Ensuring precariousness: the status of Designated Foreign National under Protecting Canada's Immigration System Act 2012

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ABSTRACT

This article interrogates a specific legal response to the unauthorised arrival of asylum seekers to Canada by sea. It focuses in particular on the treatment of such individuals after they have been recognised as refugees under the Convention Relating to the Status of Refugees (Refugee Convention). It is a critical analysis of the introduction of the Protecting Canada's Immigration System Act (PCISA) in Canada, which amends the Immigration Refugee Protection Act (IRPA). The article focuses on the establishment of the new legal status of Designated Foreign National (DFN) under the PCISA. In the article, it is argued that this response has resulted in the creation of legal standards that undermine the rights guaranteed to recognised refugees in the Refugee Convention. The establishment of the status of the DFN also represents the creation of a legal space where those who are designated are confronted by various restrictions that have been established as a response to anxiety about the arrival of asylum seekers to the state by sea. This article examines how the creation of the DFN status has shifted the approach to the regulation of space in Canada. Drawing on critical legal studies, as well as critical legal geography, this article focuses on the interrelationship between legal knowledges, and control over space as it relates to the DFN. Finally, the article examines how it may be possible for DFNs to oppose the creation of a two-tier system of refugee protection under the PCISA by asserting their rights under section 15 of the Canadian Charter of Rights and Freedoms (the Charter).

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1. INTRODUCTION

This article draws on the discourse surrounding the establishment of the PCISA in order to show how it contributed to the creation of the restrictive status of the DFN refugee.[1] This article analyses the creation of the DFN status as a form of spatial control. It also considers the possibility of resisting the content of the status on the basis of section 15 of the Charter. Under the PCISA, those who arrive to the state as part of a group associated with a suspected smuggling or criminal operation may be categorised as DFNs.[2] The DFN status tends to primarily affect asylum seekers who arrive as a part of a group to the state by boat. However, under the PCISA, any person who is categorised as part of such a group continues to be considered to be a DFN, even after she has been recognised as a refugee under the Refugee Convention.[3] She also continues to be considered a DFN for five years after she has acquired refugee status, until she is permitted to apply for a permanent residence status.[4] Part 2 of the article sets out the features of DFN status as established in the PCISA. In part 2, I note the significant restrictions that those categorised as DFNs are subject to under the PCISA, even if they apply for, and are granted, asylum under the Refugee Convention. Part 3 then examines the language used in the debates leading up to the introduction of the PCISA. I contend that the narrative of the refugee presented in the debates shaped the content and the scope of the DFN status. As the state was not able to control the initial entry of the DFN into the territory of the state, punitive restrictions were thereafter applied to the DFN in the name of deterring future unauthorised arrivals. In order to achieve this, one of the key focuses of the legislation was to limit and control the movement of those designated as DFNs after they had arrived. In the parliamentary debates leading up to the establishment of the PCISA, the DFN was repeatedly characterised as illegal and illegitimate. It is argued that such descriptions of the

[1] Immigration and Refugee Protection Act, SC 2001, c 27, as amended by Protecting Canada's Immigration System Act 2012, SC 2012, c17, (PCISA). For ease of reference, in this article, provisions of the Immigration and Refugee Protection Act that were introduced under the Protecting Canada's Immigration System Act will be referred to as coming under the PCISA. Provisions of the Immigration and Refugee Protection Act that pre-date the 2012 amendment will be referred to as coming under the IRPA.

[2] Under s 20.1 (2) of the PCISA, persons who are part of such groups are automatically designated unless they are able to produce a visa or other documentation under the regulation and, on examination, the officer is satisfied that they are not inadmissible.

[3] Convention Relating to the Status of Refugees, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 28 July 1951, 189 UNTS 2545, as amended by the 1967 Protocol Relating to the Status of Refugees, 189 UNTS 150 (Refugee Convention).

[4] PCISA, s 11 (1.1).

DFN enabled the government to rationalise the lesser legal status granted to DFNs under the PCISA, even if they had been recognised as refugees.

In part 4 it is argued that the treatment of the DFN embodies a biopolitical management of life. In the legislation, it is suggested that the problem of the DFN is to be neutralised through the categorization and management of the DFN. The article establishes that the restrictions that are placed on the DFN under the PCISA assume a spatial logic, where the state imagines ways to prevent the movement of the refugee within as well as outside the state. After she is recognised as a refugee, the DFN is subject to a kind of suspended status. This article emphasises that the precariousness of the DFN's legal status in the state is exemplified through the consistent reinforcement of the threat of her removal from the state.

Part 5 notes that while the DFN may technically be recognised as a refugee under the Refugee Convention, the standard of protection that the Canadian Government is willing to offer the DFN is little more than protection from *refoulement*. By classifying an individual as a DFN, the state makes the decision to subject her to a lesser legal status, even if she has a claim to refugee protection as set out in the Refugee Convention. This represents a scalar shift in the treatment of the DFN. The DFN is no longer considered to be a refugee, deserving of international protection, but primarily as an irregular migrant, a person who has deliberately flouted domestic immigration rules. In effect, the DFN is reduced to a threat to the security of the state in the eyes of the law. The final section of this article considers how the establishment of a second-tier refugee status protection under the PCISA raises issues in relation to constitutional guarantees to equality and non-discrimination under section 15 of the Charter.[5]

2. THE PCISA AND THE ESTABLISHMENT OF THE DFN STATUS

Under the PCISA, the Minister of Citizenship and Immigration may determine that a group of people will be categorised as irregular arrivals if he is of the belief that they have entered Canada as part of a smuggling operation.[6] The PCISA describes an irregular arrival at sections 20.1(1)(a) and (b) as a group of persons who the Minster believes he cannot successfully carry out investigations as to their identity or admissibility, or any other examination in a timely manner. A person may also be deemed to be an irregular arrival if the

[5] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (the Charter).
[6] PCISA, s 20.1 (1).

Minister has reasonable grounds to suspect that there has been, or will be, 'human smuggling for the benefit or profit of, at the direction, or in association with a criminal organisation or terrorist group'.[7] The irregular arrival then automatically becomes a DFN unless she holds the documents required for entry; and the officer is satisfied that she is not admissible to Canada.[8] The Canadian Association of Refugee Lawyers has pointed out that two people arriving together to Canada could potentially be identified as a group for the purposes of the PCISA, in the absence of a definition of a 'group' within the context of the PCISA.[9]

While a person is designated on the basis of her arrival to the state with a group, her individual rights as an asylum seeker, and possibly later as a refugee, that are substantially affected by designation under the PCISA. The legislation was initially drawn up as a response to the arrival of migrants to Canada aboard the MV Ocean Lady and the MV Sun Sea in 2009 and 2010 respectively.[10] As is the case with unauthorized boat migrants arriving to states, most of those aboard the MV Sun Sea and the MV Ocean Lady went on to apply for asylum in Canada. This means that the status of DFN directly targets asylum seekers who arrive in an unauthorized manner to the state.[11] Under the PCISA therefore, DFNs are categorized on the basis of their mode of arrival rather than, for instance, on the apparent merit of their asylum application.[12] Consequently, under the PCISA, those who have been designated are treated first as DFNs, and second as asylum seekers and (potentially) refugees.

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[7] PCISA, s 20.1(1) (b).

[8] PCISA, s 20.1(2)

[9] Canadian Association of Refugee Lawyers, *The Unconstitutionality of Bill C-4, Submission on the Preventing Human Smugglers from Abusing Canada's Immigration System Act*, (October 2011) < http://www.cdp-hrc.uottawa.ca/projects/refugee-forum/projects/documents/TheUnconstitutionalityofBillC4final.pdf> accessed 22 April 2014.

[10] An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act 2010 (Bill-C49). It should also be noted that on February 16 2015, the Canadian Association of Refugee Lawyers intervened in a two day case hearing at the Supreme Court of Canada relating to the legality of Canada's human smuggling laws and the criminalisation of refugees and refugee claimants. The issue being decided relates to 5 cases of alleged human smuggling. A number of the cases involve refugee claimants who arrived among the MV Sun Sea and MV Ocean Lady. At the time of going to print, a decision has yet to be released. See, 'CARL Argues Human Smuggling Laws Unconstitutional In Supreme Court', (*Canadian Association of Refugee Lawyers*, 16 February 2015) < http://www.carl-acaadr.ca/articles/CARLArguesHumanSmugglingLawsUnconstitutional> accessed 3 April 2015.

[11] Canada faced a similar situation in 1999 when 599 boat migrants from China arrived to the state and sought asylum. As MacIntosh notes, the Immigration and Refugee Protection Act, RSC 2001, c 207 (IRPA) was established as a response to this arrival, much like how the PCISA has been established as a response to the 2009 and 2010 arrivals to the state. See C MacIntosh, 'Insecure Refugees: The Narrowing of Asylum Seeker Rights of Freedom of Movement and Claims Determination Post 9/11 in Canada' (2011-2012) 16 (2) Rev of Constit. Studies 181- 209, 186.

[12] For example, asylum applicants' claims that are determined to be manifestly unfounded are treated differently under Canadian law from other asylum seekers whose initial application fails because the former category are not entitled to lodge an appeal against such a decision. (s 107(1) Immigration and Refugee Protection Act, SC 2001, c 27 (IRPA)).

If an individual who has been designated under the PCISA then goes on to apply for asylum in Canada, her rights will be restricted in a way that is not experienced by other asylum seekers in the state. Thereafter, her status as a DFN will remain for at least five years after she has been granted refugee status, until she is able to access either a temporary or permanent residence status in Canada.[13] Therefore, with the introduction of the PCISA, Canada has deliberately endeavoured to grant those who arrive to the state by sea, and are later granted refugee status, a temporary legal status in the state. Categorization of individuals as DFNs results in a legal status of 'permanent temporariness' for many years after those who are designated first enter the state.[14] Under the PCISA, a person may be designated at the point of entry to the State, or at a later stage, after she has entered and applied for asylum.[15] The latter provision has been included in the PCISA in order to allow for those who arrived aboard the MV Sun Sea in 2010 to be retrospectively designated as irregular arrivals.[16]

The PCISA states that those assessed to be DFNs may be arrested and detained.[17] The detention for those deemed to be DFNs is automatic and mandatory for all over the age of 16.[18] A DFN may be released from detention if a final determination is made on her refugee claim,[19] if an order for her release is made by the Immigration Division of the Immigration and Refugee Board (IRB),[20] or if a ministerial order is made for her release.[21] The DFN is also subject to detention review procedures which are specific to the DFN.

The PCISA provides for notably less frequent review of the detention of DFNs in comparison to all other asylum seekers or migrants who are detained under Canadian immigration law. For most asylum seekers and immigrants subject to immigration detention in Canada, the review of their detention is regulated by section 57.1 of the IRPA 2001 before it was amended by the PCISA. Anyone held under that provision of the IRPA must have their

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[13] PCISA, s 11(1.1).
[14] A Bailey, R Wright, A Mountz, I Miyares, '(Re)producing Salvadoran transnational geographies' (2002) 92 (1) Ann Assoc Am Geogr 125- 144, 125 and 138.
[15] PCISA, s 81(1), 'A designation may be made under subsection 20.1(1) of the Act, as enacted by section 10, in respect of an arrival in Canada — after March 31, 2009 but before the day on which this section comes into force — of a group of persons'.
[16] ibid.
[17] PCISA, s 55(3.1). A person maybe arrested and detained if they are categorized as a designated foreign national. This may occur at the point of entry to Canada (s 55(3.1)(a)), or after they have entered Canada if they are deemed to have become a designated foreign national at a later point (section 55(3.1)(b)). Under this section, an individual may be arrested and detained without the requirement that the authorities obtain a warrant for such an arrest and detention.
[18] PCISA, s 56(2).
[19] ibid.
[20] ibid.
[21] PCISA, s 58(1).

detention reviewed within 48 hours. A subsequent review must then be carried out within seven days of the initial review and thereafter at least once every 30 days.[22] The PCISA amends section 57.1 of the IRPA to include a less frequent detention review procedure for DFNs. Under section 57.1(1) of the PCISA, the detention of DFNs must be reviewed after 14 days. Thereafter, it is to be reviewed at a six month interval, commencing after the initial review. The disparity in treatment between immigrants detained as DFNs under the PCISA and other immigrants is therefore striking. The Immigration Division of the IRB has the power to release the DFN, subject to conditions, however, if the DFN breaches any of these conditions, her application for temporary or permanent residence status may thereafter be refused.[23]

Even after a DFN has been recognised as a refugee under the Refugee Convention, she is still subject to a range of restrictions on her rights and freedoms that other refugees present in the state are not.[24] Her freedom of movement is restricted because she is not allowed to access to a Refugee Convention Travel Document and she is precluded from even applying for a permanent resident status for a period of 5 years.[25] In Canada, only permanent residents are eligible to access family reunification, therefore DFN refugees are also prevented from applying to be joined by their family for at least five years.[26] In addition, DFN refugees are not considered to be lawfully present in the state.[27] The DFN refugee is therefore denied the full set of rights set out in the Refugee Convention, even though she has been recognised as a Convention refugee by the Canadian State.[28] The right to permanent residence or access to family unity is not specifically provided for in the Refugee Convention. However, other recognised refugees living in Canada are able to gain access to these rights, without facing the same obstacles and exclusions that DFN refugees do. This demonstrates that DFN refugees have been isolated and targeted by a specific policy that deprives them of rights available to other refugees in Canada.

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[22] PCISA, s 57(1).
[23] PCISA, s 58(4), PCISA, s 11(1.3)(a).
[24] In the present article, designated foreign nationals who have been recognised as refugees are referred to as 'DFN refugees'.
[25] PCISA, s 110(2)(a) and s 11(1.1).
[26] Under s 176(2) of the Immigration and Refugee Protection Regulations, SOR/2002-227 (IRPR), the family of a refugee who are outside Canada have one year from the time that the refugee is granted refugee status to make an application for permanent residence status. Under s 176(1), the family of a refugee who are present in the state may make an application for permanent residence at the same time as the refugee and have their application processed concurrently.
[27] As the DFN is not considered to be 'lawfully staying' in the state, as per art1A of the Refugee Convention, she is deemed to not be entitled to a travel document. See PCISA, s 31(1). The DFN must submit to reporting requirements as a condition of her legal status, see PCISA, s 98(1) and s 98(2).
[28] ibid.

The system introduced with the PCISA normalises precariousness for a certain group of refugees, by denying them the possibility of applying for permanent residence for at least five years. The treatment of the DFN under the PCISA is representative of what Goldring et al have referred to as the 'legal production of illegality' in Canada.[29] However, the creation of the category of DFN also challenges the accepted distinction between who is legal and who is illegal in the state. DFNs are recognised as refugees, yet the legal status that they are subject to differentiates them from all other refugees present in the state. It marks them and their mode of entry into the state as illegitimate. As discussed below, the DFN disrupts the preferred mode of entry of refugees and migrants to the state. For this reason, the legal status that she is thereafter subject to is one which has been constructed in order to deter refugees and migrants from arriving to the state in such a manner. By designating someone as a DFN, the state gives the appearance of having reasserted control over the movement of unauthorised asylum seekers to the state. However, the status of the DFN is also a means of controlling and managing the refugees within the state.

3. THE DFN: CHALLENGING THE CONSTRUCTION OF THE REFUGEE IN THE CANADIAN IMMIGRATION AND ASYLUM SYSTEM

The establishment of the DFN status is part of Canada's effort to regulate the kinds of refugees that may enter and remain in the state. During the debates, many of the government representatives referred to the dichotomy between two types of refugee coming to Canada. The first kind of refugee had come to the state through so-called legitimate means, either as a resettled refugee, or arriving to the state with a valid visa (usually by air) and applying for asylum upon arrival. These movements were considered to be part of the general machinery of the immigration and asylum system. These arrivals were therefore not obvious to the public, occurring away from the public gaze, often as quiet movements through controlled and regulated spaces like airports. The second type of asylum seeker was someone who had come to the state through illegal means, usually visibly. The DFN status was therefore created to target those who had arrived visibly at the borders of the state, central to the public gaze. The DFN was someone seeking protection, who did not have the opportunity to rely on

[29] Goldring et al refer to four elements where if any element is absent, this indicates that a person has a precarious status in the state. These elements are 1) work authorization, 2) the right to remain permanently in the country (residence permit), (3) not depending on a third party for one's right to be in Canada (such as sponsoring spouse or employer), and (4) social citizenship rights available to permanent residents Two of these elements are absent for the DFN (2 and 4). The DFN is clearly subject to a precarious status in the state. L Goldring, C Bernstein and J K Bernhard, 'Institutionalizing precarious migratory status in Canada' (2009) 13(3) Citizenship Studies 239- 265, 239-241.

a legal path to enter the state. She was therefore forced to seek out points of the border which allowed for 'subversive' movement in order to enter.[30]

The arrival of those on board the MV Ocean Lady and the MV Sun Sea was viewed as signifying the loss of control that the state had over its borders.[31] After the MV Sun Sea arrived at the shores of British Columbia, both the state and the public viewed themselves as being overrun. Initial reports linked the arrivals to terrorist organisations in Sri Lanka.[32] However, as it became clear that most of those on board did not have such links, but were in fact seeking asylum, the government then began to attack the legitimacy of the claims of those on board. The key narrative that the government articulated during the debates was that anyone who arrived to the state in such a manner could not possibly be seeking the protection of the state. In order to further justify the treatment of the DFN, the state emphasised that the action it was taking was in order to ensure that it was able to grant refugee status to those who had not arrived to the state by sea. These refugees, unlike those who arrived by sea, were referred to as deserving of protection. According to the government, the PCISA and the DFN status would benefit the genuine refugees, while excluding asylum who had arrived unauthorised to the state.

> …we're taking people who are legitimately waiting to be recognized and accepted as having refugee status in this country, who are waiting in the system for 1,038 days, and we're cutting that down by some 75% to 80%...We're weeding away the people who don't have legitimate claims and who are clogging up the system.[33]

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[30] W Walters, 'Acts of Demonstration: Mapping the Territory of (Non-) Citizenship' in E Isin and G Neilson (eds), *Acts of Citizenship* (Zed Books 2008) 182-207, 198.

[31] The PCISA amends many of the provisions of the IRPA. MacIntosh notes that while the IRPA was enacted shortly after the events of September 11th, that legislation was first tabled in response to the arrival of boats of Chinese migrants to British Columbian shores in 1999. See C MacIntosh, above n 11, 186.

[32] M Youssef, 'Migrant held on suspicion of ties to Tamil Tigers' (*The Globe and Mail*, 8 September 2010) <http://www.theglobeandmail.com/news/british-columbia/migrant-held-on-suspicion-of-ties-to-tamil-tigers/article1369321/ > accessed 3 April 2015. However, even without definitive proof of links to terrorism, the public reaction was that of fear and suspicion toward those on board the MV Sun Sea. During the debates leading up to the introduction of the PCISA, Brian Sorseth (CPC) noted, 'The reaction of most Canadians was swift. In an Angus Reid poll shortly after the MV Sun Sea arrived, almost half of the Canadians surveyed said they believed that all passengers and crew should be deported, even if they were found to have no links to terrorism. That is a telling number and, quite frankly, one we cannot ignore'. *House of Commons Debates* 41st Parl, 1st Sess, No. 16 (11 Sept 2011) at 1218 (Brian Storseth). (The style used for the citation of the parliamentary debates adheres to that set out in *Canadian Guide to Uniform Legal Citation*, (Carswell, 7th edn, 2010)).

[33] *Standing Committee on Citizenship and Immigration*, 41st Parl, 1st Sess, No. 31 (26 Apr 2012) at 13 (Costas Menegakis).

Statements such as this, made during the debates on the PCISA, deliberately conflated the legitimacy of the *claim* that was being made by the refugee with the legality of *the way* that the refugee entered the state. The restrictions affecting the DFN were therefore applied as a result of the perceived need to protect and preserve the immigration regulations and improve the overall efficiency of the system.[34] Spontaneous arrivals, particularly those arriving by boat to the state such as the DFN, trouble and disrupt the accepted method of accommodating refugees in Canada. As Mountz has noted:

> States do not grant refugee status to everyone, and in their decision-making, they often pit the agency of the state against that of the refugee. Those who arrive of their own volition are called 'spontaneous arrivals', and they are punished for exercising their own agency.[35]

In the case of Canada, the government representatives refer to the state as almost volunteering to assist the refugee rather than being bound under international law to provide assistance. Any protection offered to the refugee, and thereafter any other residence status or citizenship granted to the refugee, is framed as a 'gift'.[36] Those asylum seekers who use their agency to access the state through irregular means, and who are designated under the Act, are punished for doing so, initially while they are asylum seekers, and later when recognised as refugees as they await access to permanent residence status. As discussed below, this position is consistent with the manner in which the government has interpreted the Refugee Convention.

It is clear from the above statement by Mr Menegakis that those who were categorised as DFN were considered to be 'illegitimate' refugees. Since DFN refugees are not entitled to a permanent residence status for five years after they have been recognised as being in need of a protection status, they are therefore excluded from accessing family reunification for at least five years after they have been recognised as refugees. While it is acknowledged that some refugees face obstacles to accessing permanent residence status after they have had their asylum claims accepted, they do not face the same automatic delay and exclusion that DFN refugees do. Permanent residence status was denied to DFNs with the specific goal of

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[34] This is clear from the statement of Bryan Hayes (CPC) 'We need to ensure that such an important system is always operating in our national interest and as effectively and efficiently as possible', *House of Commons Debates* 41st Parl, 1st Sess, No. 111 (23 Apr 2012) at 7001 (Brian Hayes).
[35] A Mountz, 'Refugees – Performing Distinction: Paradoxical Positionings of the Displaced' in T Cresswell and P Merriman (eds), *Geographies of Mobilties: Practices, Spaces, Subjects* (Ashgate 2011) 258.
[36] ibid.

excluding DFN refugees from being able to access family reunification.[37] The denial of permanent residence and the consequences of this denial therefore took on the character of punishment for entering the state in an unauthorized manner. As Minister Jason Kenney stated prior to the introduction of the PCISA:

> The problem is that it is very difficult to apply Canadian law to the smugglers who live overseas. That is why we need to include deterrents in the bill for the potential clients of the smugglers. That is why we are proposing a five-year temporary residence period instead of permanent residence for immigrants who arrive here illegally and who are recognized as protected persons. We have to have deterrents for the clients in order to reduce the human smuggling market.[38]

In this way, the responsibility for the illegal act of smuggling is shifted from the smuggler to the person who is trying to enter the state. The government portrays the person seeking protection in the state as having a choice between entering the state illegally and waiting to access the state legally, either by accessing a travel visa, or coming to the state as resettled refugees. The narrative conveyed is that by relying on smugglers, the asylum seeker has made a choice to disobey the laws of Canada, and for that, she is punished according to Canadian law. As discussed below, this rationalisation does not engage with the reasons as to why a person may need to flee her country of origin. The person seeking asylum by boat is not therefore seen as someone who is in need of international protection, but rather an immigrant who has not gone through the correct channels in order to access the territory of the state. The root source of the illegal entry, the smuggler, is depicted as being outside Canadian territory, beyond the scope of the criminal justice system. The blame is therefore displaced from the smuggler to the asylum seeker and thereafter the refugee, who effectively acts as a proxy for the punishment that would have been directed to the smuggler. This is a clear example of what Cowan et al have referred to as the 'culture of responsibility'.[39] Canada presents itself as not being accountable for not providing groups arriving to the state in an irregular manner with an acceptable standard of protection. Instead, the DFNs are punished for violating the immigration rules of the state and arriving in an unacceptably spontaneous manner to the state. While it may not be possible to prosecute the DFN under the criminal justice system for

[37] 'We must prevent individuals who come to Canada as part of a designated human smuggling operation from sponsoring family members for a period of up to five years', *House of Commons Debates* 41st Parl, 1st Sess, No. 16, at 1213 (Mike Wallace).
[38] *House of Commons Debates*, 41st Parl, 1st Sess, No. 108, at 7048 (Jason Kenney).
[39] D Cowan, C Hunter, H Pawson, 'Jurisdiction and Scale: Rent Arrears, Social Housing, and Human Rights' (2012) 39(2) JL & Soc 269-295, 290.

her use of a smuggler, the state draws on the illegality of the circumstances surrounding the entry of the DFN in order to establish a lesser legal status.[40] This was done not only in order to deter other migrants from arriving in a similar way, but to exercise control over the DFNs present in the state.

The goals associated with the creation of the DFN status under the PCISA can be compared to the temporary legal status that the United States Government granted to people who arrived to the state from El Salvador in the 1980s.[41] As Coutin has noted in relation to the Salvadorans:

> Because illegal immigration is not eliminated by criminalizing unauthorized entry, law appears weak. In contrast, shifting the focus from the law's ability to control entry to immigrants' attempts to negotiate their legal status in the United States suggests that, far from being powerless, law is critical to both immigrants' and authorities' political maneuverings.[42]

Similarly, the Canadian Government's classification of unauthorized arrivals as DFNs represented the state's reassertion of control over those who had transgressed the border without the permission of the state. While, as Coutin notes, Salvadorans contributed to the shaping of their legal status in the US, this was largely possible because of the open-ended and flexible nature of the Salvadoran's legal status. However, in negotiating their legal status, Coutin notes that the Salvadorans and activists established their right to residence status in the US on the basis of their need for political asylum, which had been denied to them.[43] Unlike the Salvadorans, DFNs may acquire a Convention refugee status. However, as noted in section 5, by linking DFN status with Convention refugee status, the state interprets the internationally recognised legal status in order to provide the minimum possible protection and rights to DFNs. In the case of the DFN, Canada has relied upon the fact that the DFN status is permissible, both legally and morally, because it is based on a strict interpretation of the Refugee Convention.

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[40] As noted below, the state may nonetheless bring criminal proceedings against the DFN on the basis of not providing the correct documentation or for being unable to provide documentation upon arrival.
[41] See A Mountz, R Wright, I Miyares, A J Bailey, 'Lives in Limbo: Temporary Protected Status and immigrant identities' (2002) 2(4) Global Networks 335-356.
[42] S B Coutin, 'From Refugees to Immigrants: The Legalization Strategies of Salvadoran Immigrants and Activists' (1998) 32(4) Intl Migr Rev 901-925, 903.
[43] ibid, 907.

It is clear that in creating the status of DFN, Canada is attempting to establish borders beyond those that exist at the state's territorial limits, which create divisions those considered to be officially 'here' and those whose presence in the state remains contested despite being physically in the territory of the state. As one Salvadoran stated in relation to his status in the United States: '[w]e need to be here legally or it's like we're not here'.[44] While the legal status of the DFN refugee may not be as uncertain as that experienced by the Salvadorans, it demonstrates how easily the state may draw on the narrative of fear and the threat of the unknown to implement a legal status that excludes even those who are recognised as being in need of the protection of the state.

4. THE DFN, BIOPOLITICS AND THE REGULATION OF SPACES

The process of categorization, control and management of the DFN can be understood in terms of the exercise of biopower. As Foucault wrote, biopower is the means by which the modern government is able to manage life.[45] Biopower is exerted over the entire population. It is evident in various facets of human life, from education systems to how the health of the nation is administered.[46] Foucault referred to the techniques and practices used to produce, care for and/or dominate individual subjects as governmentality.[47] The treatment of the DFN in Canada demonstrates a number of key features of the exercise of governmentality and biopower by the state. Many of those commenting on the PCISA referred to the idea that the government was punishing refugees for arriving to the state in a certain way.[48] While this may certainly be seen to be true, it is also clear that from the time that the DFN arrives in the state, to the point at which she has been granted a permanent residence status, she is subject to a 'calculated management of life'.[49] This is reflected in the treatment of those who have been designated under the PCISA. They are subject to what Mountz et al have referred to as a 'refugee-like, quasi-documented, non-citizen' status.[50] The status has been deliberately

[44] ibid, 905.
[45] M Foucault, *Society must be defended: Lectures at the College de France, 1975–76* (Picador, 1st edn, 2003) 247.
[46] See for example, N Rose and P Miller, *Governing the Present: Administering Economic, Social and Personal Life* (Polity, 1st edn, 2008).
[47] P Owens, 'Reclaiming 'Bare Life'?: Against Agamben on Refugees' (2009) 23(4) Intl Relations 567-582, 568.
[48] For example, Sylvain Chicoine (NDP) stated, 'The purpose of this bill is not, as stated, to fight human smuggling or to help asylum seekers by expediting the process. Its true purpose is something else entirely. All it will do is punish refugees' HC Deb March 16 2012 vol 146 cols 1230-1235.
[49] M Foucault, *The History of Sexuality, Volume l* (Vintage, 1st edn, 1978) , 139-140.
[50] Mountz et al, above n 41, 352.

constructed by the state to maintain the DFN in an effective non-status. The DFN status is one that is deliberately unclear and marginalises the DFN within the Canadian legal system.

Despite the fact that DFNs may be fleeing persecution, and therefore relying on Canada to provide them with protection, their visibility makes them a target for control and surveillance by the state.[51] It is clear that the content of the PCISA was shaped by anxiety about the unauthorized arrival of the PCISA. This feeling of anxiety was not limited to those in government, but was also expressed by the general public. Krishnamurti states that feelings of disquiet among the public were evident in discussion boards and online blog postings.[52] As she notes, the posts focused on how these arrivals would affect the status quo in Canada. As Massey has observed, '[a]n invasion of this place by something so different would, these local people argue, "destroy their way of life"'.[53] The public reaction to these arrivals in Canada can be likened to what Butler refers to as the 'manufactured public and legal hostility shown towards asylum seekers'.[54] The state views the DFN's mode of entry to the state as illegal. Thereafter, her legal status is delegitimized. She is known as a DFN and her presence is at best tolerated. These two elements working in tandem reinforce the DFNs 'positions as both legal and spatial outlaws'.[55]

The anxiety felt about the arrival of those aboard the MV Ocean Lady and the MV Sun Sea resulted in a response by the government which sought to categorise, organise, and manage the refugees. It therefore embodied an exercise of governmentality. The underlying goal of the project of creating the DFN was, 'ensuring that they are not disciplined, but regularized'.[56] In this way, Canada's DFN regime mirrors Foucault and Agamben's accounts of how the 18th century city managed the onset of the plague, which they saw as a paradigmatic example of governmentality. In his description of how the 18th century city managed the onset of the plague, Foucault outlines how the authorities at the time dealt with

[51] S Herbert, 'Contemporary geographies of exclusion II: lessons from Iowa' (2009) 33(6) Prog Hum Geog 825-832, 827.
[52] S Krishnamurti, 'Queue-jumpers, terrorists, breeders: representations of Tamil migrants in Canadian popular media' (2012) (iFirst Article) South Asian Diaspora 1-19, 7. Krishnamurti notes that online threads demonstrating conservative stances on the arrival of those on board the MV Sun Sea could be found in the most unlikely of places. She notes,'[o]n weddingbellsca, I found 345 posts in response to a thread, started on 15 August 2010 entitled 'Tamil Migrants'. The thread received as of this writing, more than 40,000 views This kind of spontaneous and largely anonymous online debate is remarkable in its illustration of the range of conservative opinions'.
[53] D Massey, 'Politicising space and place' (1996) 112 (2) Scottish Geographical Magazine 117-123, 117.
[54] C Butler, 'Critical Legal Studies and the Politics of Space' (2009) 18 S & LS 313-332, 316.
[55] ibid.
[56] Foucault, above n 49, 247.

those with leprosy and those with the plague.[57] Agamben notes that in the case of lepers, such persons are maintained outside the perimeter of the city.[58] In this way, Agamben continues, the paradigm is based on 'exclusion'. Those with leprosy are kept outside of the city to ensure that the risk of infection is managed. When the city has to deal with the plague however, Agamben posits that it is impossible to move those with the plague outside the city.[59] Those persons must be managed within the boundaries of the city. This gives rise to an increase in the use of the technologies of control and surveillance. At some point however, as Foucault points out, the leper is treated like the plague victim and vice versa.[60] The state therefore has to be prepared to accept the diseased bodies into its territory. However, those allowed to enter are surveilled and controlled within the territory until the state feels as though the risk to the state has dissipated. So while the DFN may be recognised as a refugee and permitted to leave detention and move throughout the state, she is still monitored and controlled for five years.

In *Discipline and Punish,* Foucault describes the plague as a form of disorder that is at once real and imaginary.[61] The same can be said to be true of the arrival of refugee claimants to the ports of entry in Canada who would, under the PCISA, be deemed to be 'designated'. The asylum seekers and refugees who are targeted in the proposed legislation are those who arrive in a very visible way to the shores of the state. Whether directly articulated or not, there is a general feeling of being invaded among the population, and this idea is capitalised upon by the media, who use provocative headlines and images of ships arriving and people disembarking.[62] In this sense, the threat is real, tangible, and, given the short period of time between two most recent boat arrivals, the threat is also considered to be imminent and constantly recurring. However, the threat is also imaginary because, as Macklin and Waldman have pointed out, only a very small percentage of refugee claims in Canada come from those who have spontaneously arrived at its ports, and so would be affected by the

[57] M Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage, 1st edn, 1977) , 198.
[58] G Agamben, 'Giorgio Agamben: The City, The Plague, Foucault, Ungovernableness, etc…', (*Void Manufacturing*, 8 September 2008) <http://voidmanufacturing.wordpress.com/2008/09/08/giorgio-agamben-the-city-the-plague-foucault-ungovernableness-etc/ > accessed 3 Apr 2015.
[59] ibid.
[60] ibid.
[61]Foucault, above n 57,198.
[62] Use of photos in this way by the media is referred to by MP Francis Scarpaleggia (Lib), see, *House of Commons Debates*, 41st Parl, 1st Sess, No. 15 at 1126 (Francis Scarpaleggia).

legislation.[63] Nonetheless, the suspicion that is felt about such groups is analogous to the fear of infection at the time of the plague.

The association of the DFN with a threat to the metaphorical health of the nation influences the regulatory response of the state, encouraging it to assume a spatial logic in how it manages and controls the groups of DFNs. The bodies of the DFNs are established in a different space from the 'healthy' nation. This occurs through the placement of the DFNs in detention immediately after they have arrived to the state, but also in how they are treated after they have been recognised as refugees. The DFN cannot travel outside Canada because she is not permitted to access a Convention Travel Document, as she is not considered to be 'lawfully staying'. She is also 'punished' for arriving unauthorized to the state by being denied access to family reunification until she acquires a permanent residence status in Canada. As Volpp has noted, 'being here' means something different to everyone present in the state, consequently describing this experience as 'polysemic'.[64]

The reporting requirement that the DFN must fulfil during the five year period that she is precluded from accessing permanent residence confirms the emergence of a tiered form of refugee protection in Canadian society. The requirement also further construes the DFN as a criminal presence within Canada. The DFN is under an obligation to report any change in her address to an immigration officer within 10 working days of this change.[65] She must also report any change in her employment status, within 20 days of a change.[66] The DFN must also report any departure from Canada, not less than 10 working days before the day of her departure, and also her return to Canada, within 10 working days of that occurring.[67] The message that is conveyed is through these regulations is that these refugees are regarded with suspicion and that their tenuous legal status is under constant threat of being removed. This is especially clear from the fact that a DFN must report on the request of an officer when there is evidence that refugee status has ceased to exist, as set out in sections 108(1) (a) to (e) of the

[63] 'Canada receives about 30,000 claimants each year. Five hundred Tamils represent only 2 per cent of the annual intake. The rest arrive by plane or overland, so don't elicit the same moral panic as people on boats' A Macklin and L Waldman, 'Why we can't turn away the Tamil ships', *The Globe and Mail* (Toronto, Aug 17 2010) <http://www.theglobeandmail.com/commentary/why-we-cant-turn-away-the-tamil-ships/article1377276/ accessed> accessed 3 April 2015.
[64] L Volpp, 'Imaginings of Space in Immigration Law' (2012) 9(3) Law, Culture and the Humanities 456-474, 457.
[65] IRPR, above n 26, s 174.1(1).
[66] ibid.
[67] ibid.

IRPA.[68] This engagement of the cessation provisions of the Refugee Convention echoes the Temporary Protection Visa (TPV) system established in Australia between 1999 and 2008, where a refugee could only gain access to a permanent residence status if she continued to fulfil the definition of the refugee.[69] It is yet uncertain as to whether the cessation provisions will be routinely relied upon to cease the refugee status of DFNs, thereby opening the possibility that they may be returned to their country of origin. Even if the cessation provisions are not regularly invoked by the state as a means of removing the DFN, the possibility that they *may* be used in itself emphasises the precarious nature of the DFN status. The prospect of removal or deportation therefore hangs over the DFN while she waits to gain access to a permanent residence status.

Under the Refugee Convention, the state is only required to allow the refugee to remain there for as long as the threat of persecution toward her remains in her country of origin.[70] Therefore, in terms of the Refugee Convention, not granting DFNs the right to apply for a permanent residence status for a period of five years after refugee status recognition is acceptable, as well as consistent with practice in other states.[71] For all those with who are present in the state only on the basis of a refugee status, there is a continued risk that they will be deported, should the circumstances under which they were granted refugee status cease to exist. Under the PCISA, Canada has strictly interpreted refugee status so as to prevent the DFN from accessing a more durable residence status. This narrow interpretation however has also undermined a number of the key characteristics of refugee status, as envisaged at the time of drafting the Convention. Therefore, by justifying the creation of the DFN status on the basis of the Refugee Convention, the Canadian Government draws on the Convention to reduce, not expand refugee rights.

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[68] ibid, s 174.1(2)

[69] Item 785.22 and Item 866.22, Schedule 2, Migration Regulations 1994. See M O'Sullivan, 'Minister for Immigration and Multicultural and Indigenous Affairs v. QAAH: Cessation of Refugee Status' (2006) 28 Sydney L Rev 359-371, 362.

[70] Art 1C5 of the Refugee Convention states: 'This Convention shall cease to apply to any person falling under the terms of section A if… He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality'

[71] During the debates leading up to the introduction of the PCISA, Minister Kenney noted that if Canada were to introduce a policy of temporary residence permits for all spontaneously arriving refugees, this would not be incongruent with established practice in other states,
'Some have worried that Canada was moving toward a conditional permanent residence situation for refugees, which I should point out is not unusual in other democratic countries. The United Kingdom and Germany, for example, do not grant immediate permanent residency for protected people'. *House of Commons Debates*, 41st Parl, 1st, No. 126, (17 May 2012) at 8301 (Jason Kenney).

5. JUSTIFYING RESTRICTIONS ON MOVEMENT: THE REFUGEE CONVENTION AND THE PCISA

As a result of a desire to deter refugees from using their own agency to enter the state spontaneously, the Canadian Government emphasises that such refugees should be punished through subjection to detention, a DFN status, and the use of surveillance-like reporting processes. This has been done in a manner which capitalises on their precarious existence and the idea that as DFNs they are never truly within the borders of the state.[72] As noted, the treatment of the DFN refugee represents the state's manipulation of the borders in order to exclude the DFN from gaining access to a refugee status comparable with that enjoyed by those who did not arrive to the state in the way described in the PCISA.

For the DFN, the border is constituted at the point that she enters the state, but is also present in her everyday life for many years after she has been accepted as a refugee, until the point that she is able to attain a permanent residence status. As Balibar observes, she is 'waiting to live, a non-life'.[73] Rancière has written that refugees are individuals who are in effect 'stripped of their nationality'.[74] The status of DFN perpetuates this situation, exacerbates it. The DFN refugee has been accepted as a refugee in theory, yet the treatment that she is subject to indicates that the state does not consider her to be a refugee in the truest sense. From the state's point of view, her mode of entry has detracted from both her credibility and her deservedness. Given the state's incredulity of her claim to protection, the DFN must be treated in a manner which reflects her lack of entitlement to a true international protection status.

In a way, the state has attempted to re-draw the borders around the DFN through a legal intervention. At the same time however, the limits of the DFN status are very much determined by the refugee status, as set out in the Refugee Convention. DFN status is a version of Convention status that has been manipulated and restricted in order to ensure that many of the core rights normally associated with the status are not available to those who have been designated under the PCISA. This status is viewed as something that has been established in order to create a division between those who have arrived to the state by so-called legitimate means and those who have been forced to enter the state by relying on smugglers.

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[72] Volpp, above n 64, 457.
[73] E Balibar, *Politics and the Other Scene* (Verso Books, 1st edn, 2002).
[74] J Rancière, 'Who Is the Subject of the Rights of Man?' (2004) 103 (2) S Atl Quart 297-310, 300.

In order to legitimate the creation of the DFN status, the government has drawn heavily on the formal division of the rights accruing to refugees under the Refugee Convention on the basis of their level of attachment to the state. As Hathaway has noted, the Refugee Convention provides rights to refugees on an incremental basis.[75] McAdam and Durieux also note that the architecture of the Refugee Convention is such that the longer the refugee is present in the state of asylum, the better the standard of treatment that she can expect.[76] The categories under the Refugee Convention, in order of increasing attachment are, refugees subject to a state's jurisdiction, refugees physically present, refugees lawfully present, and refugees durably residing. Under the PCISA, the government does not consider the DFN to not be lawfully staying under the PCISA for the purposes of the Refugee Convention.[77] As argued below, this defies accepted international law standards. It also defies common sense. The DFN is present for up to 5 years as a recognised refugee in the state is not to be considered to be lawfully staying. Therefore, while DFN status provides a legal status in Canada to certain refugees, it is a legal status that exists at the limits of political categories.

5.1 DFNs: recognised refugees considered to be unlawfully staying

Under the PCISA, DFNs are not recognised as 'lawfully staying' in the state.[78] As a result, they are also not entitled to access a refugee travel document. The DFN is not considered to be lawfully staying even after she has been granted refugee status. This directly contradicts article 28(1) of the Refugee Convention, which says that states must provide refugees lawfully staying in the state with a convention travel document unless there are compelling reasons of national security and public order.[79] As Ziegler notes, UNHCR has stated that

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[75] See J Hathaway, *The Rights of Refugees Under International Law*, (Cambridge University Press, 1st edn, 2005) 155. Hathaway also notes that once the refugee has accrued certain rights on the basis of her attachment to the state, those rights cannot be taken away from her. See 'The structure of the Refugee Convention reflects [a] 'layering' of rights': 'Letter from A. Andrew Painter, UNHCR Senior Protection Officer to Robert Pauw'(2003) 80 Interpreter Releases 423, 427.

[76] J F Durieux and J McAdam, '*Non-refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16(1) IJRL 4-24,14.

[77] PCISA s 31(1).

[78] ibid.

[79] Art 28(1) states: 'The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence'.
It should also be noted that art 12(2) of the ICCPR guarantees the right to leave any country, including one's own. Like art 28 of the Refugee Convention, this right may only be restricted in exceptional circumstances under art 12(3). See C Harvey and R P Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law' (2007) 19 (1) IJRL 1-21.

‘compelling reasons’, ‘national security’ and ‘public order’ must all be interpreted narrowly by the state.[80] A travel document should therefore only be denied to a lawfully staying refugee in ‘grave and exceptional circumstances’.[81]

Under the PCISA, DFNs are granted refugee status if they make a successful claim for asylum in the state. At no point in the legislation is there reference to the fact that the DFN is not considered to be a refugee under the legislation. Therefore, by not permitting a recognised refugee to avail of a ‘lawfully staying’ status, as set out in the Convention, the PCISA contradicts accepted practice in international refugee law.[82]

In a submission made to the government when the PCISA was at bill stage, UNCHR noted that although there was no universally accepted meaning of the term ‘lawfully staying’, it was UNHCR’s view that ‘stay’ referred to ‘a permitted regularized stay of some duration’ and ‘lawful’ was to be assessed on the basis of ‘prevailing national laws and regulations’.[83] On this basis, refugees who had been formally recognised by the state should be considered to be lawfully staying in the host state, and therefore able to benefit from the Convention Travel Document (CTD).[84] Reference to the DFN as not lawfully staying for the purposes of Convention is just one of the many ways that the presence of the DFN in Canada is delegitimized, despite the DFN refugee’s genuine claim for protection in the state. The process of de-legitimation happens at a number of scales, ranging from the international, where she is referred to as not lawfully staying under the Convention, to the domestic and local levels. This constant separation and classification of the DFN in opposition to all other refugees is presented as the means by which the system will be protected and preserved from the dangerous presence of the unauthorized refugee in the state.

In the Standing Committee on Citizenship and Immigration prior to the introduction of the PCISA, the reasons as to why the government denied DFN refugees access to a CTD were

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[80] R Ziegler,’Protecting Recognized Geneva Convention Refugees Outside their States of Asylum’ (2013) 25(2) IJRL 235-264, 256.

[81] ibid, fn 118 see UNHCR, *Guide for Issuing Machine-Readable Convention Travel Documents for Refugees and Stateless Persons* (October 2012) [25] <http://www.icao.int/Security/mrtd/Downloads/MRCTD%20Guide%20ICAO-UNHCR_conference%20edition.pdf > accessed 3 April 2015.

[82] As Edwards points out: ‘A literal interpretation of these articles might highlight these semantic discrepancies, however, the object and purpose of the Refugee Convention would suggest that, at a minimum, the full spectrum of rights should be made available to refugees upon recognition’, See A Edwards, 'Human Rights, Refugees, and the Right “to Enjoy’asylum” (2005) 17 (2) IJRL 293-330, 321.

[83] UNHCR Submission on Bill C-31 Protecting Canada’s Immigration System Act (May 2012) <http://www.refworld.org/docid/4faa336c2.html> accessed 3 April 2015, 9.

[84] ibid.

made clear.[85] Donald Galloway of the Canadian Association of Refugee Lawyers noted that when Canada signed up to the Refugee Convention in 1969, it entered reservations on two articles relating to the interpretation of the phrase 'lawfully staying'.[86] Article 28 was not one of those provisions. In his speech, Galloway notes that in not entering a reservation on article 28, the state was providing refugees who had not yet acquired the right to be reunited with their families in Canada with an opportunity to be reunited with those family members in a neutral country. This provision of the PCISA appeared therefore to have been established in order to make entirely certain that the DFN refugee would not have the opportunity to be reunited with her family, even outside of Canada.

The classification of the DFN refugee as not lawfully staying in the state for the purposes of article 28 of the Convention subverts one of the core purposes of Convention refugee status, which is to provide the refugee with a surrogate status, approaching the protection provided by citizenship. The ability to move within and beyond the state of asylum was considered to be one of the features of citizenship that needed to be emulated in the internationally recognised refugee status. As Holborn notes, the Nansen Passport, on which the CTD is modelled, was established as a response to the fact that pre-1951 refugees faced exclusion and social marginalisation because they did not have passports.[87] At that time, it was vital for the refugee to have access to some form of documentation that allowed her to pursue a solution to her refugee status in the country of asylum, or in other states. The underlying purpose of the Nansen Passport, and thereafter the CTD, was to ensure the freedom of movement of the refugee. By facilitating this movement across borders, the refugee was free to travel in order to find a solution to her refugeehood.

By preventing the DFN refugee from gaining access to a CTD, as well as preventing her from accessing a permanent residence status in the state, Canada has made targeted efforts to disrupt the integration of the DFN refugee in to Canadian society, or anywhere outside Canada. She is physically tied to the Canadian territory, but she inhabits a space that has been legally constructed to ensure her precarious status which is reinforced through her inability to gain access to her family either in Canada or any other territory. As noted above, this is also

[85] *Standing Committee on Citizenship and Immigration*, 41st Parl, 1st Sess, No. 38 (3 May 2012) at 17 (Donald Galloway).
[86] ibid. Here Galloway refers to the reservations that Canada entered on articles 23 and 24 of the Convention. These articles refer to the provision of public relief and the provision of social security to refugees lawfully staying in the territory of the state.
[87] L Holborn, 'The Legal Status of Political Refugees, 1920-1938' (1938) 32(4) Am J Intl L 680-703, 681.

ensured by the state through the reporting requirements that she must fulfil in order to attain permanent residence status.

However, the establishment of the DFN status indicates more troubling developments with regard to the future kind of legal status that will be available to Convention refugees in the state. As was made apparent from statements made by the government in relation to the DFN status under the PCISA, Canada is now moving toward a model of refugeehood that does not offer spontaneously arriving refugees any more protection than the bare guarantee against *refoulement*. By interpreting the Convention in this way, Canada ensures that it can establish a second class refugee status, while at the same time professing to be acting in accordance with the Refugee Convention.

5.2 Placing the Refugee Convention beyond the reach of the DFN

As noted above, the way in which the DFN status has developed in the context of the PCISA continually emphasises that the DFN is not considered to be a 'genuine' refugee by the state. This is despite the fact that the DFN refugee has been recognised under the state's refugee status determination procedure. It should also be noted that in the Convention itself, no reference is ever made to the fact that a refugee needs to fit Canadian Government's vision of 'legitimacy'. There is no reference to a 'correct' way for the refugee to enter the state of asylum and there is no requirement that they make an asylum application in good faith in order to benefit from the content of the Convention.[88] However, Minister Jason Kenney here sums up the Canadian perspective:

> The core of the convention is this: It's a commitment of *non-refoulement*. That is to say, if someone is deemed to have a well-founded fear of persecution on the enumerated grounds, they will not be sent back to their country of origin. The reforms we propose, whether for smuggled migrants or those coming from designated countries, would absolutely respect the *non-refoulement* principle. There would not be two-tier treatment for people in that respect.[89]

The DFN may only access a limited range of rights under the PCISA. It is evident therefore that DFN is a second class refugee in Canadian refugee law. Despite the clear divergence in

[88] See, R Driver, 'Asylum Claims Made in Bad Faith Under the Refugees Convention – The Australian Experience' (2011) 30(2) Ref Sur Q 96-109.
[89] *Standing Committee on Citizenship and Immigration*, 41st Parl, 1st Sess, No. 31(26 Apr 2012) at 17 (Jason Kenney).

standards between the DFN and other refugees in the state, the government has nonetheless asserted that it still discharges its duty under the Refugee Convention because it believes that it has put a system in place which will ensure that those seeking the protection of Canada will not be *refouled*. By interpreting the standard of protection that the state is required to provide to refugees as bare *non-refoulement*, all other arguments that could be made against the implementation of the DFN on the basis of the rights set out in the Refugee Convention are effectively silenced. By reading the standard of protection that the state is required to provide as *non-refoulement* in relation to DFNs, the expected minimum standard of treatment falls not just for DFNs under the PCISA, but for all refugees. The establishment of the PCISA therefore asserts that any rights referred to in the Convention, other than the guarantee against *refoulement* are granted on the basis of the good will of the state. It is for this reason that refugee status can never really be considered as a surrogate citizenship status. Refugee status and the rights associated with it are constantly subject to reinterpretation and restriction by the state.

6. POTENTIAL CHALLENGES TO THE PCISA UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The Canadian Government has presented the establishment of the PCISA and DFN status as a necessary response to the perceived increase in irregular migration and human smuggling to Canada. The limitations that the PCISA places on the DFN refugee's legal status have been justified on the ground that the immigration system must be protected. As noted above, Canada's domestic refugee law is increasingly influenced by securitization and exclusionary logic. However, under Canadian law, the legislature must account for any law that imposes a disadvantage on an individual because of their membership of a particular category. This right to equal treatment and non-discrimination is enshrined in the Canadian Charter, specifically in section 15.

The Charter is legally binding on the federal Parliament as well as the provincial Legislatures.[90] Since the establishment of the Charter, the courts have been more than willing to recognise the constitutional rights of non-citizens present in the state. In fact, the very first case heard by the Canadian Supreme Court relating to a Charter violation was by a non-citizen refugee claimant. In *Singh v Canada (Minister of Employment and Immigration)*, the refugee status determination (RSD) procedure in place at the time was challenged on the

[90]P W Hogg, *Constitutional Law of Canada* (Carswell, Student edn, 2013), 55-2.

grounds that it violated sections 7 and 15 of the Charter because it denied refugee claimants access to an oral hearing.[91] In *Singh*, it was confirmed that the Charter applied to all people who were physically present in Canada.[92] It was also affirmed that issues at stake in an RSD were of such a serious nature that depriving such rights would in fact amount to a 'deprivation of security of the person within the meaning of section 7'.[93] From the outset therefore, the Charter has established itself as providing protection to citizens and non-citizens alike.[94] This includes the protection of equality and non-discrimination under the law. As section 15 of the Charter states:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The categories listed in section 15 are non-exhaustive and, over the years, the courts have developed three analogous categories that also enjoy the protection of section 15 of the Charter. They are citizenship,[95] marital status,[96] and sexual orientation.[97] It should be noted that in the first determination relating to the application section 15, *Andrews v Law Society of British Columbia,* involved a case brought by a non-citizen. There, the Court found a violation of section 15 on the basis of an analogous category, citizenship. In *Andrews*, the

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[91] [1985] 1SCR 177. It should also be noted that the PCISA has also rolled back on the *Singh* judgment to a certain extent as first-instance decisions will no longer be made by quasi-independent decision-makers. See C Dauvergne, 'How the Charter has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence' (2013) 58(3) McGill L J 663-728, 668.

[92] While many of the provisions in the Charter apply to 'everyone', there are some provisions that are reserved for citizens. See below in relation to s 6 of the Charter, which limits the right of freedom of entry to the state to citizens.

[93] [1985] 1 SCR 177, 207. S 7 of the Charter states: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'.

[94] While both s 7 and s 15 are guaranteed to both citizens and non-citizens physically present in Canada, there are a number of provisions that are only available to citizens, such as s.6, which guarantees the right of entry to the state.

[95] See *Andrews v Law Society of British Columbia* [1989] 1 SCR. 143, *Lavoie v Canada* [2002] 1 SCR 769.

[96] See *Miron v Trudel* [1995] 2 SCR 418, *Nova Scotia v Walsh* [2002] 4 SCR 325.

[97] See *Egan v Canada* [1995[2 SCR 513, *Vriend v Alberta* [1998] 1 SCR 493, *M v H* [1999]2 SCR.203, *Little Sisters Book and Art Emporium v Canada* [2000] 2 SCR 1120.

court confirmed that non-citizens present in Canada could rely on section 15 of the Charter.[98] Almost from the inception of the Charter therefore, non-citizens have been guaranteed the protection of section 15.

On the basis of the decisions in *Singh* and *Andrews*, non-citizens would appear to benefit from extensive protection under the Charter. However, as Dauvergne has noted, the Canadian Supreme Court has not built on the promise of those early cases, and the Charter rights of non-citizens are often not heard or not addressed by the Court.[99] As Macklin has stated, 'section 15…with its promise of equality before the law, has no traction when it comes to the exclusionary dimension of immigration law'.[100] Nonetheless, the longstanding and persistent inclusion of the non-citizen under the protection of the Charter confirms the potential for the DFN refugee to assert her right not to be discriminated against on the basis of her categorisation under the PCISA.

In Canada, when the courts assess whether there has been a violation of section 15 of the Charter, there are certain questions that they will ask. Peter Hogg identifies three elements to the test used to assess whether there has been a section 15 violation. The first issue is whether the challenged law imposes (directly or indirectly) on the claimant a disadvantage (in the form of a burden or withheld benefit) in comparison to other comparable persons. The second issue is whether the disadvantage is based on a ground listed in or analogous to a ground listed in section 15. Finally, the court will assess whether the disadvantage also constitutes an impairment of the human dignity of claimant.[101] If the claimant can show that these elements are present, the burden then shifts to the government to justify the discriminatory law under section 1 of the Charter.[102]

6.1 Is it possible to argue that DFN status is contrary to section 15 of the Charter?

The first issue addressed by a court in a section 15 case is whether '[t]he presence of disadvantage (or unequal treatment) requires a comparison between the legal position of claimant and that of other people to whom the claimant may legitimately invite

[98] [1989] 1 SCR 143, 56 DLR 4th1.
[99] Dauvergne, above n 91, 666.
[100] A Macklin, 'Introduction' (2004) 3(1) J L & Eq 1-7, 1.
[101] Hogg, above n 90, 55-19. The last test of 'impairment of the human dignity' has since been contested by the courts. In *R v Kapp* [2008] 2 SCR 484, the court favoured a test of discrimination perpetuating disadvantage or stereotyping, which appears to be a less onerous, though still thoroughly ambiguous test.
[102] Hogg, ibid, 55-19.

comparison'.[103] Unlike *Andrews*, which compared the position of the citizen and the non-citizen, the comparator for the disadvantage that the DFN is subject is the 'regular' refugee, who has not been designated under the PSICA.[104]

As Rosiers and Mendelsohn Aviv have noted in relation to the PCISA:

> The distinction between 'designated' and 'regular' refugees is just one example of the discriminatory distinctions created by Bill C-31 [later the PCISA], which creates various categories of asylum seekers, with different timelines and different rules with regard to the refugee claim process, eligibility for appeal, and more. Others of these classes and categories will also be designated by the Minister at his or her discretion, rather than through transparent, democratic methods.[105]

The various ways in which the DFN refugee is treated disadvantageously in comparison to 'regular' refugees have been set out in detail above. It should also be noted that DFN status is distinguished as a particularly discriminatory status because of the length of time that it applies to an individual present in Canada. It is a status that defies the categories of asylum seeker and refugee, and carves out a new sub-status in law.

The second issue to be assessed is whether the disadvantage is based on a ground listed in, or analogous to a ground listed in, section 15. As noted above, the court in *Andrews* recognised citizenship as an analogous ground, therein also recognising non-citizens as a group that may claim the protection of section 15. The Court in *Andrews* referred to the distinct political disadvantage that non-citizens faced in Canada because they were not represented at governmental level. This, Justice Wilson stated, established their position as a particularly vulnerable group in society. Justice Wilson then went on to note that:

> While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.[106]

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[103] ibid,55-34.
[104] ibid, 55-34.
[105] N Des Rosiers and N Mendelsohn Aviv, 'Brief to the Senate Standing Committee on Social Affairs, Science and Technology regarding Bill C-31, An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act' (June 2012), 3 <http://ccla.org/wordpress/wp-content/uploads/2012/02/2012-06-04-Submissions-to-Senate-re-Bill-C-31-Immigration-and-Refugee-Protection-FINAL.pdf> accessed 3 April 2015.
[106] *Andrews*, above n 95, 152.

By recognising non-citizens' rights under section 15, the court in *Andrews* intended to compensate for the political powerlessness of the non-citizen in comparison to the citizen. However, Justice Wilson's statement must be considered in the context of Canada's immigration and refugee laws, which limit the rights of entry and residence of immigrants, refugees, and refugee claimants. While the court in *Andrews* established non-citizens as an analogous category under section 15, Thwaites notes that it nonetheless did not comment on 'the tension between section 15's guarantee of equality of treatment and the fact that non-citizens do not have an express constitutional right to remain in Canada'.[107] Like other sovereign states, Canada retains its power to determine who may enter and remain in the state. However, this power is restrained by the state's duties under the Refugee Convention as well as its broader duty of *non-refoulement* in international law.

In *Andrews*, the court recognised non-citizens as a 'discrete and insular minority'.[108] Yet, refugees are doubly disadvantaged as a group. Not only are they not citizens of Canada, but they are also unable to avail of the protection of their country of origin. DFNs, as an effective sub-category of refugees, have an even more limited opportunity to assert their rights. This is evident from the fact that the trajectory of the DFN's life is almost entirely subject to Ministerial discretion. Ministerial discretion is often viewed as a necessary element in a functioning immigration system. However, already noted, discretionary decisions affect the lives of DFNs in a much more significant way than that experienced by 'regular' refugees. As stated by the David Asper Centre for Constitutional Rights at the University of Toronto:

> The enormous scope of Ministerial discretion that pervades Bill C-31 [now the PCISA] suggests that should the bill pass, Charter challenges will not be limited to scrutinizing the letter of the law, but will also include attacks on the Minister's exercise of these unprecedented levels of discretion.[109]

Concern over the increasing scope of Ministerial discretion emerging in Canadian immigration and refugee law has also been voiced by Dauvergne. She has suggested that since *Suresh*, Ministerial discretion has effectively been 'constitutionalized'.[110] The deference

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[107] R Thwaites, 'Discriminating Against Non-Citizens Under Charter: Charkaoui and Section 15' (2008-2009) 34 Queen's L J 669-718, 675.
[108] *Andrews*, above n 95,152.
[109] Asper Centre for Constitutional Rights, 'Making Sense of an Immigration Omnibus: Asper Centre Submissions of Bill C-31' (University of Toronto 2013)<http://www.aspercentre.ca/Assets/Asper+Digital+Assets/David+Asper+Centre/Asper+Digital+Assets/Publications/Bill+C-31+Submissions.pdf>accessed 3 Apr 2015, 5
[110] [2002] 1 SCR 3. SeeDauvergne above n 91, 690.

that the state affords Ministerial discretion is particularly troubling for the DFN, both prior to, and following her acquisition of refugee status. The designation process itself reduces individuals to subjects of administrative function, effectively depoliticising them. As Rajaram and Anderas note, it is just the first step in the 'technicalisation' of the refugee claimant.[111] Technicalisation and bureaucratisation of the DFN enables states to manage and control such groups. As Rajaram notes, bureaucracies are a means of making political subjects, as well as emphasising state authority over a territory.[112] The establishment of two different types of refugee under the PCISA (the DFN refugee and the 'regular' refugee), can be referred to as what Zartaloudis calls 'bureaucratical fractioning'.[113] One significant way in which bureaucratisation allows the state to exert power over such a group is to limit the ability of the judiciary to interpret the laws that establish the categorisations of protection. This is linked to the increased deference to Ministerial discretion, noted above.[114]This is what faces the DFN and is perhaps the most significant obstacle to her assertion of her section 15 rights under the Charter.

The third issue examined in courts' assessment of a section 15 violation is whether the law in question constitutes an impairment to her human dignity. This test was established in the 1999 case, *Law v Canada*.[115] The test has been subject to a considerable degree of criticism. Gilbert, commenting on the requirement established in *Law*, has stated that '[a] test that requires claimants to show a ground of discrimination *and* a violation of their human dignity is onerous, vague, and beset by significant judicial subjectivism'.[116] In *Law*, in order to determine whether one's human dignity has been impaired, the court assessed the:

> 1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected.[117]

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[111] P K Rajaran and Z Arendas, 'Exceeding categories: law, bureaucracy and acts of citizenship by asylum seekers in Hungary' in E F Isin and M Saward eds *Enacting European Citizenship* (Cam Univ Pr 2013) 195-219, 196.
[112] P K Rajaram, 'Historicising "asylum" and responsibility' (2013) 17 (6-7) Citizenship Studies 681-696, 693.
[113] T Zartaloudis, 'Asylum, Refugee and Immigration Law Studies: A Critical Supplement' in R Islam, J H Bhuiyan (eds), *An Introduction to International Refugee Law* (Martinus Neijhoff, 1st edn, 2013), 328.
[114] Rajaram and Arendas, above n 111, 199.
[115] [1999] 1 SCR. 497.
[116] D Gilbert, 'Time to Regroup: Rethinking Section 15 of the Charter' (2003) 48 McGill LJ 627-649, 633.
[117] ibid.

In *R v Kapp*, it was subsequently pointed out by the court that these questions did not necessarily relate to the issue of the impairment of human dignity, but rather the perpetuation of disadvantage or stereotyping.[118] In *Lovelace v Ontario*, the human dignity requirement was described as a way of weeding out more trivial complaints that did not engage the purpose of the equality provision.[119] This article has already described in detail the various ways in which the DFN refugee suffers serious disadvantage in comparison to other refugees. She is subject to detention upon arrival, and thereafter her freedom of movement continues to be restricted until she acquires a permanent residence status. Also, the fact that she is unable to access family reunification for five years after she has been recognised as a refugee compounds the disadvantage that she experiences in comparison to other refugees in Canada.

Finally, it should be noted that during the course of its passage through the legislative houses, the government did not overtly engage in a substantive defence of the constitutionality of the legislation. This was something that was pointed out by Macklin during her submission to the Standing Committee. [120] Throughout the debates, the government failed to attest to the constitutionality of the legislation. Additionally, it should be noted that because the PCISA is an omnibus statute, it has an extremely broad scope. Therefore, its provisions raise constitutional concerns in relation to a variety of issues, not limited to the DFN status.[121] The reaction of the government suggests that it is aware of the resources and time that would be needed to challenge any aspect of the omnibus legislation. The manner in which the DFN status has been introduced may therefore be quite strategic in nature. Unfortunately, the fact that Bill C-31 became the PCISA at all has signalled a serious regression in Canadian immigration and asylum law, a regression from which it will be very hard to recover.

6.2 *Canadian Doctors for Refugee Care and others v Attorney General of Canada and Minister of Citizenship and Immigration*.

[118] *Kapp*, above n 101, para 23.
[119] [2000] 1 SCR 950. See G Garton, 'The Canadian Charter of Rights Decisions Digest, Section 15', Updated April 2005 (CanLII), < http://www.canlii.org/en/commentary/charterDigest/s-15-1.html> accessed 3 Apr 2015.
[120] *Standing Committee on Citizenship and Immigration*, 41st Parl, 1st Sess, No. 32 (30 Apr 2012) at 26 (Prof. Audrey Macklin).
[121] For example, the PCISA also introduces the Designated Country of Origin (DCO) under section 109.1. Refugee applicants from DCOs have restricted rights of appeal and those whose applications have been rejected do not enjoy a suspensive effect on review proceedings. It is the Minister that determines what countries are included in this list. Section 112(2) of the IRPA is also amended to place a one year bar on access to a Pre-Removal Risk Assessment (PRRA). UNHCR has been critical of the limitations placed on the PRRA under the PCISA, noting that the limitation of the PRRA raises issues relating to individuals' section 7 Charter rights. See UNHCR, 'Submission on Bill C-31: Protecting Canada's Immigration System Act, May 2012' <http://www.refworld.org/docid/4faa336c2.html > accessed 3 April 2015.

Despite the negative effects of the PCISA noted above, a recent ruling from the Canadian Federal Court offers some hope in the face of the increasingly regressive asylum and refugee laws and policies that have been introduced in Canada in recent years. In *Canadian Doctors for Refugee Care and others v Attorney General of Canada and Minister of Citizenship and Immigration,* the Federal Court strongly asserted that distinctions made between categories of asylum seekers on the basis of stereotypes and prejudices was in violation of section 15 of the Charter.[122] In the case, heard by Justice Mactavish, the court strongly defended the rights of refugees and asylum seekers under the Charter, thus confirming the continued availability of Charter protections to such vulnerable groups.

Canadian Doctors was a judicial review of the Federal Government's decision to considerably reduce, and in a number of instances, completely do away with, the health care available to certain asylum seekers and refugees in Canada.[123] In Canada, since 1957, the federal government has directly financed 'temporary basic, essential, and urgent health care' for new arrivals to Canada until such a time as they were permitted to claim provincial coverage.[124] The programme is referred to as the Interim Federal Health Program (IFHP). As Macklin notes, the programme has developed over the years, and by 2012 it covered most refugees and asylum seekers in Canada.[125] In that same year however, significant changes were made to the list of who would be entitled to access health insurance under the programme. While under the changes, resettled refugees' healthcare entitlements remained unaltered, asylum seekers were only entitled to receive urgent and essential healthcare, and asylum seekers from Designated Countries of Origin (DCO) were denied healthcare coverage unless their illness posed a threat to public health and safety.[126]

In the judicial review, the applicants argued that the changes made to the IFHP in 2012 would create a 'health care hierarchy' where the lives of certain refugees, and asylum seekers, as well as other legally residing migrants would be 'deemed less worthy of public protection'.[127] In many ways, the 2012 policy mirrored the distinctions that were created with the establishment of the DFN status, between 'legitimate' and 'deserving' refugees and 'bogus'

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[122] *Canadian Doctors for Refugee Care and others v Attorney General of Canada and Minister of Citizenship and Immigration* [2014] FC 651 (*Canadian Doctors*).
[123] ibid.
[124] A Macklin, 'Canadian Court Rules that Denying Asylum Seekers' Access to Public Health Care is "Cruel and Unusual Treatment" and Discriminatory' (*Border Criminologies*, 8 July 2014) <http://bordercriminologies.law.ox.ac.uk/tag/federal-court-of-canada/ > aaccessed 3 April 2015.
[125] ibid.
[126] ibid.
[127] *Canadian Doctors*, above n 122, para 694.

and ‘illegitimate’ refugees. Like the DFN status, the main intention behind the changes made to the IFHP was to discourage asylum seekers from coming to Canada to seek protection. In the case of the latter, however, the ultimate effect of the changes was to place the lives of asylum seekers at risk.

In the case, Justice Mactavish found that the treatment of the abovementioned categories of refugees and asylum seekers in Canada had been in violation of sections 12 and 15 of the Charter. Justice Mactavish determined that the change in policy of the IFHP amounted to ‘treatment’ as per section 12 of the Charter. She also stated that this treatment was ‘cruel and unusual’ within the meaning of section 12 of the Charter. In her reasoning, Justice Mactavish placed a great deal of emphasis on the fact that this policy shift affected children who had been brought to Canada by their parents. Justice Mactavish strongly condemned the policy on this basis, stating:

> The 2012 modifications to the Interim Federal Health Program potentially jeopardize the health, the safety and indeed the very lives, of these innocent and vulnerable children in a manner that shocks the conscience and outrages our standards of decency. They violate section 12 of the Charter.[128]

Justice Mactavish also found that the change in policy was in violation of section 15 of the Charter because of the fact that it provided a lower level of state-funded health insurance cover to asylum seekers from Designated Countries of Origin (DCOs) in comparison to asylum seekers from non-DCOs. Under section 109.1(1) of the PCISA, the Minister of Citizenship and Immigration was given the power to categorize certain countries as DCOs.[129] Countries were designated as DCOs if it was considered that they were generally safe to live in. The underlying assumption was therefore that if an individual from a DCO made an asylum claim in Canada, the likelihood was that it was a false claim. Under the Act, asylum seekers from DCOs are subject to an expedited refugee status determination process, and do not have the right of appeal to the Refugee Appeal Division of the Immigration and Refugee

[128] ibid, para 11.
[129] See above n 121.

Board. As of 10 October 2014, there are 42 countries on the list.[130] Most of those countries on the list were EU Member States, however the list is not limited to EU Member States.[131]

Justice Mactavish rejected the applicants' assertion that the changes to the IFHP was discriminatory under section 15 of the Charter on the analogous ground of 'immigration status'.[132] However, Justice Mactavish did go on to determine whether the policy was discriminatory under section 15 on the basis of 'national or ethnic origin', an enumerated category under section 15 of the Charter.[133] On this ground, Justice Mactavish then went on to consider whether treating asylum seekers differently because they had arrived from DCOs amounted to discriminatory treatment on the basis of those asylum seekers' national or ethnic origin.

The Attorney General and the Minister of Citizenship and Immigration, the respondents in the case, argued that those affected by the changes in policy were not discriminated on the basis of national or ethnic origin because a variety of countries had been categorized as DCOs.[134] Therefore, according to the respondents, 'distinctions made between foreign nationals of diverse origins do not constitute discrimination on the basis of "national or ethnic origin"'.[135] Justice Mactavish rejected this argument, stating, '[t]he fact that a program may explicitly exclude Asians, Hispanics and Blacks does not make it any less discriminatory than a program that only excludes Asians'.[136]

Justice Mactavish then went on to address the respondents' argument that the distinction created between types of asylum seekers on basis of whether they came from DCOs was justified under section 15(2) of the Charter. The respondents asserted that the distinction was defensible because of the fact that removing certain benefits from DCO asylum seekers, allowed the government to redirect money in order to take care of the needs asylum claims from countries that would take a longer time for the authorities to process.[137] This argument once again echoes the logic expressed by the government during the parliamentary debates

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[130] Citizenship and Immigration Canada, 'Designated Countries of Origin' <http://www.cic.gc.ca/english/refugees/reform-safe.asp> accessed 3 April 2015.
[131] ibid. Non-EU states include Mexico, Chile, Israel, Japan, South Korea, New Zealand, and the United States of America.
[132] *Canadian Doctors*, above n 122, para 859.
[133] ibid, para 695.
[134] ibid, para 747.
[135] ibid.
[136] ibid, para 748.
[137] ibid, para 780.

leading up to the introduction of the status of DFN, noted above.[138] As in the case of the DFN, the respondents in the present case also implied that the IFHP policy was justified because asylum seekers from DCOs were not legitimately in need of protection in Canada.

In addressing this argument, the Court recalled the decision in *Kapp*, which assessed the applicability of section 15(2) of the Charter.[139] Justice Mactavish noted that in *Kapp*, the Supreme Court stated that in order to understand whether a government programme was an ameliorative programme for the purposes of section 15(2), the government had to show that the programme is 'a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality'.[140]

Justice Mactavish noted that ameliorative programmes generally bestowed benefits on a particular group, and did not deny them, as in the present case.[141] She therefore refused to recognise that the exclusion of certain asylum seekers and failed asylum seekers from accessing core health benefits was necessary to the ameliorative goal stated. Justice Mactavish added that it was also not clear how such a programme 'advances a goal of enhancing substantive equality'.[142] Quoting the Supreme Court judgment of *AG v A*[143], Justice Mactavish stated, 'if the state conduct widens the gap between the historically disadvantaged group and the rest of society, rather than narrowing it, then it is discriminatory'.[144] It was therefore found that the distinction between asylum seekers from DCOs and asylum seekers from non-DCOs did not contribute to the government's overall stated purpose of the 'amelioration of the health conditions of refugee claimants, refugees and failed claimants in particular circumstances of need in Canada'.[145]

Justice Mactavish, having found that the programme could not be defended under section 15(2), then returned to her analysis of section 15(1). She considered whether the programme violated this subsection by perpetuating prejudice or stereotyping. Justice Mactavish's analysis of this issue is of particular note because of the implications it may have for the status of DFN. Justice Mactavish noted that the respondent had stated that the DCOs were offered a level of state-funded health insurance coverage, and the distinctions that had been

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[138] See above n 33
[139] *Kapp*, above n 101. Quoted in *Canadian Doctors*,above n 122, para 784.
[140] *Canadian Doctors*, ibid, para 786.
[141] ibid, para 790.
[142] ibid, para 796.
[143] *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 SCR 61 (*AG v A*).
[144] *Canadian Doctors*, above n 122, para 797.
[145] ibid, para 807.

made between DCO and non-DCO asylum seekers did not perpetuate prejudice or stereotyping because it simply recognised that the healthcare systems of the DCOs were of the same standard as that offered in Canada.

Justice Mactavish noted a number of flaws with this assertion made by the respondents. She observed that while some of the DCOs may have an equivalent standard of healthcare to that provided in Canada, this could not be said to be true of all DCOs.[146] She also noted that the argument that there was an equivalent healthcare system in the country of origin implied that the asylum seeker was free to return to her country of origin and seek the healthcare that she needed there. This assumption about the refugee claimant's ability to return therefore indicated a fundamental misunderstanding of Canada's *non-refoulement* obligation. Further, Justice Mactavish noted that, '[i]mplicit in this argument is the assumption that there is no merit to the individual's refugee claim and they are indeed "bogus" refugees…'.[147] Justice Mactavish observed that the change in programme had been implemented in order to address the government's overall goal of preventing people coming to Canada to '"game the system" and abuse the generosity of Canadians'.[148] This was asserted by the state even though it was acknowledged that there was no clear evidence that access to healthcare in Canada was a major 'pull' factor for asylum claimants or that there had been any serious abuse of the healthcare system by asylum seekers in Canada.[149] There was also nothing to suggest that asylum seekers from DCO countries were better able to pay for healthcare than asylum seekers from non-DCOs. Justice Mactavish noted that the position of the asylum seeker from a DCO was further aggravated by the fact that under new regulations, such an asylum seeker was unable to work in Canada for her first 180 days in the state.[150]

Justice Mactavish therefore found for a violation of section 15 of the Charter on the grounds that '[t]he distinction is based upon the national origin of the refugee claimants and does not form part of an ameliorative program' and that '[i]t is, moreover, based upon stereotyping, and serves to perpetuate the disadvantage suffered by member of an admittedly vulnerable, poor and disadvantaged group'.[151] Finally, Justice Mactavish found that the respondents had not demonstrated that the 2012 changes to the IFHP were justified under section 1 of the Charter. Section 1 of the Charter gives the government a chance to defend the introduction of

[146] ibid, para 812.
[147] ibid, para 814.
[148] ibid, para 828.
[149] ibid, para 825-826.
[150] ibid, para 607.
[151] ibid, para 871.

a measure that is otherwise in violation of section 15 on the basis of a proportionality test. The government therefore attempted to justify the change in IFHP policy on the basis that it helped ensure fairness to all Canadians, that it saved money, that it protected public health and safety, and that it protected the 'integrity' of the Canadian asylum system by deterring bogus claims.[152]

Justice Mactavish rejected the fairness argument made by the government because under the IFHP, asylum seekers never had access to a higher standard of healthcare than that available to citizens of Canada under the IFHP.[153] Justice Mactavish also rejected the assertion that the measure saved money, as many of the costs that the government assured that it had saved had simply been absorbed by the provinces.[154] Justice Mactavish further refused to accept the argument that the policy change served to benefit public health and safety as in reality; it merely prevented people from accessing necessary healthcare.[155] Rather than promote public health and safety therefore, the policy change in fact seriously undermined it.

Justice Mactavish then went on to address what was perhaps the greatest motivation behind the government's introduction of the change to the IFHP, the idea that this change in policy would discourage asylum seekers arriving to the state and making false asylum claims. In so doing, the government claimed, the integrity of the asylum system would be protected. Justice Mactavish acknowledged that deterring false asylum claims was a legitimate goal to be pursued by the government.[156] However, the government had nonetheless failed to provide evidence to support its assertion that removing healthcare from certain asylum seekers would actually help achieve this aim. While Justice Mactavish agreed that access to free healthcare might be an incentive for people to come and seek asylum in Canada, she stated that she had not been presented with sufficient evidence to suggest that this was the chief motivating factor for the arrival of asylum seekers from the DCOs.[157] Because the government was unable to justify the programme for any of the abovementioned reasons, it was deemed to be unconstitutional. However, as noted in the most *Canadian Doctors* federal decision, the 2014

[152] ibid, para 963.
[153] ibid, para 920.
[154] *Canadian Doctors*, above n 122, paras 1012-1013.
[155] ibid, para 962.
[156] ibid, para 983.
[157] ibid, para 1025.

decision is currently under appeal and on October 31 2014, the Federal Court of Appeal dismissed a motion for a stay of the original judgment. [158]

The decision in the *Canadian Doctors* case was undoubtedly a major coup for those fighting for the protection of the rights of refugees and asylum seekers in Canada. The finding for discrimination on the basis of section 15 is also particularly encouraging from the perspective of those who have been categorized as DFNs under the PCISA. Much like those affected in the above case, DFNs are targeted on the basis of stereotypes and prejudices about the motivations behind their arrival in Canada to claim asylum. As noted above, the court was particularly critical of the lack of evidence that the government was able to provide to justify such a major policy shift that had such serious ramifications for a significant group in Canadian society. Similarly, as I have documented above, the government has also failed to provide clear evidence that the introduction of the DFN status would in fact reduce the number of false asylum claims through deterring people from arriving to the state. As already noted, the DFN system instead merely punishes all asylum seekers who rely on smugglers to enter Canada to claim asylum.

However, the fact that the decision in relation to section 15 of the Charter in *Canadian Doctors* was made on the ground of national and ethnic origin may act as a limitation to the potential section 15 arguments that could be made in relation to the DFN status. As noted above, the Court rejected arguments made by the applicants, that immigration status should be recognized as an analogous category under section 15. Justice Mactavish pointed out that immigration status was not necessarily an immutable characteristic, and that the Federal Court of Appeal, by which she was bound, had already ruled that immigration status was not an analogous status under section 15.[159]

In *Canadian Doctors*, the choice to recognise section 15 rights on the ground of 'national and ethnic origin' was logical, given the nature of how the asylum seeker was affected by the DCO. While the respondents argued that this ground could not be relied up because of the *variety* of countries on the list, there was still a list which stated a finite number of DCOs. The countries targeted by the change in policy could therefore be identified. The same cannot however be said of those who are affected by the DFN status. While experience has shown that certain countries are more likely to produce asylum seekers who seek asylum in Canada

[158] See *Canadian Doctors for Refugee Care v. Canada (Attorney General)* [2015] FC 149, para 3. At the time of going to print, a date had not been set for the hearing of the appeal.
[159] *Canadian Doctors*, above n 122, para 870.

by boat, the law does not refer to a list of countries that will be affected by the DFN status, as in the case of the DCO. Therefore, in the case of the DFN, it becomes more difficult to assert that DFNs are discriminated on the enumerated ground of 'national or ethnic origin'.

While Justice Mactavish noted that she was not permitted to make a finding for immigration status as an analogous category on the basis of rulings in higher courts, there have other cases where immigration status was in fact recognised as an analogous ground under section 15. In *Jaballah (Re)*, discrimination on the basis of immigration status was recognised in the context of the availability of detention review.[160] Mr Jaballah, was a foreign national who was detained on the basis of a security certificate. He was only entitled to detention review when the reasonableness of the security certificate had been determined. This contrasted with the position of permanent residents who were detained on the basis of a security certificate. Such permanent residents were entitled to detention review every six months. The Court ruled that the difference in treatment between Mr Jaballah as a foreign national and permanent resident, was in violation of section 15 of the Charter. The Court thereby ordered that Mr Jaballah have access to detention review on the same basis as permanent residents. In her judgment in *Canadian Doctors*, however, Mactavish stated that she was bound by the decision in *Toussaint* that states that immigration status cannot be recognised as an analogous ground because it is not 'immutable or changeable only at unacceptable cost to personal identity'.[161]

It is suggested here however, that the requirement of 'immutability' for a category to be recognised as an analogous ground under section 15 does open up a possibility for DFN refugees to argue their right not to be discriminated against. It is submitted that the DFN may assert that she comes under an analogous category for the purposes of section 15 of the Charter. It acknowledged that there are challenges in arguing for the recognition of 'immigration status' as an analogous category. However, it may be possible for the DFN to argue for the recognition of DFN status as a category under section 15 instead. In *Canadian Doctors*, Justice Mactavish refers to *Irshad v Ontario (Minister of Health),* [162] where immigration status was also not recognised as an analogous ground because of the fact that it was subject to change. In *Irshad*, many of the applicants who were challenging discrimination on the ground of immigration status under section 15, had themselves become

[160] [2006] FCR 193 (FC), paras. 80-81.
[161] *Canadian Doctors*, above note 122, para 861, quoting *Toussaint v Attorney General of Canada and the Canadian Civil Liberties Association* [2011] FCA 213, para 99.
[162] *Canadian Doctors*, para 864, referring to *Irshad (Litigation guardian of) v Ontario (Minister of Health)* [2001] OJ No. 648, paras 133-136 (*Irshad*).

permanent residents by the time the case was heard. Yet, DFN refugee status is not subject to a sudden change like this. The DFN is not permitted to even apply for permanent residence status for at least five years after she has been recognised as a refugee. The position of the DFN refugee is also set in the broader context that, as a refugee, her protection status does not cease to exist either until she reacquires the protection of her country of origin, or assumes another citizenship.

This position has recently been emphasised in Canada. Following another 2012 policy change, the government has carried out cessation proceedings against refugees with permanent residence status.[163] If a refugee with permanent residence status has travelled to her country of origin, the authorities have used such trips as evidence that refugee status has ceased because the refugee has re-availed herself of the protection of her country of origin. If the authorities find that the refugee status of the permanent resident refugee had ceased to exist, this would result in her losing her permanent residence status as well as her refugee status. This leaves her inadmissible in Canada, and vulnerable to possible removal proceedings. While this policy in relation to cessation may be viewed as sharp practice, it does confirm that refugee status is not changeable in the same way as other immigration statuses. In Canada, even when the refugee acquires permanent residence status in Canada, she is still also identified as a refugee by the Canadian government. Therefore, it is submitted that refugee status demonstrates the immutability that is required for the recognition of an analogous category under section 15 of the Charter.

For the reasons stated above, it is advanced that it is possible for the DFN refugee to dispute her designation and the subsequent limitation of her rights as a discriminatory practice under section 15 of the Charter. The distinctions that are made between DFNs and other refugees under the PCISA are just as arbitrary as the distinctions noted above, in the context of the 2012 IFHP policy. Equally, as already noted above, the government did not provide clear evidence that the establishment of a DFN status would lead to either a reduction in the rate of human smuggling, or a reduction in the number of false asylum claims. The *Canadian Doctors* case therefore sends a strong warning to the Canadian Government, that it cannot simply establish asylum policies solely on the basis that it will deter asylum seekers from entering the state. In *Canadian Doctors*, while it was recognised that the government is

[163] See Canadian Council for Refugees, 'Cessation: stripping refugees of their status in Canada'(May 2014) t <http://oppenheimer.mcgill.ca/IMG/pdf/cessation-report-2014.pdf> accessed 3 April 2015.

entitled to establish asylum laws designed to protect the integrity of the asylum system, those rules must nonetheless adhere to constitutionally protected principles. In general therefore, the decision in *Canadian Doctors* stresses that the government's policies must be based on established facts that clearly link to the objective to be pursued in the policies. Further, these policies must also be proportionate in terms of the legitimate aim sought to be achieved. This was clearly not the case in the 2012 IFHP policy change, and it is argued here that this is also not the case in the context of the DFN refugee under the PCISA.[164]

7. CONCLUDING REMARKS

DFN refugee status represents a scalar shift in Canadian refugee law. At the point at which the DFN is designated, crucial decisions are made about who that person is, for example, in relation to how she arrived to the state, and whether she is part of a group. In general, it is assessed whether she 'fits' the definition of the DFN. These decisions ultimately influence whether she is considered to be a regular asylum seeker, or whether she is to become a DFN. As noted, if she is deemed to fall into the latter category, she is treated primarily as an individual who has illegally entered the state through smuggling. She is considered to effectively act as a proxy for the actual smuggler, who is in this context portrayed to be beyond the reach of the Canadian criminal justice system. Here, I have emphasised that the designation of individuals under the PCISA should not just be viewed as an inevitable response to the arrival of migrants to the state by boat, but as a specific choice made by the state as to how migrants arriving to the state by boat should be governed. The DFN is therefore excluded by the state at various levels and in a variety of spaces through the operation of Ministerial discretion.

The PCISA represents a troubling creep of the practice of Ministerial discretion which has the effect of restricting the core principles of refugee law and international human rights law. The restrictions placed on the DFN under the PCISA reveal the complexity of the bureaucratic system in Canada. It is a system that creates a series of barriers between state rhetoric with

[164] It should be noted that following this judgment, Canadian Doctors for Refugee Care, the Canadian Association of Refugee Lawyers, and Justice for Children and Youth returned to the Federal Court on Jan 26 2015 in order to ensure the government was in full compliance with the judge's order to reinstate refugee healthcare. See, 'Media Advisory: Opponents of refugee health cuts face off with federal government in new court hearing', (*Canadian Association of Refugee Lawyers,* 26 January 2015) < http://www.carl-acaadr.ca/articles/97> accessed 3 April 2015. However, the case was dismissed on jurisdictional grounds. See above n 158, para 6.

respect to its adherence to the Refugee Convention, and the reality faced by the DFN, where avenues to redress and opportunities to hold the state to account on the basis of its obligations under the Convention are increasingly closed off. Despite this, Canada has guaranteed the principle of non-discrimination to Canadian citizens and non-citizens alike under section 15 of the Charter. As evident from the *Canadian Doctors* case, the asylum seeker or the refugee may rely on the protection of section 15 to successfully contest discriminatory laws and policies. *Canadian Doctors* affirms that the state cannot rely on stereotypes about asylum seekers and refugees to enact policies that marginalise and discriminate between categories of such groups. *Canadian Doctors* also emphasises that the government must substantiate the need for restrictive asylum policies with clear facts and evidence. When the government created DFN status, it failed to clearly set out how the creation of such a restrictive status would result in the reduction of the human smuggling into Canada. Here it is argued that the protection against discrimination enshrined in section 15 of the Charter, as well as the decision in Canadian Doctors, confirms that DFN status is unconstitutional.

When the state relies on Ministerial discretion and administrative procedures to manage and control refugee populations, the refugee and the asylum seeker are often left feeling powerless and that they are unable to dispute their treatment. Over time, discriminatory treatment against such groups is viewed not only as acceptable, but something to be expected. This treatment is continually justified on the ground that it is necessary to protect the asylum system from those who might seek to take advantage of it. When a state invokes such a justification for a restrictive policy or law, they often enjoy complete impunity from challenge. However, the decision in *Canadian Doctors* emphasises that the state remains accountable under the Charter, even to asylum seekers and refugees. Therefore, while there is no doubt that the asylum seeker and the refugee in Canada now face unprecedented restrictions and obstacles to protection, the power of the government to limit their rights remains subject to challenge under the Charter.