

Asymmetric Borders: The Canada-Czech Republic 'Visa War' and the Question of Rights

Mark B. Salter and Can E. Mutlu

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Abstract

Visa policy is one of the most important areas for contemporary public policy, touching on issues of mobility, citizenship, rights, and security. This paper argues that visa policy must: 1) be placed in a national, historical context, 2) be understood as part of a mobility regime that includes identity documents, passports, preclearance, and refugee status adjudication and 3) be analysed with a view to rights and responsibilities. After providing a history of Canadian immigration and visa policies, it highlights several trends in contemporary mobility policy: the automation of decision-making, the use of risk-assessment for security purposes and the reliance on preclearance of Canada-bound travel by specifically focusing on the Canada-Czech Republic 'visa war' and the changes to Canadian practices since then. The authors conclude that one of the dominant results of the 'off-shoring' of border controls is the bureaucratisation of decision-making in spaces where rights are difficult to invoke. This development must be a matter of concern for those concerned with rights, particularly mobility rights.

Keywords: Mobility, Visa Regimes, Canada, Czech Republic, European Union, Schengen Area



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CONTENTS

1. Introduction	1
2. General history of the global visa regime.....	3
2.1 Schengen <i>acquis</i> and the visa waiver system.....	3
2.2 Canadian visa policy	6
3. Canada-Czech Republic visa war	8
3.1 Regina vs. immigration officers at Prague airport	11
3.2 Recent developments in the Canadian visa regime	12
4. Conclusions and policy recommendations	13
References	14

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Mark B. Salter and Can E. Mutlu*

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1. Introduction

Visa policy is one of the primary ways that a state governs entry – and it is a particularly useful policy tool. The visa is a *prima facie* approval to enter a particular country, although it must be emphasised that the visa does not guarantee entry or indeed bind the border official in any way. In setting out the kind of visits, the conditions for work, the documents or capital required for visit, states can manage their security, public safety, public health, economy, and society; rendering the border open and porous, or closed and impenetrable. Visa policy is thus a mirror that reflects how the state views its own population and the world: states that perceive their welfare system as being overly-burdened may have tight regulations for refugee admission or low-skilled labour; states that are concerned with fertility rates, on the other hand, may encourage immigration; states that are dependent on tourism may lower visa barriers; states that can identify particular populations as high or low-risk may choose to facilitate or target those profiled groups with long-term multiple-entry visas or national restrictions. The visa application process allows the receiving government to assess potential travellers in terms of risk and makes the administration of the actual border more efficient and just. It is the sole and exclusive prerogative of states to define the conditions for entry, and the legal room for appeal is extremely thin. It is the absolute right of a state to prohibit entry of any person or traveller, although within customary international law and through treaty law, there are two broad exceptions: states agree to accept their own citizens and duly recognized refugees. The *Universal Declaration of Human Rights* (1948), however, does guarantee the rights to mobility, to citizenship, to enter one’s own country, and to claim asylum:

13 (1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

14 (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

15 (1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

These rights are also explicitly stated in the *International Covenant on Civil and Political Rights* (1966):

12 (1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

(2) Everyone shall be free to leave any country, including his own.

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(3) The above-mentioned rights shall not be subject to any restrictions except those provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

(4) No one shall be arbitrarily deprived of the right to enter his own country.

Consequently, there is an absolute right to exit, but no corresponding right to enter, except countries of citizenship or asylum. Visa policies are one of the primary and most important policy tools that states use to manage flows of population to their borders. Visas and preclearance processes are crucial steps in this process of managing the movement of populations. De-territorialisation of border management¹ through increased pre-clearance practices push the examination of travellers ‘up-stream,’ away from the actual territory of the state. This practice also helps mitigate the degree to which the travellers can claim rights. For this reason, and also because visa decisions often take place in opaque bureaucracies in remote locations, there is a pressing and urgent need to formulate a critical approach to visa policy that examines these policies, practices and processes. By critical approaches to visa policy, we are referring to empirically grounded, rights-oriented analysis of contemporary security practices that manage global mobility.

The so-called ‘Czech Republic-Canada visa war’, which caused an intergovernmental crisis between the Czech Republic, Canada and the EU, presents an interesting and useful case study in the management of borders and populations. The Czech-Canada visa war was initiated by the Canadian government’s unilateral decision to re-impose visas on Czech nationals travelling to Canada, which was previously waived in October 2007 as part of the broader Canada-EU visa waiver initiative. Visa waiver programmes are reciprocal agreements that require a great deal of technical cooperation and a careful vetting process. The decision to engage in a visa waiver programme is closely interlinked with risk-assessment processes of the sending country and is intended to measure risks involved in waiving visas for temporary visitors – increase in asylum claims, over-stayers or those seeking ‘under-the-table’ employment with a traveller’s visa. This risk-assessment process takes place on two levels: first, national-level risks of waiving visas are measured by economic, political and social indicators such as the GDP, unemployment levels, political system, ethnic violence etc. The second level focuses on the individual travellers by separating those about whom nothing is known, or nothing good is known, and facilitating the quick and easy movement of those travellers about whom many good things are known. Visa waiver programmes require continuous assessment of these two levels.

Currently, Canada does not require a visa for temporary visits from 51 countries,² 20 of which are members of the European Union. Between October 2007 and July 2009, Czech citizens did not require a visa to travel to Canada. However, due to the increase in numbers of asylum-seekers claiming to be of Roma origin from the Czech Republic travelling to Canada, the Canadian government unilaterally re-imposed visas on Czech citizens. This decision overlapped with another controversial decision by the Canadian government: that of re-imposing visas on Mexican citizens. According to Jason Kenney, Canadian Citizenship and Immigration Minister:

the Czech Republic, a European Union democracy and Mexico, for all of its imperfections [...] was responsible for a 60% increase in the number of asylum claims filed in Canada and was largely responsible for that huge backlog. Those two countries constituted a third of our claims – 91% that were rejected as not being in need of our protection.

¹ N Vaughan-Williams. (2010), “The UK border security continuum: virtual biopolitics and the simulation of the sovereign ban”, *Environment and Planning D: Society and Space*, Vol. 28, forthcoming.

² “Visitor Visa Exemptions”, Citizenship and Immigration Canada, 7 April 2010 (<http://www.cic.gc.ca/english/visit/visas.asp#exemptions>).

Moreover, according to Kenney, the Czech Republic and Mexico, upon both of which Canada imposed a visa requirement, were “stable democracies and have robust protection for human rights”, and consequently, the *prima facie* consideration of an asylum claim was to be questioned. This decision to reject asylum-seekers based on the political system of the country of origin presents a major shift in the existing Canadian visa regime. Since the Canada-Czech visa war, this shift has become much clearer and codified with the recent changes to the Canadian asylum laws, regulation and practices under the *Balanced Refugee Reform Act* – Bill C-11 of 2010. In order to take a critical approach to the changes to the Canadian visa regime, this paper provides a brief history of the global norms for visas, and then focuses on Canadian immigration policy, particularly with respect to the re-imposition of the visa requirement on Czech nationals in 2009.

2. General history of the global visa regime

Passports and visas were originally intended as a temporary measure for the control and management of large population flows after the disruption of the First World War. The 19th century was seen as an era of free movement, at least across Europe, and the framers of the contemporary regime at the League of Nations felt that, once national and refugee populations had settled in their right place, Europe and the world could return to visa-free travel. Because travel was seen as a technical issue; one of low-politics concerning coordination and cooperation, it was agreed at the 1922 League of Nations Technical Subcommittee meeting that visa agreements would be bilateral, rather than multilateral, and that the burden would be on the receiving country to make an evaluation of the traveller, rather than the sending country. Thus, the structure of global mobility was set out: sending states were responsible for issuing secure and authentic identity and travel documents; receiving states would make assessments of potential travellers through visas and frontier formalities: Visas were a temporary necessity of the post-war period, with the anticipation that they would be unnecessary within five to ten years, but up until that point, the elimination of visas was the goal to be worked towards on a bilateral basis.³ However, once these norms and procedures were established, visas have come to be key tools in managing global mobility. States negotiate visa waivers on an individual basis, founded on an analysis of the number of acceptances and rejections of the visas themselves, and the number of asylum claims made once in the country. Canada and the UK both base their decisions on visa waivers on these broad trends. The *Schengen Agreement* of 1985, which established the European free-movement area, took a different approach.

2.1 Schengen *acquis* and the visa waiver system

The Schengen Area and related laws, policies and practices represents a success story of European integration; contributing to the ‘four freedoms’ – of capital, goods, services and persons – that are essential to the functioning of the internal market of the EU. The Schengen Area was originally established between Belgium, France, Luxembourg, Netherlands and West Germany in 1985 and the Convention on Implementing the Schengen Agreement supplemented it in 1990. Since the *Amsterdam Treaty* in 1997 – which came into effect in 1999, the Schengen framework is no longer a separate agreement, rather it has been absorbed into the EU’s *Acquis Communautaire* – the total body of EU law accumulated thus far. Since 1999, the smooth functioning of the Schengen Area is maintained by the implementation of certain practices, rules and regulations: the Schengen *acquis*. Broadly, the Schengen *acquis* oversees a) the elimination of border controls with other Schengen member states while simultaneously strengthening border controls with non-Schengen states, b) provisions on common policy on the

³ Salter, M.B. (2003), *Rights of Passage: The Passport in International Relations*, Boulder, CO: Lynne Rienner Publishers.

temporary entry of persons (including the Schengen visa), c) the harmonization of external border controls, d) cross-border police and e) judicial co-operation.

The evolution of the Area from the initial five members,⁴ established by the *Schengen Agreement* to the current Area that will soon – in 2011 – have 27 members in approximately two decades demonstrates the desire of the EU and non-EU European countries alike in taking part in this zone of free movement and collective border/visa regime. Even upon the successful absorption of the *acquis* into national legislations, however, the diffusion of these policies into practice requires time; hence the delay between the Bulgarian-Romanian accession to the EU in 2007 and their delayed inclusion into the Schengen Area scheduled for 2011.

While for the member states and the economically better-off states of the European continent such as Norway and Switzerland, accession into the Schengen Area is just a matter of time, for neighbouring or peripheral countries such as Ukraine, Belarus or Turkey, joining the Schengen zone or even acquiring a visa-waiver status is a quixotic challenge. This is not solely because of the economic status of these countries but also because of the difficulties associated with their capacity to manage their external borders with non-Schengen member states. To that effect, the Schengen zone has resulted in “two sets of measures: those which apply to Community nationals who are moving within the Union and those which apply to third country nationals”.⁵ While these multiple standards have pushed some critics to compare the Schengen Area’s “internal security culture” to a “gated community”,⁶ when compared to the visa waiver policies of the UK, the US or Canada, the “gated community syndrome” is not simply a ‘European’ phenomenon but rather a sentiment that is shared on both sides of the Atlantic.

What is different about the Schengen zone, however, is not visible to the ‘front-end customer’ – the traveller, refugee or asylum-seeker – rather it is hidden in the behind-the-scenes *dispositif* or the mobility assemblage that enables the functioning of Schengen as a ‘system of governance’. The most interesting aspects of the Schengen unified visa regime are the ‘behind-the-scenes’ practices, such as the Schengen Information System (SIS) and the visa waiver negotiations between the European Commission and third countries as they represent a unique transformation of the traditional visa regime model due to the supranationalisation of practices.

The Schengen Information System (SIS) and the SIS II, the new version of SIS to be unravelled in 2013, provide a common database for participating countries that allows a transnational sharing of information. As noted in the introduction, the Schengen visa, in and of itself, does not guarantee admission into the Schengen Area. According to *Article 5* of the *Schengen Borders Code*, entry conditions for third country nationals are: a) a valid travel documentation, b) a valid Schengen visa – if required, c) justification of the purpose of stay, d) no issued alerts on the SIS database, e) not being considered a threat to public policy, internal security, public health or the international relations of any member state.⁷ The final two points differ from traditional approaches to the governance of mobility, as they require transnational – if not supranational – cooperation that requires a network, or a database in this case, to manage risks associated with establishing a ‘European’ visa regime. In that sense, the SIS proves especially useful in the sharing of intelligence and information regarding personal information and observations – such

⁴ Belgium, France, Luxembourg, Netherlands and West Germany were the signatories of the original Schengen Treaty.

⁵ E. Guild (2005), “The Legal Framework: Who is entitled to Move?”, in D. Bigo and E. Guild (eds), *Controlling Frontiers: Free movement into and within Europe*, Aldershot: Ashgate, p. 16.

⁶ R. Zaiotti (2007), “Of Friends and Fences: Europe’s Neighbourhood Policy and the ‘Gated Community Syndrome’”, *Journal of European Integration*, Vol. 29, No. 2, pp. 143-162.

⁷ “Schengen Borders Code”, European Commission, 23 April 2010 (http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/114514_en.htm).

as whether the person was armed or violent, any reasons to be alert or actions to be taken if encountered etc., as well as information, or alerts, on banknotes, firearms, vehicles, documents, warrants etc. As of February 2010, there were 31, 618, 951 registrations in the SIS system.⁸

Under the Schengen regime, participating countries give up their exclusive control over their immigration policy and enter a cooperative governance structure with other member states. In recent years, the European Commission, on behalf of the European Communities, has successfully negotiated visa waiver agreements – for less than 90 days – with former Yugoslav republics in the Balkans and the Russian Federation. As this illustrates, it is clear that this supranational approach gives both the member states and the European Commission stronger leverage when negotiating visa waiver agreements with third countries. This multilateral approach, rather than the traditional bilateral approach, is based on the 'reciprocity' principle. In other words, in order to have visa-free travel into the Schengen Area, third countries must have waived their visa requirements for all the Schengen Area members. The logic behind this is:

Schengen is a single travel area: Member States have chosen to have a single list of countries that are subject to a visa requirement plus a list of countries for which this requirement is waived [...] It is therefore logical that, in the spirit of solidarity, the EU also seeks that third countries treat all Member States in the same way.⁹

If and when a third country decides to re-apply visa to a Schengen member, such as in the Czech-Canada visa situation, or fails to waive the visa in the first place, such as in the case with Bulgaria and Romania, affected countries inform the Commission, which then engages in negotiations with the third country directly. The reciprocity principle allows the Commission to apply a 'carrot or stick' strategy to negotiations with countries like Canada, which fail to maintain visa waivers for the entire zone. However, as listed in the Commission's most recent report on visa reciprocity,¹⁰ Canada is not the only country that the Commission is in negotiations with. Countries like Japan, Panama, Singapore, Australia, the US, Brunei and Brazil are also involved in or have recently completed negotiations with the European Commission on visa waivers.

In a parallel regime, the refugee system in the EU was established at the same time and with a similar goal: to put populations in their right place. With the dissolution of empires and the creation of new nation states, large populations in Europe were no longer connected to a nationality. Refugee status was a way of connecting these populations with states: the core principle was that each individual had a right to a state, to the protection of a state and it was in the state's interest to manage the global population in this way. There are two chief ways that refugee claims can be made: to the United Nations High Commissioner for Refugees (UNHCR) or to a signatory state of *the Convention and Protocol Relating to Status of Refugees* directly. UNHCR has a responsibility to resettle status refugees, although they do not possess any authority to compel states to accept them. States retain an absolute right to determine status according to their own laws and policies. It is certainly true that, over the past 10 years, the public discourse surrounding asylum-seekers has assumed a more militant tone. Governmental anxiety has risen surrounding the sheer ability to manage large flows of migrants, the ability to distinguish between legitimate asylum-seekers and economic migrants, and the methods by which those migrants can be contained and processed.

⁸ Council of European Union (2010), *Schengen information system database statistics dd. 01/01/2010*, Brussels: European Union.

⁹ "Visa Policy", European Commission, DG Home Affairs, 7 September 2010 (http://ec.europa.eu/home-affairs/policies/borders/borders_visa_en.htm).

¹⁰ "Fifth Report from the Commission to the Council and the European Parliament", European Commission, 19 October 2009 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0560:FIN:EN:PDF>).

As stated above, states have an absolute right to make decisions about who may enter their state, understood as a primary right of protection for the population. Individuals had a right to citizenship, and consequently entry into their national state; and if they had no nationality or had a reasonable fear of persecution from their national state, then they had a right to protection and subsequently could enter another state. The international individual right to mobility seems to be in flux, or at least in question. Visa policy is an attempt to balance these two rights: the state right to protection and the individual's right to mobility.

Over the past one hundred years states have also used visa policy as a reflection of domestic policy and as a reflection of their understanding of the world. Germany, for example, used an extensive guest-worker visa system in the 1950s and 1960s to recruit low-skilled temporary immigrants with a series of bilateral agreements with Italy (1955), Greece (1960), Turkey (1961), Morocco (1963), Portugal (1964), Tunisia (1965) and Yugoslavia (1968). States, such as Germany, the UK, France, Canada, and other countries, have also tried to balance social concerns, understood as the character or identity of the population. Thus, Canada had a white-only immigration policy, particularly evident between 1946 and 1962, which ranked nationalities of immigrants based on their perceived ability to assimilate into Canadian society. In addition to this perceived balance between economic and social factors, public safety and security has long been a driving concern of visa policy. The visa application process allows states an opportunity to pre-screen potential visitors, and has long been seen as a policing moment, to stop the trafficking of 'illegals', women, children, etc.

Despite its long history, academic and policy attention towards visa policy has intensified in the past ten years because of two veins of governmental anxiety – particularly in Europe and North America. Questions about economic migrants and asylum-seekers have dramatically entered the public imagination, as have concerns about terrorism. The expansion of the European Union to include countries with a large, poor labour force on low wages has led to concerns about domestic trades and unemployment. The increase of asylum-seekers who are 'taking advantage' of the lack of internal border controls within the European Union has led to a series of third country agreements, in an attempt to re-localise the borders of the EU. And, of course, the devastating impacts of 9/11, 7/7, and the Madrid train bombings have demonstrated the degree to which individuals can also be a threat to national security. Within the developed world, there is an emergent consensus that risk management is the appropriate paradigm for border security; that is to focus the majority of governmental attention on those travellers about whom we know nothing, or know nothing good, and facilitate the quick and easy movement of those travellers about whom we know a good deal of good things. Visas and preclearance are crucial steps in this process: they push the examination of travellers 'up-stream,' away from the actual territory of the state, which also helps mitigate the degree to which they can claim rights. For this reason, and because visa decisions often take place in opaque bureaucracies, there is a pressing and urgent need to formulate a critical approach to visa policy.

2.2 Canadian visa policy

Visas are the responsibility of Ministry of Citizenship and Immigration. They describe the role of the visa:

Canada's visa policy decisions are made on a country-by-country basis and seek to ensure there is a balance between welcoming visitors to Canada while protecting the health, safety and security of Canadians. These decisions are based on a number of criteria including social and economic conditions in the country such as the unemployment rate and economic growth; immigration issues such as refugee claims and illegal migration to Canada; the security and issuance process for the country's travel documents; health, safety and security issues; how that country manages and patrols its borders; human rights; and bilateral relations. A visa requirement is

Canada's first line of defence in controlling the flow of people into the country and ensuring Canada's immigration and refugee programs are not abused.¹¹

Visa policy can be separated into three parts: temporary visits, refugee and asylum claims, and immigration. Canada has modelled its immigration policy to be a reflection of its economic needs and concern for social stability: early Canadian legislation included a head tax on Chinese immigration and descriptions of preferred/non-preferred countries. Between 1946 and 1962, immigration policy specifically permitted discrimination on the basis of ethnic groups or race;¹² in 1967, this was supplanted by the points system that attributes the applicant a range of points based on their age, ability to speak the two official languages of Canada, education, work experience of the applicant, rather than focusing on the race, ethnicity or the country of origin. Setting aside national origin, race, religion, or ethnicity, the points system details levels of education, skills, linguistic competencies, and so on, that the Canadian government considers desirable or useful. The current legislation is the Immigration and Refugee Protection Act (IRPA) of 2002¹³ that emphasises Canada's priorities as those migrants who qualify through the points system – emphasising the needs of Canada's economy, family reunification, and humanitarian grounds. However the IRPA places emphasis on humanitarian grounds it is also coupled with the passage of a Safe Third Country Agreement (2005) with the US that has seen a significant drop in claims.¹⁴ Temporary residents are classed as foreign workers, foreign students, humanitarian cases (i.e. refugee claimants and others), and a miscellaneous class. Asylum-seekers are eligible to make a claim for refugee status at any Canadian border or on Canadian territory. Since the Safe Third Country Agreement came into effect, the number of claims has dropped dramatically, even if the percentage of acceptances/refusals has remained relatively constant. The question of temporary resident visits (tourist, student, or temporary work visas) is also intimately related to the issue of asylum-seekers.

Visa waivers are the result of a careful vetting process, and a reciprocal agreement with the bilateral partner.¹⁵ As above, the decision to engage in a visa waiver is a result of a risk assessment of the sending country. Canada does not require a visa for temporary visits from 51 countries, 20 of which are members of the European Union.¹⁶ However the Czech Republic is one of three EU countries that Canada requires its nationals to obtain a visa, the others being Romania and Bulgaria. For Lithuanian and Polish nationals, only holders of non-biometric passports are required to obtain a visa. In the history of Czech-Canada visa/travel regulations, there is a persistent concern about fraud. In 2007, the Minister of Citizenship and Immigration issued a bulletin declaring all Czech non-machine-readable passports invalid for travel to

¹¹ "Backgrounder", Citizenship and Immigration Canada, 13 July 2009 (<http://www.cic.gc.ca/english/department/media/backgrounders/2009/2009-07-13b.asp>).

¹² V. Knowles (1997), *Strangers at Our Gates: Canadian Immigration and Immigration Policy, 1540 – 1997*, Toronto: Dundurn Press.

¹³ "Immigration and Refugee Protection Act", Department of Justice, 18 October 2010 (<http://laws.justice.gc.ca/en/i-2.5/245769.html>).

¹⁴ The designation of the US as a safe third country was tested in Canadian courts, but ultimately upheld.

¹⁵ Countries with short-term travel visa-waiver agreements with Canada: Andorra, Antigua and Barbuda, Australia, Austria, Bahamas, Barbados, Belgium, Botswana, Brunei, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel (national passport-holders only), Italy, Japan, Korea (Republic of), Latvia (Republic of), Lithuania, Liechtenstein, Luxembourg, Malta, Monaco, Namibia, Netherlands, New Zealand, Norway, Papua New Guinea, Poland, Portugal, St. Kitts and Nevis, St. Lucia, St. Vincent, San Marino, Singapore, Slovakia, Solomon Islands, Spain, Swaziland, Sweden, Slovenia, Switzerland, United States and Western Samoa.

¹⁶ "Visitor Visa Exemptions", Citizenship and Immigration Canada, 7 April 2010 (<http://www.cic.gc.ca/english/visit/visas.asp#exemptions>).

Canada or for identification of status.¹⁷ The International Civil Aviation Authority (ICAO), which is responsible for the passport standards, has made machine-readable passports necessary for all signatories.¹⁸ Information in the machine-readable zone of the passport, usually embedded in two lines of code at the bottom of the identification page, with the name, photo, and data of the bearer, is automatically entered into the Canada Border Services Agency database – and acts as a *prima facie* check against watch-lists and also as an anti-fraud measure. In the absence of the machine-readable travel document, the Citizen and Immigration minister for Canada expressed concern that the passports were not reasonably secure.

3. Canada-Czech Republic visa war

One issue of central interest is the re-imposition of a Canadian visa on Czech nationals. Canadian nationals enjoy visa-free travel in all 27 EU member countries, in part because the Schengen *acquis* requires a similar visa policy for all members. However, Canada requires visas from nationals of three EU members: Czech Republic, Romania, and Bulgaria. The Canada-Czech Republic visa war has a precursor in 1996, when Canada briefly waived the visa requirement, but re-imposed it in 1997 after an enormous influx of Roma refugee claimants.

Canada responded initially to the enlargement of the European Union by conducting technical investigations (border control, passport and document fraud, etc), to satisfy Canadian requirements for visa-free travel. Accordingly, on 31 October 2007, the Canadian visa requirement was lifted for Czech nationals (along with other new EU members: Latvia; the lifting of the visa for Hungary, Lithuania, Poland and Slovakia followed in 2008). The then-Minister Diane Finley said:

We look at the risks and benefits of visa-free travel to Canada, to see if a country warrants having the visa requirement removed. We are committed to the free and secure movement of people between the EU and Canada. We are also committed to the objective of visa-exempt status for all EU member states.¹⁹

However, by 15 April 2009, Citizenship and Immigration Minister, Jason Kenney was signalling to the Czech government Canada's concern over the increased numbers of refugee claimants. "Although, like every other democracy, it has its challenges and its shortcomings, it's hard to believe that the Czech Republic is an island of persecution in Europe"²⁰ he said. "We would like to maintain our visa exemption with the Czech Republic. At the same time, we are obviously concerned about the numbers of false refugee claimants".²¹

By July, the situation had worsened and the response came. On 13 July 2009, the visa requirement was re-imposed, which was the first time that Canada had *re-imposed* a visa requirement. Alone and in concert with the European Commission, the Czech authorities protested about Canada's action. In 2009, the European Commission threatened to impose restrictions on two specific kinds of Canadian nationals, holders of diplomatic and service

¹⁷ "Visiting Canada: Who is eligible?", Citizenship and Immigration Canada, 13 October 2010 (<http://www.cic.gc.ca/english/visit/apply-who.asp>).

¹⁸ "Machine Readable Travel Documents Programme", International Civil Aviation Organization, 25 October 2010 (<http://www2.icao.int/en/MRTD/Pages/default.aspx>).

¹⁹ "Visa Free Travel to Canada for New European Union Members", *Canada Immigration Newsletter*, October 2008 (<http://www.cicnews.com/2008/03/visafree-travel-canada-european-union-member-states-03644.html>).

²⁰ "Canada flooded with Czech Roma refugee claims", *CANWEST News Services*, 15 April 2009 (<http://www.canada.com/news/Canada+flooded+with+Czech+Roma+refugee+claims/1499804/story.html>).

²¹ "Canada flooded with Czech Roma refugee claims", *CANWEST News Services*, 15 April 2009 (<http://www.canada.com/news/Canada+flooded+with+Czech+Roma+refugee+claims/1499804/story.html>).

passports (i.e. government employees), to demonstrate their protest. The Czech Republic imposed this policy almost immediately in protest (20 July 2009). However, as an EU member, the Czech Republic cannot impose its own visa restrictions on Canadian nationals.

The Canadian justification for the re-imposition of the visa requirement merits serious consideration. Citizenship and Immigration Minister, Jason Kenney said:

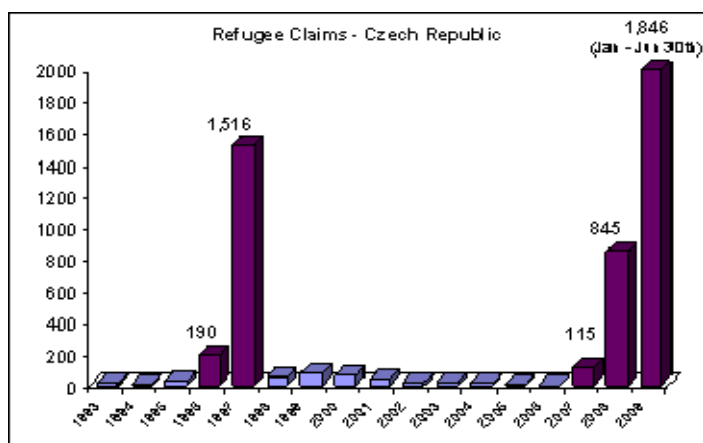
the Czech Republic, a European Union democracy and Mexico, for all of its imperfections [...] was responsible for a 60% increase in the number of asylum claims filed in Canada and was largely responsible for that huge backlog. Those two countries constituted a third of our claims – 91% that were rejected as not being in need of our protection.²²

This huge influx, contended Kenney, interfered with genuine claims:

[w]e have only one tool available to address those situations where we see an aberrant enormous wave of unfounded claims from a democratic country. You know what that tool is? It's a very blunt instrument – the imposition of a visa requirement for visitors...This is a blunt instrument. It undermines Canada's commercial and diplomatic interests. It's a necessary tool to use in a managed immigration system but you want to only as your only resort.²³

The Czech Republic and Mexico, upon both of which Canada imposed a visa requirement, were stable democracies with robust protection measures for human rights; consequently, the *prima facie* consideration of an asylum claim was to be questioned. Thus, the argument from the government was two-fold: once the visas for Czech nationals were waived, the number of refugee claims skyrocketed, and soon came to represent a large proportion of the claims before the Immigration and Refugee Board of Canada. This led to delays for legitimate claimants of up to 19 months.

Figure 1. Refugee claims in Canada by Czech Republic nationals (1983-2009)



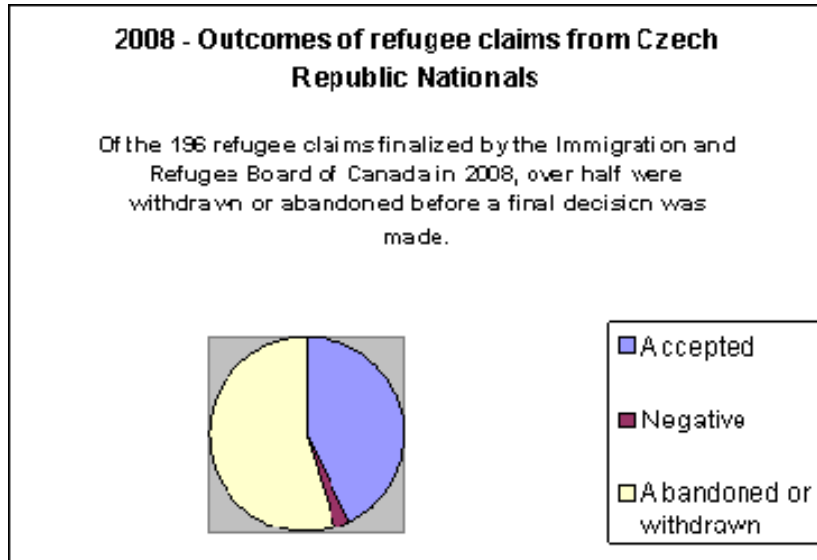
Source: Citizenship and Immigration Canada (2009).

²² “Opening remarks for The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism *Balanced Refugee Reform*”, Citizenship and Immigration Canada, 8 April 2010 (<http://www.cic.gc.ca/english/department/media/speeches/2010/2010-04-08.asp>).

²³ “Opening remarks for The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism *Balanced Refugee Reform*”, Citizenship and Immigration Canada, 8 April 2010 (<http://www.cic.gc.ca/english/department/media/speeches/2010/2010-04-08.asp>).

In addition to the question of procedural justice or efficiency, Kenney also inferred something about the character of these claimants. Because a large percentage of the claims had been abandoned or withdrawn by the claims, Kenney assumes that this means the claims were fraudulent.

Figure 2. Outcomes of refugee claims from Czech Republic nationals (2008)



Source Citizenship and Immigration Canada (2009):

The ministerial press release laid out this argument clearly:

Since the visa requirement was lifted on the Czech Republic in October 2007, nearly 3,000 claims have been filed by Czech nationals, compared with less than five in 2006. The Czech Republic is now the second top source country for refugee claims. The relatively higher acceptance rate of refugee claims originating in the Czech Republic masks the troubling fact that more than half of the claims are abandoned or withdrawn before a final decision is made by the Immigration and Refugee Board, indicating that many claimants may not be genuine refugees.²⁴

In interviews, Minister Kenney made a number of different arguments about these supposedly false claimants. First, he claimed that because Czech nationals were members of the European Union, they could migrate without visas to 26 other European countries. Second, he argued that because the Czech Republic was a democratic country with a history of protection of human rights, the claim to persecution should be met with scepticism.²⁵ The claimants, Kenney argued, were economic migrants attempting to ‘jump the queue’ of the immigration system through the ‘backdoor’ of the asylum process. He drew a contrast – made elsewhere and consistently – that Canada’s imposition of this visa restriction was to enable the refugee system to devote resources to ‘real’ victims; those in UN refugee camps. Another rationale for this re-imposition of the Canadian visa for Czech travellers was an assumption about the organisation of asylum claimants of Roma origin.

²⁴ “Canada imposes a visa on the Czech Republic”, Citizenship and Immigration Canada, 13 July 2009 (<http://www.cic.gc.ca/english/department/media/releases/2009/2009-07-13a.asp>).

²⁵ For a full interview, Jason Kenney MP has uploaded a version: <http://www.youtube.com/watch?v=pSeTxrfmjDc>

There is a sleight of hand here. According to Canada's adjudication, slightly less than half of the 196 claims finalised in 2008 were granted status. The Czech News Agency has clearer data: "Last year, the Canadian authorities closed 900 Czech asylum applications. In 734 cases, the applicants withdrew or did not reopen them. A total of 90 applications were approved as substantiated and 76 were rejected".²⁶ Similarly, O'Neil reports that 40% of all refugee claims not withdrawn were accepted. Minister Kenney argued in April, and again in July when the visa was reimposed, that predatory businessmen were falsely selling Canada as an easy asylum claim for the Czech Roma – and this accounted for the large number of claims in the first instance, and their withdrawal when it became clear that the claim process was not as easy as promised in the second instance. Legitimate claimants, then, were ones that waited 19 months in addition to facing the IRB. The Roma face discrimination in the Czech Republic, and have experienced an increase in ethnically- or racially-motivated violence in the past five years. This has led to a corresponding increase in the number of Czech Roma seeking asylum in other countries, not just Canada.

3.1 Regina vs. immigration officers at Prague airport

In 2001, the UK and Czech governments reached an agreement to allow British immigration officials to make decisions about entry into the UK at Prague airport. In that preclearance process, described in para. 2 of Lord Bingham's remarks,

those who stated that they were intending to claim asylum in the UK and those who the officers concluded were intending to do so, were refused leave to enter. This effectively prevented them from travelling to this country, since no airline would carry them here.²⁷

In answer to a core question as to whether the appellants have a right to claim rights, Lord Bingham said: preclearance does not constitute the border or the territory of the United Kingdom. And so, while in fact those Roma intending to claim asylum could not physically travel to the UK where they could make their claim, the decisions of those immigration officials are not understood as asylum decisions. He argues in para. 27: "the appellants...have not left the Czech Republic nor presented themselves, save in a highly metaphorical sense, at the frontier of the United Kingdom".²⁸ This decision without recourse is precisely the crux of preclearance programmes. From a managerial point of view, there is no question why immigration and border officials would like to shift the decision to admit asylum-seekers offshore – where no real investigation of the claim takes place; fewer resources are used than in the home country and no support needs to be provided to those claimants while their asylum claim is being evaluated. It also reduces the number of cases at the UK border itself, making that border work more efficiently. Finally, one can see that air carriers, which face sanctions if they transport passengers with false or no documents (including those who 'fly and flush' – dispose of their documents while in the air), would also encourage this pre-emptive decision-making. However, from the point of view of rights, the case is not so clear. One of the arguments made in the judgment was that *if* the UK had imposed a visa on Czech citizens, then the effect would have been similar to the preclearance policy.

²⁶ "Prague hopes that Canada will lift visas for Czechs soon", *Noviny.cz*, 12 July 2010 (http://www.ceskenoviny.cz/tema/zpravy/stat-vyplati-161-ukrajincum-65-000-kc-penize-bude-chtit-pofirme/493154&id_seznam=791?id=502410).

²⁷ "Regina vs. Immigration Officer at Prague Airport", House of Lords, 9 December 2004 (<http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041209/roma-3.htm>).

²⁸ "Regina vs. Immigration Officer at Prague Airport", House of Lords, 9 December 2004 (<http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041209/roma-3.htm>).

3.2 Recent developments in the Canadian visa regime

On 29 June 2010, the *Balanced Refugee Reform Act* – Bill C-11 – received royal assent, the last step before becoming law. Some critics, such as Amnesty International, have argued that the Bill was “rushed through the standing committee for Citizenship and Immigration (CIC); with limited opportunities for witnesses to appear”.²⁹ Such criticisms proved to be valid as the Citizenship and Immigration Committee made further amendments to the Bill following calls from the Canadian Bar Association³⁰ and other NGOs, and a joint statement made by Amnesty International, the Canadian Council for Refugees and the Refugee Lawyers’ Association of Ontario.³¹ This newly adapted Refugee Reform Act had eight major changes to the refugee adjudication process that will come into effect in the next 12-18 months.³² While the bill improves the speed and efficiency of refugee claims, it also risks losing the ability to conduct detailed investigation of the circumstances leading to the claim as well as politicisation of these claims with the introduction of the ‘safe country of origin’ designation.

According to the reforms, changes at the Immigration and Refugee Board (IRB), with “[t]he new information-gathering interview [,] will accelerate the refugee determination process. The changes to the IRB hearing process will better respond to sudden spikes in claims and help prevent future backlogs where claimants wait for months to get a hearing”.³³ As a safeguard against this ‘fast-tracking’ the CIC introduced a “Refugee Appeal Division” that provides:

an opportunity for claimants to establish that the Refugee Protection Division decision was wrong in fact or law or both, allow for the introduction of new evidence that was not reasonably available at the time of the Refugee Protection Division process and, in exceptional cases, allow for an oral hearing.³⁴

However, one of the most controversial aspects of Bill C-11 was the introduction of designations for countries of origin or the so-called “safe country of origin” clause similar to safe third country agreement. This clause suggests that: “there are places in the world where it is less likely for a person to be persecuted compared to other areas” describing people applying from these countries as “using Canada’s asylum system to jump the immigration queue”.³⁵ Critics of this new process point out the politicised nature of these designations, as the ‘safe country of origin’ designation allows the minister to define countries as ‘safe’ on entirely political grounds in a way that has real consequences for refugee determination. Moreover, CIC also made changes to the “Humanitarian and Compassionate provisions” (H&C) that will result in a reduction of the H&C cases, as most of them will be incorporated into the pool of refugee claims.

²⁹ “Refugee and Migrant Rights”, Amnesty International Canada, 16 August 2010 (http://www.amnesty.ca/blog.php?blog=refugees_hr_blog).

³⁰ “CBA calls for changes to Bill C-11, Balanced Refugee Reform Act”, Canadian Bar Association, 1 June 2010 (http://www.cba.org/CBA/News/2010_Releases/2010-06-01-RefugeeReform.aspx).

³¹ “Joint Public Statement - Bill C-11 Needs Thorough Review”, Amnesty International Canada, 27 April 2010 (<http://ccrweb.ca/en/bill-c-11-open-letter>).

³² “Moving ahead with refugee reform”, Citizenship and Immigration Canada, 29 June 2010 (<http://www.cic.gc.ca/english/refugees/reform.asp>).

³³ “Changes at the Immigration and Refugee Board of Canada (IRB)”, Citizenship and Immigration Canada, 29 June 2010. (<http://www.cic.gc.ca/english/refugees/reform-irb.asp>).

³⁴ “Refugee Appeal Division”, Citizenship and Immigration Canada, 29 June 2010 (<http://www.cic.gc.ca/english/refugees/reform-rad.asp>).

³⁵ “Designated countries of origin”, Citizenship and Immigration Canada, 29 June 2009 (<http://www.cic.gc.ca/english/refugees/reform-safe.asp>).

While the 'fast-tracking', the 'safe country of origin' designations and changes to the "Humanitarian and Compassionate provisions" were criticised, there were other changes made to the Canadian Refugee system, such as the introduction of the power to identify manifestly unfounded claims by decision-makers, timely removal of failed asylum claimants following their appeal process, as well as introducing Assisted Voluntary Returns (ARV) pilot programme, which provides guidance and limited financial assistance to failed asylum-seekers scheduled to be removed from Canada. Finally, Bill C-11 enhances Canada's resettlement programme by increasing the overall refugee intake of Canada by an additional 2,500 refugees per year with adding "up to 500 government-assisted refugees and 2,000 privately sponsored refugees"³⁶ to the existing quota of about 100,000 refugees received per year.

4. Conclusions and policy recommendations

Visa policy puts the rights of sovereign states and human rights directly in conflict with each other. States have a necessary, exclusive, and unquestionable right to determine entrants; citizens and refugees have a clear and settled claim to entry, and it could be argued that all humans have an inherent right to mobility. One of the most worrying trends we observe in Canadian visa policy, as a symptom of other innovations of the wider border control regime, is the off-shoring of decisions, where the grounds for appeal or recourse are limited.

The European Commission must continue to engage Canada in diplomatic efforts to lift the visa restriction, or find a new way of accommodating a differential visa regime. The current situation undermines the authority and the claim of the European Commission to both its members and to the international community to be able to speak and to negotiate visa waivers. The situation also undermines Canada's reputation as a globally recognised rights-focused government.

EU countries and the European Commission itself must guard against the adoption of the logic in the Balanced Refugee Reform Act, particularly the notion of safe country of origin. This makes a fundamental error of analysis in justice; that is to say that individual claims about the reasonable fear of persecution cannot be dismissed. It is a primary characteristic of procedural justice that each individual claim be adjudicated.

³⁶ "Resettlement", Citizenship and Immigration Canada, 29 June 2010 (<http://www.cic.gc.ca/english/refugees/reform-resettle.asp>).

References

- “Backgrounder”, Citizenship and Immigration Canada, 13 July 2009 (<http://www.cic.gc.ca/english/department/media/backgrounders/2009/2009-07-13b.asp>).
- “Canada flooded with Czech Roma refugee claims”, *CANWEST News Services*, 15 April 2009 (<http://www.canada.com/news/Canada+flooded+with+Czech+Roma+refugee+claims/1499804/story.html>).
- “Canada imposes a visa on the Czech Republic”, Citizenship and Immigration Canada, 13 July 2009 (<http://www.cic.gc.ca/english/department/media/releases/2009/2009-07-13a.asp>).
- “CBA calls for changes to Bill C-11, Balanced Refugee Reform Act”, Canadian Bar Association, 1 June 2010 (http://www.cba.org/CBA/News/2010_Releases/2010-06-01-RefugeeReform.aspx).
- “Changes at the Immigration and Refugee Board of Canada (IRB)”, Citizenship and Immigration Canada, 29 June 2010 (<http://www.cic.gc.ca/english/refugees/reform-irb.asp>).
- “Designated countries of origin”, Citizenship and Immigration Canada, 29 June 2009 (<http://www.cic.gc.ca/english/refugees/reform-safe.asp>).
- “Fifth Report from the Commission to the Council and the European Parliament”, European Commission, 19 October 2009 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0560:FIN:EN:PDF>).
- “Immigration and Refugee Protection Act”, Department of Justice, 18 October 2010 (<http://laws.justice.gc.ca/en/i-2.5/245769.html>).
- “Joint Public Statement - Bill C-11 Needs Thorough Review”, Amnesty International Canada, 27 April 2010 (<http://ccrweb.ca/en/bill-c-11-open-letter>).
- “Machine Readable Travel Documents Programme”, International Civil Aviation Organization, 25 October 2010 (<http://www2.icao.int/en/MRTD/Pages/default.aspx>).
- “Moving ahead with refugee reform”, Citizenship and Immigration Canada, 29 June 2010 (<http://www.cic.gc.ca/english/refugees/reform.asp>).
- “Opening remarks for The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism Balanced Refugee Reform”, Citizenship and Immigration Canada, 8 April 2010 (<http://www.cic.gc.ca/english/department/media/speeches/2010/2010-04-08.asp>).
- “Prague hopes that Canada will lift visas for Czechs soon”, *Noviny.cz*, 12 July 2010 (http://www.ceskenoviny.cz/tema/zpravy/stat-vyplati-161-ukrajincum-65-000-kc-penize-bude-chtit-po-firme/493154&id_seznam=791?id=502410).
- “Refugee and Migrant Rights”, Amnesty International Canada, 16 August 2010 (http://www.amnesty.ca/blog.php?blog=refugees_hr_blog).
- “Refugee Appeal Division”, Citizenship and Immigration Canada, 29 June 2010 (<http://www.cic.gc.ca/english/refugees/reform-rad.asp>).
- “Regina v. Immigration Officer at Prague Airport”, House of Lords, 9 December 2004 (<http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041209/roma-3.htm>).

- “Resettlement”, Citizenship and Immigration Canada, 29 June 2010 (<http://www.cic.gc.ca/english/refugees/reform-resettle.asp>).
- “Schengen Borders Code”, European Commission, 23 April 2010 (http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/114514_en.htm).
- “Visa Free Travel to Canada for New European Union Members”, *Canada Immigration Newsletter*, October 2008 (<http://www.cicnews.com/2008/03/visafree-travel-canada-european-union-member-states-03644.html>).
- “Visa Policy”, European Commission, DG Home Affairs, 7 September 2010 (http://ec.europa.eu/home-affairs/policies/borders/borders_visa_en.htm).
- “Visiting Canada: Who is eligible?”, Citizenship and Immigration Canada, 13 October 2010 (<http://www.cic.gc.ca/english/visit/apply-who.asp>).
- “Visitor Visa Exemptions”, Citizenship and Immigration Canada, 07 April 2010 (<http://www.cic.gc.ca/english/visit/visas.asp#exemptions>).
- “Visitor Visa Exemptions”, Citizenship and Immigration Canada, 7 April 2010 (<http://www.cic.gc.ca/english/visit/visas.asp#exemptions>).
- Council of European Union (2010), Schengen information system database statistics dd. 01/01/2010, Brussels: European Union.
- Guild, E. (2005), “The Legal Framework: Who is entitled to Move?”, in D. Bigo and E. Guild (eds), *Controlling Frontiers: Free movement into and within Europe*, Aldershot: Ashgate, p. 16.
- Knowles, V. (1997), *Strangers at Our Gates: Canadian Immigration and Immigration Policy, 1540 – 1997*, Toronto: Dundurn Press.
- Salter, M.B. (2003), *Rights of Passage: The Passport in International Relations*, Boulder, CO: Lynne Rienner Publishers.
- Vaughan-Williams, N. (2010), “The UK border security continuum: virtual biopolitics and the simulation of the sovereign ban”, *Environment and Planning D: Society and Space*, Vol. 28, forthcoming.
- Zaiotti, R. (2007), “Of Friends and Fences: Europe's Neighbourhood Policy and the ‘Gated Community Syndrome’”, *Journal of European Integration*, Vol. 29, No. 2, pp. 143-162.

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