

March 29, 2000

The Honourable Elinor Caplan, P.C., M.P.  
Minister of Citizenship and Immigration  
365 Laurier Avenue West  
20<sup>th</sup> Floor, Jean Edmonds Building, South Tower  
Ottawa, ON K1A 1L1

Dear Minister,

In your speech to the Canadian Bar Association Citizenship and Immigration Law Section (the Section) in Vancouver BC on November 26 of last year, you suggested clarifying or enhancing the existing grounds for detention, to help deal with increased smuggling and trafficking in Canada. You made a number of proposals and indicated that you would welcome the views of the Section on these proposals. The purpose of this letter is to provide you with our views.

### **Grounds for Detention**

As you noted, the *Immigration Act* currently permits three grounds for detention:

- inability to establish identity;
- reasonable concern for public safety; and
- warranted fear of flight.

### **Inability to establish identity**

Undocumented but cooperative claimants who comply with every effort to assist authorities in establishing who they are and where they have come from should not be detained on this ground. Such a detention is detention on mere suspicion alone. The possibility of detention on the sole basis of inability to establish identity should not be in the *Immigration Act*. In the pending round of reform of the Act, that possibility should be excised.

In Vancouver, you proposed to clarify the ground of inability to establish identity to include those undocumented and uncooperative claimants who refuse to assist authorities in establishing who they are and where they have come from. In view of our general concern about this ground, we would prefer that, as long as the present *Act* continues in force, the ground not just be clarified to include these people, but be limited to refer only to these people.

### **Concern for Public Safety**

A second proposal you made was to clarify the definition of “concern for public safety” by including anyone convicted of a serious criminal offence. We wish to make two comments here. Firstly, whether a person is convicted of a serious criminal offence should be determined by the actual sentence for the crime, not the maximum sentence for the crime. A person convicted of a crime with a high maximum who has received a short sentence, or been penalized with only a fine should not be considered as a person convicted of a serious criminal offence.

Secondly, danger is a forward looking concept, whereas convictions are in the past. It would make sense to have a conviction for a serious criminal offence as a preliminary hurdle, a condition precedent. However, under the current law it is not, and under any future law, it should not, be the only criterion. An adjudicator would still have to determine, regardless of the conviction, whether the person is likely or not to offend in the future.

### **Fear of Flight**

A third proposal you made was to clarify the definition of “fear of flight” by making explicit provision for claimants where it is reasonable to believe that they have arrived in Canada as part of a criminally-organized smuggling or trafficking operation. The suggestion appears to be that a person is more likely to flee when they have arrived as part of a criminally-organized smuggling or trafficking operation.

Earlier in your speech, you made a distinction, which we accept, between “smuggling” and “trafficking” of human beings. You pointed out that:

Smuggling has been around for awhile. It is a fee-for-service operation. Smugglers are paid for simple passage across international borders. They provide this service through various means that include such things as false travel documents and undetected border crossings. Their customers are sometimes economic migrants, but sometimes they are legitimate refugees, who resort to smugglers as the only way to escape the source of their persecution.

Human trafficking, however, is more akin to human slavery. The goal of traffickers is profit from indentured human servitude. Once their debts have been imposed, the victims of human trafficking are bound to a long term repayment plan involving forced labour, prostitution and other illicit activity. These victims often have reason to fear for their lives, and the lives of their family members back home. This exploitation is reprehensible.

In such criminally-organized human trafficking, Canada is facing something new. Historically, we have correctly assumed that people arriving upon our shores were seeking to obtain legal status and eventual integration into Canadian society. Our refugee determination system is designed to deal with those seeking legal status. For human traffickers, however, the goal is not legal status. In the first instance, it is to evade detection at our ports of entry, in order to enter unnoticed, and force their passengers underground and into servitude as soon as possible.

These remarks show your belief of a greater risk of flight from victims of trafficking than from victims of smuggling.

The Section is concerned with detention even of trafficking victims for no other reason than that they are victims of trafficking. That sort of detention piles victimization upon victimization. The best way to deny to traffickers the fruits of their trafficking is through investigation, charge, arrest, prosecution, trial, conviction and sentencing of the traffickers. That result will more likely be achieved through the release of those trafficked who are willing to assist in bringing the traffickers to justice than through continued detention of those trafficked.

We do not believe there should be a distinction between victims of smuggling and victims of trafficking. However, whatever logic might apply to the detention of the trafficked does not apply to the detention of the smuggled. No general clarification for detention should apply to the smuggled in a blanket fashion in the manner that your current proposal does.

The Section looks forward to discussing these and other matters in greater detail in the context of consultations on the pending legislation.

Yours very truly,

Elizabeth D. Chow Bryson  
Chair  
National Citizenship and Immigration Law Section