to Canada’s citizenship law (Bill C-37) by the federal government under Stephen Harper in 2009 prevents foreign-born children from passing on their Canadian citizenship to their own offspring if they, too, are born abroad. The explicit reasoning for the amendment cited an effort to better discern who has legitimate ties to Canada. This limit applies equally to the children of Canadians born abroad, whether the child is naturally born or adopted, in order to ensure consistency in the application of the rule. It is problematic as it may lead to second-generation children born abroad experiencing a period of statelessness during their upbringing (Zilo, 2016; Nakache & Lebouthillier, 2016).

2. The administrative vulnerability associated with moratorium on removals

Under s.230 IRPR, the Minister of Public Safety and Emergency Preparedness (PSEP) may impose a Temporary Suspension of Removals (TSR) with respect to a country where there is “a generalized risk to the entire civilian population” (IRPR, s.230).⁵⁵ Similarly, an Administrative Deferral of Removals (ADR) may be used “when immediate action is needed to temporarily defer removals in situations of humanitarian crisis” (CBSA 2020a). ADR and TSR fall under the moratorium on removals program⁵⁶ (IRCC, 2017c, para 13.4)). The table below lists countries that are currently under an ADR or a TSR.

Table 2: Countries under an ADR or a TSR (current to August 28, 2020) (CBSA 2020a)

Administrative deferral of removals (ADR)	Temporary suspension of removals (TSR)
Burundi	Afghanistan
Central African Republic	Democratic Republic of Congo
Gaza Strip	Iraq
Haiti	
Libya	
Mali	
Somalia (following regions: Middle Shabelle, Afgoye, Mogadishu)	
South Sudan	
Syria	
Venezuela	
Yemen	

Moratorium on removals may fulfil a legitimate objective (i.e., to ensure that migrants from certain countries won't be removed even if their claims for refugee protection have been denied on the basis that they are not *personally* at risk of persecution. However, they are often used for an extended period of time, and during that time, migrants from moratorium countries remain in Canada without any legal status (CBSA, 2020a; see also, IRCC, 2017c). This results in situations of acute administrative vulnerability, a situation further exacerbated by recent immigration reforms wherein some persons on moratorium countries –who are deemed ineligible to apply for asylum in Canada because they previously made a claim in another country– will only have access to PRRA (not H&C) and only when the moratorium is lifted, at which point they will face deportation (Library of Parliament, 2019, clause 208; also, Canadian Council for Refugees, 2019). Migrants from moratorium countries may apply for a work or study permit, but they are essentially living with the 'Sword of Damocles' hanging over their head, as removals are normally reinstated when the ADR or the TSR is lifted (IRCC, 2017c, para 13.3). Moreover, their access to health care is very limited (they only have access to the Interim Federal Health program, which offers emergency care but nothing 'extra', including coverage for chronic health issues), their access to post-secondary education depends on their capacity to pay foreign student fees, and their work permit must be renewed annually, making it difficult to find good employment and for employers to invest in these groups (CIMM, 2007). Consequently, many end up working minimum wage jobs, exacerbating their economic vulnerability.

To reduce this vulnerability, in the past few years, the government has used its discretionary tools to provide pathways to permanent residency in exceptional cases. For example, the fact that an applicant's home country is the subject of a TSR may warrant permanent resident status in H&C applications, considering that this situation is "beyond the applicant's control" (IRCC, 2017b). Additionally, collective measures were implemented for nationals of certain countries who had been the subject of a TSR for a long period of time. Thus, when the TSR affecting Burundi, Rwanda and Liberia was lifted in 2009, and the one affecting Haiti and Zimbabwe was lifted in 2014, the Minister of IRCC implemented a policy to give nationals of these countries the opportunity to apply for permanent residence in Canada on H&C grounds (IRCC, 2013a & 2016g). Many applicants from moratorium countries are eventually granted permanent residency, but the path to a more secure status is complicated and stressful and leave them for many years in a very precarious situation (CIMM, 2007).

3. The administrative vulnerability linked to IRB delays

According to the Auditor General (AG) of Canada, in December 2018, the refugee claims backlogs at the IRB stood at 71,380 cases while the expected wait time for a protection decision had reached two years (OAG, 2019, paras 2.23 and 2.25). These delays cannot only be explained by the rising number of claims for refugee protection in Canada. In fact, an AG evaluation found that “about 65% of hearings were postponed at least once before a decision was made” (OAG, 2019, para 2.30), and that most of these postponements “were due to administrative issues within the government’s control” (*ibid*, para 2.31). We must conclude that migrants are negatively impacted by administrative inefficiency existing at the IRB. This waiting period is especially daunting for vulnerable persons, who may be stuck in precarious situations. As is highlighted in the Chairperson’s Guideline 8, “the uncertainty and anxiety caused by delay can be particularly detrimental to some vulnerable persons” (IRB, 2012b, para 9; also, CIMM, 2017b). The increased backlog due to the temporary shuttering of IRCC and IRB from the COVID-19 pandemic will only exacerbate this long-standing issue. While recent efforts to rely more on priority processing and scheduling in cases involving vulnerable persons are being introduced (e.g., the Integrated Claim Analysis Centre), the outcomes of these new measures are still unknown (OAG, 2019) and need to be explored in interviews with decisions-makers.

4. Restricted access to legal aid results in vulnerable migrants navigating Canada’s asylum system on their own

Access to legal aid varies by province and, recently, funding to legal aid has been cut in Ontario (the province that receives the highest number of refugee claims per year), resulting in more stringent criteria being applied to restrict access to this critical service. Not every province offers legal aid for refugee claimants (6 out of 10) and those that do determine eligibility based on a combination of financial criteria and a review of the merits of the case (if they believe the case is genuine and will be successful) (Yeates, 2018, p. 96; Rehaag, 2011). Although most claimants qualify for legal aid, they continue to face systemic challenges to obtaining any representation. The issue is particularly acute in Ontario, which has the highest number of refugee claims, and whose legal aid budget was recently cut, resulting in PRRA applications no longer being eligible for legal aid (Canadian Council for Refugees, 2019).

Multiple studies (government, academic, and non-profit) have found a number of negative consequences for migrants from a lack of legal representation. Indeed, it has been shown that claimants represented by counsel are much more likely to obtain a positive refugee determination at the IRB than those without counsel (Barutciski, 2012; IRB, 2019h; Rehaag, 2011). A more recent evaluation of claims at the IAD of the IRB demonstrates similar findings (IRB, 2019h). The study finds that “unrepresented appellants have significantly lower success rates (21%) than appellants represented by counsel (54%). When looking at all appeals finalized during the fiscal year, the percentage of appeals allowed among unrepresented appellants drops to 12% versus 43% for represented appellants” (IRB, 2019h). An examination of 70,000 RPD decisions rendered between 2005 and 2009 also reveals that “claimants represented by lawyers were 70.1 per cent more likely to succeed than claimants represented by consultants and 275.0 per cent more likely

to succeed than unrepresented claimants” (Rehaag, 2011, p. 87).⁵⁷ Another study examining 130,514 RPD decisions from 2002-2012 (53% of which received positive decisions) also finds that “of these finalised claims, 6% (7,487) were presented by claimants without representation. The acceptance rate for these unrepresented claimants is 16%” (Barutciski, 2012, p. 24).

While all immigration/refugee applications are supposed to be treated fairly, regardless of whether the applicant has counsel, the above studies reveal the importance that quality representation can have on a positive outcome and draw attention to the persistent issues raised around the subjectivity and inconsistency in decision-making. Nowhere is this issue more pressing than for immigration detainees, who are “consistently identified as those who had the greatest difficulty accessing legal counsel” (Sadrehashemi et al., 2015, p.3). This was also noted as a key factor that contributed to a vicious cycle of long-term detention, as highlighted in Part B (IRB, 2018i), and which remains an issue today (CRCS, 2018). Access to legal aid for immigration detainees is also determined by province, with those held in Ontario detention/correctional facilities having no access to legal aid (IRB, 2018i).

5. Increased vulnerability and risk for migrants created by the Safe Third Country Agreement

The Safe Third Country Agreement (STCA) with the US has been contested and advocated against since coming into effect on December 29, 2004. While a recent (July 2020) decision by Justice McDonald from the Canadian Federal Court⁵⁸ struck down the STCA, as previously mentioned (see Part III), the decision is suspended as the appeal is pending. In this decision and in the Appellants arguments, the concept of ‘risk’ is used often and can be viewed as an acknowledgement of the vulnerability of refugee claimants whose situation is regulated by the STCA. These include the risk of return or refoulement; risk to the security of the person; risk that they will not be able to make an asylum claim; risks related to detention, etc.

Under the STCA, refugee claimants are required to request refugee protection in the first safe country they arrive in, unless they qualify for an exception to the Agreement (discussed in Part A). This creates two pathways towards increased vulnerability and risk for migrants seeking protection in Canada. First, those who do not qualify for an exception to the STCA enter Canada ‘irregularly’, meaning crossing the border at an unofficial entry point. Thus, the STCA encourages refugee claimants to risk their physical health, utilize smuggling networks, possibly fall victim to trafficking and other exploitation, in order to be able to file a claim from within Canada rather than enter Canada at a legal border crossing. Second, those who enter Canada through an official border crossing and to which the STCA applies, “are immediately returned and handed over to US authorities by Canadian officials where they are automatically detained –resulting in a *de facto* form of punishment without charges or a trial– merely for making a refugee claim in Canada, in contravention of the Refugee Convention” (Frenyó, 2020). Thus, procedures surrounding the application of the STCA on the Canadian side have been found to lack adequate safeguards under Canada’s obligations in international human rights law, which increase the presence of “risk” in the context of STCA related procedures and outcomes.

⁵⁷ The study also found that refugee determination was gendered process, as “male principal claimants were 14.1 per cent more likely to have their claims withdrawn or declared abandoned than female principal claimants. Moreover, in cases resulting in a positive or negative decision, female principal claimants were 17 per cent more likely to succeed in their claims” (Rehaag, 2011, p.90).

⁵⁸ *Canadian Council for Refugees v Canada (Immigration, Refugees, and Citizenship)*, [2020] FC 770

This increased risk arises because of the failure to acknowledge important differences between the US and Canada, which could result in vastly different outcomes for refugee claimants, and which would give them valid reasons for choosing to seek refuge in Canada instead applying, or after their claim was rejected, in the United States. Aside from the egregious measures put in place by the Trump administration (for more on this topic, see Frenyó, 2020), which in themselves demonstrate a clear lack of protection for refugee claimants, there are long-standing measures that distinguish the Canadian and American protection regimes. For instance, whereas the vast majority of refugee claimants in Canada are eligible for legal aid (though as noted earlier, they may not receive it in practice), there is no systematic provision for legal aid for refugee claimants in the US, and representation is not generally granted in the US for refugee claimants, not even to minors. Or again, the US gender guidelines issued by the US Immigration and Naturalization Services are less comprehensive and more tentative than the Canadian ones.⁵⁹ Of particular concern is the fate of women fleeing domestic violence where the State is unable or unwilling to protect them, which the IRB's Guideline 4 on Gender-Related Persecution and Refugee Status recognizes as a legitimate form of persecution that members should carefully assess when hearing a claim. In contrast, women facing sexual violence have a particularly hard time proving they merit protection in the US as a "social group" despite systematic, gender-based violence and inadequate state protections. Not surprisingly, and linked to this, a number of assessments have found that the impact of the STCA disproportionately affects women refugee claimants (e.g., Amnesty International, 2003; Bhuyan et al., 2016; Canadian Council for Refugees, 2005; Cheatham, 2020; Deepti, 2011).

6. Immigration reforms create a two-tiered asylum system for in-Canada claimants: one for most claimants and another for other claimants with stricter requirements

A number of significant reforms to IRPA were made in 2012 (Bill C-31) and 2019 (Bill C-97) to curb what is viewed as the 'abuse' of Canada's generous in-Canada asylum system.⁶⁰ Some of these reforms and their impact have been highlighted earlier (see e.g., sections on PRRA, H&C considerations) but there are several more that must be addressed.

6.1 Designated Foreign Nationals (DFNs)

In an effort to prevent human smuggling, and in response to two boats carrying 'irregular' refugee claimants to Vancouver, the government included a provision in Bill C-31 wherein the Minister of Public Safety can label a group of two or more 'irregular arrivals' as Designated Foreign Nationals (DFNs) (IRPA, s. 20.1(1)).⁶¹ This designation has severe consequences for migrants. DFNs face mandatory detention for every person 16 years and older (thus, by definition it includes the mandatory detention of minors) who are subject to very different detention review procedures (IRPA, s. 55(3), see Appendix F). This includes no

⁵⁹ For example, the *Matter of Kasinga*, 21 I. & N. 357 (BIA 1996) is hailed as an "international landmark" in the recognition of female genital mutilation as the basis for a refugee claim. However, this is a very specific form of gender-based violence. In the absence of clear guidance or gender regulations that are binding on the entire asylum system, the decision-makers in Kasinga had to form a particular social group that didn't solely rely on gender. For example, one of the criteria in the particular social group formed in Kasinga is opposition to the practice of female genital mutilation. While the government's analysis does not focus on this component of the group, it is used by decision-makers when evaluating refugee claims.

⁶⁰ To take one example, IRB (2010) states: "We set out to fix Canada's broken asylum system, which was too vulnerable to abuse by bogus asylum claimants and human traffickers. Our balanced refugee reforms will give faster protection to genuine refugees fleeing persecution and will make it easier to deport unfounded claimants who abuse Canada's generosity" (p.1).

⁶¹ "Pursuant to subsection 20.1(1), the Minister of Public Safety has the authority to order the arrival in Canada of a group of persons to be designated as an 'irregular arrival'. A foreign national who is part of a group whose arrival in Canada is designated by the Minister as an "irregular arrival" automatically becomes a 'designated foreign national' (DFN) unless he or she holds the documents required for entry, and on examination the officer is satisfied that the person is not inadmissible to Canada.

review of their case until 14 days after they are detained (in comparison to most other claimants whose case is reviewed within 48 hours), and no further review until 6 months after the first review and then not again for another 6 months (in comparison to other claimants who receive a second review after 7 days and then every subsequent 30 days (IRPA, s. 57.1). This classification is particularly grave, given the well-documented impacts of long-term detention on the physical and mental well-being of detainees (for more on this topic, see Part B). Moreover, this designation has long-term consequences for DFNs after they are released from detention. A designated foreign national cannot apply for permanent residency for 5 years under any immigration stream (refugee, H&C, family class sponsorship) and they are barred from appealing their refused claim at RAD (IRPA, ss. 20.2(1), 20.3(3) & 110 (2)(a)). If their claim is rejected at the RPD, they face removal without access to H&C and, if they successfully obtain PRRA, they are subject to removal if conditions ever improve in their country of nationality (Grant & Rehaag, 2015; Silverman, 2014). While the aim of this immigration reform was to prevent human smuggling, it does so by targeting and penalizing the migrants, not the smugglers beyond the provisions already contained in the IRPA prior to these reforms⁶² (UNHCR, 2012e; Grant & Rehaag, 2015). These measures make the prospect of life in Canada so miserable that some DFNs have already ‘voluntarily’ returned to their country of origin.⁶³ The DFN provision has not been used since the Trudeau government came in power in 2015 and the Supreme Court of Canada offered two important clarifications in this context,⁶⁴ but it is still in the legislation and hence it can be reactivated at any time.

6.2 Cessation provision

Another 2012 reform that affects *all* persons who received refugee or a protected status is the cessation provision.⁶⁵ If a person “re-avail[s] themselves of the protection of their country of nationality” the CBSA can file a cessation application against them (IRCC, 2018c). Re-availment can mean simply returning to the country of nationality, even if this takes place 20 years after receiving refugee status, the idea being that this visit raises credibility issues about the refugee’s fear of persecution (IRB, 2019f; also, Canadian Council for Refugees, 2016). If the assessment finds in favour of cessation, the individual not only loses their refugee protection but also their permanent residency and are inadmissible, meaning they must leave Canada immediately. For instance, in *Araya v M.C.I.*, a refugee mother returned to Chile to bring her son back to Canada with her. However, this was found to be an insufficient reason for return since she could have made other arrangements to retrieve her son, thus resulting in a cessation of her protected status (IRB, 2019). This case serves as just one example of how this provision can be used to the detriment

62 S. 37(1)(b) IRPA declares individuals (permanent residents or foreign nationals) who are found to be involved in “people smuggling, trafficking in persons” inadmissible to Canada. Also, s. 117 (1) IRPA reads: “No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.”

63 “Within six months of its becoming legislation, the Minister of Public Safety has used the ‘irregular arrivals’ designation once, in relation to a group of Romanian refugee claimants in December 2012. This group opted to return to Romania rather than press their cases to stay in Canada and endure the year in detention” (Silverman, 2014, p. 28).

64 The Supreme Court of Canada clarified in two 2015 decisions that foreign nationals who are facilitating their own unauthorized entry into Canada (or that of close family members) with the intent to seek refugee protection cannot be deemed smugglers and thus cannot be found inadmissible under the IRPA (as a consequence, they could not be excluded from applying for refugee protection) (*R. v. Appulonappa* [2015] SCC 59). In *B010 v. Canada (Citizenship and Immigration)* [2015] SCC 58, the SCC further ruled unconstitutional s. 117 of the IRPA (2001) in as far as it made it an offence to offer humanitarian aid to those seeking unauthorized entry.

65 “Cessation: On application by the Minister the RPD may determine that the refugee protection referred to in [s]95(1) [of IRPA] has ceased for any of the reasons described in [s]108(1) [of IRPA]. If the application is allowed, the claim of the person is deemed to be rejected ([s.]108(2), 108(3)). There is no right of appeal to the RAD for a decision of the RPD allowing or rejecting an application by the Minister for a determination that refugee protection has ceased [[s]110(2)(e)]” (IRCC, 2017a, p. 15-16).

of vulnerable groups.⁶⁶ Of particular concern is that cessation cases are among the top three groups given priority for removal (IRCC, 2017c, p. 22) and that CBSA officers are “trained to look for cessation cases among those applying for permanent resident cards or citizenship or seeking to sponsor family members” (Canadian Council for Refugees, 2016).

6.3 No RAD appeal process for certain migrants

The 2012 reforms to IRPA barred six groups of claimants from access to RAD: “claimants who come to Canada via the United States (US) through an exception to the Canada-US Safe Third Country Agreement (STCA); claimants who come from a designated country of origin (DCO); claimants whose applications for refugee protection have been declared to have no credible basis (NCB) or to be manifestly unfounded claims (MUC); claimants who are designated foreign nationals (DFNs) due to their irregular arrival; claimants who abandon or withdraw their applications; and finally individuals who were previously recognized in Canada as refugees but who have had their refugee status taken away through cessation or vacation processes” (Grant & Rehaag, 2017, p. 224).⁶⁷ In 2015, this group was reduced to 5 categories following a Federal Court decision that the Designated Country of Origin (DCO) scheme discriminates against refugee claimants who come from DCO countries by denying them access to the Refugee Appeal Division (equality rights violated under section 15 of the *Canadian Charter*). The Government of Canada ended the DCO practice as a result of this decision.⁶⁸ It is not possible here to do justice in discussing the many problems with these bars from appeal (for an excellent analysis, see Grant & Rehaag, 2017). However, there are clear implications for vulnerable groups who –for a series of reasons discussed earlier– may be unable to adequately and convincingly present their case to RPD, and with no opportunity to appeal, are left with limited options to stay in Canada. The low acceptance rates of PRRA and at the Federal Court leave an application for permanent residency on H&C grounds the only likely option (although DFNs cannot apply for this for 5 years).

6.4 New ineligibility grounds for migrants

Added to the above reforms, recent changes to IRPA through Bill C-97 create new grounds of ineligibility for refugee claimants who have applied for asylum in a country that Canada has a data-sharing agreement with: the United States, New Zealand, Australia and the UK (Library of Parliament, 2019, clause 308). This 2019 amendment to IRPA overrides the exceptions made in STCA (such as if the claimant has family in Canada) and will likely affect these claimants since the majority of in-Canada asylum claims are made at irregular border crossings between the US and Canada. While this amendment is evidently aimed at curbing ‘asylum shopping’, there are a number of legitimate reasons for why a person would make a claim in another country. For instance, a refugee claimant’s claim could have been rejected in the US but their claim would meet the requirements for asylum in Canada, such as through gender or sexuality-based persecution (Guideline 4 and 9); or a claimant could have been a dependent or spouse from a claim that was rejected in another country, but who was never able to receive their own, independent hearing; or they could have been traveling to Canada through the US, but in transit they were detained and had to make a refugee claim in order to prevent deportation (Canadian Council for Refugees, 2019; also, Goodwin & McAdam, 2007). Besides the fact that under the 1951 Refugee Convention there is no restriction on

⁶⁶ Another issue is that cessation has been applied differently between one province and another.

⁶⁷ These groups still can apply for leave and judicial review at the Federal Court. However, contrary to the RAD, they do not benefit from a statutory stay of removal.

⁶⁸ *YZ v Canada*, [2015] FC 892. Also, see IRCC, 2019o.

how many countries a person can seek asylum in (UNHCR, 2012e), there are many valid reasons for having made a claim somewhere other than Canada. Yet, these claimants will now be automatically barred from making a refugee claim in Canada and will only have access to PRRA (with its much lower acceptance rates and officers who receive less training than IRB members and who are not obligated to use the same kinds of decision-making tools, such as the Guidelines).

IV. CONCLUSION

Canada is arguably a leader in expanding the concept of vulnerability in international law by creating an explicit ‘vulnerability’ guideline to assist IRB adjudicators in administering Canada’s inland refugee determinations and by making it an important guiding principle in its overseas resettlement program. However, as demonstrated in this report, vulnerability as it is operationalized in practice remains strangely elusive.

Part of the reason this concept is so hard to pin down is due to the multiple definitions, guidelines and uses of ‘vulnerability’, which vary depending on the agencies involved, whether the protection process takes place abroad or in-Canada, and which result in different consequences for migrants. For the most part, our research has found that the concept of vulnerability generally appears to take on a narrow, procedure-specific interpretation, which allows civil servants to apply it (or not) on a case-by-case basis. Very rarely in the documentary and case law research is ‘vulnerability’ engaged with in a *substantive* manner, in particular in a way that recognizes how intersecting social identities (age, gender, sexuality, religion, ethnicity, nationality, etc.) can compound in certain environments to produce very real situations of vulnerability and precarity. Finally, our research reveals that the lack of clarity and consistency in the concept of vulnerability and its application in the Canadian protection regime creates a number of protection gaps that can actually produce or exacerbate vulnerabilities for migrants. Exploring this issue further in our interviews with migrants will help to shed light on the impact that Canadian protection measures have towards supporting or harming migrants seeking protection in Canada.

There are specific questions within the scope of our study that we were not able to answer, or which require more details from people involved at the IRB, IRCC or CBSA. Thus, below we highlight aspects of our research that need to be further investigated or clarified through interviews with decision-makers, lawyers and migrants.

- 1) One of the main issues of this research has been the discretion that IRB decision-makers or IRCC and CBSA officers have in recognizing and addressing vulnerability. It is not always clear how they are using their wide discretionary powers in practice to address the vulnerabilities of migrants.
 - How often do IRB members apply the Chairperson Guideline 8, for what reasons and with what outcomes? What is the most common vulnerability raised, and which procedural accommodations are most common? How often is the identification of a vulnerable person initiated by a decision-maker? Or does this responsibility rest in practice only on the shoulders of the counsel of the vulnerable person? Are refugee claimants and refugee lawyers satisfied with the level of accommodations offered to their clients with identified vulnerabilities?
 - A recurring issue in legal documents (especially operational manuals, guidelines and program delivery instructions) has been the need for IRCC or CBSA officers to ‘be sensitive to any particular circumstances’ and ‘remain alert to the limitations of applicants, who may need to be accommodated’, without stating any particular obligation. Therefore, how do officers use their discretion to take into account the vulnerabilities of migrants? Are there other instructions provided to officers on that matter?

- PRRA officers (from IRCC), who may conduct oral hearings in certain circumstances, are invited to consult the applicable IRB Chairperson's Guidelines "for further information" on how to identify or accommodate children, vulnerable persons, women fearing gender-related persecution and SOGIE individuals (IRCC, 2019g). The vocabulary used in the program delivery instructions indicates that it is not an obligation. Do the PRRA officers take into account the Chairperson's Guidelines to accommodate vulnerable claimants? Do they ignore them, but still consider vulnerability and act on their own initiative?
 - Overseas resettlement processes place an emphasis on identifying vulnerable refugees and urgent cases for protection. How are such refugees selected (e.g., applicants for the Women-at-Risk program selected) and how do IRCC officers assess these 'vulnerabilities' in practice?
- 2) While we were able to get a general idea of the type of training that is given to IRB members based on a written submission provided to the *Standing Committee on Citizenship and Immigration* by the IRB (see Appendix G), many questions remain regarding the content of the training intended for IRCC and CBSA officers.
- What training do IRCC and CBSA officers follow on vulnerable persons?
 - The Report *Responding to Public Complaints: A Review of the Appointment, Training and Complaint Processes of the Immigration and Refugee Board* did not provide any specific information regarding the training for ID members, even though they must complete the initial mandatory training like any other IRB member. Do the decision-makers of the ID have to attend to professional development workshops or trainings on detention, especially with regard to vulnerable persons and minors?
 - New members at the RPD "are monitored and evaluated during the training period and during their first year as a member. The evaluations include an assessment of their awareness and sensitivity relating to both cultural and SOGIE issues" (CIMM, 2018, p. 29). Is it also applicable for the other Division members? What are the consequences if a decision-maker clearly shows signs of insensitivity towards vulnerable persons?
 - IRB members are supposed to receive training to enhance the members' sensibility, considering that "[p]ersons who appear before the IRB frequently find the process difficult for various reasons, including language and cultural barriers and because they may have suffered traumatic experiences that resulted in some degree of vulnerability" (IRB, 2012b, para 2.3). The IRB proceedings are already influenced by the claimants' vulnerabilities; in fact, "IRB proceedings have been designed to recognize the very nature of the IRB's mandate, which inherently involves persons who may have some vulnerabilities" (ibid). Which specific considerations are built into IRB procedures to integrate the fact that migrants are vulnerable?
- 3) General data on refugees and asylum claims is publicly available but gathering information on specific groups of potentially vulnerable migrants is challenging. While access to data is possible upon request, we were not able to receive the data requested in time for this report, even four months after the request was made. In many cases, such as stateless persons or victims of human trafficking, detailed data may not be systematically collected, which points to important gaps in knowledge that may contribute to a lack of understanding around diverse forms of vulnerability and how they are formed. Added to this difficulty in accessing data is a confusing shift in the way the government presents information on its websites. The procedures and guidelines used by IRCC and CBSA officers, which were usually contained in operational manuals available in PDF (CP, ENF, IL, IN, IP and OP) are now being transferred in a section titled "Program Delivery Instructions". Not only is the information

now harder to find because it is only accessible through a series of hyperlinks, but it also lacks in transparency since it does not list the changes and updates made to the operational instructions over the years⁶⁹. A well-organized, publicly available repository of such information would allow us to identify such gaps, which could then be addressed, and provide greater transparency around the changes made to documents that guide the decision-making process, as well as more precise data to better understand who is being protected in Canada (and who is not).

ANNEX

APPENDIX A– LEGISLATIVE AND REGULATORY PROVISIONS

The following excerpts are relevant sections of the *Immigration and Refugee Protection Act* (IRPA), the *Immigration and Refugee Protection Regulations* (IRPR), and Canada’s Citizenship Act, divided by subjects.

1. Claim for refugee protection

95(1) IRPA – Conferral of refugee protection: Refugee protection is conferred on a person when **(a)** the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons; **(b)** the Board determines the person to be a Convention refugee or a person in need of protection; or **(c)** except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

95(1) IRPA – Protected person: A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).

96 IRPA – Convention refugee: A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, **(a)** is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or **(b)** not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97(1) IRPA – Person in need of protection: A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally **(a)** to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or **(b)** to a risk to their life or to a risk of cruel and unusual treatment or punishment if **(i)** the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country, **(ii)** the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, **(iii)** the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and **(iv)** the risk is not caused by the inability of that country to provide adequate health or medical care.

99(3) IRPA – Claim inside Canada: A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.

107(1) IRPA – Decision: The Refugee Protection Division shall accept a claim for refugee protection if it determines that the claimant is a Convention refugee or person in need of protection, and shall otherwise reject the claim.

138 IRPR - Definition: *vulnerable* means, in respect of a Convention refugee or a person in similar circumstances, that the person has a greater need of protection than other applicants for protection abroad because of the person's particular circumstances that give rise to a heightened risk to their physical safety.

2. Pre-Removal Risk Assessment (PRRA)

112(1) IRPA – Application for protection: A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

112(2) IRPA – Exception: Despite subsection (1), a person may not apply for protection if [...] **(b.1)** subject to subsection (2.1), less than 12 months [...] have passed since [...] **(ii)** in any other case, the latest of **(A)** the day on which their claim for refugee protection was rejected [...] by the Refugee Protection Division [...] **(B)** the day on which their claim for refugee protection was rejected [...] by the Refugee Appeal Division [...] **(C)** the day on which the Federal Court refused their application [...]; **(c)** subject to subsection (2.1), less than 12 months [...] have passed since [...] **(ii)** in any other case, the later of **(A)** the day on which their application for protection was rejected [...] by the Minister [...] and **(B)** the day on which the Federal Court refused their application [...].

112(2.1) IRPA – Exemption: The Minister may exempt from the application of paragraph (2)(b.1) or (c) **(a)** the nationals — or, in the case of persons who do not have a country of nationality, the former habitual residents — of a country; **(b)** the nationals or former habitual residents of a country who, before they left the country, lived in a given part of that country; and **(c)** a class of nationals or former habitual residents of a country.

113 IRPA – Consideration of application: Consideration of an application for protection shall be as follows: **(a)** an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection; **(b)** a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required; **(c)** in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98 [...].

113.01 IRPA – Mandatory hearing: Unless the application is allowed without a hearing, a hearing must, despite paragraph 113(b), be held in the case of an applicant for protection whose claim for refugee protection has been determined to be ineligible solely under paragraph 101(1)(c.1).

160.1 IRPR – exemption from 12-month bar: For the purposes of subsection 112(2.1) of the Act, the Minister must consider, when an exemption is made, any event having arisen in a country that could place all or some of its nationals or former habitual residents referred to in that subsection in a situation similar to those referred to in section 96 or 97 of the Act for which a person may be determined to be a Convention refugee or a person in need of protection.

167 IRPR – Hearing: For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following: **(a)** whether there is evidence that raises a serious issue of the applicant’s credibility and is related to the factors set out in sections 96 and 97 of the Act; **(b)** whether the evidence is central to the decision with respect to the application for protection; and **(c)** whether the evidence, if accepted, would justify allowing the application for protection.

3. Applications under H&C or public policies considerations

25(1) IRPA – H&C considerations: Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act [...] examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

25.1(1) IRPA – H&C considerations: The Minister may, on the Minister’s own initiative, examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

25.2(1) IRPA – Public policy considerations: The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by public policy considerations.

4. Open work permit for vulnerable workers

196.2 IRPR – Abuse: For the purpose of this Part abuse consists of any of the following: (a) physical abuse, including assault and forcible confinement; (b) sexual abuse, including sexual contact without consent; (c) psychological abuse, including threats and intimidation; and (d) financial abuse, including fraud and extortion.

207.1(1) IRPR – Vulnerable workers: A work permit may be issued under section 200 to a foreign national in Canada if there are reasonable grounds to believe that the foreign national is experiencing or is at risk of experiencing abuse in the context of their employment in Canada and if they **(a)** hold a work permit issued under subparagraph 200(1)(c)(ii.1) or (iii); or **(b)** previously held a work permit issued under subparagraph 200(1)(c)(ii.1) or (iii), have applied for a renewal of that permit under subsection 201(1) and are authorized to work in Canada under paragraph 186(u).

207.1(2) IRPR – Family member of vulnerable worker: A work permit may be issued under section 200 to a foreign national in Canada who is a family member of a person described in paragraph (1)(a) or (b).

5. Immigration detention

55(1) IRPA – Arrest and detention with warrant: An officer may issue a warrant for the arrest and detention of a permanent resident or a foreign national who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, for an admissibility hearing, for removal from Canada or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2).

55(2) IRPA – Arrest and detention without warrant: An officer may, without a warrant, arrest and detain a foreign national, other than a protected person, **(a)** who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2); or **(b)** if the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act.

55(3) IRPA – Detention on entry: A permanent resident or a foreign national may, on entry into Canada, be detained if an officer **(a)** considers it necessary to do so in order for the examination to be completed; or **(b)** has reasonable grounds to suspect that the permanent resident or the foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality.

56(1) IRPA – Release by an officer: An officer may order the release from detention of a permanent resident or a foreign national before the first detention review by the Immigration Division if the officer is of the opinion that the reasons for the detention no longer exist. The officer may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer considers necessary.

57(1) IRPA – Review of detention: Within 48 hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention.

57(2) IRPA – Further review: At least once during the seven days following the review under subsection (1), and at least once during each 30-day period following each previous review, the Immigration Division must review the reasons for the continued detention.

58(1) IRPA – Release by the Immigration Division: The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that **(a)** they are a danger to the public; **(b)** they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2); **(c)** the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality; **(d)** the Minister is of the opinion that the identity of the foreign national [...] has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity; [...].

58(2) IRPA – Detention by the Immigration Division: The Immigration Division may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an admissibility hearing or is subject to a removal order and that the permanent resident or the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

58(3) IRPA – Conditions: If the Immigration Division orders the release of a permanent resident or a foreign national, it may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.

60 IRPA – Minor children: For the purposes of this Division, it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.

244 IRPR – Factors to be considered: For the purposes of Division 6 of Part 1 of the Act, the factors set out in this Part shall be taken into consideration when assessing whether a person **(a)** is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2) of the Act; **(b)** is a danger to the public; or **(c)** is a foreign national whose identity has not been established.

248 IRPR – Other factors: If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release: **(a)** the reason for detention; **(b)** the length of time in detention; **(c)** whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time; **(d)** any unexplained delays or unexplained lack of diligence caused by the Department, the Canada Border Services Agency or the person concerned; **(e)** the existence of alternatives to detention; and **(f)** the best interests of a directly affected child who is under 18 years of age.

248.1(1) – Best interests of the child: For the purpose of paragraph 248(f) and for the application, in respect of children who are under 18 years of age, of the principle affirmed in section 60 of the Act, that a minor child shall be detained only as a measure of last resort, the following factors must be considered when determining the best interests of the child: **(a)** the child’s physical, emotional and psychological well-being; **(b)** the child’s healthcare and educational needs; **(c)** the importance of maintaining relationships and the stability of the family environment, and the possible effect on the child of disrupting those relationships or that stability; **(d)** the care, protection and safety needs of the child; and **(e)** the child’s views and preferences, provided the child is capable of forming their own views or expressing their preferences, taking into consideration the child’s age and maturity.

248.1(2) – Degree of dependence: For the purpose of paragraph 248(f), the level of dependency of the child on the person for whom there are grounds to detain shall also be considered when determining the best interests of the child.

249 IRPR – Special considerations for minor children: For the application of the principle affirmed in section 60 of the Act that a minor child shall be detained only as a measure of last resort, the special considerations that apply in relation to the detention of minor children who are less than 18 years of age are **(a)** the availability of alternative arrangements with local child-care agencies or child protection services

for the care and protection of the minor children; **(b)** the anticipated length of detention; **(c)** the risk of continued control by the human smugglers or traffickers who brought the children to Canada; **(d)** the type of detention facility envisaged and the conditions of detention; **(e)** the availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent of or the adult legally responsible for the detained minor children; and **(f)** the availability of services in the detention facility, including education, counselling and recreation.

6. Moratorium on removals

230(1) IRPR – Considerations: The Minister may impose a stay on removal orders with respect to a country or a place if the circumstances in that country or place pose a generalized risk to the entire civilian population as a result of **(a)** an armed conflict within the country or place; **(b)** an environmental disaster resulting in a substantial temporary disruption of living conditions; or **(c)** any situation that is temporary and generalized.

230(2) IRPR – Cancellation: The Minister may cancel the stay if the circumstances referred to in subsection (1) no longer pose a generalized risk to the entire civilian population.

7. Designated Foreign Nationals

20.1 (1) The Minister may, by order, having regard to the public interest, designate as an irregular arrival the arrival in Canada of a group of persons if he or she **(a)** is of the opinion that examinations of the persons in the group, particularly for the purpose of establishing identity or determining inadmissibility — and any investigations concerning persons in the group — cannot be conducted in a timely manner; or **(b)** has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a contravention of subsection 117(1) for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

20.2 (1) A designated foreign national may not apply to become a permanent resident **(a)** if they have made a claim for refugee protection but have not made an application for protection, until five years after the day on which a final determination in respect of the claim is made; **(b)** if they have made an application for protection, until five years after the day on which a final determination in respect of the application is made; or **(c)** in any other case, until five years after the day on which they become a designated foreign national.

8. Sponsorship

5 IRPR – Excluded relationships: For the purposes of these Regulations, a foreign national shall not be considered **(a)** the spouse or common-law partner of a person if the foreign national is under the age of 18 years; [...] **(c)** the spouse of a person if at the time the marriage ceremony was conducted either one or both of the spouses were not physically present [...].

117(9) IRPR – Excluded relationships: A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if **(a)** the foreign national is the sponsor’s spouse, common-law partner or conjugal partner and is under 18 years of age; [...] **(c.1)** the foreign national is the sponsor’s spouse and if at the time the marriage ceremony was conducted either one or both of the spouses were not physically present [...].

125(1) IRPR – Excluded relationships: A foreign national shall not be considered a member of the spouse or common-law partner in Canada class by virtue of their relationship to the sponsor if **(a)** the foreign national is the sponsor’s spouse or common-law partner and is under 18 years of age; [...] **(c.1)** the foreign national is the sponsor’s spouse and if at the time the marriage ceremony was conducted either one or both of the spouses were not physically present [...].

9. Designated representative

167(1) IRPA – Right to counsel: A person who is the subject of proceedings before any Division of the Board and the Minister may, at their own expense, be represented by legal or other counsel.

167(2) IRPA – Representation: If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.

10. Statelessness

Canada’s Citizenship Act provides for access to citizenship for a stateless person:

Section 5 (4) – a stateless person in Canada can submit an application for a Ministerial discretionary grant of citizenship to alleviate special and unusual hardship

Section 5 (5) – second generation born abroad children born on or after April 17, 2009, who would otherwise be stateless, can apply for Canadian citizenship if they are under the age of 23 and have resided in Canada for three of the four years preceding their application, has always been stateless; and has not been convicted of offences listed in subsection (f).

APPENDIX B – IRB RULES

1. Immigration Division Rules⁷⁰

Rule 18 – Designated representatives: If counsel for a party believes that the Division should designate a representative for the permanent resident or foreign national in the proceedings because they are under 18 years of age or unable to appreciate the nature of the proceedings, counsel must without delay notify the Division and the other party in writing. If counsel is aware of a person in Canada who meets the requirements to be designated as a representative, counsel must provide the person’s contact information in the notice.

Rule 38(1) – Application to the Division: Unless these Rules provide otherwise, an application must follow this rule.

Rule 50 – Powers of the Division: The Division may **(a)** act on its own, without a party having to make an application or request to the Division; **(b)** change a requirement of a rule; **(c)** excuse a person from a requirement of a rule; and **(d)** extend or shorten a time limit, before or after the time limit has passed.

2. Commentaries to the Immigration Division Rules (IRB, 2018a)

Rule 19 – Designated representatives: A representative must be designated for any person who is subject of an admissibility hearing or a detention review if this person is under the age of 18 years (a “minor”) or is unable to appreciate the nature of the proceedings (an “incompetent person”).

[...]

“Unable to appreciate the nature of the proceedings” means that the person cannot understand the reason for the hearing or why it is important or cannot give meaningful instructions to counsel about his or her case. An opinion regarding competency may be based on the person’s own admission, the person’s observable behaviour at the proceeding, or on expert opinion on the person’s mental health or intellectual or physical faculties.

[...]

As much as possible, the designated representative should inform and consult the minor or incompetent person when making decisions about the case. However, the role of the designated representative will vary, depending on the level of understanding of the minor or incompetent person. Minors will vary in their ability to participate in making decisions, depending on the type of decision that has to be made, their age and their maturity. Incompetent persons may also have some ability to participate in making decisions, depending on the type of decision that has to be made and the nature and severity of their disorder or disability.

3. Immigration Appeal Division Rules⁷¹

Rule 19(1) – Designated representative: If counsel for either party believes that the Division should designate a representative for the person who is the subject of the appeal because they are under 18 years of age or unable to appreciate the nature of the proceedings, counsel must without delay notify the Division in writing. If counsel is aware of a person in Canada who meets the requirements to be designated as a representative, counsel must provide the person’s contact information in the notice.

Rule 43(1) – Application to the Division: An application must be made in writing and without delay unless **(a)** these Rules provide otherwise; or **(b)** the Division allows it to be made orally at a proceeding after considering any relevant factors, including whether the party with reasonable effort could have made the application in writing before the proceeding.

Rule 58 – Powers of the Division: The Division may **(a)** act on its own initiative, without a party having to make an application or request to the Division; **(b)** change a requirement of a rule; **(c)** excuse a person from a requirement of a rule; and **(d)** extend or shorten a time limit, before or after the time limit has passed.

4. Refugee Protection Division Rules⁷²

Rule 1 – Vulnerable person: means a person who has been identified as vulnerable under the Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB issued under paragraph 159(1)(h) of the Act.

Rule 10(1) – Standard order of questioning: In a hearing of a claim for refugee protection, if the Minister is not a party, any witness, including the claimant, will be questioned first by the Division and then by the claimant’s counsel.

Rule 10(5) – Variation of order of questioning: The Division must not vary the order of questioning unless there are exceptional circumstances, including that the variation is required to accommodate a vulnerable person.

Rule 20(1) – Designated representatives: If counsel for a party or if an officer believes that the Division should designate a representative for the claimant or protected person because the claimant or protected person is under 18 years of age or is unable to appreciate the nature of the proceedings, counsel or the officer must without delay notify the Division in writing.

Rule 20(2) – Exception: Subrule (1) does not apply in the case of a claimant under 18 years of age whose claim is joined with the claim of their parent or legal guardian if the parent or legal guardian is 18 years of age or older.

⁷¹ [Immigration Appeal Division Rules SOR/2002-230](#)

⁷² [Refugee Protection Division Rules, SOR/2012-256](#)

Rule 20(5) – Factors: When determining whether a claimant or protected person is unable to appreciate the nature of the proceedings, the Division must consider any relevant factors, including **(a)** whether the person can understand the reason for the proceeding and can instruct counsel; **(b)** the person’s statements and behaviour at the proceeding; **(c)** expert evidence, if any, on the person’s intellectual or physical faculties, age or mental condition; and **(d)** whether the person has had a representative designated for a proceeding in another division of the Board.

Rule 20(10) – Responsibilities of representative: The responsibilities of a designated representative include **(a)** deciding whether to retain counsel and, if counsel is retained, instructing counsel or assisting the represented person in instructing counsel; **(b)** making decisions regarding the claim or application or assisting the represented person in making those decisions; **(c)** informing the represented person about the various stages and procedures in the processing of their case; **(d)** assisting in gathering evidence to support the represented person’s case and in providing evidence and, if necessary, being a witness at the hearing; **(e)** protecting the interests of the represented person and putting forward the best possible case to the Division; **(f)** informing and consulting the represented person to the extent possible when making decisions about the case; and **(g)** filing and perfecting an appeal to the Refugee Appeal Division, if required.

Rule 50(1) – Application to the Division: Unless these Rules provide otherwise, an application must be made in writing, without delay, and must be received by the Division no later than 10 days before the date fixed for the next proceeding.

Rule 53(1) – Application to change location: A party may make an application to the Division to change the location of a proceeding.

Rule 53(4) – Factors: In deciding the application, the Division must consider any relevant factors, including **(a)** whether the party is residing in the location where the party wants the proceeding to be held; **(b)** whether a change of location would allow the proceeding to be full and proper; **(c)** whether a change of location would likely delay the proceeding; **(d)** how a change of location would affect the Division’s operation; **(e)** how a change of location would affect the parties; **(f)** whether a change of location is necessary to accommodate a vulnerable person; and **(g)** whether a hearing may be conducted by a means of live telecommunication with the claimant or protected person.

Rule 54(1) – Application to change the date or time of a proceeding: Subject to subrule (5), an application to change the date or time of a proceeding must be made in accordance with rule 50, but the party is not required to give evidence in an affidavit or statutory declaration.

Rule 54(4) – Factors: Subject to subrule (5), the Division must not allow the application unless there are exceptional circumstances, such as **(a)** the change is required to accommodate a vulnerable person; or **(b)** an emergency or other development outside the party’s control and the party has acted diligently.

Rule 70 – Powers of Division: The Division may, after giving the parties notice and an opportunity to object, **(a)** act on its own initiative, without a party having to make an application or request to the Division; **(b)** change a requirement of a rule; **(c)** excuse a person from a requirement of a rule; and **(d)** extend a time limit, before or after the time limit has expired, or shorten it if the time limit has not expired.

5. Refugee Appeal Division Rules⁷³

Rule 1 – Vulnerable person: means a person who has been identified as vulnerable under the Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB issued under paragraph 159(1)(h) of the Act.

Rule 23(1) – Designated representatives: If the Refugee Protection Division designated a representative for the person who is the subject of the appeal in the proceedings relating to the decision being appealed, the representative is deemed to have been designated by the Division, unless the Division orders otherwise.

Rule 23(2) – Duty of counsel to notify: If the Refugee Protection Division did not designate a representative for the person who is the subject of the appeal and counsel for a party believes that the Division should designate a representative for the person because the person is under 18 years of age or is unable to appreciate the nature of the proceedings, counsel must without delay notify the Division in writing.

Rule 23(3) – Exception: Sub-rule (2) does not apply in the case of a person under 18 years of age whose appeal is joined with the appeal of their parent or legal guardian if the parent or legal guardian is 18 years of age or older.

Rule 23(6) – Factors: When determining whether a person who is the subject of an appeal is unable to appreciate the nature of the proceedings, the Division must consider any relevant factors, including **(a)** whether the person can understand the reason for the proceeding and can instruct counsel; **(b)** the person's statements and behaviour at the proceeding; **(c)** expert evidence, if any, on the person's intellectual or physical faculties, age or mental condition; and **(d)** whether the person has had a representative designated for a proceeding in a division other than the Refugee Protection Division.

Rule 23(11) – Responsibilities of representative: The responsibilities of a designated representative include **(a)** deciding whether to retain counsel and, if counsel is retained, instructing counsel or assisting the represented person in instructing counsel; **(b)** making decisions regarding the appeal or assisting the represented person in making those decisions; **(c)** informing the represented person about the various stages and procedures in the processing of their case; **(d)** assisting in gathering evidence to support the represented person's case and in providing evidence and, if necessary, being a witness at the hearing; **(e)** protecting the interests of the represented person and putting forward the best possible case to the Division; and **(f)** informing and consulting the represented person to the extent possible when making decisions about the case.

Rule 37(1) – Application to the Division: Unless these Rules provide otherwise, an application must be made in writing and without delay.

Rule 53 – Powers of Division: The Division may, after giving the parties notice and an opportunity to object, **(a)** act on its own initiative, without a party having to make an application or request to the Division; **(b)** change a requirement of a rule; **(c)** excuse a person from a requirement of a rule; and **(d)** extend a time limit, before or after the time limit has expired, or shorten it if the time limit has not expired.

⁷³ [Refugee Appeal Division Rules SOR/2012-257](#)

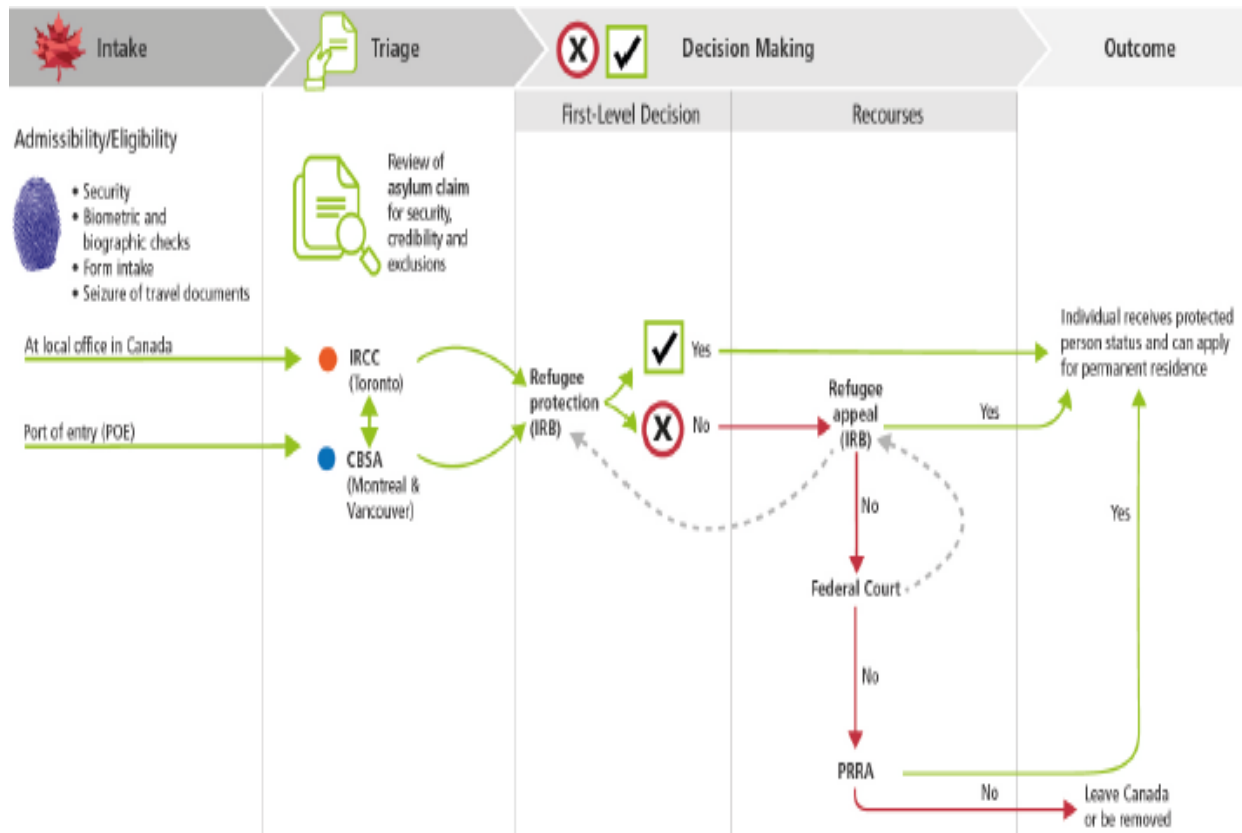
Rule 66(1) – Application to change location: A party may make an application to the Division to change the location of a hearing.

Rule 66(4) – Factors: In deciding the application, the Division must consider any relevant factors, including **(a)** whether the party is residing in the location where the party wants the hearing to be held; **(b)** whether a change of location would allow the hearing to be full and proper; **(c)** whether a change of location would likely delay the hearing; **(d)** how a change of location would affect the Division’s operation; **(e)** how a change of location would affect the parties; **(f)** whether a change of location is necessary in order to accommodate a vulnerable person; and **(g)** whether a hearing may be conducted by means of live telecommunication with the person who is the subject of the appeal.

Rule 67(1) – Application to change date or time: A party may make an application to the Division to change the date or time fixed for a hearing.

Rule 67(5) – Factors: In deciding the application, the Division must consider any relevant factors, including **(a)** in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application; **(b)** when the party made the application; **(c)** the time the party has had to prepare for the hearing; **(d)** the efforts made by the party to be ready to start or continue the hearing; **(e)** in the case of a party who requests more time to obtain information in support of their arguments, the Division’s ability to proceed in the absence of that information without causing an injustice; **(f)** whether the party has counsel; **(g)** the knowledge and experience of any counsel who represents the party; **(h)** any previous delays and the reasons for them; **(i)** whether the date and time fixed were peremptory; **(j)** whether the change is required to accommodate a vulnerable person; **(k)** whether allowing the application would unreasonably delay the hearing or likely cause an injustice; and **(l)** the nature and complexity of the matter to be heard.

APPENDIX C – SIMPLIFIED IN-CANADA ASYLUM SYSTEM PROCESS FLOW⁷⁴



74 Taken from Yeates, 2018, p. 60.

APPENDIX D – COUNTRIES EXEMPTED FROM THE 12-MONTH BAR ON PRRA APPLICATIONS (AS OF NOVEMBER 2020)

Under s.112(2)(b.1) and (c) IRPA, a person may not apply for a PRRA if less than 12 months have passed since a previous PRRA application or a negative decision on a claim for refugee protection. To ensure that migrants ‘at risk’ won’t be removed, an exemption to the 12-month bar may be made for the nationals or former habitual residents of certain countries. With that mechanism, the Canadian government recognizes that the 12-month bar could prevent migrants in a situation of vulnerability from applying for a PRRA when sudden changes in a country’s conditions happen between a claimant’s negative decision on refugee protection and the end of the 12-month waiting period. The table below lists the countries which have been exempted from this requirement since 2012.

Countries exempted from the 12-month bar on PRRA applications under s.112(2.1) IRPA (IRCC, 2020p)

EXEMPTED COUNTRIES	EXEMPTION APPLIES FOR IRB OR PREVIOUS PRRA DECISION MADE ON OR BETWEEN THESE DATES ⁷⁵
BRUNEI	June 14, 2018 – June 13, 2019
CENTRAL AFRICAN REPUBLIC	August 15, 2011 – August 14, 2012 May 12, 2013- May 11, 2014 December 9, 2016 – December 8, 2017
VENEZUELA	July 8, 2016 – July 7, 2017 August 20, 2018, and August 19, 2019,
RUSSIA	July 1, 2016 – June 30, 2017
TURKEY	February 16, 2016 – February 15, 2017
ETHIOPIA	July 28, 2015 – July 27, 2016
BURUNDI	August 13, 2014 – August 12, 2015
YEMEN	June 18, 2014 – June 17, 2015
LIBYA	February 20, 2014 – February 19, 2015
SOUTH SUDAN	August 27, 2013 – August 26, 2014
EGYPT	May 12, 2013 – May 11, 2014
MALI	February 21, 2012 – February 20, 2013
EGYPT	August 15, 2011 – August 14, 2012
GUINEA-BISSAU	August 15, 2011 – August 14, 2012
LIBYA	August 15, 2011 – August 14, 2012
SOMALIA	August 15, 2011 – August 14, 2012
SUDAN	August 15, 2011 – August 14, 2012
SYRIA	August 15, 2011 – August 14, 2012

⁷⁵ This exemption has been implemented to take into account the sudden changes in a country’s conditions. A CBSA officer shall inform the individuals concerned before removal from Canada. To qualify, the claimant must: 1) come from an exempt country; and 2) have received a final negative decision from the IRB or the Federal Court (on refugee protection) or from IRCC (on another PRRA application) between the dates specified by the Minister. Individuals who received a final negative decision after these dates are not entitled to this exemption, because “[a]ny recent changes in country conditions would have been considered when the refugee claim was decided or during the PRRA process” (see e.g., IRCC, 2019q).

APPENDIX E – IN-CANADA REFUGEE DETERMINATION PROCESS FOR DIFFERENT CLAIMANTS⁷⁶

Claimant Group	RPD Hearing Timeline	Access to RAD	Detention Review	Stay on Removal for Judicial Review	Other
Most claimants	Standard: <ul style="list-style-type: none"> 15-day BOC deadline Corroborating evidence/ documents due 10 days before hearing 60 days for hearing 	Standard: 30 days to perfect appeal	Standard: <ul style="list-style-type: none"> 1st review: Within 48 hours of detention 2nd review: within 7 days of 1st review Subsequent reviews: every 30 days 	Yes	Standard: No access to PRRA or H&C until 12 months starting the day after rejection of claim at RPD, RAD or Federal Court
Designated Foreign Nationals (DFN)	No	No	<ul style="list-style-type: none"> 1st review: within 14 days after initial detention 2nd review: 6 months after 1st review 3rd review: 6 months after 2nd review 	No	<ul style="list-style-type: none"> No access to PRRA until 12 months starting the day after rejection of claim at RPD, RAD or Federal Court No access to permanent residency, H&C or family sponsorship for 5 years No access to travel documents until a permanent resident
Ineligible claimants who made a previous asylum claim in the US, UK, Australia or New Zealand	No	No	Yes, standard	No	Mandatory PRRA.

Exception to Safe Third Country Agreement (STCA) who did not make a claim in the US	Yes, standard	No	Yes, standard	No	Yes, standard
Manifestly Unfounded Claim (MUC)	Yes, standard	No	Yes, standard	No	Yes, standard
No Credible Basis (NCB)	Yes, standard	No	Yes, standard	No	Yes, standard

APPENDIX F– SUMMARY OF THE MANDATORY TRAINING AT THE IRB, ACCORDING TO A WRITTEN SUBMISSION PROVIDED BY THE BOARD IN 2018⁷⁷

<p>Training for all IRB members (CIMM, 2018, p. 26-28)</p>	<ul style="list-style-type: none"> – New members must receive in-depth training on effective communication with stakeholders before they may rule on cases. – New members must complete the courses entitled <i>Creating a Respectful and Harassment Free Workplace</i> and <i>Values and Ethics</i>. – New members have specific training with respect to the Chairperson’s Guideline 9 on SOGIE, which includes two separate half-day sessions on legal components and practical skills of questioning with a trauma-informed approach. – New members have specific training with respect to the Code of Conduct, which includes a review of their obligations, practical case studies and exercises. – Existing members must regularly participate in professional development workshops.
<p>Training specific at the RPD (CIMM, 2018, p. 28-29)</p>	<ul style="list-style-type: none"> – New members must complete the ‘RPD New Member Training Program’, which includes a cultural sensitivity training session entitled <i>Cross Cultural Questioning</i>, training with respect to the Chairperson’s Guideline 4 (Women fearing gender-related persecution) and Chairperson’s Guideline 8 (Vulnerable persons), and further training on the Chairperson’s Guideline 9 (SOGIE). – New members must complete an 8-day training period. It focuses on the ‘RPD New Member Training Program’, on presiding in a hearing room and on questioning claimants (sensitivity and cultural awareness). Sessions are also focusing on decision writing, including decisions relating to sexual orientation to verify the avoidance of stereotypes. – Existing members designated to the <i>Legacy Task Force</i> (claims referred before December 15, 2012) receive further training on the SOGIE Guideline. – Existing members must attend professional development workshops on issues relating to adjudicating claims. Examples of workshop sessions: SOGIE guideline; Vulnerable persons; Refugee mental health; PTSD; Memory and psychology; Interpretation and analysis of psychological reports. – Existing members receive updates regarding the Federal Court jurisprudence and the application of the Chairperson’s Guidelines.
<p>Training specific at the RAD (CIMM, 2018, p. 28-29)</p>	<ul style="list-style-type: none"> – New members must complete a condensed version of the ‘RPD New Member Training Program’ as well as gender and SOGIE training. – New members receive instructions regarding the Chairperson’s Guidelines, the principles of natural justice, ethics and the Code of Conduct. – New members must complete a course and attend an hour-long discussion on cultural competence. – New members typically complete a 9-week training period, but the period of formal training may last up to 3 months, based on the member’s experience in the refugee determination system. The training focuses on refugee protection determination (3 and a half weeks), refugee appeals (3 and a half weeks) and observation of hearings (2 weeks). – Existing members must attend refresher trainings and discussions on the Chairperson’s Guidelines and cultural sensitivity. – The RAD implemented a discussion for existing members on appeals based on sexual orientation following the first year of existence of the SOGIE Guideline, which is effective only since May 2017. – The RAD develops individualized learning plans for existing members that may include additional training.

Training specific at the IAD (CIMM, 2018, p. 29)

- New members must complete a course and attend an hour-long discussion on cultural competence.
- New members must review 2 case studies related to cultural competence as part of a course entitled *Conduct of a Proactive Hearing*.
- Existing members receive annual SOGIE refreshers.
- Existing members must attend monthly professional development sessions where they receive information regarding decisions rendered by the Federal Court.

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