

PROPOSED AMENDMENTS TO *IMMIGRATION AND REFUGEE PROTECTION REGULATIONS*

Submission by UNICEF Canada to the Director,
Social Immigration Policy and Programs, Citizenship and Immigration Canada

4 MAY 2015

INTRODUCTION

UNICEF Canada appreciates the opportunity to comment on proposed amendments to the *Immigration and Refugee Protection Regulations* (hereinafter referred to as the Regulations) which would:

1. Raise from 16 to 18 the minimum age of eligibility to immigrate to Canada as a spouse or partner in all temporary and permanent immigration programs.
2. No longer recognize marriages that were conducted abroad by proxy, telephone, fax, Internet or other similar forms, across all permanent and temporary immigration programs. Include an exemption for members of the Canadian Armed Forces who, due to travel restrictions related to their service, were not physically present at their marriage ceremony and registration.
3. Address an unintended consequence of amendments made to paragraph 130(3)(b) of the *Immigration and Refugee Regulations* in 2012 that resulted in certain Canadian citizens, who were themselves sponsored as spouses, becoming ineligible to sponsor a subsequent spouse or partner.ⁱ

UNICEF Canada would like to comment on the changes to the minimum age of marriage and to the recognition of proxy marriages in particular.

The objective of the proposed amendments, as stated in the Notice published in the Canada Gazette, would be to,

...support the Government's commitment to protect Canadians from child, early, and forced marriage by raising the minimum age of eligibility of a spouse and by no longer recognizing, for immigration purposes, marriages in which one or both parties were not physically present.ⁱⁱ

It further states that,

This proposed amendment would also be in line with Canada's stance against early and forced marriage in international fora as well as with the United Nations Convention on the Rights of the Child, to which Canada is a signatory and which defines children as being persons under the age of 18.ⁱⁱⁱ

In addition to these protection objectives, the amendments seek to act as a disincentive for individuals to engage in marriages of convenience or falling victim to forced marriage as a means of seeking immigration status in Canada:

The proposed amendments would raise the minimum age of eligibility of a spouse or partner from 16 to 18 in the immigration context to prevent foreign nationals under the age of 18 from immigrating to Canada as a spouse. It could also act as a disincentive for individuals under the age of 18 to enter into a marriage in order to obtain immigration status in Canada (i.e. enter into “marriages of convenience”, in which foreign nationals marry a Canadian citizen or permanent resident in order to be eligible to immigrate to Canada as a permanent resident), since they would no longer be able to be sponsored as a spouse until they are 18 years of age.^{iv}

The proposed amendments would bar marriages conducted by proxy, telephone, fax, or Internet and other similar forms to help the immigration system make it impossible for forced marriages conducted by these means to be a mechanism to gain immigration status in Canada (i.e. through “marriages of convenience,” as described above). They may also help reduce the number of vulnerable individuals who fall victim to forced marriage in order to gain immigration status in Canada.^v

ABOUT UNICEF

UNICEF is the world's leading child-focused humanitarian and development agency. Through innovative programs and advocacy work, we save children's lives and secure their rights in virtually every country. Our global reach, unparalleled influence on policymakers, and diverse partnerships make us an instrumental force in shaping a world in which no child dies of a preventable cause. UNICEF is entirely supported by voluntary donations and helps all children, regardless of race, religion or politics. For more information about UNICEF, please visit www.unicef.ca.

The only organization named in the United Nations Convention on the Rights of the Child as a source of expertise for governments, UNICEF has exceptional access to those whose decisions impact children's survival and quality of life. We are the world's advocate for children and their rights.

POSITION OF UNICEF CANADA

It is UNICEF Canada's position that the proposed amendments to the *Immigration and Refugee Protection Regulations*, which would raise the minimum age of eligibility of a spouse and no longer recognize, for immigration purposes, marriages in which one or both parties were not physically present, should be amended to attain the stated objectives.

While we appreciate that early and forced marriage is a legitimate and serious consideration and applaud the Government of Canada's steps to address this violation of children's rights in

the international community, there is no compelling evidence to suggest that the proposed amendments will decrease the likelihood of early and forced marriage and we are concerned that the potential for negative impacts on girls and women may be more significant. The assumption that early and forced marriages take place for immigration purposes has not been well-researched in the Canadian context. Likewise, there is no cogent evidence to support the assumption that changing immigration regulations will have a deterrent effect on the occurrence of early or forced marriage.

Contrary to the intended objectives of such amendments to protect girls and women, the impact may be to increase their vulnerability. Young spouses aged 16 or 17 years old may get left behind in vulnerable contexts if their partners are no longer able to sponsor them, and administrative measures that seek to address this may not prove sufficient to ensure that their best interests are considered. For example, administrative measures may not apply outside of the refugee resettlement context; married children lose the ability to be included on their parents' immigration applications; and it may be challenging for young people to meet the stringent requirements of a humanitarian and compassionate consideration.

The refusal to allow sponsorship of spouses married via proxy can likewise have unintended negative effects. The Regulatory Impact Analysis Statement indicates that only 50% of proxy marriages will re-marry at an in-person ceremony to qualify for immigration, leaving the other 50% in limbo, stranded in their home country where they remain legally married, but effectively abandoned by their spouse.^{vi} This can have harmful consequences, including socio-economic and emotional impacts, particularly stigmatization, which are doubly harmful for the children of such couples, who are the most vulnerable in any society.

SUPPORTING POINTS

1. Bill S-7, currently before the House of Commons, proposes a minimum age of marriage of 16 years for individuals within Canada.^{vii} The proposed amendment to specify a marriage age of 18 years for foreign nationals in the Regulations is therefore inconsistent with the government's domestic approach, which is confusing and introduces inequitable treatment of children (defined in the Convention on the Rights of the Child, ratified by Canada, as persons below age 18). This differential treatment becomes further problematic when one considers that potential immigrants may not consult the Immigration and Refugee Protection Regulations before submitting their application, and may simply assume that Canadian federal law regulates immigration procedures as well.
2. Bill S-7 has not yet passed third reading in the House of Commons, and therefore may not become law. It may be premature to institute a minimum age of marriage for foreign nationals seeking to immigrate to Canada should Canadians not be bound by similar regulations.
3. UNICEF Canada maintains that an insufficient understanding of the potential consequences of instituting a federally-mandated minimum age of marriage presents

some inherent risks, and therefore we have proposed in our submission to the House of Commons regarding Bill S-7 that the Government refrain from instituting a minimum age of marriage until further data collection, consultation, and analysis can be conducted to determine a rights-based way forward that is in the best interests of the child.^{viii}

4. The proposed amendments related to an age of marriage can result in young spouses being left behind in situations where they would be highly vulnerable, such as in refugee camps. This is contrary to Canada's obligations under the United Nations Convention on the Rights of the Child; particularly as regards obligations under, inter alia, article 3, the best interests of the child; article 10, the right to family reunification; and article 19, protection from abuse and neglect.^{ix}
5. The Regulatory Impact Analysis Statement identifies the need for officers to maintain discretionary power in assessing applications on a case-by-case basis, in order to address exceptional cases where young spouses are in particularly vulnerable situations. The statement notes,

While restricting spousal immigration to persons 18 years of age and older supports the Government's objectives in terms of reducing the vulnerabilities associated with early and forced marriage, CIC recognizes that, in the refugee context, this approach could result in young spouses being left behind in situations where they would be highly vulnerable, such as refugee camps. CIC will address this concern through administrative measures. Visa officers will be instructed to give special consideration to vulnerable spouses and partners under the age of 18 applying for resettlement as de facto family members. De facto family members are persons who do not meet the definition of a family member but who are in a situation of dependence within a family. Those who do not qualify as de facto family members may be considered on humanitarian and compassionate grounds.^x

However, no recognition is made of the fact that these processes will not always work and therefore may leave vulnerable children unprotected, nor will they apply outside of the refugee resettlement context. It is important to recognize that a married child is no longer sponsorable by her parents; this presents the possibility that a young spouse may not be recognized as the family member of anyone, particularly should her husband and parents both immigrate without including her on their application.

6. The Regulatory Impact Analysis Statement also highlights that raising the age of marriage to 18 years for foreign nationals will act as a deterrent factor, both against forced marriages as well as against forced marriage for the purposes of immigration.^{xi} However no data or evidence is presented to support this claim;

whether this intended effect will come to pass is unknown. It is possible that no deterrent effect will take place; rather foreign nationals may continue to be married at the age of 16; simply the act of depositing a sponsorship application may be delayed until they attain the age of 18. The Regulatory Impact Analysis Statement notes this as well, stating that, “Canadian citizens and permanent residents wishing to sponsor a spouse aged 16 or 17 will be required to postpone submitting a sponsorship application until the spouse turns 18”.^{xii} Where the sponsoree remains in Canada while awaiting their foreign spouse’s 18th birthday, there is a stronger possibility that the sponsoree may simply abandon their foreign spouse in favour of a newer relationship; there is also a greater likelihood of emotional detachment between the two spouses occurring, negatively affecting the outcome of an immigration decision. Furthermore, this potentially leaves a child without support until their 18th birthday.

7. There is no pressing need to impose these regulations. The Regulatory Impact Analysis Statement notes that only approximately 0.1% of spousal sponsorship applications are for foreign national spouses/partners aged 16 or 17 years, and only 0.5% of these applications are for marriages that were performed by proxy, which does not constitute a critical mass demanding regulatory change.^{xiii}
8. The absolute ban on marriage via proxy entails a risk of abandonment of young spouses overseas by their Canadian sponsoree, who may not wish to undertake the journey to re-marry at an in-person ceremony. The Regulatory Impact Analysis Statement notes that, “The number of those who choose to remarry as a result of the proposed regulatory amendments is therefore expected to be relatively low. The analysis of costs assumes that following the introduction of the proposed Regulations, in half of the cases of spouses married by proxy, the spouses would rather choose to marry abroad, or alternately in Canada, by an in-person marriage.”^{xiv} This analysis suggests that the remaining 50% may choose not to re-marry in person, leaving their young spouse legally married in their home country but without recourse to immigrate to Canada, and exposing them to increased vulnerabilities, which may include socio-economic and emotional harm. This is particularly damaging as this effect will be incurred by individuals who married via proxy in good faith and in compliance with the laws of their home country, as much as it will affect those individuals who entered into a forced marriage, whether or not for immigration purposes. These consequences will also be experienced by the children of such couples, who are the most vulnerable in all societies, and who will feel the socio-economic and emotional effects of abandonment the most severely.
9. Identifying marriages that took place via proxy is difficult to do, as the means of marriage is not always recorded. The proposed amendments would allow for ‘greater rigour’ to be applied in the assessment of relationships where it is suspected that a proxy marriage has taken place; however there is no persuasive evidence that this will serve as a deterrent factor in preventing vulnerable individuals from falling victim to early or forced marriage.

10. The Regulatory Impact Analysis Statement notes that, in regards to proxy marriages, “Measures would be taken to mitigate the effect on individuals in genuine marriages conducted by these means, so that these individuals could be processed as common-law partners or conjugal partners, or under humanitarian and compassionate consideration”.^{xv} However there is no guarantee that these processes would work. It is important to recognize that a married child is no longer sponsorable by her parents; this presents the possibility that a young spouse may not be recognized as the family member of anyone, particularly should her husband and parents both immigrate without including her on their application.

A CHILDREN’S RIGHTS PERSPECTIVE

UNICEF Canada’s concerns about the proposed amendments to the *Immigration and Refugee Protection Regulations* are rooted in the recognition that Canada has assumed international obligations to respect and promote the rights of all children. Canada ratified the Convention on the Rights of the Child on December 13, 1991. Due to the nature of treaty obligations and customary law, there is a general duty to bring internal law into conformity with obligations under international law.

The Convention on the Rights of the Child affirms the status of all children as equal holders of human rights and it includes explicit rights to protection from all forms of violence, abuse, neglect and exploitation.

Article 3 of the Convention on the Rights of the Child enshrines the importance of considering the best interests of the child as a primary consideration when making decisions that affect their lives:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.^{xvi}
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.^{xvii}
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.^{xviii}

Article 10 of the Convention on the Rights of the Child protects the right of the child to family reunification:

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.^{xix}

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.^{xx}

Article 19 of the Convention on the Rights of the Child speaks to the child protection obligations of signatory States and provides:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians(s) or any other person who has the care of the child.^{xxi}

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.^{xxii}

It is noteworthy that the proposed amendments to the Regulations under consideration make no reference to ‘the best interests of the child’, nor does the published Regulatory Impact Analysis Statement consider the impacts upon children of the enactment of these proposed amendments. A Child Rights Impact Assessment would assist in identifying whether these amendments, which seek to protect against early and forced marriage, accomplish these goals without causing unintended consequences that actually further harm those they seek to protect.

LIST OF RECOMMENDATIONS

Recommendation 1: That the proposed amendments to the *Immigration and Refugee Protection Regulations*, which would raise the minimum age of eligibility of a spouse and no longer recognize, for immigration purposes, marriages in which one or both parties were not physically present, should not be enacted in their present form and that they be amended to better ensure the best interests and protection of children.

Recommendation 2: That the minimum age of marriage for spousal sponsorship remain as is until sufficient data collection, consultations, and evaluation can be completed that can advise on the best way forward to prevent early and forced marriage without increasing the vulnerabilities of those it seeks to protect.

Recommendation 3: That Citizenship and Immigration Canada strengthen the administrative guidelines that correspond to the “bad faith” provisions (section 4) of the Regulations in order to direct officers to increase the scrutiny of proxy marriages, as opposed to simply rejecting the recognition of marriages that take place by proxy, telephone, fax, Internet or other similar means.

Recommendation 4: That the existing Regulatory Impact Analysis/Statement be expanded to include a valid Child Rights Impact Assessment process, which should be made public for transparency and accountability purposes. As part of this process, or minimally as part of the existing requirements for the review of policy under the federal Cabinet Directive on Streamlining Regulations (compliance with international obligations), the proposed amendments to the *Immigration and Refugee Protection Regulations* should be evaluated for compliance with the United Nations Convention on the Rights of the Child, with particular consideration of articles 3, 10 and 19.

Recommendation 5: That any administrative measures, such as operational guidelines and updates to application forms, which are developed to enable officers to better detect marriages conducted by proxy, telephone, fax, Internet and other similar means, be formulated within a rights-based framework, and be subjected to a Best Interests Determination process in each case where children are affected.

Recommendation 6: That the federal government amend the *Immigration and Refugee Protection Act* so that any decision affecting a child must treat the best interests of the child as a primary consideration.

SUMMARY

It is UNICEF Canada’s position that the proposed amendments to the *Immigration and Refugee Protection Regulations*, which would raise the minimum age of eligibility of a spouse and no longer recognize, for immigration purposes, marriages in which one or both parties were not physically present, should not be enacted in their present form and that they be amended to attain the stated objectives. The risks posed by these changes include exposing some children to greater vulnerabilities, particularly those in already unstable circumstances, as well as

increasing the risk of harmful consequences to the children born of proxy marriages. Without a pressing need for the immediate institution of such amendments, UNICEF Canada respectfully suggests that further data collection, consultations, and evaluation be undertaken, including a Child Rights Impact Assessment, before changes to the Regulations are decided.

Respectfully submitted on behalf of UNICEF Canada by:

:"MMB"

Marvin M. Bernstein, B.A., J.D., LL.M.
Chief Policy Advisor
UNICEF Canada

ENDNOTES

ⁱ Canada Gazette (Vol. 149 No. 4), Regulations Amending the *Immigration and Refugee Protection Regulations*, Regulatory Impact Analysis Statement, 4 April 2015.

ⁱⁱ Ibid.

ⁱⁱⁱ Ibid.

^{iv} Ibid.

^v Ibid.

^{vi} Ibid.

^{vii} Government of Canada, Senate Government Bill, *Bill S-7: An Act to Amend the Immigration and Refugee Protection Act, the Civil Marriage Act and the Criminal Code and to make Consequential Amendments to other Acts*, 16 December 2014.

^{viii} UNICEF Canada, *Brief submitted by UNICEF Canada to the House of Commons Standing Committee on Citizenship and Immigration*, 25 March 2015, http://www.unicef.ca/sites/default/files/imce_uploads/bill_s-7_-_final_-_unicef_canada_submission_feb_2015.pdf.

^{ix} United Nations Convention on the Rights of the Child, A/RES/44/25, United Nations, New York, 20 November 1989.

^x Canada Gazette (Vol. 149 No. 4), Regulations Amending the *Immigration and Refugee Protection Regulations*, Regulatory Impact Analysis Statement, 4 April 2015.

^{xi} Ibid.

^{xii} Ibid.

^{xiii} Ibid.

^{xiv} Ibid.

^{xv} Ibid.

^{xvi} United Nations Convention on the Rights of the Child, A/RES/44/25, United Nations, New York, 20 November 1989.

^{xvii} Ibid.

^{xviii} Ibid.

^{xix} Ibid.

^{xx} Ibid.

^{xxi} Ibid.

^{xxii} Ibid.