Refuge

Vol. 25 • No. 2 Canada's Periodical on Refugees Fall 2008

Building a Better Refugee Status Determination System

Refuge

Canada's Periodical on Refugees
Vol. 25 No. 2

Centre for Refugee Studies, Room 845, York Research Tower, York University
4700 Keele Street, Toronto, Ontario, Canada M3J 1P3
Phone: 416-736-5843 Fax: 416-736-5837 E-mail: refuge@yorku.ca
Web site: http://www.yorku.ca/refuge

Editor-in-Chief Sharryn J. Aiken
Guest Editors France Houle
Martin Jones
Senior Editorial Assistant Negin Dahya
Junior Editorial Assistant Lorenzo Vargas

Editorial Advisory Board
François Crépeau, Janet Dench, Barbara Harrell-Bond, James C. Hathaway, Judith Kumin, Michael Lanphier, Susan McGrath, Obiora Okafor

Junior Editors Heather-Laurel Peters, Wesley Jordan Oakes, Stephen Charles Kaduuli

Founded in 1981, *Refuge* is an interdisciplinary journal co-published by the Centre for Refugee Studies, York University, and Queen's University. The journal aims to provide a forum for discussion and critical reflection on refugee and forced migration issues.

Refuge invites contributions from researchers, practitioners, and policy makers with national, international, or comparative perspectives. Special, thematic issues address the broad scope of the journal's mandate, featuring articles and reports, shorter commentaries, and book reviews. With the exception of formally solicited work, all submissions to Refuge are subject to double-blinded peer review. Articles are accepted in either English or French.

Refuge is a non-profit, independent periodical funded by the Social Sciences and Humanities Research Council of Canada and supported by subscriptions. The views expressed in Refuge do not necessarily reflect those of its funders or editors.

Refuge is indexed and abstracted in the *Index to Canadian Legal Literature*, *Pais International*, *Sociological Abstracts*, the *International Bibliography of the Social Sciences*, and *Canadian Business and Current Affairs*. The full text of articles published in *Refuge* is also available on-line through the Gale Group databases, accessible in many university libraries. *Refuge* is also available online through Lexis-Nexis's Quicklaw service.

Typesetting and production services were provided by Becker Associates.

ISSN: 0229-5113

Contents

Editorial

Feature Articles

Other Article

Building the Infrastructure for the Observance of Refugee Rights in the Global South

Barbara Harrell-Bond

Abstract

Refugees in the Global South face many serious violations of their rights. Several major host states have failed to ratify both the Refugee Convention and the 1967 Protocol. However, even among those states that have ratified one or both, few have enacted the domestic legislation to implement the provisions, and no state in the South has made a serious effort to bring domestic law in other subjects—immigration, health, labour, education—into harmony with the rights of refugees and their international commitments.

This article presents a multi-faceted proposal, a guide to building a new global infrastructure for the protection of refugees. An important precursor is the rapid expansion in the teaching and studying of refugee law. Today's students of refugee issues are tomorrow's researchers, lawyers, and scholars, all of which are desperately needed to help refugees navigate the process of status determination and resettlement, to advocate more generally for the rights of refugees, and to monitor states' compliance with international obligations. Also, human rights NGOs need to embrace the fact that refugees are human beings, and refugee rights are human rights. Furthermore, advocacy groups, legal aid organizations, and other NGOs need to understand that advocacy, legal assistance, and research must go hand in hand: the provision of legal assistance to individual refugees not only makes the use of their life stories for research and advocacy more ethical, it improves the quality of the research and advocacy as well. Perhaps most importantly, all the groups working with refugees throughout the South must communicate with and assist each other.

In an effort to facilitate this crucial networking and communication, sixteen refugee advocacy and legal aid NGOs from the South attended a five-day workshop in Nairobi in January 2007. The group decided to form the Southern Refugee Legal Aid Network, and to produce a charter for membership. I have been acting as the group's moderator informally since that time. In the coming months, SRLAN will attach itself to Fahamu, an advocacy NGO that publishes Africa's largest circulation magazine and has a proven track record of facilitating emerging advocacy networks. Fahamu will do fearless advocacy, often too dangerous for individual NGOs, and the SRLAN will facilitate the communication and co-operation necessary to begin the construction of the new global infrastructure for the protection of refugees. Working together, as a network of organizations throughout the South, we truly can transform this broken and unjust system.

Resume

Les réfugiés se trouvant dans le Sud global sont confrontés à de nombreuses violations graves de leurs droits. Plusieurs états hôtes importants refusent toujours de ratifier la Convention de 1951 et le Protocole de 1967. Cependant, même parmi les états qui ont ratifié l'un de ces instruments ou les deux, très peu ont adopté la législation interne qui permettrait de mettre en œuvre leurs dispositions, et pas un seul état du Sud n'a fait un réel effort afin d'harmoniser leur lois internes dans d'autres domaines — immigration, santé, travail, éducation — avec les droits des réfugiés et leurs propres engagements internationaux.

Cet article met de l'avant une proposition comportant plusieurs facettes — en quelque sorte un guide sur comment bâtir une nouvelle infrastructure globale pour la protection des réfugiés. Une importante condition de départ serait l'expansion rapide de l'enseignement et de l'étude du droit des réfugiés. Les étudiants d'aujourd'hui sont les chercheurs, les avocats et les universitaires de demain — tous des gens qui manquent désespérément pour aider les réfugiés à naviguer

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

le processus de détermination du statut et de l'établissement, pour défendre et promouvoir plus généralement les droits des réfugiés, et pour surveiller de près le respect par les états de leurs obligations internationales.

De plus, les ONG s'occupant des droits de la personne doivent accepter le fait que les droits des réfugiés sont des droits de la personne. En outre, les groupes de revendications, les organisations d'aide juridique et d'autres ONG doivent réaliser que défense des droits, aide juridique et recherche doivent travailler de concert : lorsque l'aide juridique est fournie aux réfugiés à titre individuel, cela a pour effet non seulement de rendre plus conforme à l'éthique l'usage de leurs expériences pour la recherche et la promotion des droits, mais cela améliore la qualité de cette recherche et promotion des droits. Mais, le plus important peut être, c'est que tous le groupes travaillant avec les réfugiés à travers tout le Sud doivent communiquer entre eux et s'entraider.

Dans le but de faciliter l'émergence de ce réseautage et de cette communication, seize ONG du Sud, œuvrant dans le domaine de la défense des droits des réfugiés et de l'aide juridique, ont participé pendant cinq jours à un atelier de travail qui s'est tenu à Nairobi au mois de janvier 2007. Le groupe a décidé de former le Southern Refugee Legal Aid Network (« Réseau du Sud d'aide juridique aux réfugiés »), et de préparer une charte pour les membres. Depuis lors, j'ai joué, de façon informelle, le rôle de modérateur du groupe. Dans les prochains mois, le SRLAN va se rattacher à Fahamu, une ONG de promotion et de défense des droits qui publie le magazine à plus fort tirage de tout l'Afrique et qui a de solides antécédents dans sa capacité de faciliter l'épanouissement de réseaux émergents de promotion et de défense des droits. Fahamu va organiser audacieusement la défense des droits, entreprise souvent trop dangereuse pour les ONG individuelles, tandis que le SRLAN va faciliter la coopération et la communication nécessaires pour commencer à construire la nouvelle infrastructure globale pour la protection des réfugiés. Travaillant de concert en tant que réseau d'organisations du Sud, nous pouvons transformer réellement ce système brisé et injuste.

Introduction

It is well known that the vast majority of refugees are hosted by the poorest countries in the world. Because of the restrictive policies of countries in Europe and North America, the grave reality is that *most of them will stay in these countries,* the so-called "Global South" (hereafter, South). Even if restrictions on movement to the North were relaxed, the majority of refugees would remain in first countries of asylum because their numbers are so great.

Refugees in the South face serious violations of their rights and extreme levels of poverty.[1] Moreover, large numbers of them are confined in camps and settlements where they are denied freedom of movement, which is fundamental to their ability to access all their other economic/social rights.[2] Most spend decades "warehoused" in camps, where life is characterized by sub-nutritional diets, neglect of separated children, sexual and gender-based violence, threats, detention, beatings, torture, and even extrajudicial killings.[3] Encamped refugees are also isolated from whatever protection might be accessed through the host state's judicial authorities. Disputes or infractions of rules within camps are managed by committees of fellow refugees who have assumed extrajudicial powers to administer corporal punishment, fine, and detain, acting completely outside the legal structure of the host government, often treating actions as "punishable crimes" that are not even included in a host state's criminal code, such as adultery.[4]

Although the right to identity papers is guaranteed under Article 27 of the Refugee Convention, refugees in camps are seldom issued anything other than a ration card issued to the head of the family.[5] Even if a state (in concert with UNHCR) does issue a Convention Travel Document (CTD), few states are recognizing them.[6]

The injustice is not confined to camps. Host states in the South that allow refugees to live in urban areas usually deny them their rights to gainful employment, access to state schools, health services, and adequate housing.[7]

Article 8 of the 1950 *Statute of the Office of the UNHCR*[8] lists the protection responsibilities of this office. The statute does not go beyond requiring the office to promote the "conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;"[9] and to promote "through special agreements with Governments the execution of any measures calculated to improve the situation of refugees …"[10] The statute then lists activities, each of which presumes the existence of an effective and functioning judicial system and an active and independent civil society. While this may have been more or less the case in Europe at the time the Statute was devised, it is *not* the case in most countries of the South where so many refugees are hosted today.[11]

More than fifty years have passed since the promulgation of the Refugee Convention and the 1967 Protocol that expanded its scope to include the rest of the world, yet very little has been done to promote *or* protect the rights of refugees in the South. The available evidence suggests the situation for refugees in these countries is rapidly deteriorating.[12]

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

The Infrastructure for Refugee Protection: What Is Missing?

Over 145 states have ratified either the Refugee Convention or the 1967 Protocol, but several signatories—Madagascar, Monaco, Saint Kitts and Nevis, and Turkey—still do not accept any refugees from the South. Because they either have not become states parties to the 1967 Protocol, or have entered a reservation to the geographical expansion of the Protocol, they have only committed themselves to accepting refugees from Europe. Moreover, forty-five states have not ratified *either* the Refugee Convention or its Protocol, including such major hosting countries as Jordan, Syria, Lebanon, Indonesia, Malaysia, Nepal, Pakistan, and Thailand.[13] *How can we build a proper infrastructure for protecting refugee rights without this minimal legal foundation?*

Among those States in the South that have ratified the Refugee Convention, very few have enacted domestic legislation to regulate the administration of that treaty or the other international human rights conventions that they have ratified. Where they have—in Tanzania, for example—there has been only one published account evaluating Tanzania's domestic law in terms of the degree to which it conforms to the standards of the Refugee Convention,[14] and no court challenges have been made to its content.[15] Even though Uganda's 2006 domestic legislation is very progressive in certain respects[16]—for example, in that it includes gender-based claims for asylum[17]—it does not conform in other respects to the Refugee Convention, for example, by denying refugees the right to appeal against rejection.

In these situations, asylum seekers need lawyers to navigate the process and to challenge both existing refugee law and the implementation processes. In South Africa, for example, asylum seekers were given only seven days to appeal their rejections and were not given reasons for them. This grossly unreasonable refusal to provide reasons was only cured by the order granted by consent in the case of *Pembele & Others vs. Appeal Board for Refugees & Others,*[18] a case brought by the Legal Resources Centre in Cape Town in 1996.[19]

Just as serious as the poor implementation of refugee law itself is the lack of effort to reform other domestic laws to bring them into harmony with refugee law. Extant and unreformed immigration, labour, health, and education legislation can be fatal to a refugee claim, especially if judges and defence lawyers are not trained in the relationship between domestic and international law as applied to refugees. Even in states such as Egypt, where the ratification of an international convention takes precedence over domestic law, that legal principle is unlikely to have any impact on asylum decisions if prosecutors and decision makers are not trained in the content and meaning of these conventions.

There are a host of other infrastructural problems that will need to be addressed if the rights of refugees are to be protected. The dearth of opportunities to seriously study refugee law at universities and law schools is a major problem *all over the world.* Even if a student specializes in public international law, the likelihood is that she or he will be made aware of the existence of the various refugee conventions in only one or two classes. But students need to *study* refugee law, in all its complexities. Without in-depth training in refugee law, they will not be prepared to practice it.[20]

In 1982, there were only *two* places in the world where refugee law was taught *as a subject:* Osgoode Hall Law School in Toronto, Canada, and the Refugee Studies Centre (RSC) at the University of Oxford. Today, there are more law schools that teach refugee law as an area of concentration, but they are still only a handful, and are concentrated mainly in the North. How many masters programs in human rights include refugee law as an area of specialization, much less teach it as one option?[21]

The lack of education has real consequences. Outside South Africa,[22] there was *no* refugee legal aid NGO in the South before 1998.[23] Today, those lawyers who do practice in the South tend to be concentrated in the capital cities and are generally ill-equipped to deal with cases of violations of refugee rights. Judges and magistrates themselves are usually totally untrained in refugee law.[24]

Although human rights NGOs have multiplied in the South, it seems to have escaped the awareness of the human rights movement generally that a refugee is a human being with the same rights as the other people the movement focuses on. Little concern has been shown for refugee rights,[25] and only a minuscule number of NGOs are providing legal assistance to them and advocating for their rights.[26] This is reflected in the almost total neglect of violations of refugee rights by the Human Rights Council or the Office of the UN High Commissioner for Human Rights (OHCHR).

This office was created in 1993, and the HCHR is appointed by the UN Secretary General with the approval of the General Assembly. Perhaps its first mention of refugees came in 1997 by Mary Robinson, then-HCHR, in a speech entitled "Linkage between Human Rights and Refugees Issues." Some excerpts from this speech demonstrate her awareness of the connection between refugees and human rights, and her strong commitment to realizing the reciprocal benefits of cooperation between UNHCR and her office:

> … Let me reiterate that human rights are indeed deeply connected to the problem of refugees. … UNHCR and our Office are now looking at ways to strengthen and formalize this bilateral cooperation in a broad framework agreement, an MOU [Memorandum of Understanding], intended to deepen our

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

> cooperation not least through the holding of joint meetings and activities, through the exchange of staff, and co-sponsorship of staff training. … [UNHCR], through its extensive field presence, could assist my Office, by signalling those situations requiring human rights operations, suggesting ways in which these operations could complement UNHCR's activities, and providing logistical support to the OHCHR field presence. … In turn, in view of UNHCR's presence in a large number of countries, the sharing of information with rapporteurs and UN experts—however confidentially—may improve the quality and thoroughness of the work of the human rights machinery.[27]

One can only wonder why this offer of co-operation was not followed up, or why the HCHR continues, for the most part, to neglect the violations of refugee rights in host countries. Elizabeth Ferris acknowledges that:

> [were] the Human Rights Council to establish a special working group, or special representative, to examine protracted refugee situations[, t]his would have the advantage of highlighting the constellation of human rights abuses which occur in protracted refugee situations and could be a way of pressuring governments to lift some of the restrictions on refugees.

But she argues that deference to UNHCR may undermine its independent human rights inquiries. For example:

> The Working Group on Arbitrary Detention … has not yet looked at restrictions on movement in protracted refugee situations. … [W]hen the Special Rapporteur [on torture] undertook a mission to Nepal (January 2006), he did not look into the situation of Bhutanese refugees …
>
> In fact, [the Office of the High Commissioner for Human Rights] defers to UNHCR in refugee settings. As pointed out in its training manual, 'it would not generally be the role of a UN human rights operation to visit a refugee camp managed by the UNHCR to review camp conditions. … However, the mandate and expertise of UN human rights operations can often be complementary to an HCR role, provided there is adequate coordination.'
>
> One of the obstacles to both OHCHR and [national human rights institutions] becoming more engaged in addressing the human rights of refugees in protracted refugee situations is the dominant role played by UNHCR in refugee camps. … [I]t is hard for human rights organizations to decide to devote additional resources to human rights violations which are understood to be under the mandate of UNHCR. However, as we have seen, UNHCR has not been able to assure the human rights of refugees living in camps under its jurisdiction. Moreover, none of the human rights actors has done an adequate job in assuring the human rights of refugees in protracted refugee situations. … [T]he dominance of UNHCR, particularly in camp settings, may have dissuaded human rights actors from closer scrutiny.[28]

The increase in the practice of adjudicating individual refugee claims in the South has created another gaping hole in the infrastructure that must be filled if refugees are going to succeed in having legitimate claims recognized.[29] Formerly, refugees in the South, especially those who arrived *en masse,* were granted *prima facie* recognition and "gazetted" by the government (albeit as they were herded into camps). Today, however, it is becoming increasingly common for their status to be adjudicated individually, and in most countries of the South, this is being done by UNHCR.[30]

Unfortunately, the procedural standards applied by UNHCR country offices are far lower than those that the UNHCR declares that States should follow.[31] UNHCR does not permit the refugee or the refugee's advocate access to the contents of the refugee's file or the transcript (let alone a tape recording) of his or her interview, and it withholds secret evidence from both the claimant and his or her representative.[32] UNHCR also withholds country of origin information (COI), which may differ from that obtained by the legal advisor. If such evidence is incorrect, as it often appears to be,[33] there is no way to refute it. UNHCR does not give reasons for rejections, rendering it almost impossible to mount an effective appeal. Moreover, "appeals" are reviewed by a colleague of the original decision maker; UNHCR does not provide for an independent appeal.[34] Most UNHCR offices do not allow a legal representative to be present during the adjudication of a claim. Only in Egypt,[35] Turkey, Lebanon,[36] and most recently Kenya is representation allowed.

In 2006, UNHCR adjudicated claims for refugee status in eighty countries.[37] This same year, it received 91,500 individual refugee applications, making it the largest refugee status decision maker in the world. Each application involves, on average, 2.4 family members.[38] More than 79 per cent of these refugee status applications to UNHCR are made in countries that have ratified the Refugee Convention.

Since refugees are unlikely to be aware of refugee law (they are sometimes totally unaware the existence of UNHCR, to say nothing about its role in procedures in making their claims), it is *crucial that refugees have access to legal aid and be represented as their claims are adjudicated.* Research (1997–1999) in Uganda and Kenya,[39] and in Egypt,[40] ascertained that refugees reported that legal aid was a priority need.[41]

Just as the staff of NGOs in the South need education and training in refugee rights and an understanding of the connection between human rights and refugee issues, so too are new NGOs needed, NGOs that will provide specialized and relentless legal representation to asylum seekers before

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

UNHCR. These two infrastructural goals are inevitably connected: rights advocacy organizations can illuminate connections between human rights and refugee issues and identify cases in which targeted legal work is necessary and legal aid organizations can build cases that catalogue violations of refugee rights and create a factual record that allows for more effective advocacy.

Making a Start

In 2004, four refugee legal aid organizations began attending the September International Council of Voluntary Agencies (ICVA) and UNHCR's annual consultations in Geneva. Until 2008,[42] these meetings preceded the September meetings of UNHCR's Executive Committee and attracted the UNHCR's implementing partner NGOs, which are primarily concerned with delivering humanitarian assistance. 2004 marked the *first* time that NGOs working exclusively on issues related to the violations of refugee rights turned up at these consultations. Our reason for attending was to expose the whole NGO membership of ICVA to the procedural weaknesses of status determination as conducted by UNHCR. Side meetings and plenary sessions were designed to debate these issues. Each year these NGOs also arranged private consultations between the legal aid NGOs and staff of the Refugee Status Determination (RSD) unit within UNHCR, Geneva.[43]

The first positive result of such efforts was that UNHCR made public for the first time its "Procedural Standards for Refugee Status Determination under UNHCR's Mandate Status 2005."[44] Following the release, a group of NGO representatives and the UNHCR RSD Unit began an email discussion of the weakness of these "Procedural Standards." In the course of these discussions, UNHCR recommended that NGOs adopt a code of ethics for its staff if they hoped to be allowed to represent refugees in UNHCR's adjudications.[45]

UNHCR decided to write this code itself and its first draft included certain objectionable items, such as the requirement that the legal representative hand over all case notes to UNHCR, which would make the maintenance of attorney/client confidentiality impossible. UNHCR also wanted to ensure that NGOs never represented an "unfounded" claim, with being struck off the list of approved organizations representing such refugees as the penalty if they did. Suffice it to say, the perception of a claim as "unfounded" is subjective, a matter of interpretation,[46] and, ultimately, since the responsibility for giving accurate facts in the case rests with the claimant, NGOs could not tie themselves to such requirements.[47] This "crisis" catalyzed the organization of a meeting for the purpose of devising a more workable code.

Beginnings of a Southern Refugee Legal Aid Network

In January 2007, a five-day workshop was convened in Nairobi.[48] Sixteen refugee advocacy and legal aid NGOs from the South attended,[49] two of whom represented networks with branches in a total of thirty-two African countries. Under the chairmanship of Michael Gallagher, a lawyer who works with the Jesuit Refugee Service in southern Africa, a committee was formed to write what has become the Nairobi Code.[50]

The group also decided to form the "Southern Refugee Legal Aid Network" (SRLAN) and went on to produce a charter for membership. Since that time, the network has been operating by email on an informal basis. I have been acting as its "moderator," linking members with my network of contacts and working to expand it. During the year and a half the group has existed, members have been sent information on UNHCR's changing policies and have exchanged and responded to urgent calls for information concerning cases. Refugees have been assisted. Just one example: a Tanzanian was *refouled* from Australia to Tanzania but immediately escaped to Zambia. I got word of this and the next day he was in contact with two NGOs in Zambia. NGOs have supported each other with such diverse tasks as reuniting children across borders and finding competent refugee translators for preparing information pamphlets in different languages. They have also responded to unique requests for COI that are not covered in RefWorld, UNHCR's source of COI.

The SRLAN has held two meetings in Geneva, in September 2007 and June 2008, which were also attended by representatives of UNHCR's RSD Unit. At its second meeting the SRLAN shared experiences of the operations of the network since its inception, planned its website pages, and reviewed the use of the Nairobi Code. The group approved its vision and mission statement,[51] and set an ambitious work program for itself for the first year: defining a membership strategy, revisiting the Nairobi Code, establishing secure communication systems, developing a plan for training, and creating a COI database that goes beyond UNHCR's RefWorld and other traditional sources of information to meet the needs of the network.[52] This will include a list of academic country-of-origin specialists who are prepared to provide *pro bono* affidavits for particular cases.

The SRLAN will attach itself to Fahamu, an NGO with offices in Kenya, Senegal, South Africa, and Oxford.[53] Fahamu's advocacy work aims to support human rights and social justice movements by promoting the innovative use of information and communications technologies to stimulate debate, discussion and analysis.[54] Fahamu has a proven track record in facilitating the emergence of advocacy networks.[55] While

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

concentrating on Africa, Fahamu has experience with global networks and will facilitate SRLAN's international reach.

Fahamu publishes the newsletter *Pambazuka News,* produced by a pan-African network of around 500 citizens and organizations, and with a readership of around 500,000 people, it is now Africa's largest circulation magazine and online platform dedicated to human rights and social justice in Africa. It publishes articles on a wide range of subjects—to date over 2,000 on refugees and forced migration—and, in collaboration with SRLAN, it will strengthen its coverage of refugee rights internationally. It is published in English, French, and Portuguese, soon to expand to Arabic.

Fahamu's portfolio of distance learning courses has also been widely praised.[56] Some 1,000 organizations and participants have completed its courses since 2003, and the methodology has been adopted by other institutions such as the University of Oxford and the office of the UNCHR.

The advantages of attaching the SRLAN to Fahamu are several, but the most salient for network members is Fahamu's freedom to do fearless advocacy. It is not enough to pass crucial protection information to Amnesty, Human Rights Watch (HRW), or the US Committee for Refugees and Immigrants (USCRI); if publicity and the shaming of governments are to have any impact or effect, they must be done *rapidly.* However, being identified with any public advocacy on particular issues and cases can be dangerous for individual NGOs.[57] Fahamu, through its weekly newsletter, is able to do such advocacy while keeping sources anonymous.[58]

Through SRLAN and Fahamu, legal aid organizations will have the array of sources they need to obtain accurate information, as well as the extensive contacts they will need to initiate public advocacy when the litigation of one case identifies broader systematic problems. And advocacy groups will have access to the education they need to understand the complexities of refugee rights, as well as the contacts they need to identify the most immediate threats to those rights.

The Challenges Ahead

Advocacy

The most serious and immediate problem facing refugees is the violation of their rights, beginning with the dangers of *refoulement*. UNHCR's role in the "protection" of refugee rights is ambiguous to say the least. Since it relies on "quiet" diplomacy with governments, it is not possible to know empirically whether it is actually preventing worse violations than would occur without it.[59] Even at its Executive Committee (ExCom) meetings, UNHCR is apparently hesitant to "name and shame" particular governments. In a speech to ExCom by Erika Feller, the Assistant High Commissioner for Protection, she noted that " … 30 per cent of all refugee children are not regularly attending school; that military recruitment of children occurred in some 6 per cent of refugee camps; that fewer than 50 per cent of refugees in 82 countries surveyed enjoyed full freedom of movement and the right to work …"[60] Such statistical compilations of violations would imply that UNHCR is "monitoring" states' performance, but the real effect of such generalized and anonymous reporting is dubious.

In the crisis that began in 2007 in the Aswan region of Egypt, some 1,500 Eritrean and others nationalities who were ostensibly seeking to smuggle themselves to Israel were detained in inhumane conditions. Several Egyptian NGOs, Amnesty International, and the Euro-Mediterranean Human Right Group's subcommittee on migrants and refugees (MAWG)[61] mounted a concerted international campaign attempting to force the Egyptian government to allow UNHCR access. It was only after High Commissioner for Human Rights Louise Arbour issued a press release decrying the situation that Egypt finally agreed.[62] Before UNHCR was allowed access to the refugees, however, Egypt had already *refouled* at least 700 Eritrean asylum seekers.[63]

It is significant that neither AMERA Egypt (which provides legal aid to refugees), nor its UK parent organization, AMERA UK (which raises funds for AMERA Egypt) publicly joined this campaign. Like most foreign human rights NGOs in Egypt, AMERA Egypt is allowed to operate under the Ministry of Foreign Affairs, but since it registered in late 2003, it has never been given a registration number. The insecurity among AMERA's Egyptian staff (and its UK board members) seems to encourage unnecessary self-censorship. It is difficult to ascertain whether their fear of being closed down if they engage in such advocacy is justified.[64]

Most refugee NGOs limit their work to advocacy and policy work rather than providing legal services.[65] It is difficult to conceive how one does effective advocacy/policy work without in-depth research, which requires interviewing individual refugees. However, interviewing individual refugees for advocacy/policy work without then providing legal aid, when it is apparent that it is necessary, raises ethical questions. When researching for *Rights in Exile,*[66] we found that we could not say to a refugee who has just divulged their situation (which will likely involve terrible suffering if not torture and/or despair about their current state of affairs), "Thank you very much for the information you have provided, it will help my research." We found it was *absolutely necessary on ethical grounds* to offer legal aid with such individual interviews.[67]

This is not to suggest that advocacy and policy work *per se* should stop, simply that it should be embedded in the refugee experience and all our experience indicates that the best advocacy is an outgrowth of providing legal aid. The lack of ma-

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

terial assistance is real in most situations, although this could be overcome by refugees themselves if they were enjoying their rights. Thus it is necessary not only to connect advocacy groups to legal aid networks through an umbrella network like SRLAN, but to encourage, and train, advocacy organization to provide some legal assistance themselves. Not only is this advocacy more ethical in what it asks of and provides for individual refugees, it will also be better informed and more effective than "pure" research. Only this kind of advocacy can turn the tide of the realization of refugee rights.

Developing a Strategy to Convince Governments to Ratify the Convention, Introduce Domestic Refugee Legislation, and Reform Other Legislation to Conform

To succeed in the aim of convincing non-signatory countries to ratify the Convention as well as to introduce domestic legislation to regulate the implementation and reform other legislation in conformity with it will require concerted efforts on the part of actors both inside and outside the country. Lessons can be drawn from Fox and Brown's *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements.*[68]

This book is a theoretical analysis of what it took to hold the World Bank to account for violations of the rights of various peoples whose lives and livelihoods were being destroyed by "development projects." In summary, it shows that it was only when "grassroots movements" protested in dramatic ways and Northern NGOs supported their work through lobbying government members of the World Bank that any progress was made. Fox and Brown are very careful to explain the complexity of the situation and to argue that success was the result of numerous variables; one cannot identify precisely what factors brought about the change. Nonetheless, their study demonstrates new understandings of the effective roles of insider/outsider and how their collaborations can result in positive advocacy.

In order to encourage the ratification of the Convention, and introduce domestic refugee law and law reform, it will be necessary to engage representatives of parliaments, political parties, ExCom governments, donors, legal specialists, and others. Together, they will need to devise an effective local strategy in each country concerned and to identify a strong NGO to lead this process on a country by country basis.

Convincing Law Schools to Offer Refugee Law Courses

It has probably been almost accidental that law schools began offering courses in refugee law. It is rare that law schools go beyond simply mentioning the Refugee Convention in a public international law course. No concerted effort has been made to convince law faculties either of the "market" for such courses or of their possible impact, especially if they were combined with the legal aid clinics that provide students with practical experience. Readers will doubtless have ideas of many "entry" points to begin such a campaign. Do we need to form a syndicate of refugee law professors, analogous to that of International Association of Refugee Law Judges (IARLJ),[69] to take over this responsibility?

There is great need to increase legal scholarship in and on the South, scholarship that could provide the grounds for lobbying/campaigning as well as court work. There are scores of law students who could be challenged to focus their masters, J.D., and/or doctoral research on refugee issues. Suggestions include such exercises as an analysis of domestic refugee law, where it exists, as well as other domestic law, in terms of its conformity with refugee law (see above). Statelessness, an issue that is also the responsibility of UNHCR, has also received too little academic attention, among other pressing concerns.

If law schools were to begin offering robust education in refugee law, it is not only legal scholarship that would benefit. As discussed above, a new generation of refugee lawyers is needed to monitor compliance with and implementation of international commitments, to explore the connections between human rights and refugee issues, and to provide legal aid to individual asylum seekers trying to navigate the UNHCR or state process.

Increasing Training in Refugee Law Worldwide

Several years ago, UNHCR, through the Hungarian Helsinki Committee, began a program to start legal aid clinics in the states in Central and Eastern Europe which were aspiring to join the European Union. As a result of this investment, we now have a resource for law teachers, whether or not they are versed in refugee law, to introduce the subject. Created by groups of refugee law specialists, it is an online "living casebook," the *Refugee Law Reader* (the *Reader*).[70]

While it was initially developed to provide legal resources and guidance for young professors in the region of East and Central Europe, it is now being used on five continents, by both experienced and new professors, advocates and researchers. The next edition will launch the French, Spanish, and Russian versions of the *Reader,* as well as expand its scope to include new sections on Africa, Asia, and Latin America.

The *Reader* contains a comprehensive adaptable curriculum that is designed for teaching across different legal systems, but one of the notable benefits of being a "living casebook" is that it is able to keep pace with an area of law that is in a period of rapid development. The *Reader* also provides the complete texts of over 600 up-to-date core legal materials, instruments, and academic commentary.

The *Refugee Law Reader* is designed primarily for refugee law instructors, although NGOs that practice legal aid

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

can have access to many of the documents. In the meantime, there is a need for a distance learning course for the great number of countries where there is no access to such formal teaching. Fahamu will be developing one.

We have already mentioned the urgent need for training on refugee rights among the hordes of actors whose professional lives put them into daily contact with refugees, such as the police, immigration officers, camp managers, teachers, religious leaders, NGOs that serve (or fail to adequately serve) these populations, and refugees themselves. I only know of one organization, the Refugee Law Project in Uganda, that has a year-round program of such training.[71]

But there are encouraging signs. The International Associations of Refugee Law Judges has held training conferences in Uganda, Egypt, Ethiopia, Ukraine, Russia, Belarus, Georgia, Malta, Poland, Japan, the Philippines, Ireland, Slovakia, Hungary, the Czech Republic, and Slovenia. Judges from many of the Eastern European countries which were applying to join the EU were also gathered in various places at various times in other centres. Judges from all over the world have attended training sessions at conferences organized by the IARLJ in New Zealand, Canada, Ireland, the UK, Switzerland, and Sweden. The next world conference is in Cape Town, South Africa, in January 2009.[72] It is intended that the SRLAN and the IARLJ will develop closer links to bring such training to more countries in the South.

Building Capacity to Provide Legal Aid in the South

Although important, advocacy condemning the violations of rights *after* they have occurred is not enough. The major challenge facing the network will be to strengthen the capacity of existing refugee NGOs or to help new ones emerge, in order to provide legal assistance to individual refugees. The network's ultimate goal would be to have a least one such NGO devoted to this work in every country in the South. The task is enormous, but a promising start has been made.

AMERA UK[73] is funding AMERA Egypt and partially funding the Refugee Law Project in Uganda.[74] The Dutch foundation 3Rs Stifting is also raising funding for legal aid in the South.[75] Operating on a financial shoestring, Asylum Access[76] has started new legal aid NGOs in Ecuador and Thailand. It has plans to found another in Tanzania in 2009.

In 2008, I was able to send Christophe Chabaud, a French lawyer who was a former student of mine at the American University in Cairo, to Senegal. There, he worked for nine months with the office of the West African Refugees and Internally Displaced Persons (WARIP) Network.[77] Lisa Weinberg, an experienced refugee lawyer, also spent a month there writing a critical overview of the refugee situation in Senegal.[78] Although this WARIP Network office is experienced in refugee advocacy, and has even taken cases to the African Commission on Human and People's Rights, it had little experience preparing testimonies for first instance applications to the Senegalese government or for appeals against rejection.

Alice Nah, who is organizing an Asia Pacific Regional Consultation on Refugee Rights on behalf of the Asian Forum for Human Rights and Development (Forum Asia), a regional NGO based in Bangkok, is planning to hold a first meeting in November 2008 in Malaysia. Thus far, this network is concerned with building collaboration across the Asia Pacific region and enhancing advocacy on behalf of refugees. Hopefully some of these NGOs will develop the skills to represent refugees with all aspects of their legal needs.

Another important role for these NGOs will be to monitor the work of UNHCR for irregularities in its procedures wherever it does refugee status determination. UNHCR cannot expect states to do better than it does, so it must set the highest example. The Helsinki Citizens' Assembly—Turkey's Refugee Advocacy and Support Program has integrated monitoring of UNHCR's practices into its mandate.[79] My experience in the past has been that states in the South usually have a higher acceptance rate than UNHCR. For example, in the 1990s, Tanzania was accepting 98 per cent of individual claims, a fact that the UNHCR office in Tanzania complained about.[80] On the other hand, generally UNHCR's rate of acceptance is much higher than of the same populations in European and North American countries. For example, UNHCR in Turkey recognizes 75 per cent while its neighbour, Greece, a member of the European Community, recognizes less than 1 per cent.

Conclusion: "Simply Irritated at Injustice"

However enthusiastic the members of the SRLAN itself, it is an understatement to say that promoting respect for refugee rights in the Global South will require the concerted efforts of individuals and institutions from around the world. I believe that all who read *Refuge* are as concerned as I am at the extent to which the very institution of asylum is under serious threat.[81] Many of us are extremely troubled about the expansion of UNHCR's mandate to include internally displaced persons (IDPs). UNHCR was never intended to become the world's largest welfare agency for displaced people: *it was established to protect the rights of refugees.*

The protection of those rights necessitates an international effort to build a new infrastructure in the South. Students must learn refugee law and human rights and must be encouraged to undertake research in numerous ill-explored topics. Better training in refugee rights, refugee law, and the interaction between domestic and international commitments must be offered to all the actors in the system. A new generation of better-educated and better-trained researchers,

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

lawyers, and scholars must carefully monitor implementation of and compliance with international commitments. Legal aid organizations must engage not only in the representation of individual clients and careful monitoring of domestic and international law, but also in fearless advocacy for refugee rights more generally. Advocacy organizations must see the benefit of providing legal assistance, both for individual refugees and for the quality of the advocacy itself. And the various actors in the field, doing research, monitoring, legal aid, and advocacy, must communicate with and assist each other. Most of all, what is needed is vision, determination, and persistence. A new infrastructure is possible.

I think it best to conclude this paper anecdotally, with the story of how one person, Pamela Baker, a barrister from the UK, worked to change the situation for Vietnamese in Hong Kong, and how her efforts have had a lasting impact there and elsewhere for these refugees. She is the first person I know who responded to the need for refugee legal aid in the far corners of the world, and who inspired young volunteers to join her in this work. She was working for the Hong Kong Legal Aid Department, [82] when, in 1990, the territory changed its policy *vis-à-vis* the Vietnamese, introducing a screening process designed to send them back to Vietnam.

Baker broke with her department's policy, granted legal aid to the entire crew and passengers of a boat so that they could bring *habeas corpus* applications to challenge their detention. The case became known as Boat 101 and caused considerable embarrassment to officials from Hong Kong to Whitehall.[83] UNHCR accused Baker of fostering false hopes among the boat people, and consequently government officials banned her from the camps and her files were removed.[84]

She resigned and set up law offices in her home, inviting young lawyers to work with her as volunteers. One, Mark Daly, describes the early days:

> At any one time there were about 6 lawyers—including Peter Barnes from Australia, myself from Canada, 2 lawyers from the UK, another from Australia and one from the US. A law professor, a volunteer, acted as clerk. Most of the work was done *pro bono*—with some battles to get the Legal Aid Department to back up a case to keep the firm going. I know that Peter taught piano lessons to supplement his stipend and I taught tennis lessons. Vietnamese refugees would sometimes reward us with mangoes or the occasional bottle of brandy.

Hoi Trinh, a Vietnamese volunteer lawyer from Australia, writes:

> With a team of young volunteer lawyers and wannabes, [myself] included, Pam set out to launch a series of landmark cases against cruel bureaucratic decisions made by first, the Hong Kong, then the British, and later, the Chinese administrations. To many a refugee, she was a savior. But I remember she used to respond to such acclamation with classic English understatement: "I am simply irritated at the injustice." And as justice every so often demands, Pam's fights resulted in thousands of releases and changed many refugees' lives forever. To this day, I suspect, across the globe, her name still resonates in Vietnamese homes with much respect and admiration. As for me, apart from showing me how to be a true lawyer at a time when I was trying to imitate one, Pam showed me how to be genuinely caring of one's clients, to really listen without prejudice, that in the end one should "just do it and life will take care of the rest," and perhaps most importantly, that one should only really work if it's fun. "The moment you stop having fun, it means your heart is no longer there. Move on," she used to say. For all that I must thank her. Had I not met her, I wouldn't have had the courage to call it quits at the corporate law firm I was working for in Australia. Had I not met her, I wouldn't have found my calling in the Philippines. … [85]

When Pam Baker became ill with cancer, Mark Daly and Peter Barnes established the law firm Barnes & Daly in Hong Kong. They won a case in the Court of Final Appeal,[86] where it was determined that a refugee who had been rejected by UNHCR could not be *refouled* because of the threat of torture.[87]

> By way of short update, our firm continues to advise hundreds of asylum-seekers—and since the Court of Final Appeal case of *Prabakar*—CAT applicants. … we continue to take cases challenging a number of the government policies with respect to asylum seekers in the areas of detention, support and social assistance, prosecution policy, fairness of the RSD procedures and the CAT process, as well as making individual submissions to the UNHCR despite the lack of procedural fairness in that process. In addition, we take constitutional challenges in general human rights in an attempt to make the courts more receptive to international human rights law. [88]

Recently, two other unsung heroes, Adam Shapiro[89] and Perla Issa, have taken up the torch to evacuate the Iraqi Palestinians stranded in camps on the Syrian-Iraqi border and inside Jordan They approached non-traditional resettlement countries where there were already large settled Palestinian and other Arab communities as well as places like South Africa, Malaysia, and New Zealand. They went to Chile, having made contact with a senator there who set up meetings with politicians, government officials, human rights and community leaders, and businessmen in Santiago. Having gotten the issue at the top of the agenda with these groups, including the Deputy Secretary of Interior, in April

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

2006, the Chilean Ambassador formally declared Chile's intention of taking 110 refugees. A misinformation campaign began in Chile that almost scuppered the scheme. Adam Shapiro returned in August 2007 and a firm decision was taken by the government to accept 117 from Al-Tanf Camp in the no-man's-land between Syria and Iraq. At writing, news has just been received that the first baby born to one of these Palestinian refugees since arrival in Chile has been delivered, named Rafi. His mother was overjoyed, telling well-wishers she was "very emotional that her son will be born a Chilean."

Similar negotiations were undertaken with Brazil, which resulted in its willingness to take Palestinians from Runwayshid camp, located just inside Jordan, near the border with Iraq. In September 2007, the first group of 35 Palestinians left for Brazil (out of a total of 127). In Brazil, UNHCR and NGOs have taken the responsibility for integration, language training, and other services for the newly arrived refugees.

Adam Shapiro and Perla Issa have also gone to Caracas, Venezuela, and are following up with the President's office and the Ministry of Foreign Affairs there. They have begun to make contacts in South Africa, Spain, Costa Rica, Malaysia, Australia, and New Zealand and are planning similar efforts with Uruguay and Ecuador.

Yemen was approached to provide a temporary place for all the Palestinian refugees from Iraq living on the borders as well as in Baghdad, but this idea for temporary respite from the desert camps while they worked to get the entire group resettled was undermined by less-than-determined efforts by the UNHCR and the PLO, as well as a seeming lack of motivation to address the urgency of the situation. In the camps on the border as well as in Baghdad, Palestinians face targeted attacks, killings, and kidnappings, and other violence persists, specifically against Palestinians.

Sudan's offer to resettle the refugees was rejected by a vote in the Al-Walid and Al-Tanf camps when it was first announced. However, the PLO has pressed forward with the initiative and, given lack of options, or even hope for options, some refugees are considering accepting Sudan. However, now that the International Criminal Court (ICC) has taken measures against the government, it is to be determined if the UNHCR as an agent of the international community will press forward.

It is a long and slow process depending on the diplomatic skills and personal financial resources of just two individuals, something akin to the work of Hoi Trinh, the Vietnamese lawyer in the Philippines.

Appendix

The Nairobi Code

MODEL RULES OF ETHICS IN REFUGEE CASES

1. SCOPE AND PURPOSE

These rules are intended to guide legal aid providers in the context of refugee status determination procedures and other legal aid services offered to refugees.

These rules are subordinate to any applicable domestic rules governing the provision of legal services, and are intended only to supplement such rules.

2. DEFINITIONS

The term "*legal advisor*" refers to any person providing advice and/or representation to people seeking recognition as refugees, or to people who have been recognized as refugees and are seeking other assistance.

The term "*services*" refer to the advice, document preparation, and/or representation that a legal adviser may provide.

"*Advice*" includes providing an opinion about how law or policy applies to a particular person's circumstances.

"*Document preparation*" includes assisting a person in preparing written documents in the person's own name, including but not limited to personal testimonies, that are intended for submission in support of an RSD or other application.

"*Representation*" includes acting on behalf of another person either orally or in writing, including the submission of memoranda arguing that a person meets the legal criteria for refugee status or communicating with UNHCR or other bodies on a client's behalf about his or her case.

The term "*client*" refers to a person to whom a legal adviser has agreed to provide services and who voluntarily accepts those services.

The term "*prospective client*" refers to a person who has sought services from a legal adviser but to whom the adviser has not yet agreed to provide services.

3. ADVISOR-CLIENT RELATIONSHIPS

3.1 Advisors shall in all cases clearly explain to prospective clients whether they can offer services of any kind, and shall provide clear explanations of the type of services they offer. The objectives and scope of any advisor-client relationship shall be explicit before the advisor begins to conduct any work on the case, and before the client is asked to agree to the representation.

3.2 In order to maximize impact, legal aid providers may limit their services. For instance, some agencies may provide only advice or document preparation, or may focus their services on particular types of client who either have particularly acute needs or whose cases raise especially important legal issues. However, advisors must inform clients of any limits in the services

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

to be provided at the beginning of the advisor-client relationship.

3.3 Notwithstanding Rule 3.4, a legal adviser is under no obligation to provide services to a prospective client, and may decide to decline to provide assistance unless prohibited by Rule 3.4.

3.4 Subject to the provisions of rule 3.2, legal advisers shall not deny services to any person on the basis or race, gender, sexual orientation, nationality, political opinion, religion, age, family status, indigence or membership in a particular social group.

3.5 Advisor-client relationships may begin only with the voluntary, informed consent of the client, and may continue only if this consent continues. A client may end his or her relationship with a legal adviser by clear and explicit communication, orally or in writing. An allegation by a client of ethical misconduct against an advisor shall be presumed to indicate that the client no longer consents to continuing the advisor-client relationship.

3.6 Clients should remain in control of the goals of representation. If at some point during the advisor and client relationship, the client and advisor are unable to agree on the goals or strategies of representation the advisor may withdraw from representation.

3.7 Clients shall be entitled to view and obtain copies of all materials in their files. Legal advisers shall provide copies of the materials to the client upon the client's request, during or after the end of the advisor-client relationship. However, advisers may maintain records of their work on a client's case, and are not required to destroy files, even if requested by a client.

3.8 The legal adviser shall notify the adjudicating body in writing when the advisor client relationship has terminated.

4. DILIGENCE

4.1 An advisor shall act responsibly and with due diligence in the handling of a client's case and shall act within the bounds of the law and these rules to obtain the best results possible for the client.

4.2 Advisors shall complete all work as agreed with clients. Advisors shall complete all required documents for a client by any deadline applicable.

4.3 Advisors are responsible for maintaining regular access to published UNHCR materials and country of origin information necessary to assist clients in refugee status determination applications and other matters.

4.4 Advisors shall maintain a filing and records system in order to record their work on a client's case.

5. CONFLICTS OF INTEREST

5.1 Advisors shall not provide services to any prospective client where the advisor has a direct financial or personal interest that is opposed to the client's interest.

5.2 Advisors shall not offer services to any prospective client where another client of the same advisor has interests that are opposed to the prospective client's interests.

5.3 Where two clients of the same advisor develop a conflict of interests after the beginning of an advisor-client relationship, and where local ethical or professional standards would permit, the advisor shall seek to refer one or both of them to alternative advisors immediately.

5.4 Where advisors have a personal relationship with the client that could interfere with his or her exercising objective judgment, the advisor shall seek to refer the client to an alternative legal advisor, if available.

5.5 Where Rule 5.3 or 5.4 applies and alternative legal advisors are unavailable, an advisor may assist clients where a conflict of interest exists only after clearly and explicitly notifying the clients of the conflict and its potential consequences, and after seeking ways to limit the scope of representation so as to minimize conflicts.

6. CONFIDENTIALITY

6.1 Clients and prospective clients are entitled to confidentiality of the information obtained from them or others by their advisors. The confidentiality privilege is owned by the client, not by the advisor. Except as provided for in these rules, confidentiality may be waived only with a client's explicit consent.

6.2 An advisor shall protect the confidentiality of all information that is gathered regarding a client's affairs, except as specifically provided for in these rules. Advisors shall maintain files and records in a manner designed to protect the clients' confidentiality. The duty to maintain client confidence continues beyond the termination of the advisor client relationship unless otherwise provided in these rules.

6.3 Confidentiality shall not apply to information that has entered the public domain with the client's consent. When a client voluntarily allows a piece of information to enter the public domain, the client will be presumed to have waived confidentiality on that piece of information. However, advisors may not reveal information that has entered the public domain against the wishes of the client, or without the client's consent.

6.4 An advisor may reveal confidential information about a client to other legal advisors for the purpose of professional consultations, so long as the other advisors

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

will be bound by the same duty of confidentiality and so long as the other advisors do not have a conflict of interest as described in Rule 5.

6.5 Where an advisor believes a client is likely to inflict bodily harm on another person in the imminent future, the advisor must take prompt steps to inform the appropriate authorities, and may reveal that amount of confidential client information which is necessary to prevent bodily injury.

6.6 An advisor may reveal confidential information as minimally necessary to defend him or her from any formal accusation of breach of these ethical rules.

6.7 A legal advisor or organization employing a legal advisor may use information collected from clients' cases in publication and writings without the consent of affected clients only if the publication is sanitized of any unique details that would allow an interested person to identify the person involved.

6.8 A legal advisor or an organization providing legal services must train all staff and support personnel on their responsibility to maintain client confidential information and ensure that client confidences are maintained.

7. DUTY OF INTEGRITY

7.1 An advisor shall adhere to the truth in all communications, shall urge his or her clients to do the same, and shall not encourage, advise, or assist any person to make false or misleading statements to any tribunal or agency before whom the advisor appears on the client's behalf.

7.2 Notwithstanding Rule 7.1, the advisor is not the decision-making body regarding the validity of applications for refugee status recognition or other matters, and has no duty to screen out or turn away prospective clients who have relatively weak claims.

7.3 An advisor shall conduct his or her interactions with other parties in a courteous, professional manner, consistent with principles of respect for other people and principles of human rights and non-discrimination.

7.4 When an advisor knows that a client has made misstatements of fact to a tribunal or adjudicating body before the beginning of the advisor-client relationship, and there are no contrary local profession ethical rules, the following shall apply:

7.4.1 The advisor shall not reveal the past misstatements to any person or body without the client's explicit consent.

7.4.2 The advisor shall attempt to persuade the client to correct the statements.

7.4.3 The advisor shall not proceed in making any communication to the adjudicating body or any other body that are founded on the past misstatements, and shall not take any actions likely to lead the adjudicating body or any other body to rely on the past misstatements.

7.5 An advisor shall not knowingly sign or otherwise be associated with any letter, report or other documents, make any statement or offer any submission with respect to a client which contains false or misleading information. An advisor shall not submit to an adjudicating body any document which the advisor knows to either be a forgery or to contain false or misleading information.

7.6 When client makes statements to an adjudicating body after the beginning of the advisor-client relationship that the advisor knows to be false, the following shall apply:

7.6.1 The advisor shall not reveal the misstatements to any person or body without the client's explicit consent.

7.6.2 The advisor shall attempt to persuade the client to correct the statements to the adjudicating body.

7.6.3 The advisor shall not proceed in making any communications to the adjudicating body or any other body that are founded on the misstatements, and shall not take any actions likely to lead the adjudicating body or any other body to reply on the misstatements.

7.6.4 Where the misstatement goes to the heart of the representation and the client refuses to correct the misstatement, the legal advisor shall cease the representation.

8. DUTY TO AVOID EXPLOITATION

8.1 An advisor shall not engage in any relationship either directly or indirectly that is likely to compromise his or her independent judgment on behalf of the client in rendering legal services and shall not exploit his or her client for financial, sexual or other gain. To avoid all doubt, any sexual or business relationship between a legal advisor and a current client shall be presumed to be exploitative.

8.2 Advisors shall not solicit or receive any services, products, or labor for which a person might normally be compensated in money or other exchange from any current client or for six months after the end of an advisor-client relationship, except as permitted by Rule 5.5 where a relationship pre-existed the need for legal services and no alternative legal advisors are available.

8.3 Advisors shall not enter into any financial relationship with any current client or for six months after the end of an advisor-client relationship.

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Promulgated at
SOUTHERN REFUGEE LEGAL AID CONFERENCE (SRLAC)
Nairobi, Kenya
1 February 2007

Attached Annexes

- Annex 1 Model Minimum standards of qualifications for Legal Advisors for Refugees
- Annex 2 Complaint Mechanism as a Feature in a Professional Accountability Structure for Legal Aid Providers

Annex 1

MODEL MINIMUM STANDARDS OF QUALIFICATIONS FOR LEGAL ADVISORS FOR REFUGEES

Qualifications of Legal Adviser: Subject to any domestic rules to the contrary, a person may be recognized as a legal advisor for refugees if they meet either criteria A or B:

Criteria A:

- Current license issued by the relevant authority of a member state of the United Nations as a lawyer, solicitor, attorney, barrister, counselor-at-law or equivalent professional designation.

Criteria B:

- Undergraduate degree, equivalent to a Bachelor's degree or
- is a current student in a supervised legal clinic connected with an accredited university or other legal institution or
- Is a person with more than 2 years experience working in refugee matters

and

- Training in refugee law (minimum 20 hours)
- Training in interviewing techniques and testimony writing (10 hours)
- Training in ethical responsibilities (2 hours)

Training may consist of independent reading, observation of practitioners or other types of instruction.

A person who is recognized as meeting either of these criteria may offer the full services of a legal adviser to applicants in refugees.

Annex 2

COMPLAINT MECHANISM AS A FEATURE IN A PROFESSIONAL ACCOUNTABILITY STRUCTURE FOR LEGAL AID PROVIDERS

At the very least, every legal aid provider shall have a client complaint mechanism as part of its office handbook of operating procedures. These procedures shall be communicated to each client at the beginning of the relationship.

Some suggested elements of the complaint procedure include:

1. Preprinted complaint forms which are in the major languages spoken by the client community. The form should assist the complainant in making the complaint by suggesting necessary elements such as date and place of action complained against and an opportunity to provide a narrative of the incident.
2. Each organization should determine the procedure for dealing with anonymous complaints. On their own anonymous complaints can never be the source of a negative action against an employee.
3. Instructions on how to communicate the complaint should appear on the form and also in a conspicuous public area of the legal aid provider's office.
4. The complaint should be investigated and resolved in a timely fashion by a disinterested party.
5. The results of the complaint process should be communicated to the complainant where known.
6. The employee complained against shall have the presumption of innocence.
7. The person complained against should be notified of the complaint. The person complained against should have a right to reply to the complaint and all evidence used against them and to be heard by the independent investigator.
8. The organization shall keep records of all complaints submitted as well as of the investigation findings and resolutions.
9. The range of sanctions for violations of ethical duties should be part of the office handbook of operating procedures.

Notes

1. James Hathaway, *The Rights of Refugees under International Refugee Law* (New York: Cambridge University Press, 2005) at 1; Lawyers Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention* (New York: Human Rights First, 1995, 2004); Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (New York: Berghahn Books, 2005).
2. See US Committee for Refugees and Migrants, "Campaign to End Refugee Warehousing," online: <http://www.refugees.org/warehousing>.
3. Hathaway, *supra* note 1; Verdirame and Harrell-Bond, *supra* note 1.
4. I. Griek, "Access to Justice in Kenyan Refugee Camps Exploring the Scope of Protection," (M.Sc. thesis, School of

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Public Administration and Public Affairs, Leiden University, 2007); I. Griek, "Traditional Systems of Justice in Refugee Camps: Cause for Concern?" in D. Mukherjee, ed., *Refugee Rights and Issues: Concepts and Country Experiences* (Hyderabad, India: ICFAI University Press, 2007).

5. Hathaway, *supra* note 1 at 237.
6. I am aware of recent failed attempts for a refugee to travel on a CTD including to Germany, Kenya, Tanzania, and the US.
7. Exceptionally, "Kampala urban refugees access schools and health services, both the referral hospitals and health clinics run by the city council. The only issue is that they too must pay the usual fees just like hosts." Zachary Lomo, email to author, 1 August 2008.
8. *Statute of the Office of the United Nations High Commissioner for Refugees,* G.A. res. 428 (V), annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950).
9. *Ibid.* at article 8, para. (a).
10. *Ibid.* at article 8, para. (b).
11. UNHCR funds a group of "implementing partners" to deliver education and health services, and the World Food Programme (WFP) delivers food rations to refugees in camps. UNHCR is responsible for supplying micronutrients. This work, which had been largely conceived as "charity," has only recently begun to be conceived as part of a "rights-based" approach. A number of retraining courses have been offered to start altering the attitudes of UNHCR's NGO implementing partners. For example, in 2007 the American University in Cairo offered a two-week course in both English and Arabic on a rights-based approach to food supply in camps.
12. For example, Egypt—which has in the past tolerated refugees on its territory—is now regularly refouling recognized refugees as well as those seeking asylum. See Amnesty International, "Egypt: Amnesty International calls for President to stop flights to possible torture in Eritrea," Index Number: MDE 12/014/2008, 20 June 2008.
13. UNHCR, "States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol," online: <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>.
14. K. Kamanga, "The (Tanzania) Refugees Act of 1998: Some Legal and Policy Implications" (2005) 18 J. of Refugee S. 100 at 116.
15. It is understatement to say that the 1998 Tanzanian Act is outrageous in the extent of its non-compliance with the Refugee Convention. Kamanga's article (*ibid.*) is fairly muted in its analysis and critique. Again, as far as I know, no government official or parliamentarian in Tanzania has been approached about the need to reform this law.
16. See online: <http://www.refugeelawproject.org/resources/legalres/refugeesact.pdf>.
17. See *ibid.*, art. 4(d). Gender discriminating practices include "strict and forced adherence to a dress code, obligatory pre-arranged marriages, physically harmful facial or genital mutilation, rape, domestic violence and other gender related negative activities."
18. *Joao Pembele and six others v. Appeal Board for Refugee Affairs and five others* (1996), Case No. 15931/96, Cape Prov. Div. [unreported].
19. J. Klaaren, "A Guide to South African Refugee Law," 16 May 1999, online: <http://www.law.wits.ac.za/school/klaaren/sareflaw.htm>.
20. Most lawyers working in this field—including lawyers at UNHCR—have simply "learned on the job." At least in the UK and the Netherlands, the only two examples that I know of, lawyers who provide legal aid to refugees and who are paid under their government's schemes have to take regular courses to update themselves.
21. Law schools already recognize the student market for public interest work. Harvard Law School, for example, guarantees funding for any student who spends a summer working in the public interest. Last year, 373 students passed up lucrative associate positions at law firms to participate in the program. See online: <http://www.law.harvard.edu/students/sfs/sumfund>.
22. There several anti-apartheid NGOs transformed themselves to provide legal aid and policy advocacy for refugees.
23. See below for one exception in Hong Kong, although not normally regarded as "the South."
24. But see below for a record of the work of the Association of International Refugee Law Judges.
25. For example, the Danish government funded a huge project to upgrade the judicial system in Uganda, which went so far as to produce little handbooks to put in the pockets of police for easy reference. None of this program included even a reference to refugees although Uganda is a major host country.
26. See, online, for Uganda, <http://www.refugeelawproject.org>; for Kenya, <http://www.rckkenya.org>; for Egypt, <http://www.amera-uk.org>; for Lebanon, <http://www.frontiersassociation.org>; and for Turkey, <http://www.hyd.org.tr/?sid=23>.
27. Mary Robinson, "Linkage between Human Rights and Refugees Issues," 1997, UNHCR, online: <http://www.unhchr.ch/huricane/huricane.nsf/view01/B6622AE1672268BBC125662E00352F7F>.
28. E. Ferris, "Protracted Refugee Situations, Human Rights and Civil Society" in G. Loescher *et al.,* eds., *Protracted Refugee Situations: Political, Human Rights and Security Implications* (Tokyo: UN University, 2008) 85.
29. M. Kagan, "Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt" (2006) 45 J. Refugee S. 19.
30. See online: <http://www.rsdwatch.org>. All cases referred by UNHCR for resettlement are adjudicated by the government considering them. UNHCR's mandate status is not enough to get them automatically accepted. Since refugees usually have no idea what constitutes the grounds for asy-

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

lum, they urgently need legal assistance for this process to be successful. Kagan, *supra* note 29.

31. See, for example, Iranian Refugee Alliance 1995, online: <http://www.irainc.org/text/pub/report.html>; Michael Alexander, "Refugee Status Determination Conducted by UNHCR" (1999) 11 Int'l J. Refugee L. 251; M. Kagan, "Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001–2002" (2002) [Working Paper No. 1, Forced Migration and Refugee Studies, American University in Cairo]. An extensive bibliography of such literature is shown online: <http://www.rsdwatch.org>.
32. Asylum Access, "Disclosure of evidence in UNHCR's refugee status determination procedures: Critique and recommendations for reform" (20 June 2008), online: <http://www.rsdwatch.org/Disclosure%20of%20Evidence%20in%20UNHCR%20RSD.pdf>. Such an illegal practice can be absolutely fatal to a case. For example, a refugee had been given a death sentence *in absentia*. Human Rights Watch (HRW) had written to UNHCR to alert them and recommend he be granted refugee status. *The letter was misunderstood by UNHCR staff and his claim was rejected.* Fortunately, but only by chance, his representative knew about the existence of this letter and wrote HRW to tell them how their evidence was being used. They immediately sent the legal advisor another copy so that there was evidence to reopen the case; eventually he was granted status.
33. On one occasion we were privy to the UNHCR's confidential Country of Origin Information (COI) on Sudan. It was completely inaccurate and out-of-date.
34. See online: <http://www.rsdwatch.org>. The RSD Unit at UNHCR Geneva has, as of 2007, conceded that appeals will be handled "where possible" by a senior member of staff who does not work in the RSD unit. This is as independent as appeals against UNHCR decisions will be in the foreseeable future. UNHCR has rejected the suggestion that an independent tribunal could be established in each country where UNHCR conducts RSD adjudications. The IARLJ has offered to train such tribunal members.
35. Although allowed by the protection officer in Cairo since legal aid became available there, some staff appeared to resent the presence of a legal advisor. And there was no guarantee that the interviewer read the dossier prepared for the claimant. AMERA has attempted to adapt to this latter problem by writing very brief submissions.
36. In Lebanon UNHCR has been conducting an "experiment" in its co-operation with the NGO, the Frontiers Ruwad Association.
37. See online: <http://www.rsdwatch.org>.
38. Barbara Harrell-Bond, "Starting a Movement of Refugee Legal Aid Organizations in the South" (2007) 19 J. Int'l Refugee L. 729–735; see also online: <http://www.rsdwatch.org/index_fi les/Page386.htm>.
39. Verdirame and Harrell-Bond, *supra* note 1.
40. Natalie Briant and Andrew Kennedy, "An Investigation of Perceived Needs and Priorities Held by African Refugees in an Urban Setting in a First Country of Asylum" (2004) 17 J. Refugee S. 437.
41. In Egypt, health services was the first priority need, legal aid second.
42. In 2008, the ICVA/UNHCR consultations took place in June.
43. Attending these meetings has been an important educational experience for the Southern NGOs. Some took advantage to also visit the offices of the UN Human Rights Commission. This office, which one would assume should be directly involved in violations of refugee rights, only acts on behalf of refugees in exceptional cases.
44. Since 2004, fairly dramatic improvements have been made in two country offices. Refugee legal aid NGOs in Turkey and Lebanon are now able to represent their clients. In Turkey they are sometimes able to see the transcripts, but in Lebanon a "feasibility" study is being carried out with Frontiers, the refugee legal aid NGO there, to give reasons for rejection and to allow access to claimants' file; see online <http://www.rsdwatch.org>.
45. The justification for creating a code of professional ethics for NGOs conducting refugee legal aid arose because not all persons who work for them are lawyers, who would naturally be bound by the ethics of their own bar associations.
46. M. Kagan, "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination" (2003) 17 Geo. Immigr. L.J. 367 (cited by *Singh v. Gonzalez,* 403 F.3d. 1081 (9th Cir. 2005)).
47. Also discussed in Harrell-Bond, *supra* note 38. We appealed to a member of the International Refugee Law Judges (online: <http://www.iarlj.nl/general>) to ask them to intervene. He argued with the head of the RSD Unit in Geneva that this was *not* a UNHCR responsibility.
48. It was funded by the US Institute for Peace.
49. An NGO and a law firm from Hong Kong were included. Although China is a party to the Refugee Convention and Protocol, it has not been extended to the territory of Hong Kong, which receives refugees from the same war-torn countries as appear in most other host countries in the south. Guatemala was also represented.
50. M. Kenny, "The Nairobi Code: A client centred approach to ethical conduct" (2007) 35 Immigration Review 12; Harrell-Bond, *supra* note 38. See the Nairobi Code, AMERA UK, online: <http://www.amera-uk.org/Files/Nairobi%20Code-1.pdf>.
51. Vision: SRLAN aims at transforming the disparate refugee rights organizations into a global movement to root refugee assistance in human rights and international law by increasing their co-operation, information sharing, and coordinated advocacy. Mission: a. Separately and in concert, our mission is to promote and advocate for the rights of refugees in places where they have previously been ignored. We address ourselves to any institution, government, intergovernment agency, or non-government organization that has the power to affect refugees' enjoyment of their human

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

rights. b. We form this network in order to combine our efforts on issues of common concern, and to share as possible our resources. We work internally among ourselves to promote the highest standards of professional skill and ethics in our own work.

52. There is still too little recognition of the resources contained in UNHCR's RefWorld, not only among NGOs. At the 2007 Nairobi meeting, it was discovered that UNHCR's Kenyan Country Office's RSD officers were unaware of it although it has been doing RSD since 1991.
53. See online: <http://www.fahamu.org>.
54. For three years, running it has been voted one of the top ten websites that are changing the world of the internet and politics.
55. Examples include the independent Equinet (the Regional Network on Equity in Health in Southern Africa, online: <http://www.equinetafrica.org>) and AU-Monitor, which was established by Fahamu to facilitate constructive engagement between African civil society organizations and the African Union.
56. In 2005 it won the Tech Museum Award for its contributions to distance learning for human rights.
57. In Egypt, for example, the Association for Human Rights Legal Aid (AHRLA), was closed by the government because it was prosecuting senior policemen for raping a refugee woman. It was successful—although the guilty party is freely living in his home despite his twenty-five-year sentence. AHRLA NGO was also representing a case against a member of the government security for the death of an Egyptian under torture.
58. Some in attendance at the meeting in Geneva recommended that even the list of member organizations should be password-protected in order that governments could not identify sources of information used by external lobbying groups such as Amnesty or HRW.
59. Each country office is responsible for producing an annual report that includes the protection problems refugees are facing. The sample from 1999 that I have read did not include information on demarches to governments or the response.
60. UNHCR, "Keeping the spirit of Cartagena alive, 20 years later," Colombia (11 November 2006), online: <http://www.unhcr.org/admin/ADMIN/4524bc952.pdf>.
61. MAWG is the Migration and Asylum Working Group of the Euro-Mediterranean Human Rights Network (EMHRN); online: <http://www.euromedrights.net>. It was set up in the frame of a project financed by the European Commission, under the AENEAS program, online:<http://ec.europa.eu/europeaid/where/worldwide/migration-asylum/details_en.htm>.
62. See "UN human rights chief urges Egypt to stop deporting Eritrean asylum-seekers," UN News Centre (19 June 2008), online: <http://www.un.org/apps/news/story.asp?NewsID=27078&Cr=asylum&Cr1>; "UNHCR alarmed by Egypt's forceful return of Eritrean asylum seekers," UN Radio (20 June 2008), online: <http://www.unmultimedia.org/radio/english/detail/9935.html>.
63. We can assume that UNHCR was making *démarches* to the Egyptian government but this "quiet" diplomacy was largely ineffective.
64. Association for Human Rights Legal Aid (AHRLA) was closed by the Egyptian government following its defense in an open court of a refugee who had been raped by police and a person who died from torture by a member of the security. It is hard to believe that joining in a publicity campaign well underway would have similar consequences.
65. This represents the majority of SRLA Network members at the moment. Legal aid is provided in Ecuador, Egypt, Hong Kong, Kenya, Lebanon, Malta (not strictly part of the Global South as it is an EU country), Thailand, Turkey, Senegal, South Africa, and, on an *ad hoc* basis, in Zambia.
66. Verdirame and Harrell-Bond, *supra* note 1.
67. The American Anthropological Associations' Code of Ethics requires that any working relationship with affected individuals must be "beneficial to all parties involved." See <http://www.aaanet.org/committees/ethics/ethcode.htm>. See also Michael A. Rynkiewich and James P. Spradley, *Ethics and Anthropology: Dilemmas of Fieldwork* (New York: Wiley, 1976).
68. Jonathan A. Fox and L. David Brown, *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (Cambridge, Mass.: MIT Press, 1998).
69. See online: <http://www.iarlj.nl/general>.
70. Rosemary Byrne *et al.,* eds., *The Refugee Law Reader,* 4th ed. (Dublin and Budapest: Hungarian Helsinki Committee, 2008), online: <http://www.refugeelawreader.org>.
71. Refugee Law Project, "Education and Training Department," Refugee Law Project online: <http://www.refugeelawproject.org/about/edtr/index.htm>.
72. Geoffrey Care, email to author (15 July 2008); see also online: <http://www.iarlj.nl/general>.
73. AMERA Egypt, "History," AMERA Egypt online: <http://www.amera-uk.org/egypt/history.html>.
74. AMERA UK, "Objectives & History," AMERA UK online: <http://www.amera-uk.org/objectives_history.html>.
75. See Stichting 3R, online: <http://www.stichting3R.nl>.
76. Both the 3Rs Stifting and Asylum Access were begun by former interns who worked at AMERA Egypt and others. All three, including AMERA UK, are able to tap sources in their own countries that are only available through charities, foundations registered in those countries.
77. See WARIPNET, online: <http://www.waripnet.net>.
78. L. Weinberg, "West African Refugees and Internally Displaced Persons Network (WARIPNET) Senegal Legal Aid Assessment," on file with author. She has worked as an intern at AMERA Egypt for six months and at the Lutheran Immigrant and Refugee Services, Worcester, Massachusetts, and the Community Legal Services and Counselling Center, Cambridge, Massachusetts.

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

79. See Helsinki Yurttaslar Dernegi, "An Evaluation of UNHCR Turkey's Compliance with UNHCR's RSD Procedural Standards" (September 2007), online: <http://www.hyd.org.tr/?pid=553>.
80. Personal Communication, Mr. Johnson Braham, who headed the Government's refugee office. Also in Uganda, a Senior Protection Office complained that the government's Refugee Eligibility Committee (REC) was being "too generous" in their decisions on RSD. Zachary Lomo, email message to author (1 August 2008).
81. James C. Hathaway, "Why Refugee Law Still Matters" (2007) 1 Melbourne J. of Int'l L. 3, online: <http://www.austlii.edu.au/au/journals/MelbJIL/2007/3.html>.
82. She was in Hong Kong handling family law cases, spearheading a campaign to build the first shelter for battered women, and lobbying successfully for legislation against domestic violence.
83. "Obituary," *The Times of London* (3 May 2002), online: <http://pambakerfoundation.org/docs/Pam%20Baker-obituary-Times.doc>.
84. *Ibid.*
85. Hoi Trinh now has worked tirelessly in the Philippines to find resettlement places with their families for the thousands of Vietnamese who were left behind in the 1990s when the US stopped taking refugees from there.
86. *Secretary for Security v. Sakthevel Prabakar,* CACV No. 211 of 2002.
87. States which have ratified the Convention Against Torture cannot send failed asylum seekers back to where they would face torture.
88. Mark Daly, email message to author (26 June 2007). According to UNHCR approximately 2,500 people register claims with them in Hong Kong each year. Over 90 per cent of asylum seekers claiming refugee status come from South and Southeast Asia; 10 per cent arrive from Africa. We are always looking for assistance from those with some relevant experience (paid or unpaid). We are looking for solicitors, trainees, and student interns committed to the area.
89. Adam Shapiro, a filmmaker, is also a co-founder of the International Solidarity Movement (ISM). The ISM is a Palestinian-led movement committed to resisting the Israeli occupation of Palestinian land using nonviolent, direct-action methods and principles. Founded by a small group of activists in August 2001, ISM aims to support and strengthen the Palestinian popular resistance by providing the Palestinian people with two resources: international protection and a voice with which to resist non-violently an overwhelming military occupation force. See online: <http://www.palsolidarity.org/main/about-ism>.

Barbara Harrell-Bond, OBE, was the founder and director of the Refugee Studies Centre at the University of Oxford. Since retirement, she has held visiting positions at Makerere University and the Forced Migration and Refugee Studies Department of the American University in Cairo. She founded the Refugee Law Project, <http://www.refugeelawproject.org>, in 1999 in Uganda and the Africa and Middle East Refugee Assistance (AMERA), <http://www.amera-uk.org>, in 2000 in Cairo; both provide legal aid to refugees. Since 2007 she has been researching the situation of Iraqis in Cairo and supervising interns providing legal assistance for their resettlement claims. Some of her principal publications are: (with G. Verdirame), Rights in Exile: Janus-Faced Humanitarianism *(New York: Berghahn Books, 2005);* Imposing Aid: Emergency Assistance to Refugees *(Oxford University Press, 1986); and (with D. Skinner and A. Howard)* Community Leadership and the Transformation of Freetown (1801–1976) *(The Hague: Mouton, 1977).*

I want to thank all who commented on and added to this paper: Rachel Levian, Zachary Lomo, Alice Nah, John Quin, and Chris Szabla. I remain responsible for any errors.

© Barbara Harrell-Bond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Refugee Status Determination in Brazil: A Tripartite Enterprise

Liliana Lyra Jubilut
and
Silvia Menicucci de Oliveira Selmi Apolinário

Abstract
Refugee Status Determination (RSD) in Brazil is nowadays a tripartite enterprise, involving UNHCR, the Brazilian government, and civil society. This tripartite character, and especially the participation of the civil society is an impressive feature of RSD in Brazil. It thus seems to be a practice that should be analyzed to see if indeed it can be regarded as a "best practice." In light of this, the paper aims to verify whether or not there are lessons to be learned from RSD in Brazil with a view to improve best practices of RSD in general.

Résumé
Le régime de détermination du statut de réfugié (DSR) au Brésil est couramment un arrangement tripartite, engageant le HCR, le gouvernement brésilien et la société civile. Ce caractère tripartite, tout particulièrement la participation de la société civile, semble être le point saillant de la DSR au Brésil. Par conséquent, c'est là une façon de faire les choses qui mérite d'être examiné de plus près afin de vérifier si on peut vraiment la considérer comme une « pratique exemplaire ». Au vu de ce qui précède, cet article vise à vérifier s'il y a des leçons à tirer de la DSR au Brésil, et cela dans le but d'améliorer les pratiques exemplaires de la DSR en général.

Introduction

International refugee law, especially the 1951 Convention relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol, defines who is a refugee. To enable States Parties to these treaties to implement their provisions, refugees have to be identified. The determination of refugee status, although mentioned in article 9 of the Refugee Convention, is not specifically regulated and each State Party can establish the procedure that it deems most appropriate, considering its particular constitutional structure.

With regard to refugee law and protection, Brazil can be seen as both an "old" and a "new" country.[1] It is an "old" country insofar as Brazil was involved in the first international initiatives of refugee protection,[2] has been a member of the Executive Committee (ExCom) of the United Nations High Commissioner for Refugees (UNHCR) since 1958, and ratified the 1951 Refugee Convention and its 1967 Protocol in 1961 and 1972, respectively.[3] And it is a "new" country given that the National Refugee Act, Law 9.474,[4] was passed in 1997 and that in the beginning of the twenty-first century it became an emerging resettlement country.[5]

As the most important developments have occurred in the last decade or so, one can see that refugee law and protection in Brazil has evolved significantly in a short period of time. However, there is always room for improvement.

Refugee status determination (RSD) in Brazil is nowadays a tripartite enterprise, involving UNHCR, the Brazilian government, and civil society. The involvement of civil society is a heritage from the early beginnings of refugee protection in Brazil, when there was no government procedure in place and UNHCR had to rely heavily on civil society in order to guarantee any form of protection whatsoever.

This tripartite character, and especially the participation of civil society, seems to be an impressive feature of RSD in Brazil as it guarantees a more democratic procedure and involves all actors needed to ascertain integral protection to refugees. It thus seems to aid in the establishment of a better RSD protection and is a practice that should be analyzed to see if indeed it can be regarded as a "best practice."

In light of the above, this paper aims to describe the practice of RSD in Brazil, assess its main qualities and flaws, and verify whether or not there are lessons to be learned from RSD in Brazil with a view to improve best practices of RSD in general.

© Liliana Lyra Jubilut and Silvia Menicucci de Oliveira Selmi Apolinàrio, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

To achieve these aims, this article is divided into three parts. The first part will provide an overview of RSD in Brazil, both before and after the National Refugee Act of 1997. The second will analyze RSD procedures in Brazil, through three lenses: the internal context in which they occur; the general norms of international refugee law in relation to RSD; and the most protective standards that should apply to the protection of human beings in light of an holistic approach to international law and international human rights law. And finally, the paper will assess if and how the experience of RSD in Brazil can assist in the development of a better-structured RSD system in the world.

RSD in Brazil before the 1997 National Refugee Act

The 1997 National Refugee Act was a turning point in the history of refugee law and protection in Brazil. It established a national law that not only translates the main universal protection clauses to the Brazilian legal system but also enlarges the traditional protection by establishing the possibility of recognizing a person as a refugee due to gross violations of human rights, following the regional formula created in 1984 by the Cartagena Declaration,[6] which concluded:

> 3. To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

Furthermore, it established an administrative RSD procedure in Brazil and a body—the National Committee for Refugees (in Portuguese, *Comitê Nacional para Refugiados,* or CONARE)—vested with the responsibility of analyzing each individual case. Both of these features were newly introduced by the National Refugee Act.

Prior to 1997 RSD in Brazil was regulated by an interministerial rule, Inter-Ministry Rule 394 (and not by a specific bill), and was conducted mainly by UNHCR. This mechanism was designed in the context of the changing regimen in Brazil. During this period, the state looked for ways to strengthen the application of treaties directed towards the protection of human beings, since this was a factor in acquiring legitimacy within international society. In particular, Brazil suspended some of the reservations it had made to the Refugee Convention and stopped adopting the geographical limitation allowed for in this document.[7]

Recalling the dictatorship regime that existed prior to the mid-1980s in Brazil is key to understanding how RSD in Brazil was built and designed. During this period, despite repression by the military authorities, some NGOs (specifically those linked to the Catholic Church in Rio de Janeiro and São Paulo), with the support of UNHCR, assisted nationals from Argentina, Chile, Uruguay, and Paraguay to get protection in a third country. This action was developed with no support from the state. In fact, the people involved in these assistance actions were risking their lives and liberty, given that some of the people being protected were under military investigation due to their political opinions. This resulted in a very strong bond between Brazilian civil society and UNHCR and in the development of an expertise in refugee protection encompassing both the international community and the internal civil society.

After promulgation in 1988 of the Federal Constitution, which established a regime based on the rule of law, human rights, and democracy, refugee protection started its transformation into a tripartite structure.

In the early 1990s, the development of RSD in Brazil faced the challenge of receiving a large number of asylum seekers from Angola, who left their country due to armed conflict. Most of them were recognized as refugees by the procedure created by the above-mentioned interministerial rule.

This interministerial rule established that UNHCR was to conduct the analysis of individual cases and recommend them (or not) to the Brazilian government for its final approval:

> In general the procedure for determining refugee status was as follows: UNHCR interviewed the person seeking refugee status and elaborated a legal opinion recommending, or not, the granting of that status. This legal opinion was then sent to the Ministry of Foreign Affairs, which presented its view on the matter and sent it to the Ministry of Justice, which made the final decision. The decision was then published in the official gazette of the Brazilian government (*Diário Oficial da União*).[8]

Following this notification, the Federal Police issued an identification document to the refugee.

It is interesting to note that during this period the Brazilian government always followed the legal opinion that was proposed by UNHCR. Furthermore, NGOs linked to the Catholic Church, especially Cáritas Arquidiocesana do

© Liliana Lyra Jubilut and Silvia Menicucci de Oliveira Selmi Apolinàrio, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Rio de Janeiro and Cáritas Arquidiocesana de São Paulo, continued to be the historical partners of UNHCR, being responsible for the actual assistance to and orientation of asylum seekers and refugees.

RSD in Brazil after the 1997 National Refugee Act

With the approval of the National Refugee Act, there was a substantial change in RSD in Brazil: the transfer of RSD responsibility to the Brazilian government with UNHCR maintaining a supervisory role.

Cáritas Arquidiocesana do Rio de Janeiro and Cáritas Arquidiocesana de São Paulo continued to be part of the new structure, keeping the role of providing reception, assistance, and orientation to asylum seekers and refugees. With the beginning of the resettlement program in Brazil, there was an increase in the number of NGOs working with refugees in Brazil.[9]

The National Refugee Act is the zenith of a process of improving refugee law and protection in Brazil, which had as other landmarks the recognition of UNHCR as an international body in 1982; the approval of the Federal Constitution in 1988; and the lifting of the geographic and temporal restrictions in 1989. It also translates into an increased concern with human rights in the country after the dictatorship, which led to Brazil being more willing to commit to and respect international obligations regarding human rights.

As mentioned, the National Refugee Act defines who is recognized as a refugee in Brazil[10] and the RSD procedure to be applied. It also establishes the rights and duties of a refugee and the special regimen that applies to people awaiting the decision on RSD—*i.e.,* the asylum seekers (these rights include the impossibility of forced return, deportation, expulsion, or extradition, and the suspension of all administrative and criminal procedures due to irregular entries).

In its fourth title, the National Refugee Act establishes the procedure for RSD in Brazil, stating that:

> Art. 17—A foreigner shall appear before a competent authority and state his or her desire to request recognition of the condition of refugee.
>
> Art. 18—The competent authority shall notify the requester to give information and such notification shall set the date for commencement of procedures.
>
> Paragraph One—The competent authority shall inform the United Nations High Commissioner for Refugees- UNHCR on the existence of a proceeding for request for refuge and shall enable UNHCR to offer suggestions to facilitate the development of the proceeding.
>
> Art. 19—In addition to the information, given if necessary with the assistance of an interpreter, a foreigner shall complete a request for recognition as a refugee, including a complete identification, professional qualification, schooling of the requester and members of his or her family group, as well as report on the circumstances and facts that form the basis of the request for refuge, indicating the appropriate evidences
>
> Art. 20—The record of the information and supervision of the request form completion shall be effected by qualified officials and in condition to guarantee information confidentiality.[11]

In light of the above provisions, one can see that the National Refugee Act only establishes the guidelines of RSD in Brazil, reserving an important role to UNHCR.

One of the few impositions of the National Refugee Act regarding RSD is that the decisions on RSD requests are to be made by CONARE, which is a collective deliberative body, as will be further explained below.

Building upon these guidelines, the Brazilian government, UNHCR, and Brazilian civil society have developed a tripartite enterprise regarding RSD which reflects the idea that, for the protection of refugees to be integral, it has to involve the international community, the state, and civil society.

RSD procedure in Brazil begins, as stated above, with the asylum seeker's request for refuge to the competent authority. This authority is the Federal Police, which will formalize the request into a Declaration Term (*Termo de Declaração*). This document contains the civil qualification of the asylum seeker (name, nationality, name of parents, birthdate) as well as the main reasons for which the asylum seeker left his or her country of origin and is asking for refugee status in Brazil. The date of the Declaration Term is deemed to be the date of the beginning of the procedures.

In order to systematize the procedures, CONARE has established a standard Declaration Term to be followed by the Federal Police throughout the country.[12] Each adult asylum seeker should have an individual statement taken and written down in a Declaration Term. Children are encompassed in their parent's document.

After having this document issued, the asylum seeker is instructed that he or she has to continue with the proceedings in order to be recognized as a refugee in Brazil. If the asylum seeker remains six months or more without responding to the requests of the proceeding or abandons it, the procedure is archived without having its merits analyzed.[13]

The step following the issuance of the Declaration Term is the completion of a more thorough standard questionnaire.[14] This step normally takes place at the refugee centres directed by civil society organizations. Nowadays there are two refugee centres in Brazil, directed by Cáritas Arquidiocesana do

© Liliana Lyra Jubilut and Silvia Menicucci de Oliveira Selmi Apolinàrio, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Rio de Janeiro and Cáritas Arquidiocesana de São Paulo. If the asylum seeker is located in a place where there is no refugee centre, the questionnaire is to be filled in at the Federal Police Department.[15]

After the questionnaire is filled in, it is sent to CONARE and the asylum seeker is granted authorization to have a provisory identification issued. This document is the Provisional Protocol (*Protocolo Provisório*).[16]

The asylum seeker, then, has to go through two interviews. The first interview is conducted by a lawyer from civil society.

In the past, this lawyer was appointed by the Brazilian Bar Association and worked in a partnership between UNHCR and the two mentioned refugee centres. Nowadays, the refugee centres hire the lawyers themselves and UNHCR assists their work by funding their salaries and providing technical support.

The interview is conduct individually and whenever possible in the language of the asylum seeker. When an interpreter is required, the interpreter is instructed about the confidentiality of the proceedings.

The second interview is conducted by a representative of CONARE and follows the same rules as the first interview.

As mentioned above, CONARE is a collective deliberative body. It has both governmental and non-governmental members and the UNHCR has "voice-no-vote" status. The government representatives come from the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Health, the Ministry of Labour and Employment, the Ministry of Education and Sports, and the Federal Police. The representative of the civil society comes from an NGO that is involved in the assistance and protection of refugees. Nowadays this seat is occupied by Cáritas Arquidiocesana de São Paulo, with Cáritas Arquidiocesana do Rio de Janeiro being the alternate.

CONARE is presided over by the Ministry of Justice and has a general coordinator that assists its work by organizing the RSD cases to be decided in a plenary meeting with all its members. The general coordinator operates under the umbrella of the Ministry of Justice and is also in charge of the administrative issues regarding refugees, such as the expedition of status declarations, travel authorizations, and authorizations for the issuance of identification documents.

After the two interviews have taken place, there is a meeting by a Preliminary Analysis Group (*Grupo de Estudos Prévios*) to assess the merits of the case. This step grew out of practice, with the perception that it would be impossible for CONARE to have in-depth analysis of each case in its bimonthly plenary meetings. In order to have each case considered thoroughly, the Preliminary Analysis Group was established. It convenes before CONARE's plenary meeting and does a preliminary analysis of the case, taking into consideration the findings of the civil society's and government's interviews.

The Preliminary Analysis Group consists of CONARE's general coordinator, a representative of the Ministry of Foreign Affairs, a representative of the Federal Police, a representative of UNHCR, and a representative of the civil society organization who has a seat in the CONARE.

With the pre-analysis executed, the cases go to the CONARE's plenary to be decided. In the plenary each member is entitled to one vote, and decisions are made by majority.

If the decision is positive, the asylum seeker is recognized as a refugee in Brazil. If the decision is negative, there is the possibility of an appeal.[17] This appeal is also an administrative procedure, which has to take place within fifteen days after the asylum seeker is notified of it, in order to be timely. The appeal is analyzed by the Minister of Justice, who gives the final decision on RSD in Brazil. If he changes CONARE's decision, the person is recognized as a refugee; if he does not, the person is subject to the general foreigner's regimen[18] and is not a refugee in Brazil.

After being recognized as a refugee by CONARE or the Minister of Justice, the refugee has to present herself or himself to the Federal Police Department in order to be registered as a refugee. Before registration, the refugee has to sign a Term of Responsibility (*Termo de Responsabilidade*), a standard form which was established by CONARE's Normative Resolution 3.[19] According to this term, the refugee agrees to observe the rules, laws, and provisions aimed at the maintenance of public order and the respect of the rights and duties established by Brazilian law, and attests his or her awareness of being subject to Brazilian civil and criminal law. The refugee also assumes the responsibility of collaborating with Brazilian authorities and humanitarian agencies that assist refugees in Brazil.

The refugee states that he or she is aware of the conditions that may result in the loss of refugee status: (i) proof of falsity during the RSD process; (ii) omission of facts that, if known, should result in a negative decision; (iii) acts against the national security or public order; (iv) leaving Brazilian territory without previous authorization from the Brazilian government.

In regard to the need for authorization to leave Brazilian territory, CONARE's Normative Resolutions[20] establish the conditions for obtaining an authorization to travel abroad. The refugee shall submit a solicitation to CONARE stating the duration, destination, and reasons of the trip. If necessary, the refugee can ask for a Brazilian passport issued to foreigners, according to provisions of the Foreign Statute Act (Law 6.815, 19 August 1980).

© Liliana Lyra Jubilut and Silvia Menicucci de Oliveira Selmi Apolinàrio, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

The principle of family unity does not operate only when all family members become refugees at the same time. Rather, in Brazil, it can be equally applied to cases where a family unit has been temporarily disrupted through the flight of one or more of its members. CONARE's Normative Resolution 4[21] provides for the extension of refugee status through the application of the family unity principle and establishes a standard form of Term of Family Unit Request. According to this resolution, refugee status can be extended to family members (spouse, "ascendant" and "descendant," as well as other elements of the family group who depend economically on the refugee[22]), once they are located in the national territory.

Finally, in the spirit of the establishment of durable solutions for refugees living in Brazil, CONARE's Normative Resolution 10[23] ruled on the situation of the refugee who achieves permanent status. In general, the resolution states that even with permanent status, refugee status is continued.

As can be noted by the above description, some of these procedures have been formalized by resolutions of CONARE, but some relevant aspects derive only from practice, as, for instance, the participation of civil society. This has both positive and negative aspects, as, on the one hand, it enables constant improvement, and on the other hand, it may lead to suppression without prior notice of developments that may be seen as guarantees to the refugees. It is important to note, however, that since redemocratization, the trend of refugee law and protection in Brazil has been to evolve, which may minimize this last concern.

Analyzing RSD in Brazil

Having reviewed RSD procedure in Brazil in the previous section, this section will proceed to analyze it in order to extract lessons, either for its improvement or for the improvement of RSD in general. This analysis is threefold. First it is important to consider RSD in Brazil from an internal standpoint, considering the National Refugee Act, the practice of RSD, and the context in which it occurs. Secondly, the analysis should be made in comparison to the international standards of RSD, *i.e.* to international refugee law. And finally, bearing in mind that international refugee law is part of a wider system of the protection of the human person (alongside international human rights and international humanitarian law), the analysis of RSD in Brazil should take into consideration whether or not it is in keeping with the most protective standards.

RSD in Brazil in light of the internal context

First of all the adoption of the National Refugee Act in 1997 must be considered in the context of the redemocratization of Brazil and promulgation of the Federal Constitution in 1988, which considered the primacy of human rights and the concession of political asylum to be guiding principles for Brazil in its international relations (article 4, II and X). This is a key issue because the geographic limitation was suspended just after the Federal Constitution's promulgation, starting the process of developing an internal RSD process in Brazil, which was consolidated in 1997.

Brazil's National Refugee Act is modern and consistent with international standards on refugee protection, being considered as a model to South American countries since the time of its adoption.[24] It is interesting to observe that some countries, inspired by the Brazilian legislation, issued their own internal rules on refugees, providing for specific situations such as the recognition of refugee status based on reasons of gender, as in the case of Argentina. In Brazil, this aspect has been considered in the broad concept of membership in a particular social group.

Asylum seekers can apply to receive refugee protection all over the country with no cost to them at all.[25] The decentralization and cost-free nature of the procedure are points to be commended in RSD in Brazil.

The RSD procedure is normally fast: an asylum seeker's request for refugee status usually takes six months to be analyzed by CONARE. In the meantime, asylum seekers receive permission to work, although their language, background experience, and social discrimination are obstacles that they may face in trying to find jobs.

It is important to highlight that RSD procedures in Brazil were developed for examination of claims on an individual basis. This has been satisfactory given that the number of asylum seekers in Brazil is not relatively large,[26] but the situation could be different in the case of a mass influx of refugees. It would be desirable to create prevention mechanisms in order to avoid a humanitarian crisis in such a situation. However, in RSD in Brazil, there is no procedure for determining eligibility for refugee status on a group basis, rather than through individual screening, when there might be a mass influx or when prevailing conditions might have substantially the same effect upon a large population.

Brazil faced a challenging situation during 2006, when an impressive number (by Brazilian standards) of asylum seekers from Lebanon asked Brazil for protection as refugees.[27] On that occasion, CONARE decided not to consider the *sur place* refugee condition of some individuals who were in Brazilian territory when the conflict started, giving a misguided interpretation to that situation. Besides that, because of many fraudulent requests, CONARE decided to apply a "fast-track" procedure for requests by people from Lebanon. This solution, however, did not consider international standards, especially the ExCom Conclusion 30 (XXXIV) of 1983 on the problem of manifestly unfounded or abusive applications for refugee status or asylum, which states:

© Liliana Lyra Jubilut and Silvia Menicucci de Oliveira Selmi Apolinàrio, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

> (e) Recognized the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive, the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees and therefore recommended that:
>
> (i) as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status

In the case described above, one can see that the fast-track or emergency approach developed by CONARE took into consideration only the interest of the Brazilian government. However, at the other end of the spectrum, one sees that CONARE has used an emergency approach in other circumstances, mainly in order to give a fast response in resettlement cases needing immediate protection.

The fast-track procedure, however, is not ruled by law in any of the cases. This can be regarded as a problem as there is no legal guarantee of the continuity of the procedure in the resettlement cases in the case of a change of government and of public policies in the future. Besides, the fast-track procedure can mean a different treatment for the asylum seeker who arrives in Brazil and asks for refugee status and for the resettled refugee, as the fast track is applied positively almost exclusively to the latter.

The fact that RSD procedure is based mainly on an administrative structure has positive and negative aspects. The expertise of CONARE could have more results if, in fact, the members of CONARE were experts in refugee protection, with advanced knowledge of international and comparative rules. It is true that there has been an effort at capacity building; however, it continues to be limited since there is no attention to the broad system of international law. To determine refugee status, one must consider the inclusion and exclusion clauses, which requires knowledge of other areas of international law, such as international humanitarian law, international criminal law, and international human rights law.

Keeping this limitation in mind, the possibility of judicial review of the RSD decisions is important. In the Brazilian system, there is no legal rule about appeal to the Judiciary in causes related to formal aspects of RSD or to the final decision of the administrative procedure (CONARE and the Minister of Justice). It must be observed that CONARE's decision—either negative or positive—is limited to stating the recognition or the non-recognition of the condition of "refugee." There is no satisfactory motivation of the decisions. This fact *per se* denies a basic principle of public administration, and affects the asylum seeker's defense in the case of an appeal, as he or she does not know with certainty the reasons why his or her refugee status request was denied, as the main motivation in the refusal is that the case did not meet "refugee criteria." In this matter it is important to note that, in the few cases that were brought to the Judiciary, this organ said that the statement that the case did not meet "refugee criteria" was enough motivation.[28]

Although the Federal Constitution guarantees access to the Judiciary[29] in the case of violation or threat to a right, as this is not manifestly stated in the National Refugee Act, few cases are proposed for the consideration of the Judiciary. The result is a precarious judicial jurisprudence on refugee issues in Brazil and unsatisfactory knowledge of the international standards by the members of the Judiciary. In most of the cases in which the Judiciary was called to rule on RSD-related issues, it referred to CONARE's decision, justifying this action by highlighting the technical expertise of this body, without proceeding to a new analysis of the merits of the case.[30] Initiatives of training and developing capacity as well as diffusion of international refugee law should be acknowledged, as, for instance, the first course on international refugee law, established in 2007 for university teachers and public attorneys in Rio de Janeiro.[31]

Recognition of participation by civil society as a full member of the CONARE was innovative:

> Another distinguishing characteristic of CONARE compared to similar organs in the region is that civil society, represented by an NGO that works with refugees, is not only present but is also entitled to vote. In other countries, these three trends (a representative of a non-governmental organization which works with refugees and is entitled to vote) are not present simultaneously. For example, in Argentina and Uruguay civil society is not represented; in Paraguay the representative of the NGO cannot vote and in Bolivia civil society is represented by the church and by Universidad Mayor de San Andres but there is no mention of the fact that these organs work or have to work with refugees.[32]

Nonetheless it was a reflection of the state of rules based on human rights established by the Federal Constitution of 1988 and the history of refugee protection in Brazil. In fact, if one adopts a more cynical point of view, one could say that the government did not want to assume the entire responsibility for refugees, leaving the practical concern related to the actual reception and integration to the historical experts on the issue—UNHCR and civil society.

Despite the causes that influenced the tripartite design of RSD in Brazil, it presents positive aspects that can not (and should not) be denied. The participation of civil society bal-

© Liliana Lyra Jubilut and Silvia Menicucci de Oliveira Selmi Apolinàrio, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

anced the state's concern about national security with the insertion of human concerns into decision making. However, as commented, the participation of civil society has a limited role given that (i) its functioning is not part of the positive law, (ii) an interview of the asylum seeker by CONARE is required, and (iii) in CONARE's plenary meeting it has only one vote.

In addition, the organizations of civil society that are engaged in refugee protection have no institutional common basis to unite them. When they speak up, they mainly do so separately. So, the current initiative to create a national council on refugees (the Brazilian Refugee Council) that unites the legitimized organizations that work with refugee issues assumes a huge relevance. Once established, the Brazilian Refugee Council will have the ability to enhance the position of civil society in CONARE and in the Brazilian government as a whole, and to aid in demanding that the rights of refugees and asylum seekers be fulfilled, that this population's interests be represented in general public policies, and that specific public policies be created respecting the plurality of human beings and the rights of foreign people in conformity with article 5 of the Brazilian Federal Constitution of 1988.

The lack of legal provision on the cooperation of government and civil society ends up generating double efforts and a logistic cost to the asylum seekers related to completion of all the required forms. This cost does not seem to represent a problem to someone with a regular economic condition; however, to an asylum seeker struggling to integrate, it can be insurmountable, notwithstanding the fact that RSD should be free of all costs (direct and indirect).

To sum up, the positive aspects of RSD in Brazil, from the internal point of view, are: participation of civil society (the most important and singular aspect of RSD in Brazil); decentralization; freedom from cost; and democratization of the political dialogue and future endeavours. The negative aspects are: non-legal provision of the exercise of the participation of civil society and the limited role reserved to it; inequality of RSD depending on the place of solicitation (presence or lack of civil society assistance); logistic cost; double efforts; confusion of responsible actors in the perspective of the asylum seeker who does not know the system and therefore has difficulty in grasping the tripartite enterprise; non-legal provision of mass influx procedure or of an emergency approach; non-legal provision of financial assistance; and co-optation of civil society and individual role played by the civil society actors.

Consistency of RSD in Brazil with International Refugee Law

Because Brazil is a state-member of the Refugee Convention and its 1967 Protocol, the analysis of the conformity of RSD with international standards will be based on Part Two of the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* directed to the procedures for the determination of refugee status.[33]

In view of the situation of different procedures established by states and of the unlikelihood that all states bound by the Refugee Convention and the 1967 Protocol would establish identical procedures, ExCom, at its twenty-eighth session in October 1977, recommended that procedures should satisfy certain basic requirements.

These basic requirements, which reflect the special vulnerability of the asylum seeker and which would ensure that the applicant is provided with certain essential guarantees, are the following:

a. The competent official (*e.g.*, immigration officer or border police officer) to whom the applicant addresses himself or herself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. The official should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority;

b. The applicant should receive the necessary guidance as to the procedure to be followed.

c. There should be a clearly identified authority, wherever possible a single central authority, with responsibility for examining requests for refugee status and taking a decision in the first instance.

d. The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his or her case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.

e. If the applicant is recognized as a refugee, he or she should be informed accordingly and issued with documentation certifying his or her refugee status;

f. If the applicant is not recognized, he or she should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.

g. The applicant should be permitted to remain in the country pending a decision on his or her initial request by the competent authority referred to above, unless it has been established by that authority that his or her request is clearly abusive. He

© Liliana Lyra Jubilut and Silvia Menicucci de Oliveira Selmi Apolinàrio, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

> or she should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.

As considered before, Brazil has developed a procedure specifically on RSD that conforms to the standards listed above. However, some observations must be made.

Concerning the qualification of the personnel engaged in these procedures there is still a long way to go in order to achieve the ideal level of necessary knowledge and understanding of an applicant's particular difficulties and needs. The National Refugee Act and CONARE's resolutions do not require expert professionals to deal with refugee issues. There are no interpreters who have been through special training. In most cases, a refugee who already has a satisfactory knowledge of Portuguese assists with translation during the interview phase of the RSD procedure when there is difficulty related to language understanding.

Furthermore, there is a difference of reception procedure if one considers the presence of refugee centres in the locality in which the applicant requests refugee status. Usually the asylum seeker will find facilities (Portuguese course, medical treatment, and others) and assistance in Cáritas Arquidiocesana do Rio de Janeiro and Cáritas Arquidiocesana de São Paulo, which leads to the conclusion that the asylum seeker who is located in a city in which there is no Cáritas representation will be in a more vulnerable situation than applicants who can rely on Cáritas, including guidance through all the steps of the RSD procedure and the possibility of being interviewed by a lawyer provided by this organization.

Despite the existence of flaws, one can see an effort on the part of UNHCR and of CONARE to develop capacity regarding refugee issues in the Federal Police Department, which, as mentioned, has an important role in RSD in Brazil. An example of this effort was the creation of seminars for Federal Police members on procedures and criteria on RSD held in eight different cities (São Paulo, Santos, Guarulhos, Curitiba, Foz do Iguaçu, Paranaguá, Manaus and Tabatinga) during 2007.[34] There are plans to turn this initiative into a continuous effort, always focusing on cities that are ports of entry to Brazil or that have a considerable number of refugees.

The ExCom also expressed the hope that all States Parties to the Refugee Convention and its 1967 Protocol would give favourable consideration to UNHCR participation in such procedures in appropriate form.[35] As mentioned before, UNHCR has an important role in the Brazilian RSD procedure; nonetheless it does not have the right to vote during the CONARE plenary sessions.

RSD in Brazil and the most protective rules

The National Refugee Act is in general a modern legal instrument. However, as expected of a consensus achieved in a post-dictatorship period and with a foreign status law from 1985 (before redemocratization), it is made up of general provisions. When the "law operator" has to apply the rule to the concrete case, there are many difficulties due to the lack of provisions for special cases or to reluctance to apply human rights rules to cases of asylum seekers and refugees, when they are children, elderly, sick, victims of torture, etc.

In light of this, if one considers the most protective rules, RSD in Brazil has a long way to go, in order to be satisfactory. The following comments illustrate some aspects of this.

First, respect for due process is far from ideal: (i) experience shows that it is extremely difficult to change a decision of CONARE, (ii) there is no procedure of obligatory revision of the CONARE decisions, and (iii) the guarantee of the contradictory is also minimized. On the other hand, CONARE has in the past permitted lawyers to attend its plenary meetings, but this is not the regular situation. There is a common understanding in this body that RSD is not an adversarial procedure and, in consequence, there is no need of a lawyer. This situation contributes to the non-technical character of the CONARE decisions and also to a lack of motivation of the decision, which as seen has not so far being regarded by the Judiciary as a reason for ruling against CONARE's decision.[36]

Secondly, regarding complementary protection, one can see that RSD in Brazil is broader than the universal rules, as the National Refugee Act provides for the recognition of refugee status based on gross violations of human rights. This provision enables RSD to focus not on individual fear of persecution but rather on the situation in the country of origin, and, therefore, enables people coming from a situation of grave and generalized violation of human rights (as for instance from a situation of internal conflict) to be recognized as refugees.

Furthermore, although Brazil does not have a mechanism of temporary protection, CONARE's Normative Resolution13 of 23 March 2007 provides for the reference of special situations by CONARE to the National Council on Immigration. According to this resolution, the requests for refugee status that can not fulfill the requirements of eligibility under Law 9.474/1997 shall be analyzed by the National Council on Immigration in order to grant a permanent status based on humanitarian conditions.

In this sense one can see that complementary protection is advancing in Brazil, and may make up, in some cases, for the feeble due process guarantees that are in place.

Concerning the protection of vulnerable groups, there are some cases that give rise to special problems in establish-

© Liliana Lyra Jubilut and Silvia Menicucci de Oliveira Selmi Apolinàrio, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

ing the facts during the RSD procedure, and because of this, have to count on special legal provisions in order to prevent discrimination and different treatment of similar situations. These are mentally disturbed persons and unaccompanied minors.

In determining refugee status the subjective element of fear and the objective element of it being well-founded need to be established. Mental or emotional disturbances impede a normal examination of the case. A mentally disturbed person may, however, be a refugee, and while that person's claim therefore cannot be disregarded, it should call for different techniques of examination, especially a formal statement of medical advice. Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case. If there is an attested case of legal incapacity (according to the Brazilian Civil Code), a legal representative should be nominated for this person. This has not been the case of RSD in Brazil, where there is no special provision on the rules of a case involving a person with a mental illness. In some cases, when Cáritas is enrolled in the procedure, the asylum seeker can count on special assistance (as for instance medical treatment before the interviews). However, the extent of such assistance is not nearly enough, a situation which is far from desirable.

There is no special provision in the legally binding international refugee instruments regarding the refugee status of persons under age. The same definition of a refugee applies to all individuals, regardless of their age. When it is necessary to determine the refugee status of a minor, problems may arise due to the difficulty of applying the criteria of "well-founded fear" in the case. If a minor is accompanied by one (or both) of his or her parents, or by another family member on whom the minor is dependent and who requests refugee status, the minor's own refugee status will be determined according to the principle of family unity. However, there is still the problem of evidence of paternity considering the need of child protection against trafficking.

The handbook of the UNHCR[37] says that the question of whether an unaccompanied minor may qualify for refugee status must be determined in the first instance according to the degree of the minor's mental development and maturity. However, in Brazil, the Civil Code and judicial procedures and rules demand that a legal representative be nominated in order to preserve the rights of the unaccompanied minor (under eighteen years old) and to act as a guardian. The international standards stipulate that, in the absence of parents or of a legally appointed guardian, it is for the authorities to ensure that the interests of a minor applicant for refugee status are fully safeguarded.

The problem is that the judicial procedure required to nominate a guardian demands a lot of time, with the result that the minor suffers the insecurity of being in a non-regular status in Brazil, since the minor can not appear alone before the Department of Federal Police in order to make the initial declaration (Term of Declaration). A special procedure shall be determined by law so the best interests of the minor are preserved.

In relation to minors, there are also some difficulties concerning the lack of a birth certificate, which is required by some authorities in order to provide access to education and health treatment services, and also concerning the risk of stateless condition. In fact, stateless cases are not considered in all their aspects and application of the relevant international agreements.

RSD in Brazil—lessons learned?

From the above, it seems that the most relevant lesson that RSD in Brazil can teach is the importance of having a strong presence of civil society in the proceedings, as this may balance the state's concern with national security as well as help to improve integral protection. However, civil society contributes to the creation of protection links that are too personally based. It is necessary that achievements related to health, education, shelter, etc. assume a legal character in order to provide legal security and a permanent status to the facilities and services.

Civil society is an important actor in defending inclusion of asylum seekers and refugees in general public policies and programs, and also in attributing character of positive law to some of the assistance practices directed to guarantee the rights of children, elders, victims of torture and sexual violence, traumatized persons, etc. Once legal provisions are in place, it is easier for government actors and civil society to prove their violation, hence strengthening the protection of asylum seekers and refugees.

A second lesson that should be highlighted is the importance of having a technical body with knowledge of international law in general, and international refugee law in particular, in charge of RSD. However, there should also be some measure of judicial review in order to rectify mistakes and improve refugee protection.

Also in relation to RSD procedure it seems important to have the most transparent system possible and to have the most protective guarantees in place, regularized by law so that they can not be withdrawn due to political shifts.

Lastly, one cannot highlight enough the importance of training all the actors involved in RSD procedures, especially those in charge of the first approach, in general the staff of the Federal Police Department (Immigration Branch of the Police), and also the staff of NGOs and of the judiciary. Only

© Liliana Lyra Jubilut and Silvia Menicucci de Oliveira Selmi Apolinàrio, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

with training will there be awareness of the rights and duties of refugees and asylum seekers, as well as of the special characteristics of this population and the need to have special procedures in place so that they can have their rights really respected.

Conclusion

Although Brazil has a long way to go in RSD, the basis for dialogue is already in place. It must be consolidated in order to allow for the tripartite structure involving the UNHCR, the Brazilian government, and civil society to be successful in guaranteeing integral protection to refugees and asylum seekers.

The tripartite structure is a model to inspire RSD in other countries given that it permits dialogue and analysis of the problems from different perspectives and the integration of various social protection nets. But it is not enough in itself. These social arrangements of refugees' and asylum seekers' protection must be converted to fundamental rights, so they can be demanded if not respected or implemented, with each participant being receptive to new perspectives and preserving their functional original roles.

The role of civil society in RSD is paramount as it adds a "democratic aspect" to RSD in Brazil, and could stress the humanitarian concerns of the individual cases in order to minimize the national security and labour competitive arguments brought by some government sectors.

The government should keep in mind its international obligations, arising not only from international refugee law but from international law in general, especially humanitarian assistance obligations that are required not only by law but also by any standard of legitimacy.

Lastly, UNHCR has to live up to its role as "guardian" of international refugee law, remembering that the law is only there to protect the people it was designed to assist, so that political and/or economic considerations should be kept to a minimum in light of the humanitarian plea of refugees.

The design of the tripartite RSD is definitely a "best practice" in terms of RSD and refugee protection, but its results must go from the local/subjective to the national/objective (positive law) level, and then become a model to be *mutatis mutandis* duplicated in other countries.

Notes

1. Liliana L. Jubilut, *O Direito Internacional dos Refugiados e sua aplicação no ordenamento jurídico brasileiro* [International refugee law and its application in the Brazilian legal order] (São Paulo: UNHCR; Método, 2007).
2. José Henrique Fischel de Andrade, "O Brasil e a Organização Internacional para Refugiados (1946–1952)" [Brazil and the international organization for refugees] (2005) 48 Revista Brasileira de Política Internacional [Brazilian Journal of International Politics] 60; José Henrique Fischel de Andrade, *Direito Internacional dos Refugiados: evolução histórica (1921–1952)* [International refugee law: Historical evolution 1921–1952] (Rio de Janeiro: Renovar, 1996).
3. The Refugee Convention was signed by Brazil on 28 July 1951, approved by the Legislature through Decree 11, 7 July 1960, and promulgated by the Executive through Decree 50.215, 28 January 1961. The 1967 Protocol was signed on 31 January 1967, approved by the Legislature through Decree 93, 30 November 1971, and promulgated by the Executive through Decree 70.946, 7 August 1972. The geographic limitation and reserves were only suspended by Decree 98.602, 20 December 1989, and Decree 99.757, 4 December 1990, both issued by the Executive.
4. Law 9.474, 22 July 1997, defines mechanisms to implement the Refugee Convention of 1951 and establishes other provisions.
5. José Henrique Fischel de Andrade and Adriana Marcolini, "A Política Brasileira de Proteção e de Reassentamento de Refugiados—breves comentários sobre suas principais características" [The Brazilian policy of refugee protection and resettlement—Brief comentaries on their main characteristics] (2002) 45 Revista Brasileira de Política Internacional [Brazilian Journal of International Politics] 168.
6. *Cartagena Declaration on Refugees,* 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190–93 (1984–85).
7. As stated by Guy S. Goodwin-Gill and Jane McAdam while explaining the definition of a refugee: "Originally, the definition, […] limited the application of the Convention to the refugee who acquired such status 'as a result of event occurring before 1 January 1951'. An optional geographic limitation also permitted states, on ratification, to limit their obligations to refugees resulting from 'events occurring in Europe' prior to the critical date"; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law,* 3rd ed. (Oxford: Oxford University Press, 2007), 36.
8. Liliana Lyra Jubilut, "Refugee Law and Protection in Brazil: A Model in South America?" (2006) 19 Journal of Refugee Studies at 26.
9. Brazil received mainly refugees from: Afghanistan who were living in refugee camps in Iran and India; from Colombia, who were under the protection of Ecuador and Costa Rica; and from Palestine, who were living in refugee camps in Jordan. The resettlement initiative has also extended the protection net of civil society in Brazil. Nowadays there are three NGOs that are UNHCR resettlement partners in Brazil: Associação Antônio Vieira (in Porto Alegre, Rio Grande do Sul), Cáritas Brasileira Regional São Paulo (in the state of São Paulo), and Centro de Direitos Humanos e Memória Popular (in Natal, Rio Grande do Norte). UNHCR has a sixth partner in Brazil, which

© Liliana Lyra Jubilut and Silvia Menicucci de Oliveira Selmi Apolinàrio, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

is Instituto de Migrações e Direitos Humanos (in Brasília, Distrito Federal).

10. "Art. 1—An individual shall be recognized as a refugee if: I—due to well founded fears of persecution for reasons of race, religion, nationality, social group or political opinions, he or she is out of his or her country of nationality and cannot or does not wish to rely on the protection of such country; II—having no nationality and being out of the country where he or she had previously retained permanent residence, cannot or does not wish to return to such country based on circumstances mentioned in item I above; III—due to severe and generalized violation of human rights, he or she is compelled to leave his or her country of nationality to seek in a different country."
11. The text of the National Refugee Act in English is cited based on the information available on the UNHRC Refworld web site, online: <http://www.unhcr.org/cgibin/texis/vtx/refworld/rwmain?page=country&docid=3f4dfb134&skip=&category=LEGAL&coi=BRA&rid=4562d94e2>.
12. CONARE Normative Resolution 1, 27 October 1998, establishes the standard Declaration Term to be completed by the Federal Police Department on the occasion of the request for refugee status. Furthermore, it states that this document shall be sent to the General Coordination of CONARE, with a copy to the Caritas Arquidiocesana, aiming the fulfillment of the questionnaire in order to make possible the analysis of the refugee solicitation.
13. CONARE Normative Resolution 11, 29 April 2005, provides for the publication of the notification established by article 29 of Law 9.474, 22 July 1997 (deadline for certain procedures and for attending to official notifications). This resolution revoked CONARE Normative Resolution 7, 6 August 2002. If CONARE has already issued a negative decision and the asylum seeker can not be found in order to receive the notification, the decision shall be published by the official press for the purpose of establishing the deadline for appeal.
14. CONARE Normative Resolution 2, 27 October 1998, establishes the standard questionnaire for refugee status request, which shall be completed by the asylum seeker at the headquarter of the Caritas Arquidiocesana and sent to the General Coordination of CONARE in order to continue with the procedures. In a location where there is no Caritas representation, the completion of the questionnaire shall be arranged by the Federal Police Department and the questionnaire sent to CONARE along with the Term of Declaration. Although there is no provision for the language in which the questionnaire is to be available, it is available in Portuguese, English, French, and Spanish. An asylum seeker who does not speak any of these languages can be aided by a translator, who is not part of the regular staff of the institutions enrolled in the process.
15. CONARE Normative Resolution 9, 6 August 2002, establishes the place for completion of the questionnaire for requesting refugee status in the localities in which there is no representation of Caritas Arquidiocesana.
16. CONARE Normative Resolution 6, 26 May 1999, provides for the concession of a protocol to asylum seeker. Once the asylum seeker has the Provisional Protocol, he or she is entitled to have a labour license and a document relevant for financial purposes called the Register of Natural Persons (Cadastro de Pessoas Físicas, or CPF); so that he or she can begin to integrate into Brazilian society more fully.
17. CONARE Normative Resolution 8, 6 August 2002, provides for notification of the request of the refugee status. If the asylum seeker can not be found after six months from the date of the CONARE decision to receive the notification, the negative decision of the refugee status request shall be published in the official press.
18. The Statute of Foreigner (Law 6.815, 19 August 1980, establishes the legal situation of foreigner in Brazil, and creates the National Council of Immigration). Decree 86.815, 10 December 1981, rules the Law 6.815/80, which establishes the legal situation of foreigner in Brazil and creates the National Council of Immigration and stipulates other provisions.
19. CONARE Normative Resolution 3, 27 October 1998, establishes the standard form Term of Responsibility which has to be signed by the refugee before his or her register into the Federal Police Department. The competent authority shall provide an interpreter if necessary so the refugee has knowledge of the content of the Term.
20. CONARE Normative Resolution 5, 11 March 1999, provides for authorization to travel to abroad. CONARE Normative Resolution 12, 29 April 2005, provides for authorization for a refugee to travel abroad; for issuing of a Brazilian passport to a refugee foreigner, when necessary; and for processing of the loss of refugee status because of leaving Brazilian territory without authorization.
21. CONARE Normative Resolution 4, 11 March 1999, establishes the extension of refugee status through the application of the family unit principle.
22. For the purpose of the resolution, "dependants" must be understood as: the spouse; the single son/daughter, under twenty-one years old, including those adopted, or older than twenty-one years old when they can not provide for themselves; ascendant; and sisters/brothers, grandsons/granddaughters, great-grandson/great-granddaughter, nephew/niece, only if they are orphans, single, and under twenty-one years old, or of any age when they can not provide for themselves. The situation of economic dependency of a person older than twenty-one years who cannot provide for her/himself has to be related to physical and mental health and must be declared by a doctor. The minor children whose parents are detained or have disappeared must be considered in the same situation as orphans.
23. CONARE Normative Resolution 10, 22 September 2003, provides for the situation of the refugee who achieves permanent status.

© Liliana Lyra Jubilut and Silvia Menicucci de Oliveira Selmi Apolinàrio, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

24. *Supra* note 31.
25. Only when recognized they will have to pay the required amount in order to have a refugee identification document issued. Currently a judicial provisional measure suspends this payment if the foreigner states her or his economic condition.
26. According to CONARE, during 2007 Brazil received fewer than 500 requests for refugee status, and as of June 2008, Brazil hosted 3,513 refugees.
27. For details, see the position of Cáritas Arquidiocesana de São Paulo on asylum seekers from Lebanon: Cáritas Arquidiocesana de São Paulo, Documento entregue na Reunião do CONARE de 23.03.2007 [Legal position presented at CONARE'S meeting of March 23, 2007], Posição da Cáritas Arquidiocesana de São Paulo sobre Solicitantes e Refúgio Libaneses [Cáritas Arquidiocesana de São Paulo position on asylum seekers from Lebanon].
28. For instance the decision of the Superior Court of Justice (Superior Tribunal de Justiça) in: Agravo Regimental no Agravo Regimental do Mandado de Segurança 12.212/DF, cited in Liliana L. Jubilut, *O Direito Internacional dos Refugiados e sua aplicação no ordenamento jurídico brasileiro* [International refugee law and its application in the Brazilian legal order], *supra* note 1 at 103. (*Agravo Regimental* is a special appeal according to specific court regulations only available for Superior Courts. *Mandado de Segurança* is the writ of security or the writ of mandamus.)
29. Federal Constitution 1988, article 5, XXXV: "the law shall not exclude from review by the Judiciary any violation of or threat to a right."
30. For instance the decisions of the Superior Court of Justice in: Agravo Regimental do Mandado de Segurança 12212/DF; *Habeas corpus* 36033/DF; and *Habeas corpus* 32622/DF, cited by Liliana L. Jubilut, *O Direito Internacional dos Refugiados e sua aplicação no ordenamento jurídico brasileiro,* [International refugee law and its application in the Brazilian legal order], *supra* note 1 at 103.
31. Liliana Lyra Jubilut and Silvia Menicucci Apolinarion (organizers). I Course on International Refugee Law, realized in December 2007 at the Centre of Human Rights, Department of Law, PUC-Rio.
32. *Supra* note 7 at 33.
33. HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979. The UNHCR also developed a handbook on procedural standards for refugee status determination under UNHCR's mandate, in which it considers general issues, reception and registration in RSD operations, adjudication of refugee claims, processing claims based on the right to family unity, notification of RSD decisions, appeal of negative RSD decisions, UNHCR refugee certificate, procedures for file closure / re-opening, procedures for cancellation of refugee status, and procedures for cessation of refugee status. See "Procedural Standards for Refugee Status Determination under UNHCR's Mandate," <http://www.unhcr.org/publ/PUBL/4316f0c02.html>.
34. In the cities of São Paulo, Santos, and Guarulhos the seminar was offered with the support and participation of Cáritas Arquidiocesana de São Paulo.
35. Such participation is based on article 35 of the Refugee Convention and the corresponding article 11 of the 1967 Protocol, which provide for co-operation by the Contracting States with the High Commissioner's Office.
36. The decision of the Superior Court of Justice in: Agravo Regimental no Agravo Regimental do Mandado de Segurança 12.212/DF cited in Liliana L. Jubilut, *O Direito Internacional dos Refugiados e sua aplicação no ordenamento jurídico brasileiro,* [International refugee law and its application in the Brazilian legal order], *supra* note 1 at 103.
37. Handbook on Procedural Standards for Refugee Status Determination under UNHCR's Mandate.

Liliana Lyra Jubilut holds a Ph,D. in international law from Universidade de S. Paulo, and an LL.M. in international legal studies from NYU School of Law, and is Professor of International Law and Human Rights at Faculdade de Direito do Sul de Minas. Silvia Menicucci de Oliveira Selmi Apolinário holds a Ph.D. in international law from Universidade de S. Paulo, and is Professor of International Law and Human Rights at PUC-Rio (Rio de Janeiro) and International Humanitarian Law at UniCEUB (Brasília). Both authors were lawyers at the refugee centres in S. Paulo and Rio de Janeiro and were directly involved in RSD in Brazil.

© Liliana Lyra Jubilut and Silvia Menicucci de Oliveira Selmi Apolinàrio, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

A Foot in the Door: Access to Asylum in South Africa

Darshan Vigneswaran

Abstract

Asylum seekers in South Africa experience extreme difficulties lodging their claims at the Department of Home Affairs. This paper utilizes new survey data to measure the extent of the Department's failures to provide access to the status determination process. The principal finding is that South African officials often go out of their way to prevent asylum seekers from entering the system. This provides support for the argument the Department is beholden to an institutional culture of immigration protectionism. This assessment differs from conventional analyses of poor African performance of status determination which emphasize issues of corruption and institutional capacity.

Abstract

Les demandeurs d'asile en Afrique du Sud rencontrent des difficultés extrêmes pour présenter leurs demandes au Département des affaires intérieures. Cet article utilise des données d'un nouveau sondage pour mesurer l'étendue des manquements du Département vis-à-vis de son devoir de rendre accessible le processus de détermination du statut. La conclusion principale est que les autorités Sud africaines s'évertuent souvent pour empêcher les demandeurs d'asile d'accéder au système. Cela semble soutenir l'allégation que le Département est prisonnier d'une culture institutionnelle de protectionnisme en matière d'immigration. Cette évaluation se démarque des analyses conventionnelles de la mauvaise performance africaine en matière de détermination du statut qui, elles, soulignent des problèmes de corruption et de manque de capacité institutionnelle.

You get stepped on. You are tired, you are bored and thirsty. You feel like you are dead and not human anymore.[1]

Introduction

Responding to a perceived need to prevent unwanted migration since the 1980s, many developed countries have instituted measures to limit access to asylum. While status determination processes and procedures in Africa have usually departed significantly from "best (and worst) practices" in the Global North, countries on the continent have taken a similar turn towards more limited access.[2] However, the provisions and procedures utilized by African states towards this end have differed from European, Asian, and North American counterparts. The main differences in developments on the continent need to be understood within the different body of international instruments which govern refugee protection, in particular the 1969 Organization of African Unity (OAU) Convention governing the Specific Aspects of the Refugee Problem in Africa (the OAU Convention). The Convention envisages a framework of protection that takes into account the unique character of refugee flows in the continent and the unique capabilities of African states, providing specifically for group based or *prima facie* determination systems.[3] Despite these differences, status determination in Africa is not entirely different in character from counterparts elsewhere. While group based and UNHCR implemented determination systems are far more prominent across the region, status determination models in Africa often share important features with practices outside the continent. While it is unlikely that jurisprudence in non-African countries will ever afford much attention to African courts' interpretations of key provisions in the UN Refugee Convention, status determination issues in African countries will almost certainly impact upon developments and debates elsewhere, given the continent's disproportionate share of the world's refugee population.

© Darshan Vigneswaran, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

It is in this respect that the South African case is particularly interesting. South Africa is currently attempting to meet a relatively ambitious and recent set of refugee commitments. The transition to democratic rule and relative stability in the 1990s saw the end of an era in which the Republic was both an international pariah and prominent refugee sending country. Over the last two decades, South Africa has acceded to international refugee conventions and passed its own Refugees Act (no. 130 of 1998). In doing so, the post-Apartheid government eschewed some of the hallmarks of African asylum policies (*e.g.,* camps, group determination, delegation of responsibility to UNHCR)[4] relatively early on, opting for a self-settlement model of protection accompanied by individualized status determination procedures.[5] The process of crafting the laws to define how this decision-making process would be administered was highly transparent and drew heavily on the expertise of, and inputs from, civil society and international non-governmental organizations. The result was a reception and status determination system containing strong procedural safeguards for applicants and a variety of institutional checks and balances on the decision-making process. These protections are buttressed by South Africa's progressive constitution and policed by a robust community of civil society monitors and legal service providers that possess considerable interest in migration issues, funding for projects around status determination and protection, and the capacity to demand compliance with the country's new refugee laws.[6] In these respects, and on paper, South Africa stands out as a Global North-style status determination system, albeit located in the Global South.

Given the considerable promise of this nascent experiment in status determination, the current state of disarray in South Africa's refugee reception system is particularly concerning. South Africa possesses a large and growing backlog of undetermined asylum claims.[7] As is alluded to in the opening quotation, and will be documented in this piece, asylum seekers in South Africa experience extreme difficulties and trauma in the simple act of attempting to enter a refugee reception office and lodge their claim. Given the significant differences between these conditions and conditions at similar offices in Europe and North America it is worth beginning with a thick description drawn from Lawyers for Human Rights (LHR) monitoring at the Gauteng offices:

> Rarely does an asylum seeker gain entry to a refugee reception office on their first attempt. The office accepts a limited number of applications per day. Entitlement to one of these positions is controlled by a hazy coalition of security guards, migrant agents, interpreters and officials who solicit bribes and favours in return for favourable treatment and employ oblique force against those who would challenge the integrity of their parallel system. Those who do not have the capacity to pay have a choice; well, a choice that is not really a choice. They can return at a later date and risk being caught by the police without documentation, or they can sleep overnight outside the office and retain their place in the official queue. On the nights when LHR did headcounts they discovered between 80 and 300 people sleeping outside the office. At night armed criminals visit the site. Incidents of theft are common. There have been several reports of rape. There is no shelter in the vicinity of the office and people often endure rain and very cold conditions while waiting outside. Women sleep with babies by their side. On some occasions the police have visited during the night and arrested asylum seekers or extorted them for bribes. Fights about places in the queue are common at night, sometimes degenerating into the throwing of bricks and stones and leading to several cases of hospitalisation. Efforts to normalise conditions of shelter outside the office have been resisted by officials. On at least one occasion the City of Tshwane arrived in the morning to clear all temporary shelters, bedding, and belongings of people gathered outside the office.
>
> In the morning, people waiting outside begin to form themselves into queues. Agents, security guards and interpreters are heavily involved, making offers and explaining how people will be received on that day. No-one knows at this point how they will be received, who will be chosen and how many will gain entry. Sometimes it is elderly women, sometimes Malawians only, sometimes 40, sometimes 100. The police will arrive and on occasions make arrests. Sometimes people seek to flee the police and there have been at least two deaths caused by people attempting to escape, only to run headlong into the morning traffic. There will also be beatings; by the police, by security guards; on occasions by street vendors who join in. On one occasion at Rosettenville office, asylum seekers have been sprayed with water guns. On another occasion they were simply hosed down by a security guard. Almost everyone is in a heightened state of anxiety and there is invariably a great deal of pushing, shoving and then more fights, particularly when the gangs controlling entry pick people out of the queue or place their members at a privileged point in line. The new asylum seekers are soon joined by a steady stream of people waiting for renewals, who form something more closely resembling a queue. Since these people are only waiting for a stamp and not to fill in forms, they will usually all be served, though when they will be served varies, sometimes waiting for 2 hours, sometimes for 24 hours. All this occurs in a venue that reeks of urine and sweats with human anticipation and fear. All of this occurs before anyone has seen a Home Affairs official.

It is tempting to explain these problems in the reception system purely in terms of a mismatch between legal framework and geographic context. According to this line

© Darshan Vigneswaran, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

of argument, individualized status determination models and Refugee Convention protection systems are not suited to Africa, where countries ordinarily experience conditions of mass influx from neighbouring countries and rarely possess the adequate bureaucratic resources or legal expertise to process these populations. This line of thinking is reflected in Toby Mendel's work on Tanzania, which ponders whether "it is time to recognise that the 1951 Convention is simply not the right instrument for poor countries hosting large numbers of refugees."[8] Various facets of refugee reception in South Africa support a similar assessment of conditions there. Over the past six years the country has consistently received over 30,000 applications for asylum per year. Given that these figures are produced by offices which set fixed quotas on the number of asylum claims received per day, the total number of asylum seekers entering the country is almost certainly higher. As the political and economic climate in Zimbabwe has deteriorated, hundreds of thousands of people from that country have been displaced across the border into South Africa, and at the time of writing it is highly plausible to suggest that more will come. Although the African National Congress (ANC) has passed a wide range of very progressive laws on a variety of human rights issues since taking government, lack of capacity and budget has meant that it has failed to deliver on many of its promises. Furthermore, the spread of corruption through the bureaucracy has consistently handicapped the government's ability to deliver essential services to desperately poor populations in the townships, let alone non-nationals in need. Many critics, including the members of the ANC leadership, have identified problems of capacity and corruption in the refugee reception system.[9] The findings of this study support the idea that these characteristically "African" refugee governance problems have contributed to the dilapidated state of status determination processes in South Africa. Limited capacity and corruption do not, however, tell the whole story.

This study suggests that explaining conditions of access to status determination in South Africa requires us to pay more attention to the institutional culture of the government agency with primary responsibility for implementing refugee laws: the Department of Home Affairs (DHA). The study shows that, far from being simply the product of high demand or officials' predilection for with illicit remuneration, the barriers to asylum in South Africa are commonly produced by the individual effort of officials of the DHA, who act outside their legislative mandate to prevent asylum seekers gaining access to the reception system. While the methodology employed by this study does not allow for an explanation of precisely why officials behave in this manner, there is a range of evidence available from other archival, monitoring, and research work to generate a compelling hypothesis as to why this may be the case. This paper affords primary weight to the factor of institutional culture. Put simply, the DHA officials are embedded in an institution which sanctions its officials engaging in extralegal practices that prevent foreigners from entering and residing legally in South Africa. This culture, which has its roots in the DHA's Apartheid days, continues to inform how agents of the Department understand their responsibilities to new laws, and plays a considerable role in limiting access to asylum and undermining the integrity of the status determination system.

The paper will make this case in four parts. The first section outlines the principal characteristics of South Africa's refugee status determination system, paying specific attention to the key legislative responsibilities of the DHA. Section two introduces the methodology. Here, I explain why we chose to survey applicants at the reception offices. Section three analyzes the survey data and reveals the failure of the Department to meet its legal obligations. Section four attempts to explain these failures by looking at the institutional history of the DHA and some key events during the brief history of the administration of the Refugees Act. This section illustrates senior management's promotion of a culture of defensiveness towards asylum claims.

South Africa's Status Determination System

South Africa's refugee status determination system is the product of an ongoing and often *ad hoc* effort to respond to new refugee flows and commitments through an ongoing process of design, implementation, consultation, and reform. This process began with the signing of a series of agreements between 1991 and 1993 with the UNHCR and the government of Mozambique to create arrangements for the repatriation of Mozambican nationals who had fled the civil war in the late 1980s and early 1990s. After the transition to democratic rule in South Africa, the ANC government acceded to the OAU Convention (1995) and then to the United Nations Refugee Convention and its 1967 Protocol (1996). The Refugees Act was passed by Parliament in 1998 and, after some contestation of the terms of its implementing Regulations, came into effect in 2000. The details of the process leading to the passage of the Act have been dealt with elsewhere.[10] For our purposes, it is important to note the progressive political context in which the government established its commitments to a refugee agenda. Many members of the ruling ANC had been hosted by neighbouring countries as exiles of Apartheid South Africa and had strong personal reasons to support a reciprocal policy. In this context, the objective of Mozambican repatriation and regularization, which occupied much of the early refugee policy-making debates, represented an opportunity to assist a faithful ally, and not simply afford protection to foreign nationals in need. Following this,

© Darshan Vigneswaran, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

the late 1990s represented an extremely progressive policy-making phase in South Africa for human rights. Not only did South Africa translate its Freedom Charter, with promises of protections for all living within its borders, into a new set of constitutional rights; it also signed up to a raft of international legislation on human rights and passed a wide range of domestic implementing laws. This spirit was not only reflected in the types of laws South Africa introduced, but extended to the way it designed new policy frameworks. The Refugees Act was drafted and passed through a series of consultative processes in which civil society representatives and consultants were heavily involved and their inputs often translated directly into statutory provisions and policy outcomes.

The principal outcome of this progressive policy-making process was a set of refugee laws which included a variety of procedural safeguards for asylum seekers. The refugee reception system envisaged in the legislation consists of four parts: entry, application, hearing, and documentation. Put simply, it is expected that an individual will register their intention to apply on entry; proceed directly to an office in the interior to make an application; and subsequently sit an interview with an official who will determine the claim; and it also is expected that the applicant will receive documentation validating their right to be in the country until the entire process is complete. The legislation and its regulations outline provisions to promote access to each stage of the status determination process. The first issue is the Act's protection of applicants' right to freely enter South Africa to make their claim. The legislation sets out a geographically bifurcated process whereby (a) applicants register their intention to apply for asylum either at their point of entry or first encounter with a government official;[11] and (b) applicants formally lodge their applications in the country's interior.[12] These provisions envisage a process whereby the various police, army, and ordinary DHA officials who man the border and border posts assume collective responsibility to ensure that new arrivals' intentions to make asylum claims are acknowledged. The DHA officials alone are responsible for issuing temporary permits and directing applicants towards sites where they can formally lodge a claim. The Act made specific provision for the establishment of refugee reception offices (RROs) for this latter purpose[13] where officials must receive the asylum seeker's claim.[14]

The second set of provisions attempts to ensure that claims are made at the RROs in a free, transparent, and accurate manner. The DHA is responsible for ensuring that the RROs are staffed by trained Refugee Reception Officers[15] who are responsible for:

- verbally notifying the applicant of their rights and obligations;[16]
- assisting applicants to properly complete their forms;[17]
- providing competent interpretation, where practicable and necessary;[18] and
- ensuring the confidentiality of asylum applications and the information contained therein.[19]

The third set of provisions attempts to guarantee the fair adjudication of claims. Here, the legislation recognizes the limitations of an ordinary official's capacity to fairly apply refugee laws in all cases. The Refugees Act requires that the Refugee Reception Officer hand the application to a Refugee Status Determination Officer (RSDO). The RSDOs should be trained to determine status.[20] These officers should formally interview all applicants, allowing for the presence of a lawyer if so desired, and determine whether to grant or reject refugee status. If an application is rejected, the applicant should be afforded the opportunity to appeal the decision to a higher authority.[21] The DHA is obliged to establish a Standing Committee for Refugee Affairs and a Refugees Appeal Board to adjudicate on different categories of refusal.[22]

The fourth set of provisions provides for the temporary protection of applicants while their claims are decided. These provisions are crucial in South Africa, where the police zealously enforce immigration laws and documentation of an individual's status is crucial to prevent deportation and possible *refoulement*. When an applicant first registers their intention to apply for asylum they should be referred to a DHA official who should issue them with a "transit permit" verifying their right to be in the country for three weeks or until they formally lodge their claim.[23] As soon as an individual lodges a claim, the Refugee Reception Officer should issue them with a temporary asylum seeker's permit.[24] Refugee reception officers should also renew the asylum seeker's permit at regular intervals until a decision has been made and the applicant has exhausted all mechanisms of appeal.

To summarize, South African legislation requires the DHA to administer status determination in accordance with four linked provisions:

- settlement-oriented reception of claims to facilitate access;
- assistance by RROs to ensure free, transparent, and accurate completion of forms;
- interviews and appeal mechanisms to ensure fair adjudication of claims; and
- documentation to provide protection against *refoulement*.

Methodology

The DHA's failure to fulfill these and other procedural obligations has been rigorously documented over the years by a number of scholarly publications and NGO reports.[25]

© Darshan Vigneswaran, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

However, these reports have been primarily based upon qualitative data, including (a) interviews with asylum seekers, policymakers, and service providers; (b) observations of practices at the RROs and at the border; and (c) reports and statements by public officials and public bodies such as the Refugee Directorate, the Standing Committee for Refugee Affairs, and the Parliamentary Portfolio Committee for Home Affairs. This data has been very useful in developing assessments of key problem areas in departmental performance. It has also been helped analysts to generate plausible hypotheses as to why the DHA has been unable to fulfill these obligations. However, this data can not help us identify the seriousness of the various implementation failures identified or measure the power of the various competing explanations of access problems.

In order to account for these shortfalls, gauge to what extent the DHA was fulfilling each of these four of these procedural requirements, and discriminate between competing plausible explanations of the shortfalls, we have used a survey of asylum-seeker experiences. This survey began with an exhaustive study of governmental and non-governmental monitoring of the RROs to identify a series of performance benchmarks for the DHA in relation to reception, assistance, interviewing, and documentation. We used these benchmarks to design an instrument that would test whether the recollected experiences of asylum applicants met the minimum standards set out in the relevant legislation. The majority of the questions were closed-ended, though in order to develop a clearer idea about (a) illegal and conflict-related activities and (b) applicants' perceptions and personal understanding of the asylum-seeker process, we also asked a small number of open-ended questions. The instrument was refined through:

- a series of workshops with lawyers and other civil society partners in Johannesburg, Durban, and Cape Town to ensure national relevance and comparability; and
- piloting at the Pretoria and Cape Town offices.

The instrument was then translated into French, Shona, and Kiswahili and back-translated to English to check translation accuracy.

Given the often lengthy periods that pass between first applying for asylum and first sitting an interview, and the potential for loss of accurate recall, it was decided to split the survey into two parts and target two separate populations. The target population for the first survey was all applicants who had submitted an application for asylum but had yet to sit a formal interview with an RSDO (hereafter: pre-RSDO). The target population for the second survey was all applicants who had sat an interview with an RSDO (hereafter: post-RSDO). Given the difficulties in generating household and telephonic surveys of asylum seekers in South Africa,[26] and in securing interviews with applicants leaving the RRO, it was decided to sample applicants waiting to renew their asylum-seeker permits. A sample size of 400 applicants per city was chosen (200 pre-RSDO, 200 post-RSDO). These subjects were systematically selected over a one-month period in November and December 2007. Due to language difficulties and subjects' security concerns, Somalis, Ethiopians, Bangladeshis, and Pakistanis were under-represented. Given current trends in the flows of asylum seekers into the country, it is relatively unsurprising that most respondents were male and either of Zimbabwean or Congolese nationality. The current paper reviews findings from the survey conducted at the Gauteng-based offices.

Evaluating DHA Performance

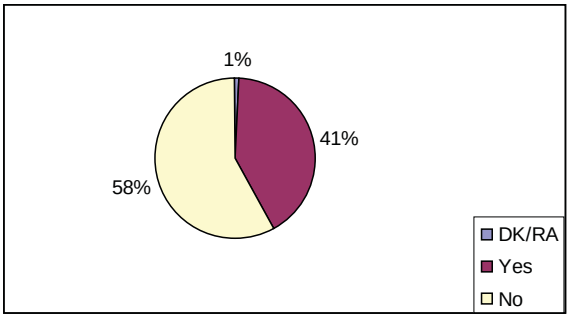
Supporting the findings of previous monitoring and analysis, the survey reveals a refugee-reception system that is not functioning as intended by the legislation. In part this is due to problems of capacity. The Refugee Affairs Directorate itself acknowledges its inability to adequately process the number of claims received on an annual basis. This reflects a consensus position of all stakeholders, including the DHA Minister, senior-level DHA officials, the Parliamentary Portfolio Committee, judges adjudicating on refugee and asylum matters, and refugee advocates. More important are the specific findings regarding the obstructive institutional culture behind these problems. Whereas previous monitoring had suggested rampant corruption and/or laxity of officials in enforcing laws as potential problems, the current study suggests that officials generally err on the side of overzealousness in the administration of status determination procedures, unlawfully denying access to the system and negatively prejudicing applicants' claims. The following discussion will support this claim through a discussion of the four legislative provisions outlined above.

Free-settlement Oriented Access

The overzealous enforcement of immigration laws means that asylum seekers are rarely able to register their intention to claim asylum. The prototypical applicant at the Pretoria office enters the country without any identifying documentation (53% n = 226), informally (58% n = 223), across a Zimbabwean border (78% n = 227). Hence, even though the Refugees Act specifically caters for informal entrants, this means that applicants who do not enter at a border post will rarely be able to register their intention to claim asylum. The security officials (police and army) they are most likely to first encounter in the Limpopo border region have a limited working knowledge of South African asylum laws and regularly deport Zimbabwean

© Darshan Vigneswaran, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Figure 1: Entered RSA through an official border post



nationals (the majority of entrants) without calling upon the DHA to conduct status determination.

Asylum seekers who enter South Africa through a border post are better off than informal entrants because they can register a claim for asylum as soon as they meet a DHA official. However, DHA officials commonly deny applicants the right to register their intention to apply. The fact that one-fifth of applicants who were eventually able to obtain their asylum papers noted that they were not given a permit when they informed officials at the border of their intention to apply (20% n = 30) suggests that a much larger proportion of those who have tried never reached the office. It is also likely that many potential applicants do not think it is worth trying to register their claim at the border. Given the unstated policy of denying Zimbabwean migrants the right to asylum at the Beitbridge border post, only one-fifth registered a claim upon entry (19% n = 79). In addition to individual officials pro-actively creating barriers to entry, DHA officials do little to ensure that potential applicants are notified of their rights to register their claims. One in ten (10% n = 230) applicants found out that they needed to make their claim for asylum at an RRO. The majority were told by friends or family (72% n = 230).

Given these factors, the majority (90% n = 232) of applicants arrive at the reception office to formally lodge their claim without having previously registered their intention to do so. At this stage they encounter further barriers to access. The main problems are the quotas each office has instituted in order to limit the number of applications per day.[27] These quotas, which directly contravene the statutory obligation to receive claims, result in extremely long queues. Our findings show that an average applicant will have to return to the RRO approximately three times, and wait approximately twenty-two days between first arriving at the office and first entering the office. Such findings may be taken to reflect an unavoidable consequence of officials' attempts to match their limited capacity to receive applications with an overwhelming demand for asylum. This interpretation becomes less plausible when we reflect upon the types of conditions applicants are forced to endure in the line. Most (60% n = 231) spend at least one night outside to maintain their position in the queue. On average, those who spent one night could expect to spend ten nights outside—about one of every six (18% n = 141) doing so with children in their care. The line itself is a site where asylum seekers, many of them already victimized and brutalized in their countries of origin, become targets once again. About one-third of respondents (35% n = 226) reported being hurt, threatened, or robbed whilst waiting in the queue. The accompanying box offers their accounts of such experience.

Question: Did anyone hurt you, threaten you, or steal your belongings while you were waiting in line? Can you explain what happened?

"I was sleeping and I woke up in the morning and I did not find my money or my phone."

"It was these two guys who threatened me; they threw me out of line and took my phone and money—two hundred rand."

"People crush on you in the line and I was hurt because I was defending my child."

"Someone wanted to fight with me; those who control the queue; wanted me to pay. I didn't have any money."

"The time I was at the surrounding area of the reception my clothes and belongings were taken by the Metro Police."

"We were hit by stones by passers-by during the night."

It is difficult to directly link this evidence of neglect to an explanation of DHA official behaviour; however, it is certainly cause to reconsider whether the decision to limit the number of entries is purely the result of capacity issues, or rather a more intentioned barrier to access. After all, DHA reception officials, regardless of their rank, witness the suffering of people in the queue every day when they come to work. These doubts become more compelling when considered in relation to the apparent lack of attention that officials give to ensuring that those who enter are able to lodge their claims. Having endured the queue, many respondents are given forms to fill out and told to return on a later date (34% n = 230), or given an appointment for another date (15% n = 230). Some wait without being given any attention at all (3% n = 230). Since long queues to access do not appear to accord with an effort to ensure that those who enter are served correctly, one might be tempted to assume that they are the conscious product of corrupt officials. At least one study on the South African border suggests that long queues are often purposely created and sustained by corrupt officials who wish to generate demand for illegal services to circumvent the line.[28] Our results cast doubt on a similar reading of

© Darshan Vigneswaran, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

refugee reception. While a significant number of respondents reported having paid someone to get their papers (10% n = 230), doing so did not significantly impact upon the time it took to lodge a claim.

Assisting Completion of Forms

Perhaps officials are simply lazy and not motivated by any specific desire to create barriers to the lodging of claims? Some of our findings on the assistance applicants received inside the office might support such a reading. Almost two-thirds (68% n = 219) of respondents report that officials provided no assistance in completing the form. A similar proportion (67% n = 218) report that officials did not go over the form with them once it was complete. Officials only provided assistance to a small number (17% n = 70) of those who needed interpreters. When officials did pay attention to a case, they usually did so in a manner that would jeopardize the confidentiality of the claim. Applicants were often questioned in a public area—more than a quarter (28%) of the 129 applicants who were asked questions by officials about their asylum claim said that other people were able to overhear their answers.

Further analysis of this data offers a more worrying finding: of officials purposively negatively prejudicing claims. While officials clearly explain to applicants what their obligations are, the same is not true of applicants' rights. Most (92% n = 228) applicants reported that they were aware of their obligation to renew their permit before it expired. In contrast, very few (8% n = 228) reported being told they were allowed to bring a lawyer to their next interview. Furthermore, most (63% n = 228) were not aware that their answers would not be shared with anyone outside the office. Going beyond simply preventing applicants from knowing their rights, there is some evidence to suggest that officials arbitrarily intervene in the filling out of forms. The respondents who most needed assistance (respondents who needed interpreters and respondents who had difficulties understanding the questions on the form) were less likely to receive assistance than those who needed no help.

Ensuring Fair Adjudication

The tendency to negatively prejudice applications extends to the status determination process itself. In some respects we simply see a recurrence of the same problems of laxity in official performance of duties that plague the reception of applications. Officials do not provide interpreters when they are needed and do not inform applicants of rights that will potentially improve their capacity to accurately tell their story, such as the right of female applicants to request an interviewer of the same sex. Perhaps more importantly, official practices put applicants in a position where they are unlikely to be able to accurately recount or defend their stories. Most (62% n = 197) applicants say they were given no advance warning that they would be interviewed. This is because reception officers commonly neglect their duty to clearly schedule dates for each applicant's interview, preferring instead to select individuals for an interview from the line of applicants waiting to renew their permits. After having waited for months and in some cases years for the interview, the individual is not likely to be in a position to refuse. Given this, it is relatively unsurprising that most (88% n = 196) applicants note having brought no evidence to the interview to substantiate their case. Most applicants do not receive a copy of their original application form. Again, there may be some reason to attribute the above problems to lack of capacity or sheer laziness. The DHA has notoriously bad information technology and case flow management systems. This often goes as far as not having working photocopiers or not having adequate paper to print identification documents.[29] Due primarily to the unwillingness of staff to adopt new information technology systems,[30] there is no centralized database of applications and no ability to track whether the applicant has left the province to make a claim elsewhere.

Again, the incompetence of officials does not account for all of the shortfalls. While some sins of omission can be easily dismissed as the result of absent-mindedness, laziness, or incompetence, the failure of officials to make simple concessions during official hearings suggests a more intentioned effort to deny applicants the capacity to compensate for their lack of preparation. Most officials do not begin the interview by explaining to the applicant the purpose of the interview. This is a significant problem because the applicant has already been caught by surprise and may think they are being interrogated for having not fulfilled one of their obligations (*e.g.* to maintain a valid permit or to uphold South African laws). Although an RSDO will usually possess a copy of the applicant's original application form, most (66% n = 191) applicants are not provided with a chance to view this copy before the interview. Furthermore, most applicants told us that the RSDO did not go through their form with them (72% n = 194). Given that in most cases the RSDO will refer primarily to the contents of the application form and in many cases identify problems on the form, or question the veracity of an individual's story, these omissions place the applicant at a considerable disadvantage, denying them the ability to know with any certainty the reasons why they are being asked various questions.

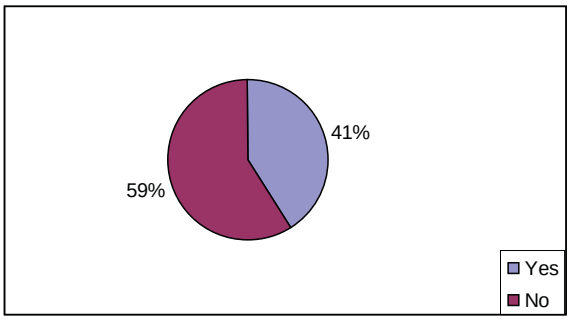
Providing Protecting Documentation

The final obligation of the reception officials is to ensure that applicants are provided with adequate documentation to legalize their stay in the country. As we have already noted,

© Darshan Vigneswaran, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

officials are generally lax in ensuring that all applicants' claims are formally lodged on the same day they enter. As a result, a minority of applicants (41% n = 230) receive this permit on the first day they enter the office. On average, asylum seekers wait a further five days after first entering the office before they finally receive a permit.

Figure 2: Got permit the first time entered the Refugee Reception Office



This general sloppiness extends to the process of issuing permits where almost a quarter of respondents (24% n = 229) reported mistakes on their original permits, among them misspelled or incorrectly ordered names and incorrect birthdates.

Given the frequency with which applicants are stopped and asked for their papers, the scrutiny which police officers commonly apply to asylum permits, and the potential risks they face of being subject to *refoulement,* it is difficult to accept these mistakes as mere laxity and more tempting to assess them as the product of a more "malign indifference." This reading is buttressed by our data on the problems applicants experience in maintaining their documentation. An average asylum seeker has to renew his or her permit five times a year and will come to the RRO more than once to have it renewed. Legislation does not prescribe the validity period for asylum permits, so it is uncertain why officials, given the freedom to use their discretion, continue to specify, on average, validity periods of two-and-a-half months on permits. This practice increases office workloads in the processing of renewals, while promoting the social exclusion of already vulnerable migrants who must regularly sacrifice work hours and transport funds in order to remain legal. Some asylum seekers (13% n = 217) fail to renew their permits in time due to work or personal commitments that prevent them from coming to the office, and a small percentage (5% n = 205) report having been arrested or fined for having an expired permit.

Summary

In summary, the findings of this survey suggest that South Africa's RROs commonly fail to meet the basic procedural obligations that lawmakers designed to ensure fair and free access to the status determination process. In some respects the study simply extends some common indictments of South African governance in the post-Apartheid era, and post-colonial governance in Southern Africa more generally, to the field of refugee affairs. Like counterparts in other areas of government, the Refugee Directorate in the DHA appears to lack the capacity to fulfill South Africa's newly progressive laws. It is unable to ensure that migrants seeking protection can lodge their claims, access documentation, and receive fair adjudication. Furthermore, the DHA appears to lack the ability to effectively manage and discipline its junior officials. Laxity, incompetence, and to a lesser extent corruption create unnecessary blockages in the system and jeopardize the rights of claimants.

The findings of this survey also depart in significant ways from this general acceptance that difficulties in Africa in administering individual-based status determination stem simply from the fact that states are weak, fragmented, and corrupt. Several of the instances of procedural breakdown uncovered by this study suggest that officials were not simply failing to do their jobs, but were collectively going out of their way to repel, hinder, and undermine asylum seekers' capacity to receive fairly adjudicated claims. Officials (a) refused to register or receive intentions to apply, thereby subjecting applicants to various forms of hardship; (b) interfered without warrant in the preparation of application forms; (c) kept applicants "in the dark" during interviews; and (d) imposed conditions to make it difficult to maintain valid identity documents. This behaviour poses an interesting puzzle for further analysis. Why would ordinary officials seek to obstruct asylum seeker claims in this way? Unfortunately, our survey instrument, which was specifically designed to capture asylum-seeker experiences, is not capable of providing a compelling account of officials' motivations. Ultimately, it is highly unlikely that these questions can be solved without ethnographic analysis of official culture within the DHA itself. In the absence of such data, I will attempt to piece together a plausible hypothesis. The rudiments of this explanation can be found in the historical origins of the DHA and the decisions made by the Refugee Directorate at key moments since its incorporation. The essence of the argument I want to put forward is that the obstructionist behaviour of DHA officials is an expression of a discretionary institutional culture that has become defined by the objective of excluding undocumented migrants.

What Do We Make of Bureaucratic Obstructionism?

In my other writing on this subject I have emphasized the historic lack of capacity within the DHA.[31] However, in

© Darshan Vigneswaran, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

addition to its many capacity constraints, the DHA has been historically characterized by an institutional culture which significantly hampers its ability to adequately administer the Refugees Act. While indifference and impunity can be the hallmarks of almost any government bureaucracy,[32] and were common features of Apartheid era official attitudes,[33] the immigration activities of DHA officials have been uniquely structured by legislation which fostered such an attitude towards clients. Immigration laws during the Apartheid era, which were brought together underneath a single Aliens Control Act in 1991, provided officials with a considerable degree of discretion to decide how individual requests for immigration permits ought to be evaluated. As suggested by the former special advisor to the Minister, the purpose of this highly discretionary environment was to validate racially prejudicial outcomes in the language of non-racial administrative law:

> If you read the Aliens Control Act and you're applying for a permit, you do not know under what criteria you will get or you will not get the permit. You will not know what procedures you would need to follow. The Aliens Control Act gives no information in terms of which most of the permit categories would qualify for either permanent or temporary residency. In terms of permanent residence, there was a mechanism in place where … an application would come in under some general criteria of being a good citizen and somehow in the application of those criteria whatever came out were white, Anglo-Saxon, protestant people.[34]

Importantly, while the new administration has subsequently passed legislation that was specifically intended to reduce the degree of discretion available to individual officials, the Refugee Directorate officials began to administer refugee laws in the context of the Aliens Control Act.[35] Furthermore, training has yet to transform the way in which officials administer the laws. This has been specifically acknowledged by the current Home Affairs Minister, Nosiviwe Mapisa-Nqakula:

> [i]t is sometimes very difficult to get officials to change their mindsets. It seems that many officials are still stuck in the era of the Aliens Control Act. Some seem to think that the law means what they think it should mean.[36]

While clearly acknowledging the origins of the problem, the Minister's comments do not recognize the significance of subsequent government policy in ensuring that official discretion was utilized to restrict entry, instead of being deployed for personal gain or avoidance of duty. Why is it that officials appear to go out of their way, and beyond the law, to prevent access to asylum?

The origins of this answer can be found in the generally restrictive discourse towards undocumented migrants that has been formulated within the DHA since the transition to democracy. Within the Government of National Unity, the leader of the Inkatha Freedom Party, Mangosuthu Buthelezi, identified illegal immigration as a pressing threat to South Africa's hopes of economic upliftment for the majority of its previously disenfranchised and poverty-stricken population. His ideas live on in the current administration, and particularly within the DHA Ministry, which has sought to ensure that migrants of various forms were not able to enter South African territory and, barring that, the South African labour market. This ideology also found expression in South Africa's new Immigration Act,[37] which set out a series of provisions excluding all those who would compete with South Africans for jobs and/or could not contribute to the development of South African skills or directly employ South Africans. However, it has also found deeper expression in the world views of officials within the DHA, who conceptualize the prevention of immigration as a responsibility that goes beyond their legally mandated role of ensuring the sanctity of South Africa's immigration laws.

Evidence of this abiding commitment to an exclusionary ideology can be found in the efforts of the reception officials to limit access to asylum. The first such instance occurred in 2001 when, in an apparent effort to instil the "jobs-protecting" ethos of the forthcoming immigration legislation into the refugee system, the then Minister of Home Affairs, Mangosuthu Buthelezi, authorized the production of an asylum-seeker permit which expressly prohibited asylum seekers from working or studying, as one of the conditions of their temporary stay in the Republic. The DHA position was summed up in the minutes of the Standing Committee Meeting confirming the decision to prohibit work and study rights:

> it happens that a person comes to our country to apply for asylum while he in fact is looking for a job … this was the main cause of the backlog that is now troubling the department.[38]

In the early years of refugee protection, the Department was already experiencing a considerable backlog of undetermined applications. This meant that asylum seekers would reside legally in South Africa for months and often years without any legal means of earning a living. This issue was brought to a head in the case of *Watchenuka*.[39] While accepting that foreign nationals did not have the right to freedom of trade, occupation, or profession provided for in section 22 of the Constitution, the complainant argued that rights

© Darshan Vigneswaran, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

to life, dignity, equality, and administrative justice do apply to foreign nationals and that the denial of the right to work in effect contravened these constitutional rights. Although the presiding judge did not rule on the constitutionality of the prohibitions, he declared the prohibition "inconsistent" on the grounds that the decision had not been made in accordance with the appropriate procedure, *i.e.* with adequate consultation with the Standing Committee for Refugee Affairs. The *Watchenuka* case is crucial because it provides us with the first evidence of the Ministry's discomfort at the inconsistencies between refugee protection laws and immigration policies. It also evinces a willingness on the part of high-level officials, and in this case the Minister, to avoid their procedural obligations to refugee protection in order to privilege the goal of exclusion.

This dynamic would resurface in the 2006 case of *Tafira*[40] when the DHA sought to deny access to applicants it deemed to be unworthy or not *bona fide.* By this time, some of the problems identified above in gaining access to the RROs had surfaced. Applicants were waiting in long queues, and the DHA was unable to receive applications from all those presenting themselves at the offices. In order to deal with this problem the Refugee Directorate introduced a "pre-screening" system for all applicants. This process required applicants to complete an additional form, prior to formally lodging their application. The form was not contemplated in either the Refugees Act or its Regulations, and varied in content between different offices, asking applicants to respond to a series of questions about their reasons for applying. DHA officials would use the forms to identify the likelihood of success of a claim and decide on that basis whether to allow an individual to make a formal application. Applicants deemed to be unlikely to be successful claimants would be issued with instructions to apply for a work permit or other form of residential permit at an alternative DHA office. On some occasions the DHA went further to initiate procedures for deportation of pre-screened applicants. In *Tafira,* the court ruled in favour of the WITS Law Clinic that the pre-screening system was illegal.

While no longer formally practiced at the reception offices, the pre-screening case is crucial because it evinces the support of upper-level management within the DHA for procedures that protect South African borders, regardless of their conformity with the provisions of the Refugees Act. Importantly, and despite the considerable evidence that backlogs, delays, and poor service delivery have been characteristics of South African status determination since the mid-1990s, the DHA has not only argued in favour of its rights to restrict access, but has turned the argument on its head, justifying additional restrictions by blaming the current problems at the RROs on the asylum-seeker population as a whole. In communication with Lawyers for Human Rights, DHA officials indicated that "they were acting in accordance with the Department's policy of identifying asylum seekers who, in their opinion, would not qualify for asylum while queuing to make their asylum applications."[41] The Department conceded that it had instituted a queue management system requiring immigration officers to enquire from the people in the queues about the purpose of their visit to the offices because "in many instances the queues are congested by foreigners who queue for immigration permits or reasons other than application for asylum."[42] If such persons were not in possession of proper documentation they would be considered "illegal foreigners" and arrested.

These examples do not provide us with conclusive evidence on the motivations of ordinary DHA officials. However, they collectively point to the existence of an official attitude or mindset within the DHA that condones, or at least enables, the types of status determination processes we saw in the previous section. Across these cases we see officials seeking to move beyond the mandated procedures and in some cases in direct defiance of refugee law in order to ensure that the integrity of the South African immigration regime is sustained. These measures suggest the possible presence within the DHA of an institutional culture that endorses illegal actions which ensure that potential applicants are excluded. While these various forms of obstruction have been represented by the Department as ways of ensuring the sanctity of the reception system, it is important to note that neither of these moves can ensure that the ostensible targets of protection, so-called *bona fide* asylum seekers are guaranteed access. Instead, working with a logic similar to that of immigration laws, policy makers have sought to utilize deterrence and in some cases deportation to repel a variety of potential applicants from the reception system. It seems plausible to suggest that when junior officials within the Department act with the same sort of impunity towards their own official obligations, their actions are more likely to be endorsed than sanctioned by their seniors.

Concluding Remarks

This paper has developed the foundations for an intriguing debate on status determination across the divides of the Global North and the Global South. By holding up the ambitious procedural commitments of the South African government to the scrutiny of a "customer survey" we have exposed the range and depths of problems within the reception system. Previous analyses of this system have relied heavily on observations at the offices or anecdotal reports and have therefore been limited in terms of their ability to explore the relative merits of competing diagnoses of the limitations of applied status determination law. Although limited to a sin-

© Darshan Vigneswaran, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

gle and possibly somewhat atypical case, the findings of this study ask us to entertain the possibility that the implementation problems in South Africa may not merely reflect the conventional story of state failure so familiar to the politics of development and so commonly witnessed in sub-Saharan Africa. Rather, the image of officials going out of their way to create barriers to asylum suggests the existence of an institutional culture that repeatedly undermines the efforts of monitors and other external bodies to implement reform. Using evidence of official policy I then argued that these activities constitute outcomes of an institutional culture of immigration protectionism that is prevalent within the DHA.

If we accept this interpretation, then we are forced to go beyond dismissing the experiences of asylum seekers in South Africa as the inevitable malaise of status determination in a developing country. Instead, we are compelled to think of the facets of institutional culture, including humanitarianism, multi-culturalism, liberalism, and a human rights ethos on the one hand, and xenophobia, racism, mis-directed patriotism, and protectionism on the other, that may influence the manner in which status determination systems function in other, non-African settings. In particular, the relatively rapid deterioration of South Africa's protection regime forces us to consider the long-term negative consequences of the current anti-asylum-seeker consensus in developed countries for the capacity of states to protect refugees.

Notes

1. Anonymous asylum seeker outside the Pretoria Refugee Reception Office.
2. Bonaventure Rutinwa, "The End of Asylum? The Changing Nature of Refugee Policies in Africa," *Refugee Survey Quarterly* 21, no. 1/2 (2002): 12–41.
3. Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism," *International Journal of Refugee Law* 3, no. 2 (1991): 185–207; M.R. Rwelamira, "Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa," *International Journal of Refugee Law* 1, no. 4 (1989): 557–561.
4. Jennifer Hyndman and Bo Viktor Nylund, "UNHCR and the Status of Prima Facie Refugees in Kenya," *International Journal of Refugee Law* 10 (1998): 21–48; Loren B. Landau, *The Humanitarian Hangover: Displacement, Aid, and Transformation in Western Tanzania* (Johannesburg: Witwatersrand University Press Publications, 2008); Toby D. Mendel, "Refugee Law and Practice in Tanzania," *International Journal of Refugee Law* 9, no. 1 (1997): 35–59; George Mukundi Wachira, "Refugee Status Determination in Kenya and Egypt" (LL.M. thesis, University of Pretoria, 2003).
5. Jonathan Klaaren and Chris Sprigman, "Refugee Status Determination Procedures in South African Law," in *Advancing Refugee Protection in South Africa,* ed. Jeff Handmaker, Lee Anne de la Hunt, and Jonathan Klaaren (New York: Berghahn, 2008).
6. Ingrid Palmary, "Recommendations on Atlantic Philanthropies' Funding for the Migration and Human Rights Sector: Priorities, Gaps and Weaknesses in the Sector" (report prepared for Atlantic Philanthropies, 2006) [unpublished].
7. Jeff Handmaker, "Starting with a Clean Slate? Efforts to Deal with Asylum Application Backlogs in South Africa," in *Advancing Refugee Protection in South Africa* (see note 5); : 1–29.
8. Mendel, "Refugee Law and Practice in Tanzania," 59.
9. Consortium for Refugees and Migrants in South Africa, "Protecting Refugees and Asylum Seekers in South Africa" (2007); Department of Home Affairs, *Final Report on the Support Intervention in the Department of Home Affairs* (Parliamentary Monitoring Group, 2007), <http://www.pmg.org.za/docs/2007/070314report.htm> (accessed 5 May 2007); Fever Tree Consulting and A.T. Kearney, "Transforming the Department of Home Affairs: Refugee Affairs: Reception Offices Network Integrated Plan Workstream Delivarables #7" (2007); Forced Migration Studies Programme, WITS Law Clinic, and Lawyers for Human Rights, "Crossing Borders, Accessing Rights, and Detention: Asylum and Refugee Protection in South Africa" (2006); IQ Business Group, "Report on the Process Engineering Findings and Recommendations Related to the Processing and Adjudication of Applications for Asylum Received by Refugee Reception Offices" (2006).
10. Florencia Maria Belvedere, "Beyond Xenophobia: Contested Identities and the Politics of Refugees in Post-Apartheid South Africa" (Ph.D. dissertation, University of Minnesota, 2006); Jeff Handmaker, Lee Anne de la Hunt, and Jonathan Klaaren, eds., *Advancing Refugee Protection in South Africa* (New York: Berghahn, 2008); Timothy R. Smith, "The Making of the 1998 Refugees Act: Consultation, Compromise, and Controversy" (Working Paper no. 5, Forced Migration Studies Programme, 2003), <http://www.migration.org.za/> (accessed 10 June 2008).
11. Refugees Act Regulations, s. 2(2).
12. Refugees Act, s. 21; Refugees Act Regulations, s. 2(1).
13. Refugees Act, s. 8.
14. *Ibid.,* s. 21(2)(b).
15. *Ibid.,* s. 8 (2, 3).
16. Refugees Act Regulations, s. 5.
17. Refugees Act, s. 21(5).
18. Refugees Act Regulations, s. 5.
19. Refugees Act, s. 21(5).
20. *Ibid.,* s. 8 (2, 3).
21. *Ibid.,* s. 24; Refugees Act Regulations s. 10
22. Refugees Act ss. 9–20, 25–6; Refugees Act Regulations, ss. 13–4.
23. Immigration Act, s. 23.
24. Refugees Act, s. 22; Refugees Act Regulations, s. 13.

© Darshan Vigneswaran, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

25. Consortium for Refugees and Migrants in South Africa, "Protecting Refugees and Asylum Seekers in South Africa;" Lee Anne de la Hunt and William Kerfoot, "Due Process in Ayslum Determination in South Africa from a Practitioner's Perspective: Difficulties Encountered in the Interpretation, Application and Administration of the Refugees Act," in *Advancing Refugee Protection in South Africa* (see note 5); Department of Home Affairs, *Final Report on the Support Intervention in the Department of Home Affairs;* Forced Migration Studies Programme, WITS Law Clinic, and Lawyers for Human Rights, "Crossing Borders, Accessing Rights, and Detention: Asylum and Refugee Protection in South Africa;" IQ Business Group, "Report on the Process Engineering Findings and Recommendations Related to the Processing and Adjudication of Applications for Asylum Received by Refugee Reception Offices;" University of Cape Town Law Clinic, "Final Report of the Uct Observation Team on the Challenges Facing the Cape Town Refugee Reception Office" (2007).
26. Darshan Vigneswaran, *Lost in Space: Residential Sampling and Johannesburg's Forced Migrants* (Forced Migration Studies Programme Migration Methods and Field Notes, n. 4, 2007), <http://www.migration.org.za/> (accessed 10 June 2008).
27. At some offices this involves setting an absolute maximum on the total number of cases. Other offices will set more quotas on the number of applicants per nationality or set aside specific days to receive applicants from various countries.
28. David B. Coplan, "A River Runs through It: The Meaning of the Lesotho-Free State Border," *African Affairs* 100 (2001): 82–116.
29. *Department of Home Affairs, Final Report on the Support Intervention in the Department of Home Affairs.*
30. IQ Business Group, "Report on the Process Engineering Findings and Recommendations Related to the Processing and Adjudication of Applications for Asylum Received by Refugee Reception Offices."
31. Darshan Vigneswaran, "Enduring Territoriality: South African Immigration Control," *Political Geography* 27 (2008): 783–801.
32. Josiah Heyman, "Putting Power in the Anthropology of Bureaucracy: The Immigration and Naturalization Service at the Mexico-United States Border," *Current Anthropology* 36 (1995): 261–287.
33. De la Hunt and Kerfoot, "Due Process in Ayslum Determination in South Africa from a Practitioner's Perspective: Difficulties Encountered in the Interpretation, Application and Administration of the Refugees Act."
34. Interview of Mario Ambrosini, former Special Advisor to the Minister for Home Affairs (22 September 2006) [unpublished; digital recording on file with author].
35. Klaaren and Sprigman, "Refugee Status Determination Procedures in South African Law."
36. Department of Home Affairs, *Briefing by the Minister of Home Affairs, Mrs N. Mapisa-Nqakula to the Chambers of Commerce and Stakeholders from Business Community* (Department of Home Affairs, 2006), <http://www.home-affairs.gov.za> (accessed 10 June 2008).
37. n. 13 of 2002.
38. Standing Committee for Refugee Affairs, "Minutes of Meeting of the Standing Committee, 18 September," ed. Department of Home Affairs (2000).
39. *Watchenuka v. Minister of Home Affairs* [2002] JOL 10388.
40. *Tafira v. Minister of Home Affairs* [2002] JOL 12960,
41. Lawyers for Human Rights, 31 March 2005.
42. *Ibid.*

Darshan Vigneswaran is a Senior Researcher at the Forced Migration Studies Programme, University of the Witwatersrand, South Africa. His research interests are in international relations, political geography, international migration, and research methods. *The author would like to thank Roni Amit, Tesfalem Araia, Veronique Gindrey, Tobias Hlalambelo, Loren Landau, and Tamlyn Monson for their assistance and for comments on previous drafts. Atlantic Philanthropies and the British Academy UK-Africa Fellowship scheme provided support for research and writing up respectively. The study would not have been possible without the generous assistance of the Department of Home Affairs, Lawyers for Human Rights, UCT Law Clinic, and WITS Law Clinic.*

© Darshan Vigneswaran, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

An Evaluation of South Africa's Application of the OAU Refugee Definition

Tal Hanna Schreier

Abstract

This paper undertakes an analysis of South Africa's application of the OAU Convention's expanded refugee definition. It finds that in the first stage of South Africa's refugee status determination process, government officials tasked with individually determining refugee status seemingly make use of the OAU Convention's refugee definition and basic country of origin information in a unique form of prima facie refugee determination. In this regard, improved training of officials is essential in order to ensure that the appropriate level of protection to all asylum seekers is afforded in terms of the definition. At the South African Refugee Appeal Board level, however, due to the in-depth nature of the decisions rendered, the OAU refugee definition is more correctly, yet cautiously, utilized to provide protection to persons fleeing indiscriminate widespread disruption of public order or generalized violence. This research is the first of its kind to analyze select decisions of the South African Refugee Appeal Board.

Résumé

Cet article entreprend une analyse sur la façon dont la définition élargie de réfugié proposée par la Convention de l'OUA est appliquée par l'Afrique du Sud. Il conclut qu'au premier stade de la procédure Sud africaine de détermination du statut de réfugié, les responsables gouvernementaux chargés de la détermination du statut de réfugié au niveau individuel semblent utiliser la définition de réfugié contenue dans la Convention de l'OUA ainsi que l'information de base sur le pays d'origine pour faire une détermination prima facie, unique en son genre, du statut de réfugié. À cet égard, il est impératif que les responsables gouvernementaux reçoivent une meilleure formation afin d'assurer un niveau de protection approprié à tous les réfugiés en ce qu'il s'agit de la définition. Cependant, au niveau du South African Refugee Appeal Board (la Commission d'appel des réfugiés de l'Afrique du Sud), vu la nature approfondie des décisions rendues, la définition de réfugié de l'OUA est plus correctement — mais aussi prudemment — utilisée pour fournir une protection aux personnes qui fuient des perturbations étendues et indiscriminées de l'ordre public, ou la violence généralisée. Cette étude est la première en son genre à analyser des décisions sélectionnées du South African Refugee Appeal Board (la Commission d'appel des réfugiés de l'Afrique du Sud).

Introduction

The *1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa*[1] (OAU Convention) is, to date, the only legally binding regional refugee treaty and is regarded as a "cornerstone of refugee protection in Africa.[2] Nearly forty years on, the OAU Convention remains an essential means of providing protection to large numbers of persons who are forced to flee their countries of origin due to indiscriminate widespread disruption of public order or generalized violence, with its most celebrated feature being the expansion of the refugee definition[3] to provide protection to such persons.

South Africa's refugee protection system is still in its nascent stage of development, having only commenced after the demise of Apartheid regime in the mid 1990s. In 1995 and 1996 respectively, South Africa signed the OAU Convention and the *Convention relating to the Status of Refugees* (Refugee Convention).[4] Shortly thereafter, South Africa enacted its Refugees Act 130 of 1998, which became operational in the year 2000. The Refugees Act incorporates both the 1951 Convention and OAU Convention refugee definitions, thus providing for expanded refugee protection in the Republic.[5]

The OAU refugee definition and the OAU Convention as a whole have not been subject to much interrogation; neither

© Tal Hanna Schreier, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

have they been the subject of much international jurisprudence. Similarly, South Africa's analysis of the OAU refugee definition has been less than noteworthy. To date, there exist no published Refugee Appeal Board decisions, or reported or unreported South African High Court decisions that have interpreted the OAU refugee definition. In general, refugee law jurisprudence in South Africa is thin, save for a number of cases related mainly to asylum procedure. Moreover, reliable statistics from the South African Department of Home Affairs or other sources, which may detail the extent of the application of the OAU refugee definition in practice, are not readily available, if not non-existent.

In analyzing some of the key elements of the OAU refugee definition as well as the approach to refugee determination in the country, this paper will attempt to ascertain whether, in the South African context, the expanded refugee definition is providing the necessary protection to certain individuals, as envisaged by the OAU Convention. A detailed analysis of selected Refugee Appeal Board decisions on topic will assist in determining the current level of protection afforded by the South African refugee regime in this regard.

South Africa's Refugee Determination Process and the OAU Definition: A Form of Prima Facie Refugee Status Determination?

At the outset, it is necessary to determine to whom the OAU refugee definition specifically applies. This question arises because of the definition's words "every person," which need to be considered. According to Micah Rankin, some African States view the OAU refugee definition as applying only to Africans. The basis for this position may possibly be found in the Convention's main objective, that as a regional complement to the Refugee Convention, it was created in order to meet the specific needs of African refugees, which may suggest an intention on the part of its drafters to limit its territorial application to Africa.[6] However, the plain meaning of the words "every person" clearly points to a more inclusive interpretation, meaning that the definition's application ought to be universal. Furthermore, the Refugee Convention's universal application, stemming from the same inclusive wording, provides evidence of the requirement of similar application. This broader line of interpretation is also more consistent with the expanded definition's aim to extend asylum rather than to refuse it.[7] Notwithstanding this point, the actual position that the South African government takes in relation to the scope of the OAU refugee definition is what remains relevant to the within study. In this regard, it is necessary to examine what transpires in South Africa's refugee determination procedure.

In South Africa, it is the responsibility of the Department of Home Affairs (the Department) to determine the status of refugees. This is done by way of a status interview conducted by a Department official, known as a Refugee Status Determination Officer (RSDO). A rejected asylum seeker has the right to review of the RSDO's decision by the Refugee Appeal Board or by the Standing Committee for Refugee Affairs, two quasi-judicial tribunals created in terms of the Refugees Act.

While the Refugees Act provides for special measures or powers of the Minister of Home Affairs to be taken in times of a mass influx of refugees into the country,[8] it was anticipated and in fact legislated that, in the normal course, at first instance each asylum seeker in South Africa receives an individual refugee status determination. However, research indicates that in South Africa the individual process of refugee status determination improperly makes use of the OAU refugee definition in a unique form of *prima facie* refugee determination,[9] which is a process normally used in times of mass influx or emergency. This is because

> it appears that South Africa applies a form of prima facie asylum determination that is not related to a mass-influx situation, but rather depends on whether it is "obvious" than an applicant is a refugee, based on the danger and instability within a part of the applicant's country of origin.[10]

Ingrid van Beek explains this point further by asserting that in South Africa "there is not only a mixed understanding of the definition of 'prima facie refugees' … but on what is perceived as a mass influx situation."[11] Van Beek's research included interviews with Department officials, who stated that South Africa was experiencing a situation of mass influx as determined by reference to the actual number of asylum seekers that were entering the country. Interestingly, several years later, in a recent report by the Refugee Affairs Directorate, Department of Home Affairs, this very same conclusion is echoed. Refugee Affairs, throughout its *2006 Annual Report on Asylum Statistics,* concludes that South Africa is still experiencing a mass influx of asylum seekers into the country.[12]

In this regard, there is a clear inconsistency that exists in terms of the legislative intent of the Refugees Act as compared to the actual understanding and practice of Department officials at the refugee reception offices. More specifically, the Department is on one hand stating that there is a mass influx of asylum seekers into the country, thereby legitimizing its use of the OAU refugee definition in order to fast-track refugee status determinations. However, on the other hand, the Minister has never implemented the special provisions, in terms of her powers under section 35 of the Refugees Act, to deal with a mass influx of asylum seekers into the country, if such was really the case. The special provisions that the Minister may invoke

© Tal Hanna Schreier, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

include the accommodation of any specific category or group of asylum seekers or refugees in camps or refugee reception centres. To add to the confusion, nowhere in the Refugees Act is the term "mass influx" actually defined.

Therefore, while there is no *official* mass influx into South Africa at this time, it seems that the Department's approach to refugee status determination in fact relies on the application of the OAU refugee definition to assist in accelerating or fast-tracking applications based on a *prima facie* recognition of refugee status. This can likely be explained as a result of the endemic resource and capacity shortages at the Department of Home Affairs, Refugee Affairs Directorate,[13] which "pose serious challenges for Refugee Affairs … and have overwhelmed the already fragile refugee services."[14]

Anais Tuepker comments that, in the process of fast-tracking applications within South Africa's refugee status determination procedure, which includes the use of unofficial or non-legislated practices such as pre-screening processes,[15] reliance on implicit "white lists" of refugee producing countries, and the focus on merely confirming the nationality of an asylum seeker, indicates that the "institutional culture [among the Department] overwhelmingly supports an automatic link between nationality and refugeehood which produces the shared knowledge that asylum is only really for a select group of nationals."[16]

In terms of RSDOs' focusing on the nationality of an asylum seeker, Lee Anne de la Hunt describes the following practice in more detail as follows:

> While the Department of Home Affairs denies keeping a list of "refugee producing countries" or a "white list" there is clearly a mindset or institutional culture within the department that determines who is a refugee and who is not, based on the asylum seeker's country of origin. The focus of this country-oriented approach is that, particularly in relation to countries whose nationals are very likely to be granted asylum (Somalia, for example), the focus of the determination hearing is on getting the asylum seeker to "prove" his or her nationality on the basis of his or her knowledge of demographics, culture and language, geography and the political landscape.[17]

The aforementioned practices relied upon by Department officials are evidenced by the fact that the majority of recognized refugees in South Africa "are from countries in Africa where civil, generalized conflict and the breakdown of public order are endemic."[18] De la Hunt surmises that the Department's acceptance rates fluctuate depending on the government's assessment of the situation in the countries from which the asylum seekers hail.[19] She further reasons that the high acceptance rates from these countries are made on the basis of the OAU refugee definition, in that:

> … the letters advising refugees that their asylum claims have been successful merely state this fact …. [while] most of the rejection letters start by declaring that the asylum seeker has failed to prove that he or she has a well-founded fear of persecution, but then go on to give a (usually standardized) assessment of the situation within the country of origin (for example, that the country of origin is a democracy that protects its citizens) with very little analysis, of the actual claim itself, or its merits.[20]

The year-on-year increase in the number of asylum seekers arriving in South Africa undoubtedly places a burden on the already strained refugee services in the country. To some extent therefore it is understandable that "at least implicitly … Home Affairs officials prefer easy acceptances on the basis of the OAU definition; it also appears, however, that they do not deal satisfactorily with claims arising from the Convention's narrower definition based on a persecution standard."[21]

As a consequence of the Department's approach that the OAU definition patently supports the notion of refugee-generating countries, there appears to be another disturbing practice amongst the Department's officials, related to the limiting of the number of applicants who can apply for asylum. Many asylum seekers are simply refused entrance to the refugee reception offices. For the most part, this practice is recognizably arbitrary and based on the large numbers of asylum seekers that queue outside the offices each day,[22] but it may also be on account of an applicant's nationality. In this regard, the following specific examples come to mind. Two particular clients at the author's office, one of Nepalese nationality and the other from Fiji, were time and again denied access to the Cape Town Refugee Reception Office, having been advised by Home Affairs officials that Nepal and Fiji are "safe countries" and that they therefore could not be asylum seekers.

According to the above, therefore, it would seem as if at first instance, *i.e.* at the RSDO interview level, the OAU refugee definition or section 3(b) of the Refugees Act is in fact only applied to African asylum seekers. Tuepker confirmed this fact in an interview she conducted with an official of the Department of Home Affairs: Head Office.[23] Furthermore, L. de la Hunt concludes that "both the [Department of Home Affairs asylum] statistics themselves, as well as conversations with Home Affairs officials, indicate that the benefits of the extended definition are only available to African refugees."[24]

Aside from the fact that the legislative framework for refugee status determination in South Africa does not provide for the type of *prima facie* refugee status determination which has clearly emerged, another particular problem that may arise with the use of such a practice is that such refugee status determinations fail to recognize that some applicants from "refugee-generating" countries may also have individ-

© Tal Hanna Schreier, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

ualized refugee claims or, in other words, a well-founded fear of persecution. Ignoring this fact, or not providing each asylum seeker with the opportunity to fully explain, in a formal application process, his or her individualized reasons for fleeing his or her country, may have a negative effect on that refugee later on if or when the Department decides to invoke cessation of the refugee's status, based on the fact that the presumed conditions which caused the refugee to flee cease to exist.[25]

The Position of the Refugee Appeal Board

According to the author's experience and as per the literature reviewed, the first-instance RSDO decisions in South Africa's asylum process are generally of such poor quality that a specific determination as to their application of the OAU definition cannot be properly gleaned. In this regard, the RSDOs' decisions granting an applicant refugee status do not provide reasons for same, for example, whether the applicant was approved in terms of a particular section of the Refugees Act. Rather, such decisions simply state " … [T]he application for asylum in respect of yourself has been approved … and your formal recognition of refugee status is hereby attached."[26] Furthermore, while decisions rejecting an asylum seeker's application must set out reasons for same, they usually only set out the applicant's claim in a short paragraph, and then proceed to reject the claim based on reasons to the effect that the applicant could not establish a well-founded fear of persecution. The lack of sufficient and/or continuous training of RSDOs, as well as lack of adequate resources to conduct country-of-origin research, likely accounts for the poor quality of these decisions.

It is therefore necessary to examine the decisions of the Refugee Appeal Board, which are generally more detailed, including a thorough review of the appellant's refugee claim, up-to-date country-of-origin information and international jurisprudence, used to accept or reject an appellant's claim. The Refugee Appeal Board has itself on numerous occasions acknowledged the poor quality of the RSDO's decisions; *i.e.,* rather than conducting an appeal in the true sense,[27] the Refugee Appeal Board deems its hearings to be *de novo* hearings in which the Board in effect conducts a fresh refugee status determination hearing with the appellant.[28]

Unfortunately, to date, the Refugee Appeal Board has officially made public only two of its decisions,[29] which makes it very difficult to properly ascertain or determine its jurisprudence. Fortunately, despite the dearth of appeal decisions made available at this time, through her many interactions with the Refugee Appeal Board in the course of her employment, the author has been able to pose questions of the Appeal Board members in an attempt to better understand its interpretation of the OAU definition. In terms of the scope of application of the Refugees Act section 3(b), in other words whether the OAU definition applies to every person or only to every African, the Chairperson of the Refugee Appeal Board responded to the author's question as follows:

> … [T]he Board would apply [Section 3(b) of the Refugees Act] to anyone from any part of the world and not only Africans. The reasons here fore is that when the OAU Convention was incorporated into the Refugees Act, it did not specify that it would only apply to the African continent but was left open so to speak.[30]

In terms of the whether the Internal Flight Alternative (IFA) may be applied to a person who takes flight as a result of a section 3(b) event, the Chairperson of the Appeal Board, on behalf of the Board, advised[31] that the Board is not wholly in agreement with the position taken by UNHCR or James Hathaway, its interpretation being that the IFA does not apply, as the definition clearly states that the event need only take place in either part of the whole of an applicant's country of origin or nationality. In this regard, the Board is of the opinion that, if possible, an asylum seeker needs to have exhausted all internal remedies in his or her country of origin, prior to seeking protection abroad. This is in line with the notion of "surrogate protection," in which the international community is only required by law to provide asylum when a person's government is unable to do so itself. In this regard, for example, it would not be possible or reasonable for a forced migrant from an event seriously disturbing the public order in Goma, in the eastern part of the Democratic Republic of the Congo (DRC), to be required to travel to the very faraway capital city of Kinshasa, whereas fleeing across the border into a neighbouring country is safer and more practical. However, if internal flight from a location in which an OAU event took place to one in which there is safety within the country is possible and not unduly difficult for the individual, then the Board feels that the IFA issue may be raised.

Lastly, with regard to the issue of a whether or not a person may become a *sur place* refugee according to the OAU refugee definition, the Chairperson of the Refugee Appeal Board stated the following:

> … the OAU Convention or section 3(b) of the Refugees Act, 1998, cannot apply to a sur place case because of the wording of the definition or section i.e. you must be compelled to leave your habitual place of residence … If you were not compelled to leave then it cannot apply. However, looking at the wording of section 2 of the Refugees Act, 1998, read with section 3 of the Act, it is clear that a person [fearing a section 3(b) or OAU event] must be granted asylum sur place.[32]

© Tal Hanna Schreier, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Some Refugee Appeal Board Decisions Reviewed

According to section 26(1) of the Refugees Act, "any asylum seeker may lodge an appeal with the Appeal Board … if the Refugee Status Determination Officer has rejected the application in terms of section 2(3)(c),"[33] in other words, if the RSDO has rejected the application as unfounded. This automatic right to an appeal effectively means another layer added to the South African refugee determination procedure, since it is more often than not the case that rejected asylum seekers heavily rely on the appeal process for a proper decision on their claim and/or merely to prolong their stay in the country. The immense number of appeal cases already heard by the Appeal Board for which decisions are still pending and those which are scheduled to take place in the future, which currently runs well into 2009, is symptomatic of this situation.

For this research, the author was only able to obtain a small number of appeal decisions from the Refugee Appeal Board. In this regard, the Chairperson of the Appeal Board provided the author with approximately one hundred random appeal decisions, of which only eight decisions dealt with the section 3(b) refugee definition. Despite the small sample, the mere fact that only such a small percentage of appeal board decisions raise the section 3(b) definition may indicate that most of the claims that fall within the ambit of section 3(b) are in fact properly adjudicated by RSDOs at first instance. Irrespectively, an evaluation of the decisions obtained provides a picture of the Appeal Board applying the OAU definition sensibly, yet at the same time rather cautiously.

Of the Appeal Board decisions obtained, five of them dealt with the general application of the section 3(b) definition. In this regard, rather than analyzing a particular element of the definition itself, these decisions reviewed the appellant's claim, then reviewed the conditions in the appellant's country of origin, and finally concluded, based on the situation in the appellant's country of origin, whether or not the asylum seeker qualified for refugee status in terms of this definition. In terms of these decisions, especially those in which the Appeal Board upheld the appeal and granted refugee status based on the application of section 3(b), the question remains as to why the RSDO at first instance did not apply the same country of origin research and reasoning to reach the conclusion that the asylum seeker must receive refugee protection. Unfortunately, due to the fact that the Refugee Appeal Board deems its hearings to be *de novo* ones, it is not possible when reviewing the Board's decision to assess the reasoning of the RSDO in coming to his or her negative decision at first instance for the same applicant. The author, however, on a number of occasions, has been advised by Department officials of the lack of sufficient internet facilities, hence country of origin research capabilities, of its RSDOs. This explanation may account for the incorrect application of the OAU definition at first instance as officials are unable to properly assess the situation in the applicant's country of origin.

In Refugee Appeal Board decision number 159/2004,[34] the Appeal Board granted refugee status to a Somali national hailing from the country's war-ravaged capital city of Mogadishu, the appellant's place of habitual residence. The appellant's claim consisted of his fleeing Mogadishu due to generalized life-threatening factional clan fighting which was occurring throughout the city. In its decision, the Appeal Board referred to various 2003 country reports, which confirm the large number of civilian deaths in the city due to the continued fighting in the capital city. Interestingly, in this case, counsel for the appellant argued that her client should be granted refugee status based on an individualized or 1951 refugee claim and also argued that the appellant did not have an Internal Flight Alternative as he could not flee to "the northern part of the Somalia because he is from a different clan and will not be accepted there."[35] In this regard, the Appeal Board pointed out that counsel erred, as:

> … its reasons for not returning the appellant to his country of origin falls within the ambit of section 3(b) of the Refugees Act, 1998, and not as prayed for by Counsel in terms of section 3(a) of the Act. Section 3(a) makes it clear that a person must have a well-founded fear of being persecuted for a specific reason mentioned in the section. This is not the case with section 3(b) where a person is compelled to leave his or her place of habitual residence because of, for instance, events seriously disturbing or disrupting public order and where persecution as such is not necessarily present. In this case, the appellant was compelled to leave Somalia because of the faction and clan fighting, in other words events seriously disturbing and/or disrupting public order, in order to seek refuge elsewhere.[36]

In another Appeal Board decision of a Somali national, the Appeal Board granted refugee status to the appellant who hailed from the southern Somali city of Kismayo. Similar to the above decision, according to this appellant's personal background it emerged that "nothing has ever happened to him personally and that his complaint is based on the ongoing clan-related fighting taking place in Kismayo and elsewhere in Somalia."[37] After reviewing the appellant's claim, the Appeal Board went on to review a prominent country report on the situation in Somalia, which confirmed that the entire southern part of the country remains unstable due to chronic lawlessness and insecurity, hence " … [i]t is clear that anyone coming from the southern Somalia, such as Kismayo, whether anything has happened to them or not, fall within the group of asylum seekers needing international protection."[38]

© Tal Hanna Schreier, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

According to the sample of decisions reviewed, it is evident that the Refugee Appeal Board also dismisses appeals on the basis of an analysis of the current conditions of the appellant's country of origin. In this regard, the Appeal Board uses documentary evidence or country reports to indicate that a change in country-of-origin conditions has taken place such that it is now, based on a forward-looking definition of a refugee, considered safe for the asylum seeker to return to his country of origin.

It is trite law that the refugee definition is a forward-looking one, meaning that when a decision maker assesses whether someone qualifies for refugee status, he or she must determine if the asylum seeker will face persecution upon return to their country of origin. The *Michigan Guidelines on Well-Founded Fear*[39] expand on this point, but specifically with regard to the element of *fear* in the 1951 refugee definition:

> An understanding of "fear" as forward-looking expectation of risk is fully justified by one of the plain meanings of the [Refugee Convention's] English text, and is confirmed by dominant interpretations of the equally authoritative French language text ("craignant avec raison"), which do not canvass subjective trepidation. This construction avoids the enormous practical risks inherent in attempting objectively to assess the feelings and emotions of an applicant. It is moreover consistent with the internal structure of the Convention, for example with the principle that refugee status ceases when the actual risk of being persecuted comes to an end, though not on the basis of an absence of trepidation (Art. 1(C)5–6), and with the fact that the core duty of non-refoulement applies where there is a genuine risk of being persecuted, with no account taken of whether a refugee stands in trepidation of that risk (Art. 33).[40]

A similar approach, that of a forward looking assessment of risk, to refugee determination based on the OAU or section 3(b) refugee definition, also must take place when the RSDO or the Refugee Appeal Board is deciding upon an asylum seeker's claim. This position is also logically consistent with the cessation clause found in the Refugees Act, 1998 at section 5(1)(e), which provides that a person ceases to qualify for refugee status if "he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist."[41] In light of this fact, the Appeal Board appropriately assesses the prospective risk of an appellant by evaluating the *current* conditions in his or her country of origin.

With the above in mind, an example of the Board's forward-looking assessment in terms of sections 3(b) and 5(1)(e) of the Refugees Act is found in Appeal Board decision number 4013/03, in which the Board dismissed the appellant's claim. In this case, which the Appeal Board heard in February 2004, the Rwandan national fled his country of origin when the genocide reached his village in 1994. The appellant arrived in South Africa in 1995 and, by letter dated 10 September 1997, the Standing Committee for Refugee Affairs declined to grant him refugee status.[42] Once again, it is unclear why this decision was taken by the Standing Committee at the time, and in this regard, the Appeal Board confirms that "because the appeal hearing is a *de novo* procedure, the appellant does not have to prove that the Standing Committee was wrong … [rather] the Board assesses the evidence given by the appellant and makes its own decision on the objective facts concerned."[43] In any event, in terms of its assessment of the appellant's claim, the Appeal Board had "no hesitation in finding that section 3(b) of the Refugees Act, 1998, applied to the appellant when he initially lodged his application for refugee status."[44] However, the Appeal Board's decision to dismiss the claim was based on whether or not "the situation in Rwanda has changed to such an extent that it is safe for appellant to return there."[45] In this regard, and based on the Appeal Board's review of 2004 and 2005 Rwanda situation reports, the Board determined that it would be safe for the appellant to return to his country.

The above decision brings an important issue to the fore, that being the implication of such an extensive delay in the decision-making process of the Department of Home Affairs and Refugee Appeal Board. In the case, the appellant arrived in South Africa in early 1995 and, ten years later his appeal to the Refugee Appeal Board was dismissed, based on a forward-looking assessment of risk. This means that while the appellant *had* a genuine refugee-related reason for fleeing his country ten years ago, at present, however, according to the Appeal Board, he could safely return there due to the changed circumstances in his country of origin. Unfortunately, this approach fails to take into consideration the impact of section 5(2) of the Refugees Act. This section states that cessation of refugee status based on section 5(1)(e) "does not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality." In the case of *Mayongo v. Refugee Appeal Board & Others*[46] the South African High Court, in a judicial review application of an Appeal Board decision dismissing an appeal of an Angolan asylum seeker, dealt with this issue specifically and granted the applicant refugee status. The Court held that

> According to the UNCHR handbook a person is a refugee as soon as he/she fulfils the criteria contained in the definition. That takes place before he/she applies for refugee status.

© Tal Hanna Schreier, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

> Recogniblotion of refugee status does not make the person a refugee but only declares that he/se is one… . The RAB accepted that he was compelled to flee Angola. It follows that he was a refugee at the time. When the RAB dealt with the appeal it did not consider the impact of sections 5(1)(e) and 5(2) because the applicant never officially obtained refugee status. In that respect it made a basic error of law. It was in law compelled to determine whether the post-traumatic stress syndrome and major depressive disorder constituted a compelling reason to refuse to avail himself of the protection of the Angolan Government.[47]

In light of this *Mayongo* decision, the Appeal Board's decision in the Rwandan national's case described above may contain a similar basic error in law. The Board decided that the genocide in Rwanda fell within the meaning of a section 3(b) event, in other words, an event that compelled the appellant to flee his or her country because it seriously disrupted or disturbed the public order. In its decision, when reviewing the appellant's claim, the Appeal Board simply stated that the appellant was a Tutsi, who was forced to flee when the genocide reached his village. The author suggests that when the appellant arrived in South Africa, in terms of both the OAU *and* the Refugee Convention definitions, he would have qualified for refugee status. Not only did the Rwandan genocide qualify as an OAU event, but because the appellant was a Tutsi, he was specifically persecuted due to his race or tribe, as contemplated in the Refugee Convention definition. The ten-year delay in finalizing this asylum seeker's claim, led to the Appeal Board dismissing his claim based on a lack of a forward-looking assessment of risk, without taking into consideration possible circumstances of section 5(2) of the Refugee Act. Thus, the Appeal Board, having framed the reasons why the appellant fled his country to be a section 3(b) reason only, may have erred in its decision.

Two additional decisions of the Appeal Board examined by the author further highlight the significance of the forward-looking assessment of risk as discussed above. Both these Appeal decisions involved Burundian nationals. The first of these, decided on 6 May 2004, found that the appellant, who fled his country in 1998, was a refugee because "in the circumstances … the change(s) in Burundi have not been shown to be durable."[48] This decision was reached after the Board reviewed country-of-origin information which showed that despite a ceasefire in Burundi, fighting was still taking place in the country, hence a durable change of circumstances could not be established. In this regard, the Appeal Board took into consideration Hathaway's following position on this point: "This condition (durability) is in keeping with the forward-looking nature of the refugee definition and avoids the disruption of protection in circumstances where safety may be only a momentary aberration."[49]

Nearly three years later, however, in an Appeal Board decision dated 4 April 2007, the case of a Burundian appellant, who fled his country in 1997 when the civil war was rife in his country, was dismissed due to country-of-origin reports that indicated that "the conditions in Burundi are changing for the better."[50] In this case, the Board found that "there have been no serious recurrences of the widespread armed conflict or serious human rights abuses that were widely reported in 2004 and that section 3(b) of the Refugees Act 130 of 1998 is no longer applicable,"[51] hence it was safe for appellant to return to his country at this time.

The remaining Appeal Board decisions that the author reviewed relate to specific elements of the OAU or section 3(b) refugee definition. In this regard, the author examined two Appeal Board decisions in which the phrase "place of habitual residence" was considered. In Appeal Board decision number 378/05, the appeal was upheld and refugee status granted to a female national of the DRC. The appellant was living and working in Uvira, and in September 2002 fled the generalized violence in that area, moving to Moba, another town in the DRC, where she remained for the next nine months. When the fighting reached Moba, she fled the country, eventually arriving in South Africa. She claimed she could not return to her country of origin, due to the ongoing fighting in the eastern part of the DRC. In this case, the Board stated that the principle issue to be decided was whether the appellant was compelled to leave her place of habitual residence in order to seek refuge elsewhere, in other words whether section 3(b) of the Refugees Act was applicable. In answering this question, the Board decided the following:

> The last location where the appellant "resided" in the DRC was Moba where she had fled to after leaving Mulonge village in Uvira. The Board has reservations whether Moba can be seen as the appellant's [place of] habitual residence and finds that it was not whether or not she was compelled to leave it. The Board finds that Uvira was the appellant's place of habitual residence which she was compelled to leave in order to seek refuge elsewhere. The appellant's evidence indicates that she was compelled to leave her place of habitual residence due to events seriously disturbing or disrupting public order i.e. the fighting taking place in the eastern DRC and specifically Uvira.[52]

The Board's above interpretation relating to the appellant's place of habitual residence is, in essence, consistent with M. Rankin's comments relating to incidents of delay between the time when a refugee is compelled to leave his or her place of habitual residence due to an OAU event and the time he or she arrives in the country of asylum. During this period, an individual may be internally displaced and thus have to take up residence in various secondary locations before finally

© Tal Hanna Schreier, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

fleeing the country. Whereas within the context of the 1951 Refugee Convention definition, a delay in taking flight may affect the asylum seeker's credibility,[53] in terms of the OAU definition, a delay goes to the issue of whether someone has actually been compelled from their habitual residence.[54] Rankin elaborates on this issue further as follows:

> The short answer to the delay problem may be found in the concept of a continuing compulsion. That is the idea that having once fled from her place of habitual residence an asylum seeker will continue to be compelled so long as the displacement can be casually linked to an initial triggering event.[55]

In this same Appeal Board decision, the Board also confirms its cautious position taken with regard to the IFA, as described above. More specifically, in this regard the Board states:

> The final question which the Board has to consider is whether in cases where section 3(b) of the Act is applicable, the internal relocation alternative can be applied or not. In this instance Counsel for the appellant has argued that it cannot be applied. The Board has certain reservations but for the purpose of this decision will go along with [Counsel's] argument. In the circumstances the appellant's appeal must succeed.[56]

In Refugee Appeal Board decision number 415/05, the Board again considered the issue of "place of habitual residence" when it dismissed the appellant's claim. In this case, the appellant, a national from the DRC, was living in Lubumbashi, but was on a fishing trip with friends during school holidays in Moba. When appellant and his friends received news that rebels were coming, they attempted to return home to Lubumbashi but they encountered government troops in the town of Pweto. The soldiers accused the appellant and his friends of being rebels and then forced the appellant to fight with them against the rebels. Shortly thereafter, the appellant was able to escape in an attack by the rebels on the army soldiers, and fled the country, eventually arriving in South Africa. The appellant stated that when he fled, he was afraid to return to Lubumbashi because he would be accused of being a rebel and that furthermore he could not return to the DRC because of the war situation in the eastern Congo. The Board found that the appellant "did not habitually reside at Moba or at Pweto in the lower eastern part of the DRC"[57] because he and his friends were there on vacation. The Board therefore concluded that "it is clear that section 3(b) of the Refugees Act, 1998, has no application here as the appellant, and his friends, were not compelled to leave their place of habitual residence to seek refuge elsewhere."[58] The Board furthermore decided that the appellant's assertion that he would be considered a rebel was implausible, and that Lubumbashi is under government control and according to country information is safe from fighting. Accordingly, the appellant was denied refugee status. This decision demonstrates an appropriate analysis on the part of the Appeal Board regarding the application of the OAU refugee definition. It furthermore reveals a situation in which the Appeal Board properly assesses an appellant's claim from the viewpoint of both the Refugee Convention *and* the OAU refugee definitions.

Lastly, the final Appeal Board decision obtained by the author for the purposes of this paper focuses on the Board's specific interpretation of the meaning of a disruption or disturbance of the public order. In Refugee Appeal Board decision number 1433/06, the Appeal Board dismissed the appeal of a Nigerian asylum seeker based on its interpretation of this aspect of the 3(b) definition. In this case, the appellant claimed that, as a Christian, he was fearful of the fighting taking place in his country between Christians and Muslims, although "he was unable to state exactly where the fighting was taking place."[59] In its decision, the Board reviewed country of origin information on Nigeria, which confirmed that "there were incidents of violence between Muslims and Christians between 2001 and 2004 mainly in the Plateau and Kano states … [and] in reaction to the religious violence, President Obassanjo declared a state of emergency."[60] Furthermore, another report confirmed that as a result of violent incidents between Christians and Muslims during February 2006 in the city of Onitsha, from where the appellant hailed, the "state governor deployed 2000 policemen on the streets and appealed for calm." According to these reports, the Board concluded that "the government [of Nigeria] is taking an active role in preventing and/or stopping the violent incidents between Christians and Muslims"[61] and that the "government is doing all it can to prevent or control violent incidents between the two religious groups." In turning to the application of section 3(b) of the Refugees Act, the Board concluded that the definition does not apply in this case, as events disrupting or disturbing the public order implies "that the government is no longer in control,"[62] which according to the Board "is not the case in Nigeria at all, [since] the government is firmly in control."[63]

This interpretation of the Appeal Board of "events seriously disturbing or disrupting public order" is seemingly a narrow one. A government's attempts, no matter how genuine, to suppress or subdue serious disruptions or disturbances of public order should not be the litmus test for the application of this definition, since generalized violence and massive human rights violations may nonetheless take place, thereby compelling someone to take flight. The effectiveness of a government's attempts must therefore be considered as well.

© Tal Hanna Schreier, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

While the above case involved a clearly weak refugee claim, in that the appellant could not even point to specific events that compelled him to take flight, the Board in this decision nevertheless demonstrated a restrictive analysis, as nowhere did it question the ability of the Nigerian government to control the unrest that had occurred. The following decision of the Appeal Board reviewed by the author is, however, more instructive on this point.

In the course of her employment, the author has come across only one other Appeal Board decision, which provides further insight into the Board's interpretation of section 3(b) of the Refugees Act, and which complements the above decision. In Refugee Appeal Board decision number 729/06, in which the Board dismissed the appeal of a Burundian asylum seeker, the Board stated the following:

> Where law and order has broken and the government is unwilling or unable to protect its citizens, it can be said that there are events seriously disturbing or disrupting public order. To determine when a disturbance had taken place involves weighing the degree and intensity of the conduct complained of against the degree and nature of the peace which can be expected to prevail in a given place at a given time. The test should be objective.[64]

This quote provides some clarity as to the Board's interpretation of "events seriously disrupting public order," as here the Appeal Board refers to the necessary ability of a government to protect its citizens in the face of an OAU or section 3(b) event. Accordingly, it can be stated that the Board takes the position that only when an asylum seeker's government is "unwilling or unable to protect" its citizens in the face of law and order having broken down, does this constitute a section 3(b) event. What is unclear or undefined, however, is the precise meaning of "law and order breaking down."

Conclusions

In light of the continuing trend that has seen the narrowing of the scope of application of the Refugee Convention definition, resulting in the denial of protection to people who require safety for their lives outside of their country of origin or nationality, the expanded OAU refugee definition represents an "opposite trend [and] is what comprises its true value for refugee jurisprudence at a global level."[65] Whether or not in the South African context this is the case has been the focus of this paper; the question being whether South Africa is applying the expanded refugee definition sensibly and as such providing protection to those persons who may otherwise not qualify for refugee status in terms of the Refugee Convention definition. The answer to this question is a particularly difficult one. At the outset, assessing whether the definition is properly applied is critically hampered by the fact that the precise legal meaning of the OAU refugee definition is non-existent, and that comparative jurisprudence from other jurisdictions on the continent is not readily available.

Turning to South Africa's asylum determination procedure, one can conclude that, at first instance, the Department's reliance on the OAU refugee definition in the form of a *prima facie* procedure based on "white lists" or "refugee generating countries" is an inadequate approach, in that it may include generalized and hence incorrect assumptions about what constitutes an OAU or section 3(b) event and a lack of appropriate consideration of the other elements of the definition. Additionally, as there is currently no official mass influx situation in the country, such group determination violates the Refugees Act, which clearly provides for an individualized refugee status determination for each applicant. In examining only the objective conditions of a country, the RSDOs may also potentially disregard the subjective elements of an individual applicant's claim. In this regard, as van Beek correctly asserts, "a [refugee] determination procedure, which is only based on country information, neglects the fact that refugees also come from countries perceived to be safe … [and] violates the principle of non-discrimination, written down in the South African Constitution and the UN and OAU Conventions."[66]

This research concludes that, in terms of its application of the OAU Convention's refugee definition, it would appear that Department of Home Affairs officials are not sufficiently trained to apply the definition properly and that the asylum process itself, given the significant pressures it faces, does not allow for this to take place. Specific training on the non-exclusive application of the section 3(b) refugee definition should be provided, as well as a concerted effort to promote the expansion of the concept of refugee protection to *all persons* who do not have individualized claims of persecution in their countries of origin.

With regard to South Africa's Refugee Appeal Board decisions, a more considered and measured approach to the application of the OAU or section 3(b) refugee definition has been observed. From the limited number of decisions reviewed, it appears as though the Appeal Board is faithfully applying its mind to the numerous interpretative issues raised by the OAU refugee definition, and the Board's application of the expanded refugee definition is reasoned, although fairly limited or narrow in its scope. However, it may not be until such time as an Appeal Board's decision involving its interpretation of the expanded refugee definition is challenged on judicial review to the South African High Court that more meaningful jurisprudence will develop in this regard.

© Tal Hanna Schreier, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Notes

1. *1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,* adopted on 10 September 1969 by the Assembly of Heads of State and Government, CAB/LEG/24.3 (entered into force on 20 June 1974 [OAU Convention].
2. *The Addis Ababa Document on Refugees and Forced Population Displacements in Africa,* adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, Addis Ababa (8–10 September 1994) at para. 3.
3. The OAU Convention firstly, in Art I(1), repeats the Refugee Convention refugee definition (with the 1967 Protocol's addition, which removed the geographical and temporal limitations from same) and then includes this additional definition of a refugee at Art I(2):

   > … the term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

4. *Convention relating to the Status of Refugees,* 28 July 1951, 189 U.N.T.S. 150 (*entered into force* 22 April 1954) [Refugee Convention]; and *Protocol Relating to the Status of Refugees,* 606 U.N.T.S. 267 (*entered into force* 4 October 1967).
5. Section 3(a) and 3(b) of the South African *Refugees Act 130 of 1998* [Refugees Act].
6. M. Rankin, "Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on" (UNHCR Working Paper No. 113, April 2005) at 12, online: <http://www.unhcr.org/research/RESEARCH/425f71a42.pdf> (date accessed: 2 January 2008).
7. L. de la Hunt, "Refugee Law in South Africa: Making the Road of the Refugee Longer" in *A Reference Guide to Refugee Law and Issues in Southern Africa* (Lusaka: Legal Resources Foundation, 2002) at 34. De la Hunt supports this inclusive interpretation, claiming that the OAU definition should "apply universally and equally to all applicants, regardless of their country of origin."
8. Section 35 of the Refugees Act, entitled "Reception and accommodation of asylum seekers in event of mass influx," provides the Minister with the ability to grant refugee status to a group or category of persons, although what is meant by a group of persons is unclear.
9. The concept of "*prima facie* refugee determination" refers to the provisional granting of refugee status to a person or persons without the formal requirement of conducting an individual refugee status determination to establish whether or not the displaced person(s) qualify. Rather than the granting of refugee status based on a legal definition, *prima facie* refuge determination is essentially a device or a method to enable, in urgent situations such as a mass influx, appropriate protection measures to be taken when individual refugee status determination procedures are impractical. According to the UNHCR, in effect it is the number of refugees that triggers the mechanism for *prima facie* refugee status. See *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1992), 13, at para. 44.
10. I. van Beek, "Prima facie asylum determination in South Africa: A description of policy and practice" in *Perspectives on Refugee Protection in South Africa,* ed. J. Handmaker, L. de la Hunt, and J. Klaaren (Pretoria: Lawyers for Human Rights, 2001), 18.
11. *Ibid.*
12. Department of Home Affairs, Directorate of Refugee Affairs, *2006 Annual Report on Asylum Statistics* (January 2007), obtained by author from the UNHCR branch office in Pretoria; on file with author). This report states (at 4) that "during 2006, Refugee Affairs experiences multifaceted challenges in dealing with mass influx of asylum seekers" and states (at 6) that "the mass influxes of asylum seekers have overwhelmed the already fragile refugee services."
13. J. du Plessis, "Home Affairs puts in overtime" *Pretoria News* (28 April 2008).
14. *Supra* note 12 at 4.
15. *Supra* note 12 at 6 confirms that this practice still takes place, in order to "lessen administrative load of refugee offices, then redirect manifestly unfounded cases to relevant directorates and finally provide assistance to deserving asylum seekers."
16. A. Tuepker, "On the Threshold of Africa: OAU and UN Definitions in South African Asylum Practice" (2002) 15:4 Journal of Refugee Studies 418.
17. *Supra* note 7 at 36.
18. *Ibid,* at 35.
19. *Ibid.*
20. *Ibid.* at 36. This practice is confirmed by the author's personal experience, having through the course of her employment, read hundreds of RSDO's rejection letters, which predominantly state that the asylum seeker does not qualify for refugee status because while he or she showed fear of past persecution, it could not be found that he or she would be persecuted upon return to the country of origin.
21. *Ibid.* at 36.
22. *Supra* note 13, in which the Department of Home Affairs estimates that "between 1000 to 2000 foreigners were trying to apply for [asylum seeker] permits every day."
23. *Supra* note 16 at 413.
24. *Supra* note 7 at 36.
25. Section 36 of the Refugees Act allows the Minister to withdraw refugee status from someone who ceases to remain a refugee for the reasons set out in Section 5 of the Refugees Act.
26. *Pro forma* letter appended to each B1-1155 Form (Refugee Regulations, 2000), also referred to as the Section 24 Refugee Status document.

© Tal Hanna Schreier, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

27. For example, by focusing on the first instance decision and allowing the appellant to argue grounds of appeal regarding same.
28. According to first-hand observations by the author between 2006 and 2008, the Appeal Board practice indicates this position. In this regard, the Board members usually advise the appellant that the appeal hearing is a *de novo* one. Furthermore, the Board members rarely refer to the appellant's file in order to confirm or dispute any facts stated at the Appeal, and reference by the appellant or his or her legal representative to an error made by the RSDO at first instance is usually only acknowledged by the Board member but not dealt with in detail.
29. Currently on the Department of Home Affairs website, online: <http://www.dha.gov.za/raab.asp> (accessed on January 28, 2008). Incidentally, there exists no statutory obligation on the Board to report its decisions, in terms of the Refugees Act, its Regulations, or the Appeal Board Rules 2003.
30. Email response to author's question by Refugee Appeal Board Chairperson, Mr. Tjerk Damstra, July 3 2007 (notes on file with the author).
31. In a conversation with the author on 7 February 2008 (notes on file with the author).
32. Email response to author's question by Refugee Appeal Board Chairperson, Mr. Tjerk Damstra, 4 January 2008 (notes on file with the author).
33. Section 26(1) of the Refugees Act.
34. Upon providing the author with these decisions, the Chairperson of the Appeal Board requested the author to protect the anonymity of the appellants, hence the use only of the Appeal Board decision number to identify the decision reviewed.
35. Refugee Appeal Board decision number 159/2004 at 3.
36. *Ibid.* at 7.
37. Refugee Appeal Board decision number 418/05 at 6.
38. *Ibid.* at 7.
39. *The Michigan Guidelines on Well-Founded Fear,* Third Colloquium on Challenges in International Refugee Law Convened by the Program in Refugee and Asylum Law, University of Michigan Law School, March 26–28, 2004, online: <http://www.refugeecaselaw.org/fear.pdf> (accessed 25 January 2008).
40. *Ibid.* at 4–5.
41. Section 5(1)(e) of the Refugees Act.
42. Prior to the Refugees Act being implemented, the Standing Committee for Refugee Affairs was the body that was responsible for individual refugee status determinations in South Africa.
43. Refugee Appeal Board decision number 4013/03, 6, at para. 20.
44. *Ibid.* at para. 18.
45. *Ibid.* at para. 20.
46. *Mayongo v. Refugee Appeal Board & Others,* 2007 J.O.L. 19645 (T).
47. *Ibid.* at para. 8–9.
48. Refugee Appeal Board decision number 294/04 at 5.
49. *Ibid.*, quoting J. Hathaway, *The Law of Refugee Status* (Canada: Butterworths, 1991) at 203.
50. Refugee Appeal Board decision number 002/06 at para. 23.
51. *Ibid.* at para. 24.
52. Refugee Appeal Board decision number 378/05 at para. 21–22.
53. Due to a delay in the asylum seeker fleeing his country, it may be determined that the harm that the asylum seeker was facing was not serious; in other words it did not amount to persecution, such that it required him or her to immediately flee the country. See *supra* note 12 at 25, note 166, on this point.
54. *Supra* note 6 at 24–25.
55. *Ibid.* at 25.
56. Refugee Appeal Board decision number 38/05 at para. 23.
57. Refugee Appeal Board decision number 415/04 at para. 22.
58. *Ibid.*
59. Refugee Appeal Board decision number 1433/06 at para. 8.
60. *Ibid.* at para. 18.
61. *Ibid.* at para. 19.
62. *Ibid.* at para. 22.
63. *Ibid.*
64. Refugee Appeal Board decision number 729/06 at para. 13.
65. G. Okoth Obbo, "Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa" (2001) 20:1 Refugee Survey Quarterly 79 at 113.
66. *Supra* note 10 at 28.

Tal Hanna Schreier, B.A., LL.B., LL.M., is a Canadian lawyer currently based in South Africa. She researched this paper while completing her LLM and working as Senior Refugee Legal Counsellor and Advocacy & Training Coordinator at the University of Cape Town Law Clinic's Refugee Rights Project. The Project provides free legal support and services to refugees and asylum seekers in the Western Cape, as well conducting strategic litigation and advocating for the rights of refugees at all levels of government and society.

© Tal Hanna Schreier, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Responsibility Sharing or Shifting? "Safe" Third Countries and International Law

Michelle Foster

Abstract

This article assesses the legality at international law of "protection elsewhere" policies, that is, policies whereby responsibility for refugees is transferred between states such as in the US-Canada Safe Third Country Agreement. An analysis of the operation of such policies in Europe, Australia, and North America raises serious concerns about the ability of such schemes to uphold their aims and objectives in conformity with international law. The paper concludes by recommending that states reconsider the utility and legality of such schemes with a view to developing policies that genuinely address the need for responsibility sharing.

Résumé

Cet article évalue la légalité en droit international des politiques dites « protection ailleurs », c.-à-d. les politiques sous le couvert desquelles la responsabilité envers les réfugiés est transférée entre états, comme c'est le cas avec l'Entente entre le Canada et les États Unis sur les tiers pays sûrs. Une analyse de l'opération de telles politiques en Europe, en Australie et en Amérique du Nord soulève de sérieuses questions sur la capacité de tels arrangements à respecter leurs buts et objectifs en conformité avec le droit international. L'article conclut avec la recommandation que les états reconsidèrent l'utilité et la légalité de tels arrangements avec comme objectif le développement de politiques qui répondent réellement au besoin de partage de la responsabilité.

Introduction

In recent decades many states, particularly in the developed "North," have increasingly relied on a range of deflection, interception, and transfer policies in an attempt to minimize their own obligations towards refugees under the *Convention relating to the Status of Refugees* (the Refugee Convention). While many of these occur offshore and are thus difficult to monitor, a more prominent practice has been the formulation of "protection elsewhere" policies such as the adoption of the *Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* (the US-Canada STCA). Agreements such as these apply to refugee applicants once they have successfully avoided or overcome other hurdles constructed by states such as interdiction, carrier sanctions, and deflection policies. In an increasingly large number of states, refugees find that arriving at or entering the territory of a state party is not the end of the journey because they are then informed that they will be sent to a "safe third country"—often, but not necessarily, one in which they transited *en route* to their final destination. This paper is concerned with the legality of such policies at international law. A protection elsewhere policy, as considered in this paper, refers to a situation in which a state or agency acts on the basis that the protection needs of a refugee should be considered or addressed somewhere other than in the territory of the state where the refugee has sought, or intends to seek, protection.[1] While sometimes ascribed different labels, including "country of first asylum" or "safe third country," the core legal question remains the same, *viz.*, whether a state may deflect its responsibility under international law by transferring a refugee to another state.[2] This paper will analyze the US-Canada STCA and its surrounding litigation in some depth, but is not restricted to this particular manifestation of the safe third country concept.

There are various methods by which protection elsewhere policies are implemented. The first is through a formal multilateral assignment scheme such as the Dublin Regulation II, in which the state through which the applicant for asylum entered the EU is responsible for dealing with the application, even if it is lodged in another Member State. The second is a formal bilateral assignment scheme such as the US-Canada

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

STCA, which provides that the country of last presence shall examine the refugee status claim of any person arriving at a land border port of entry who makes a refugee claim.[3] The third is what we might call "unilateral" transfer schemes such as are effected in Australian law via section 36(3) of the *Migration Act 1958* (Cth), which excludes from protection a person "who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently, any country apart from Australia."

The key difference between these schemes is that in the case of multilateral and bilateral schemes there is a written agreement between the relevant state parties which, at least theoretically, have reasonably comparable systems of refugee status determination and protection and thus purport to be concerned with the allocation of responsibility between comparable Member States. In these scenarios there is at least a theoretical possibility that "responsibility sharing" could ensure fair and equitable allocation of protection responsibilities as between states.[4] By contrast, in the case of unilateral removals, where there is not necessarily any readmission or other written agreement, nor any meaningful analysis of the situation pertaining in the "other country," it is more accurate to view these schemes as an attempt to avoid responsibility rather than sharing it fairly as between state parties.

However even the bilateral and multilateral schemes have given rise to serious concerns. First, one might question the responsibility sharing objective given that, for example, in the EU context, the Dublin Regulation does not contain any mechanism for ensuring that responsibility is shared in an equitable manner. As the European Parliament recently noted, it "fails to serve as a burden-sharing mechanism."[5] Rather, the experience has been, unsurprisingly, that responsibilities have shifted towards the border states.[6]

Second, divergence of policies and practices even within a theoretically "harmonized" system, such as is established in the EU,[7] means there is significant inequity in the system which has resulted in an "asylum lottery." For example, the United Nations High Commissioner for Refugees (UNHCR) reports that a Chechen transferred from Austria to Slovakia sees his or her chance of being granted refugee status going from 80 per cent to 0 per cent.[8] Similarly, the European Council on Refugees and Exiles (ECRE) notes that in 2007 recognition rates for Iraqis varied from 0 per cent in Greece and Slovenia to 87.5 per cent in Cyprus.[9] Even in the context of the bilateral US-Canada STCA—an agreement between two very similar state parties to the Refugee Convention—there have been many concerns raised as to the adequacy of the US system to fully uphold Article 33 of the Refugee Convention.[10] Thus, at present, protection elsewhere is more of a challenge than an opportunity for refugee protection.

Lawfulness of Protection Elsewhere Schemes

The adoption and implementation of protection elsewhere policies is now so well entrenched in state practice, and ostensibly approved by the UNHCR, that one may assume it is futile to consider whether such policies are permitted at international law. However the legality of the schemes is rarely a question capable of litigation before domestic courts in light of domestic jurisdictional limits, and thus the international law arguments have rarely been canvassed and addressed in any depth. For example, in *Canadian Council for Refugees v. R,* Phelan J. noted that "there may be an issue of whether a Canadian law which requires a person to make their refugee claim in a country, other than the one of their choosing, is compliant with the Refugee Convention."[11] However, he concluded that in the absence of other evidence, "it is presumed that Canadian law is at least compliant with the relevant Conventions."[12] It is useful at the outset to note that while the Federal Court of Appeal overturned Justice Phelan's decision to grant an application for judicial review declaring invalid sections 159.1 to 159.7 of the *Immigration and Refugee Protection Regulations* and the STCA, Justice Phelan's assessment of the STCA's compliance with the Refugee Convention remains relevant.[13] This is because the reason for overturning Justice Phelan's decision was not that his Honour's assessment that the STCA is inconsistent with Article 33 of the Refugee Convention was incorrect as a matter of fact or law, but rather that this was not the proper question to be resolved by the Court. Justice Phelan had assumed that compliance with Article 33 (and Article 3 of the Convention Against Torture) was a condition precedent to the Governor-in-Council's exercise of its delegated authority to designate the US as a safe third country, and that since aspects of the US asylum process are inconsistent with both relevant treaties, the STCA and accompanying regulations are *ultra vires.*[14] However the Federal Court of Appeal found that the correct inquiry was not as to whether there was *actual* compliance with international law, but rather only whether the Governor-in-Council had *considered* the factors set out in the Act (including compliance with Article 33) prior to making the designation.[15] In light of the fact that the reason for overturning Justice Phelan's decision was a technical rather than substantive one,[16] reference will continue to be made to his Honour's consideration of the substantive questions of actual compliance.

Turning then to the question of whether Justice Phelan was correct to raise the issue whether protection elsewhere policies are permitted at international law, the starting point must of course be the text of the Refugee Convention.[17] The Refugee Convention does not explicitly authorize a transfer of a refugee or applicant for refugee status from one state party to another. Rather, authority for the legality of such transfers

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

is assumed to be found in an omission in the text, namely, the lack of a right to be granted asylum. As is well understood, the Refugee Convention prohibits a state from returning a person to a state in which he or she will be exposed to persecution (the obligation of *non-refoulement* in Article 33). It is thus often assumed by state parties that as long as Article 33 is not violated, the state is free to transfer a refugee to a third state. Indeed, so much was assumed in the concurring opinion of Evans J.A. in the Canadian Federal Court of Appeal, where his Honour asserted in passing that the "provisions of neither the international Conventions relied on in this litigation, nor the Charter, require Canada to abstain from enacting regulations which may deter nationals of third countries in the United States from coming to the Canadian border to claim refugee protection or protection from torture."[18] This was said to be because both Article 33 of the Refugee Convention and Article 3 of the CAT "impose a negative obligation not to *refoule,* not a positive obligation to receive potential claimants."[19]

Interestingly however an analysis of the text of the Refugee Convention reveals that it is not silent as to the circumstances in which a person may be excluded from protection on the basis that he or she is able to obtain protection elsewhere. Rather there are three situations in which a state may decline to protect a person because he or she can obtain protection elsewhere: where a person has more than one nationality, he will not satisfy the definition of refugee if "he has not availed himself of the protection of one of the countries of which he is a national" (Article 1A(2)); where a person has *de facto* nationality in another country the Convention "shall not apply" (Article 1E); and where a refugee acquires a new nationality and enjoys the protection of the country of new nationality the Convention "shall cease to apply" (Article 1C). Importantly, in each of these situations the refugee enjoys a level of protection in a third country *greater than* that provided in the Refugee Convention since in each case the refugee will enjoy equivalent protection to that enjoyed by nationals in the third state, whereas in some instances the Refugee Convention dictates a lower standard of protection for refugees than that enjoyed by nationals.[20]

The explicit reference to these carefully defined circumstances in which the availability of protection elsewhere can exclude a person from refugee protection might be thought to be exhaustive of the situations in which a state can decline to protect on this basis—that is, an application of the *expressio unius* principle.[21] This may further be supported by reference to the context, object, and purpose of the Refugee Convention, matters appropriately considered under the rules of treaty interpretation,[22] which could be said to support the view that the Convention requires states to engage in international co-operation to protect refugees, not deflect responsibility to other states.

The difficulty with the textual argument however is that the exclusions above all speak to the definition of a refugee and thus to who qualifies for protection. In the context of protection elsewhere practices and policies, such as the US-Canada STCA, there is no suggestion that a transferred refugee applicant is *excluded* from protection, but rather that the claim for protection is more appropriately assessed and implemented in another state. Further, there is a contra indication in the text, in that Article 32 prohibits the expulsion of refugees other than in exceptional circumstances, but this only applies to those refugees "lawfully present" in a state's territory.[23] The adoption of the concept of lawful presence was a deliberate choice and is to be distinguished from other levels of attachment such as refugees who are merely within a state party's jurisdiction or territory.[24] It thus suggests that there is a period between a refugee coming within the jurisdiction of a state party and attaining the status of lawful presence during which he or she may be lawfully transferred to another state. However this conclusion does not mean that a state is untrammelled in its decision to transfer. We thus now turn to a consideration of what constraints are imposed on any decision to transfer.

Refugee Rights Other than Article 33

No state has ever asserted that there are no constraints whatever pertaining to a decision to transfer a refugee or asylum seeker to a third state; rather all states accept that at the very least Article 33 of the Refugee Convention must be respected in any decision to transfer. The content of that requirement may be subject to debate, an issue to which this article will turn below, but the fundamental relevance of Article 33 is accepted.

However what is much more controversial is whether there are any other obligations relevant to a decision to transfer a refugee. In general, states tend to assert that Article 33 is the *only* relevant Refugee Convention obligation, and in much of the jurisprudence it is assumed by courts, either implicitly or explicitly, that Article 33 is the only relevant consideration. In the Canadian litigation, for example, Justice Phelan concluded, following a discussion of relevant comparative case law, that "the focus of the Convention is on protection against *refoulement* and as long as the third party protects in practice against *refoulement,* other distinctions will not bar return."[25] In reaching this conclusion his Honour did not consider the relevance of other rights to this context from a principled perspective but rather relied on his Honour's view of the comparative case law. Indeed he primarily relied on Lord Bingham's judgment in *Yogathas* in which his Lordship stated that "the Convention is primarily directed to preventing *refoulement* and it is inappropriate to compare other issues between two states, such as the applicant's living

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

conditions in the third country."[26] However the relevance of other rights has rarely been directly argued and considered as a discrete issue in the jurisprudence and thus the persuasiveness of previous authority on this point is open to question since it is not the outcome of a considered assessment of the competing arguments but rather largely represents *obiter* comments in judgments otherwise primarily concerned with Article 33 as a constraint. By contrast, several expert affidavits produced in the Canadian Federal Court directly addressed this issue, representing possibly the most comprehensive elucidation of the competing arguments presented to a court to date.[27] Justice Phelan's rather cursory dismissal of this important argument is particularly curious in light of this, particularly given that a number of Refugee Convention rights other than Article 33 were asserted to be at risk on return to the US,[28] but perhaps is explained on the basis that under the Canadian legislation, Article 33 was the key focus of an inquiry into the validity of the Agreement.[29]

This raises the question as to what is the correct position as a matter of international law. The Refugee Convention in fact contains many rights other than Article 33, and it might be argued that those rights already acquired by a refugee in the sending state are relevant to determining the validity of safe third country agreements. As soon as a refugee is within the territory of a state party (regardless of whether he or she has been recognized as a refugee by the state party), he or she is entitled to the following rights: Article 3 (non-discrimination); Article 4 (freedom of religion); Article 13 (right to property); Article 16(1) (access to the courts); Article 20 (equality of access to rationing); Article 22 (right to education); Article 25 (administrative assistance); Article 27 (identity papers); Article 29 (freedom from fiscal charges); Article 31(1) (non-penalization for illegal entry or presence); Article 31(2) (freedom from constraints on freedom of movement unless necessary); Article 33 (*non-refoulement*); and Article 34 (consideration for naturalization). In addition, the refugee has the possibility of acquiring further rights as his or her connection with the state strengthens.

There is a strong argument that once a refugee has acquired rights in the sending state, the sending state must ensure that those rights are respected in the receiving state.[30] This view has some judicial support. In overturning the "common law" doctrine of "effective protection" that had been developed by the Federal Court of Australia, in *NAGV v. Minister* the High Court of Australia noted that one of the problems with this doctrine was that it assumed that the only "protection obligations" which Australia owed to refugees (and thus the only obligation relevant to a decision to transfer) was that contained in Article 33. However, as the High Court noted, the Convention contains a number of other requirements including the provision of free access to courts and the right to religious freedom.[31] The implication was that, as a matter of treaty interpretation, more than mere compliance with Article 33 is required in order to effect a lawful transfer.[32]

This is consistent with general principles of international law. As the European Court of Human Rights (ECHR) has noted, a sending state cannot avoid the obligations it has incurred under human rights treaties (in that case the European Convention on Human Rights) *vis-à-vis* refugees within territory simply by transferring them under the Dublin Convention; nor can it "contract out" of its legal obligations.[33] This is also recognized in European Parliamentary Resolution 1569 (2007) in which states are reminded that the transfer of refugees offshore cannot "absolve a state from its responsibilities,"[34] and has received support from the Assistant High Commissioner—Protection of the UNHCR.[35]

This reasoning applies even more strongly in the context of the Refugee Convention than in the context of general human rights treaties. The Refugee Convention's purpose is to impose obligations on states regarding a specific group of persons. While the Convention does not impose obligations on states to deliver rights to refugees in the abstract, state parties have assumed obligations to deliver rights to refugees with whom they have a connection, in some cases based on mere physical presence. If it were possible to circumvent the considerable range of obligations imposed on state parties by simply transferring a refugee to another state, this would defeat the *raison d'ĕtre* of the Convention.[36]

Indeed, evidence suggests that rights other than *non-refoulement* alone are often considered critical to refugees' own idea of what amounts to "protection."[37] For example, Grabska notes that in Egypt, due to the number of reservations to the Refugee Convention made by Egypt, the rights of refugees and asylum seekers are significantly constrained; so much so that "the possibility of full integration in terms of access to citizenship, civil, political, social, economic and cultural rights in Egypt for refugees is effectively ruled out."[38] In her fieldwork, Grabska found that the key concern expressed by refugees was effective protection and security. Importantly, refugees view such protection "not only in terms of being free from random arrests and deportation, but also in terms of having access to basic human rights, such as the right to education, work, housing and health services."[39] Grabska quotes one Rwandan refugee: "Having a blue card is nonsense, it is like being in a prison, but even the prison is better because you are fed there. But we are not given any help so how are we expected to survive?"[40] This explains why it is that many refugees have chosen to leave Egypt and seek refuge in nearby states such as Israel; and seriously calls into question whether refugees can legally be returned to Egypt by Israel under the assumption that it is a safe third country.[41]

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

This has become an increasingly important issue in recent times in the context of returns to Greece by EU Member States pursuant to the Dublin Regulation. The question whether Greece can be considered a safe third country has been the subject of debate for some time,[42] but has become acute since the UNHCR published a position paper in April 2008 calling for all EU Members States "to refrain from returning asylum-seekers to Greece under the Dublin Regulation until further notice."[43] In addition to concerns about the ability of returnees under Dublin to access an adequate asylum procedure in Greece, the UNHCR and other organizations have pointed to the fact that Greece has failed to implement even the minimal standards set out in the EU Reception Directive—a directive that aims to provide minimum standards for the reception of asylum seekers "that will normally suffice to ensure them a dignified standard of living."[44] In 2007 the European Court of Justice found that Greece had failed to adopt *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers* (the Reception Directive) on the basis that it failed to adopt, within the prescribed period, "the laws, regulations and administrative provisions necessary to comply" and had thus "failed to fulfil its obligations under Article 26 of that directive."[45] It is arguable that failure to implement the Reception Directive is *prima facie* evidence that a state is in violation of international obligations including under the Refugee Convention, the *International Covenant on Civil and Political Rights* (ICCPR), and the *International Covenant on Economic, Social and Cultural Rights* (ICECSR), given that in many respects the Reception Directive sets a lower standard than that required by these international treaties.[46]

As a result of these concerns, a number of EU Member States have begun halting transfers of all or some asylum seekers to Greece under the Dublin Regulation. Most relevant for present purposes is the fact that in some cases the prohibition on transfer has not been imposed due to concerns that Article 33 is at risk of violation, but rather due wholly or in part to the human rights situation for asylum seekers in Greece. For example, in May 2008 the Swedish Migration Board decided to halt the deportation of children to Greece on the basis of a real risk that children will be detained in Greece while awaiting determination of status.[47] Further, during 2008 several lower administrative courts in Germany issued a temporary stay of proceedings preventing the German government from transferring asylum seekers to Greece in respect of a number of (adult) asylum seekers. In a decision of 25 April 2008 the administrative court (VG) in Giessen issued a temporary stay of proceedings for a period of six months due to the inhuman conditions for asylum seekers in Greece contrary to the Reception Directive and to the Asylum Procedures Directive.[48] In another decision of 21 August 2008 the administrative court in Hamburg issued a temporary stay of proceedings on the basis that the return was not possible because of the danger of serious detriment to the asylum seeker, specifically the "conditions not conforming to human rights standards in the asylum seeker camps and the asylum proceedings that do not even approximately comply with the minimum legal standards."[49]

This is consistent with the UNHCR position paper which refers to the "[p]roblematic reception conditions for unaccompanied minors, in particular access to health, education and welfare during the course of the asylum procedures,"[50] as well as the "extremely limited reception facilities for asylum-seekers" including lack of accommodation and access to employment.[51]

It is unclear whether the reference to human rights in these decisions is a reference to rights contained in the Refugee Convention or other international human rights treaties, although explicit reference to the EU Reception Directive suggests that consideration of Refugee Convention rights is considered relevant. In any event, while there may be some debate concerning the extent to which other Refugee Convention rights are determinative in this inquiry, there is no question that general human rights treaties such as the ICCPR and the European Convention on Human Rights constrain a state in its ability to expel, deport, or transfer a person to another state, under a safe third country regime or otherwise.[52] At the very least, a state is prohibited from removing a person where there is a real risk that his or her right to life, or right not to be subjected to torture, or to cruel, inhuman, or degrading treatment, will be violated.[53]

Of particular relevance to the present context, "inhuman or degrading treatment" has been interpreted so as to apply to a violation of socio-economic rights. For example, in *Limbuela,* the House of Lords found that the UK's policy of prohibiting asylum seekers from receiving welfare benefits when their applications were not filed "as soon as reasonably practicable" amounted to "inhuman or degrading treatment" in violation of Article 3 of the European Convention on Human Rights. As Lord Bingham explained, this was because an asylum seeker "with no means and no alternative sources of support, unable to support himself is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life."[54] As to whether this action amounted to "treatment" for the purposes of Article 3, Lord Hope emphasized that the "imposition by the legislature of a regime which prohibits asylum seekers from working and further prohibits the grant to them, when they are destitute, of support amounts to positive action directed against asylum seekers and not mere inaction."[55] In the context of the ICCPR, the Human Rights Committee (HRC) has routinely found states in violation of Article 7 where they have subjected persons within

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

their control, such as prisoners and detainees, to a deprivation of socio-economic rights.[56]

In assessing whether treatment of transferred refugees/asylum seekers in the third state is likely to amount to degrading treatment, it is vital that regard be had to the particular vulnerability of children, especially in the area of socio-economic rights. This approach is consistent with the views of the Committee on the Rights of the Child which has emphasized that the *non-refoulement* obligations implied in the *Convention on the Rights of the Child* apply:

> … irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.[57]

Thus, where there is evidence of a real risk that asylum seekers will be subjected to such treatment on transfer under a safe third country arrangement, the sending state is prohibited from effecting such transfer under international law. This analysis therefore suggests that it is incumbent upon states to consider rights other than Article 33 of the Refugee Convention alone in assessing the legality of transfers pursuant to a protection elsewhere scheme or policy. Thus, the assumption that nothing other than Article 33 is relevant is clearly unsustainable as a matter of international law.

However, even if it were assumed that Article 33 is the only relevant constraint on a decision to transfer a refugee to a third state, it is important to note that rights violations in the third state can be relevant to an Article 33 analysis on a number of bases.

First, it may be that the conditions or treatment meted out to refugees in the third state in fact amount to persecution on the basis of race, religion, or nationality, both in the form of more traditional methods of persecution (such as violence) but particularly in the context of a violation of social and economic rights.[58] This is of course very unlikely to be an issue in the context of the US-Canada STCA, but such arguments may well be made in the context of Israel's recently renewed policy of returning refugees to Egypt, in light of the situation described above. Another example is provided in the context of Indonesia—a country through which many refugees pass *en route* to Australia and which has been considered in the past by the Australian authorities to be a country in which a refugee may have received effective protection.[59] However according to the UNHCR office in Jakarta, Indonesia cannot be considered to provide effective protection because *inter alia,* "[t]here is no lawful access for these persons to the labour market and thus they are not able to work legally, which obviates any adequate and dignified means of existence. There is no possibility of exercising any civil, economic, social or cultural rights."[60] This may well amount to persecution for reasons of race or nationality or even membership of a particular social group.[61]

Second, it might be argued that a violation of socio-economic rights in the third country may amount to constructive *refoulement,* particularly if such conditions were so harsh as to give rise to a serious likelihood that refugees would risk returning home rather than tolerate the harsh conditions.

Third, the "reception conditions" afforded to refugees in the receiving state may also be relevant to the question whether the refugee is able to access a "fair and effective asylum procedure," which of course has a direct bearing on whether the third state will engage in *refoulement,* discussed below. Indeed, this has been noted by the UNHCR in the context of Greece, discussed above. As the UNHCR notes, "it is essential to enable asylum seekers to sustain themselves during the asylum process, not only out of respect for their rights, but also to ensure a fair and effective asylum procedure."[62] Similarly, ECRE has expressed concern that reception standards vary widely across Member States, particularly in relation to access to health care, including psychiatric assistance and facilities—an issue that may bear directly on the fairness of an adjudication procedure.[63] This analysis reflects the idea of the "interdependence of rights"—a concept recognized more broadly in international human rights law and scholarship and one that needs to be more fully understood and implemented in refugee law.

This analysis leads to the conclusion that it is essential that any state wishing to implement a safe third country or protection elsewhere policy ensure that the human rights conditions in the third state are assessed as part of the decision to transfer.

Article 33 of the Refugee Convention

Even if there is no risk that a refugee will suffer persecution or other human rights violations in a third state, there are still many important issues which must be considered by the sending state in order to ensure that there is not a risk of indirect *refoulement.* It is well accepted that Article 33 applies to indirect *refoulement* as well as direct *refoulement;* that is, just as a state is prohibited from returning a refugee directly to a state in which he or she will be exposed to persecution, a state cannot return or transfer a refugee to a third state where it is foreseeable that the receiving state will in turn send the refugee back to a country of persecution.[64] The question arises therefore as to what factors the sending state

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

must consider in assessing whether indirect *refoulement* is foreseeable.

First, the sending state must be satisfied that the third (receiving) state has an adjudication procedure in place to assess refugee status. While the Refugee Convention does not directly impose any procedural requirements on state parties, it is well accepted that if a state is to avoid violation of a *non-refoulement* obligation such as Article 33, it must institute an adequate system of status determination to enable it to ascertain whom it must protect from *refoulement*.[65] It is beyond the scope of this paper to explore in depth the parameters of an adequate status determination system; however, the UNHCR's Assistant High Commissioner—Protection has helpfully identified the "core elements" or "hallmarks of an effective system for the determination of refugee status" as follows:

> a) a single, specialised first instance body with qualified decision-makers, trained and supported with country of origin information; b) adequate resources to ensure efficiency, to identify those in need of protection quickly and to curb abuse; and c) an appeal to an authority different from and independent of that making the initial decision.[66]

Another UNHCR report prepared for the 2001 Global Consultations concluded that all applicants should "receive a written decision automatically," and that where a claim is rejected or declared inadmissible, "the decision should be a reasoned one."[67] Further, an "asylum seeker should in principle have the right to remain on the territory of the asylum country and should not be removed, excluded or deported until a final decision has been made on the case."[68]

How might a sending state assess whether the intended recipient state's refugee status determination procedures are adequate? It would seem that recognition rates might be a useful starting point. For example, the fact that the recognition rate for both refugee status and subsidiary protection in Greece was only 1.22 per cent in 2006 suggests *prima facie* that Greece does not comply with Article 33.[69] Further, monitoring and supervision by the UNHCR might provide some helpful insight. For example, a UNHCR assessment of refugee decisions by the Greek authorities found that of the 305 decisions studied, none provided any information about the facts of the case or any detailed legal reasoning.[70] Rather, they all contained a standard paragraph alleging that "it is obvious that s/he abandoned his country in order to find a job and improve his living conditions."[71] This serves to emphasize the importance of UNHCR presence in any supposed safe third country, in that it is vital that information be available as to the quality of protection "on the ground"—an issue which in many cases may be peculiarly within the UNHCR's authority to obtain. This is not to say that UNHCR's view on whether a country is a safe third country is conclusive or can obviate the sending state's obligation to ensure that transfers comply with its own international obligations;[72] rather it highlights the need for a method of obtaining information as to the practical reality for transferred refugees in the third state.

This, however, raises a very interesting question as to whether a refugee can be transferred to a state in which the UNHCR *itself* undertakes refugee status determination, particularly given that UNHCR procedure has been criticized for, *inter alia,* its failure to "provide applicants with specific explanations for their rejections" and its lack of independent review of first level determinations.[73] This is not an academic question, given that the UNHCR is currently undertaking refugee status determination in seventy-one states, of which forty are states party to the Refugee Convention (where there are no, or inadequate, national procedures) and thirty-one are not party to the Refugee Convention.[74] However as a result of sustained critique in recent years, the UNHCR has committed to improved procedures and additional training, including the publication of procedural standards in 2005, which appears to have resulted in improved refugee status determination including a higher rate of recognition of refugee claims.[75] It remains an issue, however, which must be considered by a sending state, particularly where transfer will remove a refugee applicant from a highly sophisticated system of refugee status determination, as is found in countries like Australia, Canada, and New Zealand.[76]

Second, the third (receiving) state must guarantee *access* to that system for refugees in question; thus, for example, the sending state must ensure that refugees are not barred from the system by procedural rules or other impediments. The adequacy of any refugee status determination system is irrelevant if an applicant transferred under a "protection elsewhere" scheme will not have access to that process on transfer.[77] This has been an issue on which a number of courts have focused. For example, in *Canadian Council for Refugees v. R,* Justice Phelan found that the requirement that asylum claims be filed within one year in the US (and thus that claims may be barred for failure to comply with this provision) is not consistent with the Refugee Convention, thus putting Canada at risk of a violation of Article 33 if refugees are transferred there. Similarly, in *Kilic v. State of Belgium,* the Belgian Conseil d'État took into account evidence that the applicant would have difficulty reopening his asylum claim in Greece in deciding to suspend the removal order made by the Belgian authorities under the Dublin Regulation. The Court held: "[t]here is an important risk that the applicant is being sent to a country which does not adequately respect his right to have his asylum claim seriously considered."[78] Thus,

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

refugees must have a meaningful legal and factual opportunity to make a claim for protection in a third state.[79]

Third, the sending state must be satisfied that the receiving state interprets the Refugee Convention in a manner that respects the "true and autonomous meaning" of the definition in Article 1 of the Convention.[80] In other words, if a person is likely to be recognized as a refugee in the sending state but, due to differences in interpretation, is unlikely to be so recognized in the state to which transfer is being considered, the sending state is prohibited from transferring the applicant to the third state. While minor differences will be permitted, if the differences are "significant," meaning that they will result in different treatment, then a state may not transfer a refugee to a third state.[81] As Justice Phelan concluded in *Canadian Council of Refugees v. R.,* "it should be presumed that where there is a difference in interpretation, there will be a difference in treatment."[82] This relates both to issues such as standards of proof and also to definitional issues.

In terms of the standard of proof, in *Canadian Council for Refugees v. R.*, Justice Phelan found that the higher standard of proof applied in the US to those seeking withholding of removal, that is, "more likely than not" as opposed to "well founded fear," is not consistent with Article 33. One method by which this might be established is by considering statistics: in the Canadian challenge, the Court took note of Deborah E. Anker's evidence that the grant rate for withholding is three times lower than in respect of asylum claims. Conversely in *TI* the ECHR noted, in response to a challenge based on Germany's high burden of proof, that "the record of Germany in granting asylum claims gives an indication that the threshold being applied is not excessively high."[83]

Turning to the substantive issues, in *Canadian Council of Refugees v. R.,* Justice Phelan found that, in a number of respects, the approach of US decision makers to interpreting the refugee definition was sufficiently different to that of Canada as to suggest that it was not reasonable for Canada to consider the US a safe third country. These differences included an overly expansive view of the exclusion clauses and an unduly narrow approach to the inclusion clause especially as relevant to gender based claims.[84] This careful assessment of the differences is necessary in order for the sending state to satisfy itself that there is no risk of indirect *refoulement* on transfer.

A recent analysis by the UNHCR of the implementation of the EU Qualification Directive reveals that there is still considerable divergence among Member States in interpreting the definition of "refugee" including differences in respect of non-state agents of persecution,[85] the actors capable of providing protection,[86] and the exclusion clause.[87] This serves to reinforce the fact that a state that wishes to transfer even within a somewhat harmonized system must still assess whether the receiving state adopts the correct international meaning of the Refugee Convention before carrying out a transfer.

Procedural Safeguards

The analysis above has considered the factors which a sending state must take into account in assessing whether a transfer may be carried out in compliance with international law. This part now turns to consider the method by which this assessment is to be carried out by the sending state.

A state cannot make a blanket determination that a third state is safe and will deliver Convention rights for all refugees; nor can it rely on a safe third country agreement or assurances from a third state.[88] Rather, refugees who are being considered for transfer must have an ability to challenge the transfer decision in their particular case. As the House of Lords has said, a state is "under a duty to inform itself of the facts and monitor the decisions made by a third country in order to satisfy itself that the third country will not send the applicant to another country otherwise in accordance with the Convention."[89] This is because in the absence of an individualized assessment, the sending state is at risk of a violation of Article 33. Even a country that generally complies with the Refugee Convention may adopt a practice or approach to interpretation which places a particular claimant at risk of *refoulement;* for example, the receiving state may take a narrow approach to gender claims or those from a particular group such as homosexual men and women. Accordingly, the House of Lords has held that although an "accelerated procedure" might be acceptable, the need for efficiency cannot obviate the need for a court to subject the decision to transfer a refugee to a "rigorous examination"[90] or "anxious scrutiny."[91]

Indeed, that this is required by the Refugee Convention was explicitly accepted by Evans J.A. of the Federal Court of Appeal in his concurring opinion in *Canadian Council of Refugees v. R.* In explaining his finding that Phelan J.'s declaration of invalidity of the STCA Regulations was "not required in order to ensure that they are not applied to claimants for protection at the land border in breach of either Canada's international obligations not to *refoule,* or the Charter,"[92] Evans J.A. explained that the Regulations are capable of being construed and applied so as to be consistent with Canada's international obligations. That is, they should be interpreted so as to ensure that "refugee claimants at the Canadian land border may not be turned back to the United States pursuant to the STCA Regulations if they can establish that, if returned, they would face a real risk of their removal by the United States to a country where they have a well founded fear of torture, or persecution on a Convention ground."[93] Further, such a risk assessment "must be made in

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

respect of individual claimants, in light of the United States' law and practice at that time as it pertains to them."[94] Evans J.A. further noted that a denial of access to Canada's refugee determination system "would be subject to an application for leave and for judicial review."[95] Of course one may question the adequacy of such an individual determination, given that, as noted by Phelan J., the Canadian Border Services Agency (CBSA) is responsible for determining whether a person must be removed under the STCA or is eligible to be referred to the Immigration and Refugee Board (IRB)—the latter rather than the former agency being the highly specialized expert refugee status determination agency in Canada. It is not clear what expertise the CBSA has to undertake the "anxious scrutiny" of a risk of indirect *refoulement* required by international law.[96] Although Evans J.A. notes that "[n]o doubt guidelines will be developed to assist officers in making these eligibility determinations,"[97] it is by no means clear that this will amount to an adequate procedure. This is particularly so when we consider that the burden should be on the sending state to ensure that there is no foreseeable risk of *refoulement*—thus officers will need to be well versed in the aspects of US asylum law and practice which potentially impact on this assessment and should not expect applicants to be cognizant of the risks in their particular case.

In terms of a right of review or appeal against a decision to transfer, although available in some jurisdictions, including Canada, it is vital that the decision to transfer be suspended pending the outcome of any review or appeal in light of the potentially serious consequences for an applicant of transfer to a state which does not respect international law. This has been supported by both the UNHCR and the European Parliament following an examination of the difficulties which arise when a state does not allow for suspension of an order to transfer pending appeal, particularly when the decision to transfer is later overturned.[98]

Post-transfer Monitoring

The final point to note is that it is not sufficient for a state to rely on a written agreement, written assurances, or an initial assessment that transfer to a third country complies with the Refugee Convention. Rather the state must monitor the treatment of refugees in the receiving state to assess on an ongoing basis whether transfers can continue to be undertaken in accordance with international law.[99] As Justice Phelan explained in *Canadian Council of Refugees v. R,* the purpose of a continuous review is to

> address the fact that new matters may develop, practices and policies of the third country may shift depending on the current administration, and that opinions formed initially are not immutable and must be re-examined in the light of more current opinion and other evidence of the third country's actual, rather than, claimed compliance.[100]

Such ongoing assessment should focus on the application of laws and regulations to refugees in the receiving state in general, but also on individual refugees transferred under a protection elsewhere scheme. This issue has been addressed by the Human Rights Committee in the context of the implied *non-refoulement* obligations in the ICCPR. It has explained that when a state party expels a person to another state on the basis of assurances as to that person's treatment by the receiving state, it must "institute credible mechanisms for ensuring compliance by the receiving state with these assurances from the moment of expulsion."[101] Accordingly, in *Mohammed Alzery v. Sweden,* the HRC held that the diplomatic assurances from Egypt relied upon by Sweden were insufficient to discharge Sweden's *non-refoulement* obligations, *inter alia,* because they "contained no mechanism for monitoring of their enforcement."[102] The HRC continued:

> Nor were any arrangements made outside the text of the assurances themselves which would have provided for effective implementation. The visits by the State party's ambassador and staff commenced five weeks after the return, neglecting altogether a period of maximum exposure to risk of harm. The mechanics of the visits that did take place, moreover, failed to conform to key aspects of international good practice by not insisting on private access to the detainee and inclusion of appropriate medical and forensic expertise, even after substantial allegations of ill-treatment emerged.[103]

This highlights the fact that the ongoing analysis of the treatment of refugees in the third (receiving) state is not just a formalistic legal one, but must take into account practical realities.

Where a state has actual or constructive knowledge of violations of the Refugee Convention or other international legal obligations by the receiving state, it can no longer, in good faith, assert that transfers can be made in accordance with international law.[104] In such a case, the sending state is "disentitled from effecting any further transfers to that state under a protection elsewhere policy unless and until there is clear evidence that the breach has ceased."[105] A clear example of such a situation is the well-documented risk of indirect or chain *refoulement* on sending a refugee applicant to Greece under the Dublin Regulation, discussed above. Indeed, not only have the UNHCR and a number of well-respected non-government sources called for all EU Member States to place a moratorium on transfers to Greece, but the European Commission has reportedly initiated infringement proceedings against the Greek government for failing to adhere to

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

the requirements of the Dublin Regulation, in particular the requirement to substantively examine the refugee claim of a person transferred to Greece under the Dublin regulation.[106] In light of this, it is difficult to understand how any state could deny that a violation of Article 33 is a foreseeable consequence of transferring a refugee applicant to Greece. However to date only Norway has halted all transfers, with other states preventing transfers only of a certain category (*e.g.* children) or in individual cases.[107]

Where, in contrast to the above situation, a state transfers a person to a third state in good faith, that is, with no actual or constructive knowledge that the third state will not respect the refugee's rights, but the third state in fact violates the refugee's rights, the Michigan Guidelines concluded that the sending state is not under a strict legal obligation to receive such refugees back into its territory and provide Convention protection.[108] This is because a state is responsible for the foreseeable consequences of expulsion/deportation/removal,[109] and not for any future (unforeseeable) violations of that person's rights that may later occur in the other jurisdiction.[110] However, the Michigan Guidelines recommend that the sending state should, where possible, consider facilitating "the return and readmission of the refugee in question to its territory, and ensure respect for her rights there in line with the requirements of the Convention."[111]

Conclusion

This article has explained that, while technically permitted at international law, schemes by which states attempt to transfer responsibility over refugees are subject to stringent limitations which must be respected if transfers are to be effected lawfully. As has been displayed, these constraints are not insignificant—a point also conceded by the judiciary. In the *Adan* case, counsel for the Secretary of State argued that the House of Lords should not require the UK to ensure that each EU state complies with the one "true autonomous meaning" of the Refugee Convention because

> [f]or the Secretary of State to be required to assess the details of the judgments of the appellate courts of other EU States, and form a judgment on whether they are consistent with the 1951 Convention, with that judgment subject to reassessment by the courts of this country by way of judicial review, would impose a complex and time consuming task that is inconsistent with, and would substantially frustrate, the objective of the 1996 Act to implement the principles in the Dublin Convention and speedily return asylum seekers to other EU States for the merits of their claims to be considered.[112]

Lord Steyn dismissed this, concluding that the obligation to monitor compliance of other states with the Refugee Convention was manageable and that the "the sky will not fall in" as a result of this requirement. Further, in *Yogathas,* concerns about efficiency could not be said to obviate the need for rigorous scrutiny of the legality of a transfer. This does give rise to the question whether the safe third country/protection elsewhere concept is able, in conformity with international law, to achieve many of its aims. That is, if states must essentially engage in a form of refugee status determination prior to transferring an applicant, it does tend to call into question whether such schemes are capable of fulfilling their aims.

Indeed, research undertaken by ECRE led to the conclusion that "at best, the Dublin regulation adds a lengthy, cumbersome procedure to the beginning of the asylum process."[113] The European Parliament has recently noted that the "low level of effected transfers" is an indicator of the "deficiencies of the Dublin system."[114] Indeed the European Parliament has called for urgent reform of the system, noting that in the absence of "a genuine common European asylum system" the Dublin system "will continue to be unfair both to asylum seekers and Member States."[115]

This would tend to suggest that safe third country schemes are unworkable and undermine refugee protection, and that developed countries should dedicate their considerable resources to fashioning solutions to the refugee crisis by developing policies truly concerned to address the human rights and needs of refugees.

Notes

1. It should be noted that some of the key ideas in this paper draw upon and develop further the analysis set out in Michelle Foster, "Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State" (2007) 28:2 Mich. J. Int'l L. 223; and "Colloquium, The Michigan Guidelines on Protection Elsewhere" (2007) 28 Mich. J. Int'l L. 207 [Michigan Guidelines].
2. Stephen H. Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection" (2003) 15 Int'l J. Refugee L. 567 at 570–1.
3. Article 4, online: <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp> (date accessed: 22 January 2009).
4. Indeed, this is often the purported purpose of these schemes. For example, the Regulatory Impact and Analysis Statement accompanying the Canadian Regulations states that the STCA reflects a "widespread and growing international consensus that no refugee receiving country can, on its own, solve the refugee problems of the world. International obligations necessitate a sharing of responsibility": *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International, and John Doe v. R.* [2007]

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

F.C. J. No. 1583; 2007 FC 1262 [*Canadian Council of Refugees v. R.*] at para. 30.

5. European Parliament resolution of 2 September 2008 on the evaluation of the Dublin system (2007/2262 (INI)) at paragraph M. The Resolution further notes that "a correct implementation of the Dublin Regulation may well result in the unequal distribution of responsibility for persons seeking protection, to the detriment of some Member States particularly exposed to migration flows simply on the grounds of their geographical location" (para. H); that "the Commission's evaluation reveals that, in 2005, the thirteen Member States at the borders of the Union had to deal with increasing challenges raised by the Dublin system" (para. I); and that "southern Member states are having to accept asylum applications from irregular immigrants without any assistance from third countries which are obliged to provide such assistance under international law" (para. K).
6. European Council on Refugees and Exiles (ECRE), *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered* (March 2008) at 13, online: <http://www.ecre.org/topics/asylum_in_EU/determining_responsibility> (date accessed: 16 January 2009).
7. There are now several EU directives on various aspects of refugee law: see for example Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (Reception Directive); Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive); and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Procedures Directive).
8. United Nations High Commissioner for Refugees, 2005 Global Refugee Trends (2006), online: <http://www.unhcr.org/statistics/> (date accessed: 22 January 2009). For similar figures in respect of Iraqi applicants, see UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive,* (November 2007) [UNHCR 2007] at 13, online: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=473050632&page=search> (date accessed: 23 January 2009).
9. This was also recognized in the European Parliament's Resolution, *supra* note 5 at para. P: "whereas recognition rates of candidates for refugee status vary for certain third country nationals from approximately 0% to 90% within Member States."
10. There is a considerable body of literature concerned with the deficiencies of the US system in this context: see for example Audrey Macklin, "Disappearing Refugees: Reflections on the U.S.-Canada Safe Third Country Agreement" (2004–2005) 36 Colum. H.R.L. Rev. 365; Andrew F. Moore, "Unsafe in America: A Review of the U.S.-Canada Safe Third Country Agreement" (2007) 47 Santa Clara L. Rev. 201; Amy K. Arnett, "One Step Forward, Two Steps Back: Women Asylum-Seekers in the United States and Canada Stand to Lose Human Rights under the Safe Third Country Agreement" (2005) 9 Lewis & Clark L. Rev. 951; Lynn S. Hodgens, "Domestic Silence: How the U.S.-Canada Safe Third Country Agreement Brings New Urgency to the Need for Gender based Asylum Regulations" (2006) 30 Vt. L. Rev. 1045; Cara D. Cutler, "The U.S.-Canada Safe Third Country Agreement: Slamming the Door on Refugees" (2004) 11 ILSA J. Int'l & Comp. L. 121; Sonia Akibo-Betts, "The Canada-U.S. Safe Third Country Agreement: Reinforcing Refugee Protection or Putting Refugees at Risk" (2006) J. Inst. Just. Int'l Stud. 1; and Lara Sarbit, "The Reality Beneath the Rhetoric: Probing the Discourses Surrounding the Safe Third Country Agreement" (2003) 18 J.L. & Soc. Pol'y 138.
11. *Canadian Council of Refugees v. R., supra* note 4 at para. 81. It should be noted that the arguments concerning compliance of the scheme with Canada's *Charter of Rights and Freedoms* will not be considered in this article.
12. *Ibid.*
13. It should be noted that an application seeking leave to appeal against the decision of the Federal Court of Appeal was lodged in the Canadian Supreme Court on 26 September 2008. It should also be noted that the Canadian Council for Refugees *et al.* have instituted a complaint in the Inter-American Commission on Human Rights concerning the STCA, and the case has been found admissible: see *John Doe et al. v. Canada* Report No 121/06 2006 IACHR 240, 2006 WL 4557625 (OAS), 27 October 2006.
14. See *R. v. Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe* [2008] F.C.J. No. 1002; 2008 FCA 229 at para. 2, per Noel J.A., with whom Richard C.J. agreed (*R. v. Canadian Council for Refugees Appeal Decision*).
15. *Ibid.* at paras. 76–80.
16. The only reference to a substantive issue is at para. 81 of Justice Noel's judgment (*ibid.*), where he states that, "I should add as an aside that even if "actual compliance" was a condition precedent, the conclusion reached by the Applications judge to the effect that the U.S. did not meet that requirement at the time of promulgation could not stand since it is largely based on evidence which postdates the time of the designation… ." Again however this does not call into question Justice Phelan's assessment that, at the time of judgment, the STCA did not comply with Canada's international obligations under Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture (CAT).
17. *Vienna Convention on the Law of Treaties,* Vienna, 23 May 1968, 1155 U.N.T.S. 331, Article 31 (entered into force 27 January 1988) [VCLT].
18. *R. v. Canadian Council for Refugees Appeal Decision, supra* note 14 at para. 114.
19. *Ibid.*

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

20. See generally, James C. Hathaway, *The Rights of Refuges under International Law* (Cambridge: Cambridge University Press, 2005).
21. See Foster, *supra* note 1, 231–235.
22. VCLT, *supra* note 17, Article 31.
23. Hathaway, *supra* note 20, 659–694.
24. *Ibid.*
25. *Canadian Council of Refugees v. R.*, *supra* note 4, para. 137 (c).
26. *Regina (ex parte Yogathas) v. Secretary of State for the Home Department* [2003] 1 A.C. 920, cited in *Canadian Council of Refugees v. R., supra* note 4 at para. 125.
27. Affidavits of James C. Hathaway and Kay Hailbronner, file IMM-7818-05, on file with author.
28. For example, in James C. Hathaway's affidavit, he summarizes the other expert affidavits filed in these proceedings which suggest "several laws or practices of the United States which may deprive refugees of acquired rights in relevant cases," including Article 3, Article 25, Article 31(1), Article 31(2), and Article 34: see at para. 21 of affidavit, on file with author. It should be noted that Justice Phelan did consider the issues of detention and access to counsel, but only as they related to the risk of *refoulement,* discussed below.
29. Secton 102(1)(a) of the Immigration and Refugee Protection Act (IRPA) provides that the Governor-in-Council may designate a country as being subject to s. 101(1)(e) (which renders a claim ineligible where a person came directly or indirectly to Canada from that country) where the country complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture. In deciding to designate a country, the GIC is required to consider four factors in 102(2) including (c) its human rights record, but the inquiry still appears to be focused on compliance with Article 33.
30. See Michigan Guidelines, *supra* note 1 at para. 8.
31. *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at para. 31.
32. It should be noted that the legislation (*Migration Act 1958 (Cth)*) has been amended several times subsequent to this decision, so there is little interesting case law that has sought to develop this further.
33. *T.I. v. The United Kingdom,* 2000-III Eur. Ct. H.R. 435, 456–57: "Where States establish international organizations or *mutatis mutandis* international agreements to pursue cooperation in certain fields of activity there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the [European] Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution."
34. Council of Europe: Parliamentary Assembly, *Resolution 1569 (2007) on Assessment of Transit and Processing Centres as a Response to Mixed Flows of Migrants and Asylum Seekers,* 1 October 2007. Res. 1569 (2007) at para. 13.6.
35. Erika Feller, "Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come" (2006) Int'l J. Refugee L. 510, 529.
36. Foster, *supra* note 1 at 270.
37. I am grateful to Martin Jones for his insights on this point based on a paper he presented on the panel, Protection Elsewhere: The Challenges and Opportunities for International Refugee Protection, at 12th International Metropolis Conference, Migration, Economic Growth and Social Cohesion, 8–12 October 2007, Melbourne, Australia.
38. Katarzyna Grabska, "Brothers or Poor Cousins? Rights, Policies and the Well-being of Refugees in Egypt," in Katarzyna Grabska and Lyla Mehta, eds., *Forced Displacement: Why Rights Matter* (Hampshire: Palgrave MacMillan 2008) at 77.
39. *Ibid.* at 82–3.
40. *Ibid.* at 83.
41. I note that although Israel's "hot returns" policy to Egypt was temporarily suspended in late 2007, on 23 August 2008, Israel resumed summarily returning asylum seekers to Egypt: see Amnesty International, "Israel/Egypt: At least 91 asylum-seekers and migrants from sub-Saharan Africa," AI Index: MDE 15/038/2008 03 September 2008, online: <http://www2.amnesty.se/uaonnet.nsf/7d4a30a4bfe49590c1257011005d92fb/282a1deb281377cac12574ba00307d86/$FILE/51503808.pdf> (date accessed: 23 January 2009).
42. See Achilles Skordas and Nicholas Sitaropoulos, "Why Greece Is Not a Safe Host Country for Refugees" (2004) 16:1 Int'l J. Refugee L. 25.
43. UNHCR, *UNHCR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"* (15 April 2008) at 1 [UNHCR 2008], online: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4805bde42> (date accessed: 23 January 2009).
44. Reception Directive, *supra* note 7, at preambular para. (7). This has also been a concern raised by the European Parliament in its *Resolution of 2nd September on the evaluation of the Dublin system* (2007/2262 (INI)) at para. E: "whereas some Member States do not apply the Reception Directive effectively, either to asylum applicants awaiting transfer to another Member State under the Dublin Regulation, or at the point of return to the Member State responsible."
45. *Commission of the European Communities v. Hellenic Republic,* Case C-72/06, Judgment of the Court (Fifth Chamber) of 19 April 2007.
46. This is because the Reception Directive (*supra* note 7) sets out minimum standards that in some respects fall below that required by international law. For example, Article 13(2) provides that "Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence," which is arguably a lower standard than that required by Article 11 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). See also Article 10 of the Reception Directive, which

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

states that education can be delivered in accommodation centres and thus is only required to be delivered "under similar conditions" as nationals, which may well constitute a lower standard than that required by Article 13 of the ICESCR; and see also Article 15 of the Reception Directive which only requires states to ensure "that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness," compared with Article 12 of the ICESCR.

47. "Sweden halts return of child asylum seekers to Greece," TT/The Local: Sweden's news in English (7 May 2008), online: <http://www.thelocal.se/article.php?ID=11584&print=true> (date accessesd: 25 September 2008); see also Human Rights Watch, *Stuck in a Revolving Door: Iraqis and other Asylum Seekers and Migrants at the Greece/Turkey Entrance to the European Union* (26 November 2008) at 21, online: <http://www.hrw.org/en/reports/2008/11/26/stuck-revolving-door?print> (date accessed: 16 January 2009).
48. VG Giessen 2 L 201/08.GI.A (25 April 2008), trans. by Anne Kallies.
49. VG Hamburg AE 368/08 (21 August 2008), trans. by Anne Kallies.
50. UNHCR 2008, *supra* note 43 at para. 21.
51. *Ibid.* at paras. 20–22.
52. See Foster, *supra* note 1 at 275–278.
53. *Ibid.*
54. *R (Limbuela) v. Secretary of State for the Home Department* [2006] 1 A.C. 396 at para. 7.
55. *Ibid.* at para. 56; see also at para. 69 per Lord Scott. It should be noted that there is related jurisprudence concerning states' implied *non-refoulement* obligations as they pertain to violations of socio-economic rights which apply other than in the context of refugees. In such cases, both the House of Lords and European Court of Human Rights have applied a higher test for finding that transfer is prohibited where the suffering in the country of return would be a result of that country's *inability* to provide basic socio-economic rights to its citizens rather than unwillingness (see *N (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)* [2005] UKHL 31; *N v. The United Kingdom,* European Court of Human Rights, Application No. 26565/05, Strasbourg, 27 May 2008). However the line of reasoning in *Limbuela* is more applicable to the present discussion since the harm faced by refugees in some "safe third countries" is clearly the result of intentional deprivation of socio-economic rights along the same lines as that at issue in *Limbuela.*
56. See for example *C. v. Australia* (900/1999), ICCPR, A/58/40 vol. II (28 October 2002) 188 (CCPR/C/76/D/900/1999); *Williams v. Jamaica* (609/1995), ICCPR, A/53/40 vol. II (4 November 1997) 63 (CCPR/C/61/D/609/1995); *Smith and Stewart v. Jamaica* (668/1995), ICCPR, A/54/40 vol. II (8 April 1999) 163 (CCPR/C/65/D/668/1995); and *Rouse v. The Philippines* (1089/2002), ICCPR, A/60/40 vol. II (25 July 2005) 123. For similar jurisprudence in the European Court of Human Rights see *Kalashnikov v. Russia,* European Court of Human Rights, Application no. 47095/99.
57. Committee on the Rights of the Child, General Comment No. 6 (2005), *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin,* CRC/GC/2005/6 (1 September 2005) at para. 27.
58. See generally, Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge: Cambridge University Press, 2007), especially at 201–235 [Foster, *Refuge from Deprivation*].
59. UNHCR, *UNHCR's Views on the Concept of Effective Protection as it Relates to Indonesia* (2 December 2004; on file with author).
60. *Ibid.*
61. See generally, Foster, *Refuge from Deprivation, supra* note 58.
62. UNHCR 2008, *supra* note 43 at para. 18. A similar case was put forward in the Canadian litigation, in that the applicants asserted that the policy of detaining some asylum seekers and also the failure to provide legal counsel to refugee claimants aggravated the risk of *refoulement.* Justice Phelan dismissed these claims, not on the basis that they were incapable of validity in law, but rather that there was no evidential basis to support them: see *Canadian Council of Refugees v. R., supra* note 4 at paras. 228–236.
63. ECRE, *supra* note 6 at 18.
64. See for example, *R. v. Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 per Lord Bridge of Harwich at 532D; *R. v. Secretary of State for the Home Department, ex parte Yogathas* [2002] 4 All ER 800. This was also accepted by all parties in the Canadian litigation: as Justice Phelan noted this is consistent with the *Suresh* decision of the Canadian Supreme Court; see *Canadian Council of Refugees v. R., supra* note 4 at para. 112. This was also explicitly accepted by Evans J.A. in the Federal Court of Appeal: see *R. v. Canadian Council for Refugees Appeal Decision, supra* note 14 at para. 123.
65. For an excellent analysis of the requirements of international law, see Gerald P. Heckman, "Canada's Refugee Status Determination System and the International Norm of Independence" (2008) 25:2 Refuge 79.
66. Erika Feller (Director, Department of International Protection, UNHCR) presentation (at the IARLJ World Conference, Judicial or Administrative Protection: Legal Systems within the Asylum Processes. Stockholm, 21 April 2005), online: <http://www.unhcr.org/admin/ADMIN/42a404cf2.html> (date accessed: 30 September 2008).
67. See also Global Consultations on International Protection, *Asylum Processes (Fair and Efficient Asylum Procedures),* EC/GC/01/12, 31 May 2001 at 13; para. (o).
68. *Ibid.* at 13; para. (p).
69. UNHCR 2007, *supra* note 8 at 34.
70. UNHCR 2007, *supra* note 8 at 13–14.
71. *Ibid.* at 32.

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

72. I note that the relevance of the views of the UNHCR was a contentious issue in the US-Canada STCA litigation because the UNHCR had consistently stated that the US was a "safe third country." Justice Phelan was correct to undertake his Honour's own assessment of this question, as a state cannot rely on the UNHCR alone.
73. See Michael Kagan, "Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt" (2006) 19:1 Journal of Refugee Studies 45 at 48.
74. Richard Towle and Richard Stainsby, "Best Practices for Refugee Status Determination: A UNHCR Global Perspective" (Paper presented at the conference Best Practices for Refugee Status Determination, Monash University and Université de Montréal, Prato Centre, Italy, 29–30 May 2008), slides on file with author.
75. See RSD Watch, "UNHCR recognition rates rise in the wake of new standards" (24 July 2008), online: <http://rsdwatch.org/index_files/Page6947.htm> (date accesssed: 1 October 2008); and RSD Watch, "Large UNHCR RSD operations will give detailed written reasons for rejection to asylum-seekers denied protection" (29 September 2008), online: <http://rsdwatch.org/index_files/Page7071.htm> (date accessed: 1 October 2008).
76. This is particularly an issue when the sending state has itself set up an inferior refugee status determination procedure in the third state, such as occurred in the context of Australia's "Pacific Solution": see Savitri Taylor, "Protection Elsewhere/Nowhere" (2006) 18 Int'l J. Refugee L. 283; and Susan Kneebone, "The Pacific Plan: The Provision of 'Effective Protection?'" (2006) 18 Int'l J. Refugee L. 696.
77. This has been noted as an issue of concern recently by the European Parliament in the context of the Dublin system: "whereas there is evidence that some Member States do not guarantee effective access to a procedure for determining refugee status": *supra* note 5 at para. D.
78. Decision No 162.040 of 28 August 2006; trans. by Nawaar Hassan.
79. Michigan Guidelines, *supra* note 1.
80. *R. (ex parte Adan) v. Secretary of State for the Home Department* [2001] 2 A.C. 477; (2001) 2 W.L.R. 143 at 154 (per Lord Steyn) [*Adan*].
81. *R.* (*Yogathas) v. Secretary of State for the Home Department* [2003] 1 A.C. 920 at para. 9 [*Yogathas*].
82. *Canadian Council of Refugees v. R., supra* note 4 at para. 137.
83. *T.I. v. The United Kingdom, supra* note 33, as cited in *Yogathas, supra* note 81 at para. 54.
84. *Canadian Council of Refugees v. R., supra* note 4 at paras. 165–196 (exclusion) and paras. 197–216 (inclusion clause).
85. UNHCR 2007, *supra* note 8 at 42–46.
86. *Ibid.* at 47–52.
87. *Ibid.* at 90–95.
88. See generally *Yogathas, supra* note 81; and *T.I. v. The United Kingdom, supra* note 33.
89. *Yogathas supra* note 81 at para. 9 (per Lord Bingham).
90. This was emphasized recently by the UK Court of Appeal in *Secretary of State for the Home Department v. Nasseri* [2008] EWCA 464 where Lord Justice Laws stated "it is underlined by the need of rigorous scrutiny where an individual claims that expulsion will expose him to Article 3 ill treatment": at para. 18.
91. *Yogathas, supra* note 81 at para. 58 (per Lord Hope).
92. *R. v. Canadian Council for Refugees Appeal Decision, supra* note 14 at para. 130.
93. *Ibid.* at para. 123.
94. *Ibid.*
95. *Ibid.*, relying on *Singh v. Minister of Employment and Immigration* [1985] 1 SCR 177.
96. See *Canadian Council of Refugees v. R., supra* note 4 at para. 34 (Phelan J.). Once a CBSA officer decides that a person is ineligible to be referred to the IRB, a removal order is issued which is most often carried out on the same day.
97. *R. v. Canadian Council for Refugees Appeal Decision, supra* note 14 at para. 125.
98. See UNHCR, "The Dublin II Regulation: A UNHCR Discussion Paper" (April 2006) at 19–20; online: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4445fe344&page=search> (date accessed: 24 January 2009). The European Parliament has similarly asked the European Commission "to amend Articles 19 and 20 of the Dublin Regulation on 'taking charge and taking back', so as to provide applicants with an automatic suspensory right of appeal against a decision to transfer responsibility to another Member State under the Dublin Regulation.": Resolution of 2 September at para. 10; see also Legomsky, *supra* note 2 at 672; and ECRE, *supra* note 6 at 166.
99. In *Yogathas,* Lord Hope made it clear that integral to his decision to allow return to Germany was the fact that the Secretary of State was "able to show that he based his decision on a state of knowledge resulting from his own inquiries as to the practice in Germany and from his experience of constantly monitoring the performance by member states of their obligations in similar cases": *supra* note 81 at para. 47.
100. *Canadian Council of Refugees v. R., supra* note 4 at para. 274. These comments were made in the context of his Honour's assessment of whether the Canadian government had conducted required reviews under subsection 102(3) of the IRPA, which provides that: "The Governor-in-Council must ensure the continuing review of factors set out in subsection (2) with respect to each designated country": see *ibid.* at para. 265. Since there had been no such review as at the date of judgment, Phelan J. held that the GIC had failed to ensure the continuous review of the s. 102(2) factors: see at para. 275. While this finding was overturned by the Federal Court of Appeal (see *R. v. Canadian Council for Refugees Appeal Decision, supra* note 14 at para. 97 per Noel J.A. with whom Richard C.J. agreed; Evans J.A. not consid-

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

ering), this does not detract from Phelan's explanation of the need for and importance of ongoing review.

101. UN Human Rights Committee, Concluding Observations: Sweden, at para. 79 (12)(b), UN Doc A/57/40, 57, vol I (2002).
102. *Ibid.* at para. 11.5.
103. *Ibid.*
104. Foster, *supra* note 1 at 284–5.
105. Michigan Guidelines, *supra* note 1 at para. 15.
106. See letter from Amnesty International's EU Office to Mr. Dragutin Mate, Minister of the Interior, EU Presidency (8 March 2008), on file with author. According to ECRE, *supra* note 6, details of the action against Greece have not been made public, but it is understood to relate to "the lack of legal guarantees with regard to a substantive examination of the asylum claim by Greek authorities after transfer to Greece" at 14.
107. See "A gamble with the right of asylum in Europe: Greek policy and the Dublin II regulation," Report by NOAS, Norwegian Helsinki Committee and Greek Helsinki Monitor (9 April 2008), online: <http://www.statewatch.org/news/2008/apr/greece-dublin.pdf> (date accesssed 2 October 2008). Human Rights Watch reports that Finland has announced that it "would suspend transferring migrants to Greece unless it received written assurances from Greece that they would be fairly processed" (*supra* note 47 at 21); however it is unclear whether such assurances have or have not been granted.
108. See Foster, *supra* note 1 at 285.
109. In all of these cases, the test is said to be one of forseeability; *viz:* "The forseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on": *Kindler v. Canada,* Human Rights Committee Communication No. 470/1991; CCPR/C/48/D/470/1991 30 July 1993 at para. 6.2.
110. "If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's rights that may later occur in the other jurisdiction. In that sense a State party clearly is not required to guarantee the rights of persons within another jurisdiction': *Kindler, ibid.* at para. 6.2. Further, the principles of state responsibility regarding reparation do not accommodate this situation very well because they only envisage harm to states, rather than to individuals. Thus, there is little authority in international law for the position that the "injured" state in this context is required to remedy the breach by taking the person back.
111. Michigan Guidelines, *supra* note 1 at 285.
112. *Adan, supra* note 80 at 518.
113. ECRE, *supra* note 6 at 11.
114. European Parliament, *supra* note 5 at para. G.
115. *Ibid.* at 3 (para. 2).

Michelle Foster, S.J.D., is a Senior Lecturer and Director of the International Refugee Law Research Programme in the Institute for International Law and the Humanities at Melbourne Law School. *The author would like to thank the organizers and participants at the conference Best Practices for Refugee Status Determination, Monash University and Université de Montréal, Prato Centre, Italy, 29–30 May 2008, for their helpful feedback on this paper. She would also like to thank Nawaar Hassan and Anne Kallies of Melbourne Law School for excellent research assistance, and Dr. Constantin Hruschka of the UNHCR for providing updated German case law.*

© Michelle Foster, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Canada's Refugee Status Determination System and the International Norm of Independence

Gerald P. Heckman

Abstract

Refugee protection decisions engage migrants' fundamental life, liberty, and security of the person interests. As a result, refugee protection claimants enjoy institutional and procedural rights under conventional international law. These include the right to a fair adjudication of their protection claims by an independent tribunal. To be independent, a tribunal must meet the formal guarantees of security of tenure, financial security, and administrative independence and must actually be independent, in appearance and practice, from the executive and legislature, particularly in the appointments process. Refugee protection decisions must be made by first instance adjudicative bodies that either fully comply with the requirements of tribunal independence or whose decisions are subject to subsequent review by a tribunal that meets these requirements and has sufficient jurisdiction over the merits of the dispute. The Canadian refugee protection system fails, in certain respects, to meet international standards of independence. The Canadian Immigration and Refugee Board's Refugee Protection Division enjoys statutory, objective badges of independence and appears to operate independently of the executive. However, the independence of Canadian officials engaged in eligibility determinations and in pre-removal risk assessments is very much in question because they have a closer relationship to executive law enforcement functions.

Résumé

Les décisions sur la protection des réfugiés ont un impact sur les intérêts fondamentaux des migrants ayant trait à leur vie, leur liberté et la sécurité de leur personne. Par conséquent, les demandeurs du statut de réfugié bénéficient de droits de nature institutionnelle ainsi que de droits procéduraux en droit international classique. Cela comprend le droit à une décision impartiale sur leurs demandes de protection par un tribunal indépendant. Pour être indépendant, un tribunal doit satisfaire aux garanties formelles d'inamovibilité, de sécurité financière et d'indépendance administrative, et doit effectivement être indépendant aussi bien en apparence que dans la pratique, des organes exécutifs et législatifs, tout particulièrement en ce qu'il s'agit du processus pour les nominations. Les décisions sur la protection des réfugiés doivent être rendues par des organismes d'arbitrage de première instance qui soit, satisfaient pleinement aux conditions d'indépendance de tribunal, ou dont les décisions sont sujettes à la révision ultérieure par un tribunal qui satisfait à ces conditions et qui possède suffisamment de juridiction sur le fond du différend. Le système canadien de protection des réfugiés ne satisfait pas, à certains égards, aux normes internationales en matière d'indépendance. La Section de la protection des réfugiés de la Commission de l'immigration et du statut de réfugié du Canada jouit de symboles objectifs d'indépendance statutaire et semble opérer indépendamment de l'organe exécutif. Cependant des doutes graves planent sur l'indépendance des fonctionnaires canadiens qui s'occupent de détermination de la recevabilité et d'examen des risques avant renvoi, car ils ont un lien plus rapproché avec des fonctions exécutives d'application des lois.

Introduction

In 1985, the Supreme Court of Canada determined that Canada's refugee determination system violated the constitutional right of refugee protection claimants to security of the person because refugee protection claims could be denied without giving claimants an in-person hearing or disclosure of crucial country conditions information relied upon by the decision makers.[1] The *Singh* decision was a watershed moment in the development of Canada's refugee determination

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

system. The Canadian government's response was to create an independent agency—the Immigration and Refugee Board (IRB)—to hear, in person and at first instance, the claims of all eligible refugee protection claimants. Though a significant measure of refugee protection responsibility has been entrusted to public servants in Canada's Department of Citizenship and Immigration (CIC) under the current immigration and refugee protection law, the Refugee Protection Division (RPD) of the IRB remains a central, defining, and distinctive feature of Canada's refugee status determination system.

There is some evidence that the Canadian government may be rethinking the role of, or need for, an independent first instance refugee protection tribunal. In 2003, under the previous Liberal administration, then Immigration Minister Denis Coderre publicly proposed removing initial decision-making authority over refugee claims from the IRB and conferring it on CIC officials.[2] More recently, the minority Conservative government's failure to replace, in a timely manner, IRB members whose appointments had expired led to a 33 per cent vacancy rate on the Board and a soaring backlog of refugee claims. Opposition Members of Parliament charged that the government was seeking to manufacture a crisis in Canada's refugee determination system in order to scrap the IRB and replace it with a less generous system of protection.[3]

I argue that no changes to the current refugee determination system that would diminish the role of independent agencies in favour of the increased involvement of government officials should be adopted without assessing and ensuring their conformity with international norms of independence. There are three parts to this article. In the first, I describe the scope and content of the right at international law to a fair hearing before an independent tribunal, as defined in article 14 of the International Covenant on Civil and Political Rights (ICCPR)[4] and article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[5] In the second part, I briefly describe the decision-making structure of Canada's refugee determination system, and in the final part, I assess the extent to which this system diverges from international norms of tribunal independence. I conclude that Canada's refugee determination system in its current form does not guarantee all refugee protection claimants that to which they are entitled under international law: a hearing before an independent tribunal with sufficient jurisdiction over the merits of their claims.

The Guarantee of Independence in Conventional International Law

International human rights law entitles each individual to a fair and public hearing by an independent and impartial tribunal in the determination of his or her rights and obligations. This right is expressly guaranteed in several international declarations and conventions, including the Universal Declaration of Human Rights,[6] the ICCPR, the ECHR, and the American Convention on Human Rights.[7] It has been observed, based on a wide-ranging review of state constitutions, legislation, and supporting state practice regarding judicial independence, that "the general practice of providing independent and impartial justice is accepted by states as a matter of law" and is thus a customary norm of international law.[8] This part focuses on how the scope and content of the norm of tribunal independence are defined under article 14(1) ICCPR and article 6(1) ECHR.

Ratified by Canada and in force since 1976, the ICCPR's provisions are binding on Canada under international law, which means that at the very least, Canadian courts should, where possible, interpret Canadian law in a manner that comports with Canada's obligations under the Covenant.[9] Moreover, Canada has claimed in its regular reports to the UN Human Rights Committee to have implemented the terms of the Covenant by, among other measures, enacting the *Charter of Rights and Freedoms*.[10] The Human Rights Committee, established under the Covenant, monitors the implementation of the Covenant by reviewing the periodic reports of states parties and issues commentaries on the meaning and scope of the Covenant's provisions. Canada has recognized the jurisdiction of the Committee to receive and consider communications from individuals alleging a breach by Canada of their rights under the Covenant.[11] I pay close attention to the Committee's pronouncements on the scope and content of the norm of tribunal independence expressed in article 14, and also consider the jurisprudence of the European Court regarding the norm of tribunal independence expressed in article 6 ECHR, a provision broadly analogous to article 14 ICCPR, which offers insight into the nature and extent of Canada's international obligations.

Scope of the Right to an Independent Tribunal

Does article 14(1) guarantee the right to a hearing before an independent tribunal in the context of refugee status determination? In 2007, the Human Rights Committee expressed the view that "proceedings relating to an alien's expulsion" do not fall within article 14(1),[12] a decision consistent with the case law of the European Court of Human Rights in respect of article 6(1).[13] I claim that these decisions by the Committee and the European Court should not extend to refugee status determinations because they are inconsistent with the purpose and drafting history of articles 14(1) ICCPR and 6(1) ECHR and with the general framework governing the application of these provisions to adjudications in the public law realm.

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

The right to an independent tribunal in public law adjudications

Article 14(1) of the ICCPR

Article 14(1) ICCPR provides that:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The right of persons to "a fair and public hearing by a competent, independent and impartial tribunal established by law" applies only to the determination of a criminal charge and to the determination of a person's "rights and obligations in a suit at law". The *travaux préparatoires* to the Covenant and the Committee's views and comments indicate that some proceedings of an administrative nature are captured by article 14(1) and subject to its requirements of fairness, independence, and impartiality.[14]

The *travaux préparatoires* reveal a debate among drafting committee delegates about whether the right to a fair hearing before an independent tribunal in non-criminal matters should be restricted to proceedings that determined "civil" or "private" rights and obligations or extended to proceedings between individuals and the state, including administrative matters.[15] The compromise accepted by the committee was to remove the adjective "civil" but qualify the term "rights and obligations" with the phrase "in a suit at law," a formulation intended to emphasize that "appealing to a tribunal was an act of a judicial nature."[16] The consensus among the drafters was to extend article 14(1) protections to disputes between individuals and the state.[17] However, the term "in a suit at law" was intended to remove *some* matters from the scope of article 14(1), like "administrative proceedings in the first instance as to subject matters unrelated to human-rights concerns, such as taxation."[18]

The Human Rights Committee appeared to confirm that article 14(1) applies to administrative proceedings in *Y.L. v. Canada.*[19] The author of the communication, a soldier discharged from the armed forces, unsuccessfully applied to the Canadian Pension Commission for a disability pension. He appealed to the Pension Review Board, which confirmed the Commission's rulings. He claimed that he had been denied a fair and public hearing in violation of article 14(1). Canada replied that the communication was inadmissible because Pension Review Board proceedings were not a "suit at law": the relationship between the author, a member of the armed forces, and the state was a matter of public law, and did not concern "civil rights and obligations," an expression taken from the French-language version of article 14(1), which refers to "contestations sur ses *droits et obligations de caractère civil.*" The Human Rights Committee held that:

> … the concept of a "suit at law" or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review. In this regard, each communication must be examined in light of its particular features.[20]

In relation to the author's pension claim, the Committee noted that it was clear "that the Canadian legal system subjects the proceedings in [the various administrative bodies before which the author pursued his claim] to judicial supervision and control, because the *Federal Court Act* does provide the possibility of judicial review in unsuccessful claims of this nature."[21] The first instance hearing before the Pension Review Board, coupled with the availability of judicial review of the Board's decision, appeared to comply with article 14(1).[22]

Although the Committee did not expressly state that the pension proceeding was a suit at law, this can be implied from its views,[23] and many academic commentators have concluded that the Committee recognized that the Pension Board proceedings concerned the determination of rights and obligations in a suit at law.[24] The Committee has since held that article 14(1) applies to proceedings involving governments as parties, including wrongful dismissal proceedings brought by civil servants against their state employers[25] and to child protection proceedings under child welfare legislation.[26] In contrast, the selection and appointment of judges by Cyprus's Supreme Council of Judicature did not determine rights and obligations in a suit at law because they concerned the denial of an application for employment in the judiciary by a body exercising a "non-judicial" task.[27]

Like the *travaux préparatoires,* which suggest that the phrase "suit at law" was added to emphasize that proceedings subject to article 14(1) would be of a "judicial" nature, the Committee's allusion to "non-judicial" and "judicial" tasks is reminiscent of the efforts of Canadian courts to determine the threshold for the application of the common law duty of procedural fairness, and in particular their distinction between administrative decisions and judicial decisions.[28] Drawing on this analogy, the Committee's focus on whether the im-

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

pugned decision is of a judicial nature can be reconciled with its decision in *Y.L.,* where the Committee was essentially preoccupied with the following question: was the author's claim the kind of claim over which courts would normally exercise control and supervision to ensure it was decided fairly? In *Kazantzis,* it found that the author's application for a judicial appointment did not entail decision making of a "judicial" nature. Courts would not normally recognize that the author was owed a duty of fairness for the determination of this kind of claim, and would not enforce such a duty. Therefore, under the *Y.L.* test, claims of this nature were not within the scope of article 14(1). Under this approach, to ask whether article 14(1) applies to the determination of an individual's claim is to ask whether a duty of fairness is owed to the claimant. Under the *Y.L.* test, as at common law, the answer to that question depends on the nature of the claim.[29] If the determinations required to reach a decision on the author's claim are closer to judicial than legislative decision making and if that decision significantly impacts the author's life, the claim is of a kind normally subject to judicial supervision and control to ensure its fair determination; the *Y.L.* test is satisfied and article 14(1) applies. If this reasoning is correct, there should be no doubt that article 14 applies to refugee status determinations and refugee protection decisions which have long attracted the application of the duty of procedural fairness. Before examining this question in greater detail, it is instructive to review the rules governing the application of article 6(1) ECHR to public law proceedings.

Article 6(1) of the ECHR

Article 6(1) states:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The extent to which article 6(1) applies to public law disputes is also a contentious question. The European Court has applied article 6(1) outside the criminal context where the impugned proceedings involve a dispute ("contestation") over a "right," the impugned proceedings lead to a "determination" of the right, and the right is of a "civil" nature.

The Court must first decide whether there is a dispute over a "right" which can be said on arguable grounds to be recognized under domestic law. The concepts of "right" and "obligation" have an autonomous meaning under the European Convention and the European Court is not bound by a state's determination of whether the national legal system classifies an interest or privilege as a "right."[30] An entitlement or right expressly provided for by statute is clearly "recognized under domestic law". A right may also be found to exist in the face of a broad statutory discretion to confer a benefit or issue a license, even where the applicant cannot claim entitlement to a specific outcome.[31] The Court has held that the "contestation" must be of a genuine and serious nature; may relate to the actual existence of a right, to its scope, or to the manner in which the right may be exercised; and may concern questions of both fact and law.[32] The impugned proceedings must lead to a "determination" of the civil right or obligation: they must be "decisive for," "affect," or "relate to" the determination or exercise of a "civil" right.[33] Finally, the entitlement to a hearing by an independent tribunal is guaranteed in cases involving the determination of individuals' "civil rights and obligations." A major point of contention has been whether "civil" should be equated with "private," and article 6(1) restricted to proceedings meant to determine individual property rights or rights arising in tort or contract law. As described previously, there are strong arguments, based on the drafting history of articles 14(1) ICCPR and 6(1) ECHR, that this was not the intention of the drafters of either provision,[34] and that "civil" rights covers the determination of all legal rights outside the sphere of criminal law.[35] The European Court recognizes that the concept of "civil right or obligation" has its own meaning in European Convention law, that it does not exclude disputes between individuals and the state acting in its sovereign capacity, and that the character of the legislation which governs the matter to be determined and the nature of the authority which has jurisdiction in the matter (ordinary court or administrative body) are of little consequence in determining whether a right or obligation is civil in character.[36]

Applying these principles on a case by case basis, the European Court has extended the scope of article 6(1) beyond disputes concerning private rights to proceedings with a strong "public" flavour. The Court identified a dispute involving the determination of "civil rights" and thus governed by article 6(1) in each of the following cases: the withdrawal of a liquor permit (despite Sweden's claim that regulating alcohol distribution and consumption was part of its social policy and fell within an essential field of public law);[37] the decisions of professional disciplinary tribunals to restrict or eliminate individuals' right to exercise professions;[38] disputes regarding individuals' entitlement to health insurance under social security legislation;[39] and an individual's claim of entitlement to welfare allowances.[40]

The right to an independent tribunal in the refugee status determination and protection context

Having reviewed the general framework for determining the applicability of articles 14(1) ICCPR and 6(1) ECHR, particularly in the public law context, I now turn to the ap-

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

plication of these provisions in the migration context, and specifically to refugee status determinations. As noted earlier, the Committee's *Y.L.* decision essentially held that article 14(1) applies to claims of a kind normally subject to judicial supervision and control. Refugee status determinations and refugee protection proceedings involve the application of legal criteria to a factual matrix particular to each individual claimant. Such determinations are specific and judicial in nature and have a significant impact on fundamental individual interests. The claims involved in such proceedings are thus clearly of a kind normally subject to judicial supervision and control and should on this basis attract article 14(1) guarantees.

It also seems clear that under the European Court's relatively broad interpretation of article 6(1), the provision should apply to refugee status determination proceedings since they are determinative of refugee claimants' civil rights. An individual is a refugee as soon as she meets the criteria set out in the Refugee Convention.[41] In practice, however, she may only exercise the rights and enjoy the benefits that attach to refugee status, described in the Refugee Convention, if her surrogate state recognizes her status, usually after a refugee status determination proceeding.[42] In particular, Chapter II requires refugees' "surrogate state" to recognize, among other rights, property and commercial rights and family law rights long recognized by the European Court as falling within the category of "civil law" rights for purposes of the application of article 6(1).[43] Similarly, the guarantees set out in Chapter III regarding the rights of refugees to engage in wage-earning employment and, in particular, to practice a profession have also been accepted by the European Court as rights of a "civil law" nature.[44] Chapter IV provides that the surrogate state must accord to refugees lawfully staying in its territory the same treatment as it accords its own nationals in respect of public relief and assistance[45] and social security.[46] Claims to such benefits have also been recognized by the European Court as falling within the scope of article 6(1). Since refugees may exercise these rights or enjoy these benefits—many of which have "a civil law character"—only if the surrogate state recognizes their status, refugee status determination proceedings certainly "affect" or "are related to" and arguably are "directly decisive" for the question whether a civil law right can be exercised.[47] Under the interpretive framework followed by the European Court in contexts other than migration, they fall squarely within the scope of article 6(1).

Nevertheless, in *Maaouia v. France,* where a Tunisian immigrant who was ordered deported after committing serious criminal offences challenged the fairness of France's deportation procedures, the European Court held that decisions regarding the "entry, stay and deportation of aliens" do not concern the determination of their civil rights or obligations under article 6(1).[48] Proceedings for the rescission of exclusion orders did not concern the determination of aliens' civil rights, even though exclusion orders significantly affected their private and family life and prospects of employment.[49] The Court based its decision primarily on the Council of Europe's adoption, twenty-four years after the ratification of the European Convention, of a separate protocol providing minimal procedural administrative safeguards to aliens in expulsion proceedings. A majority of the Court accepted that the State Parties to the Convention had not intended immigration proceedings to be covered by article 6(1), and reasoned that the protocol was adopted precisely to fill the gap resulting from the lack of article 6(1) guarantees.[50] Though *Maaouia* did not involve a challenge to refugee status determination proceedings and the Court did not pronounce itself on the application of article 6(1) to such proceedings, it has since asserted that *Maaouia* stands for the proposition that article 6(1) does not apply to "matters of asylum."[51]

Dissenting in *Maaouia,* Judges Loucaides and Traja roundly criticized the majority judgment. First, they rejected its interpretation of the concept of "civil rights" as unduly narrow and at odds with a purposive interpretation of treaties and the drafting history of article 6(1).[52] "Civil right" should be read to include all legal rights that were not of a criminal nature,[53] because this interpretation enhanced individual rights in line with the object of the European Convention.[54] Further, it was inconceivable that a convention intended to implement the rule of law could provide for the fair administration of justice in respect of rights between individuals but fail to do so in respect of rights and obligations "vis-à-vis the administration where an independent judicial control is especially required for the protection of individuals against the powerful authorities of the State."[55] Second, the dissent questioned the majority's reliance on the protocol, arguing that while its procedural protections for the expulsion of aliens were intended to govern proceedings before competent administrative authorities, they did not purport to restrict any judicial guarantees that aliens enjoyed under article 6(1), but instead supplemented these guarantees.[56] The Council of Europe's decision to require states to put in place an administrative authority governed by minimal procedural guarantees could not be taken, without express language, to restrict aliens' right to a fair hearing under article 6(1). A protocol entered into long after the ratification of the European Convention and meant to form part of the Convention could not qualify or abolish the human rights previously safeguarded in the main body of the Convention.[57]

The *Maaouia* dissent advances powerful reasons against excluding migration proceedings from the scope of article 6(1) based on a narrow interpretation of the term "civil rights." Refugee status determination proceedings, more-

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

over, appear to fall within the scope of article 6(1) as defined by the European Court in contexts other than migration. The broad interpretation urged by the dissenting judges is even more compelling in the context of article 14(1) ICCPR, whose drafters expressly dropped the adjective "civil" from the English-language version to include public law proceedings within its scope,[58] and is consistent with other regional human rights instruments which do not distinguish between "civil" and "public" law rights.[59] The result in *Maaouia* is driven less by the text of article 6(1) and the Court's article 6(1) jurisprudence than by the implied effect of a specific protocol. And yet, the Human Rights Committee appears to have followed the European Court's lead. In *P.K. v. Canada,*[60] P.K. was denied refugee status by the IRB on grounds of credibility and denied leave to apply for judicial review of this decision by the Federal Court, and she unsuccessfully applied for a pre-removal risk assessment and for permanent residence on humanitarian and compassionate grounds. Following her removal to Pakistan, she claimed a violation of article 14(1) because the risk assessments preceding her deportation were neither fair nor independent. Canada argued that P.K.'s claim was inadmissible because article 14(1) did not apply. Refugee determination proceedings were "public law" proceedings, not a criminal charge or suit at law, and their fairness was guaranteed by article 13 ICCPR.[61] Canada argued that articles 6(1) ECHR and 14(1) ICCPR were "equivalent," that the European Court's case law was "persuasive" and that the Committee should follow *Maaouia*.[62] The Committee held that:

> [T]he concept of a "suit at law" under article [14(1)] … is based on the nature of the right in question rather than on the status of one of the parties. In the present case, the proceedings relate to the author's right to receive protection in the State party's territory. The Committee considers that proceedings relating to an alien's expulsion, the guarantees in regard to which are governed by article 13 of the Covenant, do not also fall within the ambit of a determination of "rights and obligations in a suit at law", within the meaning of article [14(1)]. It concludes that the deportation proceedings of the author do not fall within the scope of article [14(1)], and are inadmissible … [63]

The Committee appears to have accepted that, by analogy to the role of the protocol in *Maaouia,* article 13 ICCPR is a complete code governing migration proceedings and, as such, excludes the application of the more general article 14(1). This is not a plausible interpretation of article 14, for several reasons. First, article 13 applies only to decisions pursuant to which non-citizens lawfully present in a State Party are expelled.[64] It does not apply to proceedings, like refugee determination proceedings, that do not of themselves lead to expulsion,[65] but that are a necessary precondition to the exercise of non-citizens' civil rights, as demonstrated above. A second reason to doubt that article 13 precludes the application of article 14(1) to refugee protection proceedings is that article 13 applies to all non-citizens facing expulsion proceedings, including individuals present on a state's territory who have simply overstayed their visitor's or student visa, and for whom expulsion may engage no significant life, liberty, and security of the person interests. An interpretation of the Covenant that entitles refugee protection claimants, whose claims of well-founded fear of persecution in their home countries engage such interests, to procedural and institutional rights no higher than those enjoyed by overstayers must be rejected. Construing article 13 to preclude the application of article 14(1) to refugee determination or expulsion proceedings is contrary to a purposive interpretation of these fundamental human rights. It is preferable to interpret article 13 as requiring that the authority competent to order a non-citizen's expulsion at least offer that individual a procedurally fair administrative reconsideration of its expulsion decision. This requirement should not be taken, without express language, to remove the state's obligation to also provide for a fair hearing before an independent tribunal, either through a subsequent hearing before an administrative body or through judicial review.[66] *Maaouia* and *P.K.* lack any reasoning that could justify exempting refugee status determinations from the general frameworks developed by the European Court and the Committee to determine the applicability of articles 6(1) ECHR and 14(1) ICCPR. Protection claims, as well as claims regarding juridical status, the right to practice a profession, and the entitlement to social benefits which may flow from the recognition of refugee status in refugee status determination proceedings, are of a kind over which courts would normally exercise control and supervision to ensure they were decided fairly. They should be governed by article 14(1) ICCPR.

Content of the Right to an Independent Tribunal

The ICCPR

Article 14 ICCPR requires that determinations of rights and obligations in a suit at law be made by a competent, independent and impartial tribunal established by law. Administrative authorities, as well as national civil courts, are considered "tribunals" under article 14(1).[67] In determining whether a tribunal is independent, the Committee considers "the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the conditions governing their promotion, transfer and cessation of their functions; and the actual independence of the judiciary from the executive branch and the legislature."[68] These criteria were inspired by a United Nations initiative to define

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

the minimum standards flowing from the right to an independent tribunal guaranteed in the UDHR and ICCPR.[69] The United Nations' "principal instrument" for defining judicial independence is a document titled "Basic Principles on the Independence of the Judiciary,"[70] endorsed by the UN General Assembly.[71] In parallel, the UN Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a special rapporteur, Dr. L. M. Singhvi, to conduct an exhaustive study of state constitutions, legislation, and supporting state practice and produce a report on the independence and impartiality of the judiciary. In his seminal final report and a follow-up report, Dr. Singhvi developed a Draft Universal Declaration on the Independence of Justice.[72] The Basic Principles and the *Singhvi Declaration* include the traditional guarantees of security of tenure, financial security, and administrative control recognized in Canadian jurisprudence on independence.[73] In addition, both documents require that judges be appointed and promoted based on their integrity, training, and qualifications rather than improper motives.[74] Dr. Singhvi notes that in relation to the principle of independence, the doctrine of separation of powers postulates, among other things, "the insulation of the judiciary in respect of appointment, promotion, posting, transfer, removal, emoluments and other conditions of work and service from external and extraneous influence of legislative and the executive."[75]

Though developed primarily in relation to the independence of the judiciary, these guarantees are relevant to the independence of administrative decision makers.[76] The principle of independence applies to both judges and "others, who, without being judges in the formal sense, perform judicial roles and functions."[77] However, in its application to "administrators and policymakers" with adjudicative functions, the principle of independence "cannot be secured in the same way as in the case of judges and tribunals whose functions are primarily judicial and who belong by their appointment to the machinery of justice":

> The terms and tenures of those who are not a part of the judiciary are necessarily different; so are their background and appointment procedures. Safeguards applicable to members of the judiciary cannot, therefore, be made applicable to them. They may nevertheless be called upon to discharge duties of a judicial and quasi-judicial nature in an impartial and independent manner. (…) With regard to those who also perform judicial or quasi-judicial roles but who are [not] strictly a part of the judiciary, judicial standards and other safeguards apply as far as possible.[78]

In sum, the safeguards dictated by the principle of independence apply to the fullest extent to regular courts and to tribunals exercising primarily judicial functions. In the case of administrators and policy makers who also have an adjudicative function, they apply by analogy with suitable modifications and "judicial" safeguards apply only as far as possible. The principle of independence remains relevant along the entire decision-making spectrum but requires stronger safeguards for decision makers whose functions more closely resemble those of courts.

The Committee has had occasion to elaborate on the requirements of the article 14(1) guarantee of independence in its concluding remarks on the periodic reports of various state parties to the Covenant and in its views on individual communications. However, its interventions have largely been limited to cases of egregious interference by the executive with the appointment and tenure of judges,[79] and article 14(1) has seldom been applied in the context of administrative decision making.

The ECHR

Article 6(1) ECHR guarantees individuals whose civil rights are to be determined a right of access to proceedings before tribunals, including administrative tribunals,[80] whose organization and composition meet minimum standards of independence and impartiality. Independence requires that decision-making bodies be free to exercise their powers without interference from the state's executive or legislature or from the parties to the dispute.[81] While article 6 does not require states to comply with "theoretical constitutional concepts" regarding the separation of the judicial from the legislative or executive powers,[82] these are increasingly recognized as an important foundation of the principle of independence.[83]

The principal guarantors of independence

In the seminal case of *Campbell and Fell,* the Court sought to determine whether a prison's "Board of Visitors," charged with supervising the administration of a prison and adjudicating prisoners' alleged violations of prison regulations, was independent. In determining whether a tribunal is independent, the Court held, three criteria were relevant: the manner of appointment of the tribunal's members and their term of office, the existence of guarantees against outside pressure, and whether the tribunal presents an appearance of independence.

The manner of appointment of tribunal members and their term of office. The fact that tribunal members are appointed by the executive does not deprive them of independence. The executive can even provide tribunal members with guidelines regarding the performance of their functions without

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

imperiling their independence as long as it does not instruct them in their adjudicatory role.[84] The Court has upheld the independence of specialized boards of expert civil servants who were statutorily and constitutionally required to discharge their duties independently and not be subject to instructions from the executive,[85] and whose independence was strengthened by a five-year term and virtual irremovability guaranteed by law.[86] In deciding whether decision makers' terms of office are sufficient to guarantee independence, the Court has applied a flexible, contextual standard.[87]

The existence of guarantees against outside pressure. Article 6(1) guarantees the irremovability of judges during their term of office. In the absence of formal guarantees of independence, such as statutorily mandated security of tenure, the Court examines whether these guarantees are recognized in practice and whether others are present. It may regard a tribunal as independent provided its members are irremovable in practice.[88] For example, the independence of a Court Martial was not compromised by the fact that its permanent president, appointed for a four-year term to serve on panels with an independent judge advocate and two serving officers, did not enjoy formal security of tenure because permanent presidents enjoyed *de facto* security of tenure: they had never been removed from office, their position was the last of their careers, eliminating promotions concerns as a possible influence, and they worked outside the chain of command.[89] Serving officers, in contrast, were not independent. These relatively junior officers were appointed on an *ad hoc* basis for individual proceedings, had no legal training, and were not statutorily protected from external army influence while hearing a case. They were exposed to outside pressure that jeopardized their independence. They were members of the army, which was directed by the executive, and they were subject to military discipline and assessment reports that impacted their careers. Rules governing their selection, the requirement to swear an oath promising impartiality, the confidentiality of deliberations, and the rule that junior members express their view on verdict and sentence first were insufficient guarantees against outside pressure.[90] However, the independence of junior members of a Court Martial could be assured with additional safeguards.[91] One such safeguard was the provision of training material that explained Court Martial procedures and the role of each decision maker in the proceedings, and that instructed them of "the need to function independently of outside or inappropriate influence or instruction and of the importance of this being seen to be done," providing "practical and precise indications of how this could be achieved or undermined in a particular situation."[92] Such instructions brought home to the members the "vital importance of independence" and provided a "significant impediment to any inappropriate pressure being brought to bear."[93] Another important safeguard was that any opinion expressed or vote cast by officers during court martial proceedings remained confidential, preventing superiors from subjecting their performance to assessment reports.[94]

Whether the tribunal presents an appearance of independence. This third criterion operates in cases where the decision makers meet the traditional guarantees of independence but perform overlapping adjudicative and prosecutorial functions or, on a case-specific basis, are subject to executive interference. For example, a penitentiary's Board of Visitors could still be viewed as independent despite its dual role in supervising prison administration and adjudicating inmates' violations of prison rules, which placed it in frequent contact with prison officials and inmates.[95] In contrast, a minister's rarely used power to revoke a planning inspector's authority to decide an appeal deprived the inspector of the requisite appearance of independence.[96]

Judicial review and independence

Article 6(1) ECHR does not guarantee parties the opportunity to directly submit disputes over civil rights to independent tribunals. For reasons of flexibility and efficiency, a decision-making process may employ, at first instance, decision makers that do not satisfy the article 6(1) requirements in every respect.[97] It will comply with article 6(1) as long as a tribunal meeting these requirements eventually reviews the dispute.[98] This "composite approach"[99] was first adopted in *Albert and Le Compte,* which involved a professional discipline tribunal's decision to suspend the applicant doctors from medical practice:

> … [T]he Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1).[100]

But what did "full jurisdiction" mean? Where professional discipline adjudications involved two decision-making bodies, one of which made final and binding findings of fact and the other final and binding findings of law, the Court held that each body was required to meet the requirements of article 6(1).[101] In a series of cases from the United Kingdom, the European Court determined that judicial review of local authorities' child access orders did not comply with article 6(1).[102] Each case was brought by natural parents contesting the decision of a local authority to restrict their access to a child in the authority's care as an infringement of their right to private and family life under article 8 ECHR. The Court observed that the composite approach required that parents "have the local authority's decision reviewed by a tribunal

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

having jurisdiction to examine the merits of the matter."[103] Judicial review before the English courts was insufficient because it was "concerned with reviewing not the merits of the decision in question but rather the decision making process itself."[104]

In some decision-making contexts, the European Court has relaxed the requirements of its composite approach to the guarantee of tribunal independence.[105] Courts reviewing a first-instance decision that does not comply with article 6(1), perhaps because the decision maker is not independent, no longer need "full" jurisdiction over the claim; they just need "enough" jurisdiction to deal with the grounds of review point by point. In *Bryan v. U.K.,* the European Court held that whether a reviewing court has "enough" jurisdiction depends on the manner in which the first-instance decision was arrived at, the content of the dispute including the grounds of review and the subject matter of the decision.[106] The first two factors are usually considered together. Thus, if the dispute is over a policy question, the initial decision could be made by a decision maker lacking independence as long as *Wednesbury*-like review is available.[107] If the dispute concerns findings of fact, such limited judicial review is sufficient only if the initial decision is taken in a quasi-judicial process (*i.e.*, a hearing) by a decision maker bearing some of the badges of independence.[108] The third factor, the subject matter of the decision under review, is crucial. Proceedings that involve fundamental rights or interests demand more safeguards at first instance and more intensive review. These include child access proceedings, for which *Wednesbury* reasonableness review was, according to the European Court, insufficient to satisfy article 6(1). The House of Lords has held that article 6(1) requires the highest standards of independence for decisions touching on basic rights such as liberty rights engaged by the criminal process, "private" rights, and rights protected by the European Convention, including the right to a private and family life.[109]

In sum, conventional international law generally entitles individuals to have their rights and obligations adjudicated by an independent tribunal. Under the ECHR and ICCPR, the right to an independent tribunal is limited to the determination of "civil" rights and obligations or of rights and obligations "in a suit at law." However, the Human Rights Committee, other UN bodies, and the European Court have interpreted the right to an independent tribunal purposively, and have recognized its application to decision making by administrative tribunals in public law contexts ranging from town planning and economic regulation to social assistance and human rights protection. While they have recognized the importance of formal guarantees of security of tenure, financial security, and administrative independence to ensure tribunal independence, they also emphasize the need to ensure that tribunals are "actually" independent, in appearance and practice, from the executive branch and the legislature, particularly in the appointments process. States may design decision-making schemes involving adjudicative bodies that do not fully comply with the requirements of tribunal independence, so long as their decisions are subject to subsequent review by a tribunal that meets these requirements and has sufficient jurisdiction over the merits of the dispute. It is difficult to pinpoint precisely what degree of jurisdiction over the merits is "sufficient" for judicial review of administrative decision making to satisfy the international norm of tribunal independence since, as demonstrated by the foregoing review of the European Court's jurisprudence, the meaning of these concepts is continuously evolving. However, disputes involving fundamental human rights adjudicated at first instance by non-independent decision makers will require more intense review by independent tribunals with jurisdiction over questions of fact and law. Before applying these principles to the design of Canada's refugee status determination system, I briefly describe this system in the following section.

Canada's Refugee Protection System

Canada offers protection to persons who meet the Convention refugee definition[110] and to "persons in need of protection," whose removal from Canada to their country of origin would subject them personally to a danger of torture, a risk to their life, or a risk of cruel and unusual treatment or punishment.[111]

Eligibility

A person arriving at a Canadian port of entry may make a refugee protection claim to an officer employed by the Canada Border Services Agency (CBSA), an agency reporting to the Minister of Public Safety and Emergency Preparedness.[112] Persons already in Canada may make a claim to an immigration officer, a public servant designated by the Minister of Citizenship and Immigration (the Minister) to perform specific functions under the *Act,*[113] including determining whether protection claimants are eligible to have their protection claim determined by the IRB's Refugee Protection Division.[114] A refugee claimant may be ineligible to have her protection claim determined by the RPD in several circumstances,[115] including where she made a prior protection claim that was rejected by the IRB or determined to be ineligible or to have been withdrawn or abandoned, came directly or indirectly to Canada from a designated "safe third country," or was found inadmissible on grounds of security, violating human or international rights, serious criminality, or organized criminality. Claimants must provide the officer with information needed to establish their identity, background, how they arrived in Canada, and why they are seek-

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

ing refugee protection,[116] and must prove they are eligible.[117] Eligible claimants complete a Personal Information Form[118] designed to elicit the information required by the RPD to make a refugee determination decision.[119] Ineligible claimants are subject to removal from Canada but may apply to the Minister for protection under a pre-removal risk assessment (PRRA) process[120] and, if successful, receive refugee protection or, at least, a temporary stay of their removal orders.[121] They may also seek leave to apply for judicial review of their ineligibility decision in the Federal Court.

Claimants found to be ineligible because they came to Canada from a country designated as a safe country by the regulations do not receive a PRRA.[122] On December 5, 2002, Canada and the United States concluded a Safe Third Country Agreement[123] providing for the return to the United States of persons seeking refugee protection and arriving in Canada from the United States unless they can establish that an exception to the Agreement applies.[124] Refugee claimants are excepted from return if they can establish the presence in Canada of a relative with legal status,[125] are unaccompanied minors,[126] or present claims that Canadian authorities, in their discretion, decide to examine where they determine it is in the public interest to do so.[127]

In Canada, eligibility decisions under the Safe Third Country Agreement are carried out according to CIC guidelines by officers employed by the CBSA. Claimants must satisfy authorities, on a balance of probabilities, of the existence of a family relationship with an appropriate anchor relative needed to qualify for an exemption.[128] In most cases, claimants found ineligible to make a refugee claim in Canada under the Agreement are removed the same day as they arrive at the port of entry.[129] Claimants are entitled to an administrative review: the officer who conducts the examination submits an inadmissibility report and eligibility recommendation to a different officer who reviews the information with the claimant, gives the claimant a chance to respond and makes a final decision on admissibility and eligibility.[130]

The Refugee Protection Division

The Refugee Protection Division of the IRB is the primary body responsible for refugee protection determination. Its full-time and part-time members,[131] chosen by a seven-member Selection Advisory Board chaired by the IRB Chair,[132] are appointed by the Governor-in-Council for a term not exceeding seven years and are eligible for reappointment.[133] It has exclusive jurisdiction to hear and determine all questions of law and fact in refugee protection determination proceedings.[134] RPD hearings are held in the claimant's presence, typically before a single member.[135] Each panel is assisted by an IRB refugee protection officer (RPO) who reviews files to identify issues, conducts research, holds interviews, presents evidence, calls and questions witnesses, makes representations, and generally ensures a full and proper examination of a claim.[136] RPOs and RPD members question the claimant to "flush out any weaknesses in the claimant's case that might lead to a determination that the claimant is not a person in need of protection,"[137] making the RPD hearing a relatively inquisitorial process. In contrast, the claimant's representative seeks to establish that she is a person in need of protection. The Minister of Public Safety and Emergency Preparedness may intervene to oppose the claim.[138] Individual RPD panel members control the hearing procedure but generally follow IRB guidelines regarding the conduct of the hearing.[139]

A claimant's refugee protection claim is accepted if she establishes that, on the balance of probabilities, she is a Convention refugee or a person in need of protection.[140] If the RPD rejects a claim, it delivers written reasons to the Minister and claimant,[141] who is subject to removal from Canada. However, she may apply to the Minister for protection by requesting a PRRA, ask the Minister to allow her to remain in Canada on humanitarian and compassionate (H&C) grounds,[142] and seek judicial review of the RPD's negative decision.

Statutory appeals and other avenues of administrative review

Claimants may appeal a decision of the RPD to the Refugee Appeal Division (RAD) of the IRB on a question of law, fact, or mixed law and fact.[143] The provisions implementing the RAD have not been proclaimed into force in the seven years since their enactment. Until they are, failed or ineligible refugee protection claimants have two administrative "review" options: a pre-removal risk assessment and an application for a humanitarian and compassionate review of their case. Unlike a RAD appeal or judicial review, neither option allows the applicant to contest a negative RPD determination.

Persons in Canada subject to a removal order are generally eligible to apply for a PRRA.[144] Notable exceptions include claimants found ineligible to make a protection claim because they arrived from a designated safe third country or, having been removed after their protection claim was declared ineligible, rejected, withdrawn, or abandoned, returned to Canada within six months of their removal.[145] The PRRA recognizes that events that occur in a failed claimant's home country after her claim is rejected but before her removal may put her at risk of persecution or cruel and unusual treatment and entitle her to protection. Accordingly, when arrangements have been made for their removal,[146] eligible persons are notified that they may apply for a PRRA.[147] Protection claimants may only submit new evidence arising since the rejection of their claim by the RPD or evidence that was not reasonably available or that the claimant could not

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

reasonably have been expected to have presented at the time of the rejection.[148] In a PRRA, a public servant employed by CIC decides, based on a written application, whether the applicant has established that she comes within the Convention refugee definition or is a person in need of protection.[149] A successful applicant receives refugee protection just as if the RPD had granted it.[150] Unsuccessful applicants may seek leave to apply for judicial review of the PRRA decision.

At any time, refugee protection claimants may apply to remain in Canada on humanitarian and compassionate grounds.[151] The *IRPA* confers on the Minister the discretion to grant any non-citizen permanent resident status or an exemption from any applicable statutory requirement if this is justified by public policy considerations or by humanitarian and compassionate considerations relating to the non-citizen, taking into account the best interests of a directly affected child. CIC has structured this ministerial discretion by requiring officers to take into account very detailed guidelines.[152] Essentially, a H&C applicant must show that requiring her to apply for permanent residence from outside of Canada would result in unusual and undeserved or disproportionate hardship.[153] She may also claim that her removal from Canada would subject her personally to a risk to her life or security of the person.[154] In such a case, the H&C officer assesses all "non-risk" factors, approves the application if these are sufficient, and, if not, forwards it to a PRRA officer for a risk opinion which the H&C officer considers in accepting or rejecting the application.[155] H&C applications are typically "heard" on the papers. Filing an H&C application does not stay a removal order. Claimants may seek leave to apply for judicial review of unfavourable H&C decisions.

Review by the Federal Court of Canada

A refugee protection claimant may contest an unfavourable eligibility decision, refugee protection decision, PRRA, or H&C decision by applying to the Federal Court in writing, within fifteen days of the decision, for leave to apply for judicial review.[156] Leave applications are determined "without delay and in a summary way,"[157] and granted only if the application discloses a fairly arguable case for the relief requested.[158] Judges should not review the merits of the application for judicial review save to the extent required to deal with the leave application,[159] and should not grant leave lightly since the leave stage is meant to screen out frivolous applications.[160] Judges provide no written reasons in support of leave decisions,[161] which are not subject to appeal.[162] Between 2004 and 2007, the proportion of successful applications for leave and judicial review of refugee protection decisions ranged from 12 to 18 per cent.[163]

Judicial review is restricted to narrow grounds of review set out in the *Federal Court Act*.[164] On successful applications, the Court usually quashes the impugned decision and remits the protection claim to the decision maker for a determination in accordance with its directions.[165] Unsuccessful applicants may appeal to the Federal Court of Appeal only if the trial judge hearing the judicial review application agrees to certify that "a serious question of general importance is involved."[166] Trial judges certify questions for appeal in exceptional circumstances, where the question is both serious and of general importance, would be determinative of the appeal,[167] transcends the interests of the immediate parties, and contemplates issues of "broad significance and general application."[168] The decision not to certify a question cannot be appealed. Before the Court of Appeal, the appellant may advance grounds of appeal in addition to those pleaded in the certified question.[169]

To determine the intensity with which it should review determinations of the RPD or of a PRRA or H&C officer, the Federal Court applies a "standard of review" analysis which requires it to consider whether the question raised by the legislative provision at issue in the particular case was intended by Parliament to be determined exclusively by the administrative decision maker. The standard of review depends on the presence of a privative clause in the decision maker's enabling statute, whether the decision maker has special expertise relative to courts in the matter under review, the purpose of the statutory provision at issue and the nature of the question to be decided (*i.e.,* fact, law, mixed fact and law).[170] Until recently,[171] there were three possible standards of review.[172] Under the "correctness" standard, courts owe no deference to a decision-maker's interpretations or determinations. In contrast, under the "patent unreasonableness" standard, courts deferred to a tribunal's determinations made in the heartland of its expertise unless these were clearly irrational. Under the intermediate "reasonableness" standard, courts intervene if the decision-maker's decision is "not supported by any reasons that stand up to a somewhat probing examination."[173] The Supreme Court of Canada has now collapsed the patent unreasonableness and reasonableness standards into a single form of reasonableness review. However, this has not "pave[d] the way for a more intrusive review by the courts."[174] A deferential reasonableness standard will usually "apply automatically" where courts review questions of fact, discretion, or policy, or questions where legal and factual issues are intertwined.[175]

The Federal Court reviews RPD decisions on questions of law, including the interpretation of the Refugee Convention, on an exacting correctness standard,[176] largely because the RPD enjoys no relative expertise in interpreting general legal principles that define basic human rights guarantees. In contrast, it accords the highest degree of deference to the RPD's determination of a claimant's credibility or of the plausibility

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

of her evidence, which it judges to be "at the heartland of the discretion of triers of fact,"[177] and to the RPD's appreciation and weighing of the evidence adduced before it.[178] The Federal Court has stated that it would not set aside findings of fact unless they were patently unreasonable. Although the appropriate standard is now reasonableness, the Court still approaches the judicial review of RPD decisions with considerable deference.[179] It also reviews PRRA decisions on a deferential standard of reasonableness, since they are based on an appreciation of new evidence and credibility,[180] and applies the same standard of review to the discretionary and fact-intensive H&C decisions.[181]

Based on this brief description of Canada's refugee status determination system, the next section assesses whether refugee protection decision making in Canada conforms to the international norm of tribunal independence.

The Independence of Canadian Refugee Protection Adjudicators

As discussed above, to meet international norms of independence, disputes involving fundamental human rights that are adjudicated at first instance by a non-independent decision maker[182] must be subject to more intense review by an independent court or administrative tribunal with sufficient jurisdiction over the merits—legal and factual—of the dispute. In Canada, judicial review of refugee protection decisions is available, with leave, in the Federal Court—an independent tribunal. However, the small proportion of refugee protection claimants who obtain leave to apply for judicial review are heard by a court that may not have sufficient jurisdiction over the merits of refugee protection decisions because it conducts a very deferential review of the factual determinations of first instance refugee protection decision makers, including the RPD and PRRA officers, applying deferential standards of "no evidence," unreasonableness or irrationality.[183] Considering the fundamental rights at stake in refugee protection decisions, such deferential judicial review, especially of factual findings, may not be intense enough to satisfy international standards, particularly as elaborated by the European Court in *Bryan* and by the House of Lords in *Alconbury* and *Begum*. Consequently, the right of refugee protection claimants to a hearing of their claim by an independent tribunal will be respected only if the first instance decision maker or any merits review tribunal meets the requirements of tribunal independence.

Depending on the circumstances under which a protection claim is brought in Canada, it may be considered at first instance by the RPD, a PRRA officer, or an immigration officer. The RPD likely meets international norms of independence. However, there exist serious concerns about the independence of officers charged with pre-removal risk assessments of ineligible protection claimants, and border services officers responsible for deciding whether claimants arriving via the United States are eligible for a protection hearing in Canada under the safe third country agreement are probably not sufficiently independent. These concerns have also been voiced by international treaty bodies.[184]

Protection Decisions by the Refugee Protection Division

The RPD would probably be recognized as an independent tribunal under international law. Established by the *IRPA*, it has full jurisdiction to hear and determine all questions of law and fact in refugee protection proceedings. Its members benefit from strong guarantees of security of tenure. Appointed for relatively lengthy fixed terms, they are virtually irremovable.[185] They enjoy financial security, receiving a remuneration fixed by the Governor-in-Council.[186] The *IRPA* vests administrative control in the IRB Chair, who is empowered to supervise and direct IRB staff, assign administrative duties to members, apportion work among members, and guide members' decision making by issuing written guidelines and identifying specific IRB decisions as jurisprudential guides.[187] Though further research is needed to assess the impact of recent controversial changes to the appointment process for RPD members,[188] an RPD proceeding likely constitutes a hearing before an independent tribunal.[189]

Protection Decisions by PRRA officers

Some refugee protection claims are ineligible for a hearing by the RPD and are considered on the merits in a pre-removal risk assessment by a PRRA officer. PRRA officers are public servants employed by CIC. Their status and the significant impact of their decisions on non-citizens' lives raise concerns about whether they are sufficiently independent from the executive. The Federal Court of Appeal discussed similar concerns under earlier immigration legislation in *Mohammad v. Canada (M.E.I.)*.[190] Mohammad claimed that immigration adjudicators who conducted deportation inquiries lacked the institutional independence required by common law natural justice and section 7 of the *Charter*. Adjudicators were ordinary public servants employed by the Canada Employment and Immigration Commission (CEIC). Along with case presenting officers, who were part of the Enforcement Branch, they fell under the same associate deputy minister and were advised by the same Legal Services Branch. They were sometimes seconded to enforcement positions and case presenting officers were sometimes assigned to be adjudicators. The motions judge held that the relatively low independence level of adjudicators was acceptable because their decisions could be appealed to the more independent Immigration Appeals Tribunal,[191] and from there to the Federal Court of Appeal.[192] The Court of Appeal agreed that adjudicators

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

had sufficient institutional independence having regard to the statutory scheme, the regulations, administrative directives, job descriptions, and the sworn testimony of a former adjudicator regarding the operation of the adjudication system.[193] It noted that adjudicators and case presenting officers *de facto* operated within separate divisions of CEIC—the Adjudication Directorate and the Enforcement Branch—and did not report to a common superior. Seconding staff from one division to the other did not undermine this institutional separation. With appropriate safeguards, which included placing adjudicators within a directorate autonomous from enforcement staff, ensuring that they had recourse to public service grievance procedures, specifying in administrative directives and job descriptions that their independence had to be respected, and requiring them to swear an oath to faithfully and honestly fulfil their duties as public servants, the adjudication of immigration matters by public servants complied with the right to be heard by an independent tribunal.

While *Mohammad* indicates that PRRA officers may be independent under Canadian law, there are signs that this decision no longer reflects Canadian or international standards of independence. Marked by internal inconsistencies,[194] the judgment was largely displaced by 1993 amendments to the *Immigration Act* that created an Adjudication Division within the IRB,[195] provided for the appointment of adjudicators under the *Public Service Employment Act,* and ensured that they reported to the IRB Chair, not the Minister.[196] The Federal Court of Appeal questioned *Mohammad*'s validity in *Ahumada v. Canada (M.C.I.),* where it held that the secondment of an enforcement officer to the Convention Refugee Determination Division (CRDD) of the IRB raised a reasonable apprehension of bias, because she might "be mindful" of how her colleagues in CIC's enforcement branch would view her decisions and their effect on her career at CIC.[197] *Mohammad,* it held, predated several Supreme Court cases in which statutory schemes of administrative adjudication had been impugned for failing to ensure institutional independence and may not have been decided the same way today "as it was nearly 15 years ago."[198] The Court warned that "officials responsible for enforcing the law … almost inevitably tend to view matters from an enforcement perspective" and observed that in order to avoid the danger of enforcement-minded adjudication, the *Immigration Act* "entrusts adjudicative functions to a tribunal that is independent of, and separate from, the agency responsible for enforcement."[199] Even after the 1993 amendments, the Inter-American Commission on Human Rights expressed concern over the lower level of independence enjoyed by adjudicators, and the Adjudication Division's enforcement focus, given the grave impact of adjudicators' decisions on protection claimants.[200]

Unsuccessful PRRA applicants have claimed that PRRA officers lack institutional independence and that their determinations therefore breach common law procedural fairness or the principles of fundamental justice under section 7 of the *Charter.*[201] Many such claims were filed following a short-lived 2003 transfer of PRRA officers along with those portions of CIC offices in Canada that dealt with enforcement to the newly created CBSA, reporting to the Minister of Public Safety and Emergency Preparedness (PSEP).[202] The government's decision to group PRRAs with enforcement functions including removals, detention and investigation raised the eyebrows of refugee advocates, who questioned whether the CBSA, whose primary mandate was enforcement and border control, could credibly protect refugees.[203] Within ten months, the government had returned the PRRA function to CIC because it was "more closely aligned with the protection aspect of CIC's mandate."[204] Viewed charitably, the transfer of PRRAs to the CBSA was simply a mistake. It could also signal that the Canadian government considered PRRAs to be part of the enforcement and removal process, and cast a shadow over the independence of PRRA officers before December 2003, when they reported to a CIC whose responsibilities included enforcement,[205] and when they subsequently reported to the CBSA, an enforcement and intelligence agency. Conversely, their current placement within a CIC shorn of some of its enforcement functions may enhance their institutional independence.

In *Say v. Canada,*[206] the Federal Court rejected the claim that PRRA officers, when they worked within the CBSA, were "supervised and controlled by officials whose interest it is to remove the people whose cases they are assessing" and thus lacked institutional independence.[207] In response to this claim, the federal government argued that it deliberately safeguarded PRRA officers' independence by physically and operationally insulating them from immigration enforcement functions and by training them about the importance of independence.[208] Removal officers from the CBSA's enforcement unit, who provide removal-ready individuals with PRRA applications, must coordinate their efforts with the PRRA units to ensure that individual files flow to the PRRA unit for a risk assessment and back to the CBSA for removal arrangements, depending on the outcome of the assessment. To allow this interaction without jeopardizing the independence of the PRRA officers,[209] CIC entrusted coordination functions to "PRRA Coordinators" who act as a "firewall" between the PRRA officers and the enforcement unit. PRRA Coordinators do not conduct risk assessments but assign applications to individual officers for decision, hire PRRA officers, and evaluate their job performance based on the quality of their written decisions and on their productivity. PRRA officers are instructed not to have direct contact with

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

removals or enforcement personnel.[210] They may seek guidance and policy advice regarding their substantive decision-making duties from the National PRRA Policy Unit in CIC's Refugees Branch.[211] This institutional separation between PRRA officers and enforcement personnel is reinforced by the practice of housing PRRA units in physically separate offices[212] and providing them with dedicated administrative support.[213] Together with the fact that PRRA Coordinators, not the enforcement unit, assign files to individual officers, these factors may establish a relatively high degree of administrative control.[214] Moreover, the government argued, PRRA officers enjoy sufficient security of tenure and remuneration to guarantee their independence because most hold permanent positions within the public service.[215] Finally, they receive training on administrative law and the importance of independence.[216] In *Say,* the Federal Court found the government's arguments convincing. It concluded that there would not be a reasonable apprehension of bias, in the mind of a fully informed person, in a substantial number of cases, because "there was a conscious effort to insulate the PRRA Program from the enforcement and removal functions of the CBSA."[217]

Since, as the federal government concedes, the requisite level of independence depends in part on the interests at stake in the decision-making process,[218] it is noteworthy that under the former *Immigration Act,* failed refugee claimants could obtain additional hearings before the CRDD if they re-entered Canada more than six months after the last determination. Under the *IRPA,* claimants are entitled to only one hearing before the RPD, but to multiple PRRA hearings following the RPD's dismissal of their claim. PRRA officers have assumed a role once played by an independent tribunal; they make risk determinations of a similar nature and apply the same definition of "person in need of protection." A positive PRRA decision earns claimants protection similar to that granted by the RPD to successful refugee claimants. Based strictly on the nature of the individual interests at stake, then, PRRA officers should meet the same independence standards as RPD members. They do not. Whether the measures adopted by CIC to shield them from enforcement influence suffice to guarantee their independence is debatable. Although the unionized regime governing the employment of most public servants, including the grievance process, does provide some measure of employment security, these protections appear to fall short of standards recognized by the European Court.[219] Public servants are vulnerable to the influence of potentially career-limiting evaluations.[220] They could be expected, as noted in *Ahumada,* to be "mindful" of the impact of their decisions on their advancement prospects in government, including departments linked to immigration enforcement.

In *Say,* the Federal Court held that in assessing whether the grounds for the perception of a lack of institutional independence are "substantial" enough, it would show substantial deference to government decisions "that relate to appropriate organization of public servants devoted to the administration of the vast range of responsibilities of the Government of Canada."[221] The court's deferential posture in assessing the institutional independence of PRRA officers is inappropriate. PRRA officers are public servants, but they have extraordinary responsibilities. They make decisions that engage refugee protection claimants' constitutionally protected life and security of the person interests. Their institutional independence should be re-evaluated in light of this reality.[222]

Eligibility Determinations by Immigration Officers

Immigration officers determine whether refugee protection claimants are eligible to have their protection claims heard by the RPD. At ports of entry, they are public servants employed by the CBSA, an agency primarily concerned with immigration law enforcement. Inland, they are public servants employed by CIC. Without additional guarantees, these officers cannot be considered independent from the executive. In most circumstances, their lack of independence does not necessarily result in a violation of protection claimants' right to have their claims assessed by an independent tribunal, since eligibility determinations are usually followed by a risk assessment by a PRRA officer, who *may* be independent. Claimants found to be ineligible because they came to Canada from a country designated as a safe country do not receive a PRRA.[223] In 2007, the Federal Court determined that returning asylum seekers to the United States under the Safe Third Country Agreement infringed their fundamental *Charter* rights because many aspects of the US refugee status determination system do not live up to international norms.[224] If this were indeed the case, because ineligible claimants are not entitled to a PRRA, eligibility determinations engage their life and security of the person interests and must conform to the principles of fundamental justice. Fundamental justice and international norms would require that independent and impartial decision makers afford the claimants a hearing and assess whether their life or freedom would be threatened upon their return to the United States. The officers who interview claimants at the border, make eligibility decisions and review their colleagues' decisions are employed by the CBSA, an agency tasked with the enforcement of Canada's immigration laws. They do not make decisions following the quasi-judicial process and with the accompanying safeguards contemplated by the European Court in *Bryan.* Although their decisions are open to judicial review, the proceedings as a whole would likely not consti-

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

tute a hearing before an independent and impartial tribunal, particularly in light of the fundamental nature of the interests at stake.[225]

Critiques of the Canadian System by Treaty Bodies

Regional and international treaty bodies have criticized Canada's decision to entrust pre-removal risk assessment and eligibility decisions to government officials. In 2000, the Inter-American Commission on Human Rights reported on whether Canada's refugee determination process comported with its Inter-American human rights obligations. It interpreted the right to seek asylum in article XXVII of the American Declaration on the Rights and Duties of Man[226] as requiring that each refugee claimant be "accorded the minimum guarantees necessary to effectively state his or her claim,"[227] and voiced concern that non-independent immigration officials made eligibility and admissibility decisions:

> Senior immigration officers are employees of … [CIC]. Members of the Adjudication Division, while part of the IRB, are also public servants rather than appointed decision-makers. Further, while the CRDD has specialized expertise, procedures and resources for determining refugee claims, the Adjudication Division deals in broader terms and through adversarial procedures with who is admissible or removable from Canada, and with detention reviews. Because the mandate of the Adjudication Division is more heavily directed toward control issues and law-enforcement, it is inherently less able to properly balance the public and individual interests involved.[228]

It proposed that the independent CRDD decide eligibility and admissibility:

> [T]he nature of the rights potentially at issue—for example, to life and to be free from torture—requires the strictest adherence to all applicable safeguards. *Those safeguards include the right to have one's eligibility to enter the process decided by a competent, independent and impartial decision-maker, through a process which is fair and transparent.*[229]

In its Concluding Observations on Canada's third periodic report regarding its implementation of its obligations under the 1984 UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,[230] and in particular the article 3(1) prohibition against *refoulement* to torture, the Committee Against Torture (CAT) expressed concerns that "the alleged lack of independence of decision-makers," among other factors, could hinder the effectiveness of risk assessments in protecting claimants' rights under the CAT.[231] Acknowledging Canada's assurances that the PRRA process proposed under the forthcoming *IRPA* would have an application broader than that of the old process, the Committee encouraged Canada "to ensure that *IRPA* permitted in-depth examination of claims *by an independent entity* …"[232] In its Concluding Observations on Canada's fourth and fifth periodic reports, the Committee recommended that Canada "provide for judicial review of the merits rather than merely the reasonableness" of decisions to expel non-citizens where article 3(1) CAT is engaged.[233] It reiterated these concerns in its views on the petition of Enrique Falcon Ríos, a Mexican citizen who claimed to have been tortured by Mexican soldiers who suspected that he and his family were supporters of the Zapatista national liberation movement.[234] The CRDD dismissed his refugee claim, finding that his account of the events leading to his flight from Mexico was not credible due in part to significant "gaps" in his testimony.[235] The Federal Court dismissed Ríos's application for judicial review, finding no error that would justify its intervention. After he was refused permission to remain in Canada on humanitarian and compassionate grounds, he filed a petition arguing that he would be tortured if returned to Mexico. Canada argued that the petition was inadmissible because Ríos had not exhausted domestic remedies likely to bring effective relief, including judicial review of the negative H&C decision and a PRRA. The Committee disagreed, finding that for Ríos, neither an H&C application nor a PRRA would effectively protect his rights under the CAT. Humanitarian and compassionate assistance, if granted, was on a purely discretionary basis,[236] and there were significant concerns about how H&C officers' lack of independence could jeopardize the effectiveness of H&C applications as a remedy against *refoulement.*[237] A PRRA would not have been effective, since the PRRA officer could only have considered fresh evidence arising after the initial CRDD decision and Ríos was really seeking a rehearing of his case.[238] The Committee allowed the petition.[239] In subsequent petitions brought before the Committee, Canada has claimed that *Ríos* was wrongly decided and has argued, relying on *Say,* that the PRRA process is an effective remedy because PRRA officers are specially trained to consider provisions of the Canadian *Charter* and international human rights treaties and are independent and impartial, and because it is "governed by statutory criteria for protection, conducted pursuant to a highly regulated process and in accordance with extensive and detailed guidelines" and is subject to judicial review.[240] The Committee appears to have backed down from its critical position in *Ríos,* finding in several cases that, on their specific facts, the PRRA process combined with judicial review had constituted an effective remedy.[241]

In sum, because of the Federal Court's limited jurisdiction in judicial review proceedings over the merits of refugee protection claims, international norms of independence would

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

require administrative decision makers who make final decisions on the merits of protection claims to be independent. While the RPD is likely independent, the status of PRRA officers as civil servants within CIC raises some concerns about their independence. Protection claimants who can establish that they will likely be deprived of a fair hearing of their claims and exposed to *refoulement* if returned to the United States under the Safe Third Country Agreement are entitled under international norms to a hearing of their claim before an independent tribunal. The CBSA officers responsible for determining their eligibility to a hearing before the RPD are part of Canada's border control machinery and are not sufficiently independent. The concerns over the independence of PRRA officers and immigration officers are echoed in the reports and jurisprudence of regional and international treaty bodies. Because judicial review of their decisions is not available as of right and since, in the small proportion of cases where leave is granted, reviewing courts apply deferential standards of review on questions of fact and credibility, refugee protection decision making by immigration officers and PRRA officers may not meet international standards of independence.

Conclusion

I have argued, based on a review of the jurisprudence developed under the ICCPR and ECHR, that article 14 of the ICCPR guarantees refugee protection claimants a hearing of their protection claims before an independent tribunal with sufficient jurisdiction over the merits of these claims. In certain cases, the administrative decision makers responsible for the adjudication of refugee protection claims in Canada are not sufficiently isolated from the influence of the executive arm of government responsible for the enforcement of ordinary immigration laws. Where, in these circumstances, refugee protection claimants succeed in obtaining leave to apply for judicial review, the Federal Court's deferential review of questions of fact and credibility means that the Court does not have sufficient jurisdiction over the merits of protection claims as required by the international norm of tribunal independence.

How should Canada's Parliament and judiciary respond to such gaps between Canadian refugee protection laws and international human rights norms? In contemplating reforms to Canada's refugee protection system, legislators should harmonize it with international human rights norms and, at the very least, reject proposed changes that would widen the gap between domestic and international law. Canadian legislators showed openness to the positive influence of international human rights law when they inserted in the *IRPA* a requirement that its provisions be interpreted and applied in a manner that complies with international human rights instruments to which Canada is a signatory.[242] If Canada's Parliament fails to align Canada's refugee protection system with international standards, then refugee protection claimants may have little choice but to ask domestic courts to address the existing gaps through constitutional challenges. I have argued elsewhere[243] that Canadian courts should recognize that human rights norms expressed in ratified international treaties are *prima facie* evidence of the existence of similar or identical fundamental norms in Canadian law, and that they are therefore bound to interpret the *Charter* (including the content of fundamental justice—the source of refugee protection claimants' entrenched constitutional procedural and institutional rights) in conformity with these treaty norms, absent evidence that they are not universal in nature or lack resonance with Canadian legal values. At present, however, the Supreme Court has not clearly held that it is under a legal duty to interpret the *Charter* in conformity with Canada's international human rights obligations—only that there exists a "rule of judicial policy" that it should do so.[244]

Could refugee protection claimants persuade Canadian courts to invalidate Canada's refugee protection laws because they conflict with principles of fundamental justice shaped by Canada's international human rights obligations, including the international norm of tribunal independence? Clearly, significant obstacles must be overcome before such challenges could succeed. But at the very least, international human rights norms, forged from a broad consensus among disparate nations, provide an important measuring rod with which to assess the scope and content of procedural and institutional safeguards, including tribunal independence, in domestic refugee protection systems. Gaps between domestic protections and international standards need to be identified and, if possible, justified. The analytical framework I have developed here is a first step in this larger project.

Notes

1. Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 177 [Singh].
2. C. Clark, "Critics assail Coderre's proposals for refugee system" *The Globe and Mail* (21 March 2003) A15.
3. "Refugee backlog headed for record high as Tories slow to appoint adjudicators" *Canadian Press* (8 April 2008).
4. 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 [ICCPR or Covenant].
5. 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5, art. 6 [ECHR or European Convention].
6. GA Res. 217(III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, art. 10 [UDHR or Declaration].
7. 22 November 1969, 65 A.J.I.L. 679, art. 8.
8. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities,

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers—report by the Special Rapporteur Param Cumaraswamy, UN Doc. E/CN.4/1995/39 (1995) at para. 35.

9. *R. v. Hape,* 2007 SCC 26 at paras. 53 and 54 [*Hape*].
10. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. Presenting Canada's fourth periodic report regarding the ICCPR's implementation to the UN Committee on Human Rights, Canada's representative stated that the *Charter* "was the primary mechanism" for implementing the ICCPR and that the *Charter*'s provisions "were based on the Covenant": UN Human Rights Committee, Summary Record of the 1738th Meeting: Canada (17 March 1999), UN Doc. CCPR/C/SR.1738, online: <http://www.unhchr.ch> (date accessed: 15 February 2005).
11. Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 ["Optional Protocol"].
12. Committee on Human Rights, Communication No. 1234/2003, *P.K. v. Canada,* UN Doc. CCPR/C/89/D/1234/2003 (3 April 2007) [*P.K.*].
13. *Maaouia v. France* (2001) 33 E.H.R.R. 42 [*Maaouia*].
14. See Gerald Heckman, "International Law and Procedural Safeguards in Deportation Proceedings: *Ahani v. Canada*" (2004) 17.2 R.Q.D.I. 81 at 102 [Heckman, Deportation].
15. See D. Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (The Hague: Kluwer Law International, 2001) at 46, 48 and 51; P. van Dijk, "The interpretation of civil rights and obligations" by the European Court of Human Rights—One more step to take" in F. Matscher & H. Petzold, eds, *Protecting Human Rights: The European Dimension—Studies in Honour of Gérard Wiarda,* 2d ed. (Carl Heymans Verlag KG: Berlin, 1990) 131 [van Dijk 1990].
16. Weissbrodt, *supra* note 15 at 51. Roosevelt had expressed concern that administrative officers, not courts, determined many civil rights obligations like those connected with military service and taxation. van Dijk observes that these particular "civil rights and obligations" were not of a private law character, and concludes that Roosevelt understood "civil" to include all non-penal or non-criminal matters rather than solely private law matters: van Dijk 1990, supra note 15 at 137.
17. Van Dijk, *ibid.* at 137.
18. Weissbrodt, *supra* note 15 at 51.
19. Committee on Human Rights, Communication No. 112/1981, *Y.L. v. Canada,* UNGAOR, 41st Sess., Supp. No. 40, UN Doc. A/41/40 (1986) at 145 [*Y.L.*].
20. *Ibid.* at para. 9.2.
21. *Ibid.* at para. 9.4.
22. *Ibid.* at paras 9.4–9.5.
23. For a detailed discussion, see Heckman, Deportation *supra* note 14 at 107.
24. Weissbrodt, *supra* note 15 at 139; S. Bailey, "Rights in the Administration of Justice" in D. Harris & S. Joseph, eds, *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press, 1995) at 212; D.J. Harris, *Cases and Materials on International Law,* 5th ed. (London: Sweet and Maxwell, 1998) at 672; D. McGoldrick, *The Human Rights Committee* (Oxford: Clarendon Press, 1991) at 416. See also P. Boeles, *Fair Immigration Proceedings in Europe* (The Hague: Martinus Nijhoff, 1995) at 137; S. Joseph *et al., The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2000) at 281.
25. Committee on Human Rights, Communication No. 441/1990, *Casanovas v. France,* 1994, UN Doc. CCPR/C/51/D/441/1990 at paras. 5.2 and 7.4. See also Communication No.454/1991, *Pons v. Spain,* 1995, UN Doc. CCPR/C/55/D/454/1991, at para. 9.6.
26. Committee on Human Rights, Communication No. 1052/2002, *Tcholatch v. Canada,* 2007, UN Doc. CCPR/C/89/D/1052/2002.
27. Committee on Human Rights, Communication No. 972/2001, *Kazantzis v. Cyprus,* 2003, UN Doc. CCPR/C/78/D/972/2001, at para. 6.5.
28. See D. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 100–102.
29. See in particular, *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at paras. 23–25 [*Baker*].
30. *Kaplan,* Report of 17 July 1980, (1981) D&R 21 at 5(21).
31. See *Skärby v. Sweden* (1990), 13 E.H.R.R. 90 at para. 28: a dispute over a right arises where the applicant can arguably claim that the state authority has exercised its statutory discretion in a manner contrary to generally recognized legal and administrative principles. See also P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Right*s (The Hague: Kluwer Law, 1998) at 395.
32. *Benthem v. Netherlands* (1986) 8 E.H.R.R. 1 [*Benthem*].
33. Van Dijk 1998, *supra* note 31 at 397. For example, disciplinary proceedings against a doctor, although designed primarily to protect patients and promote public confidence in the medical profession, had a sufficient impact on the doctor's right to practice his profession that it effectively determined this "civil" right: *Le Compte, Van Leuven and De Meyere v. Belgium* (1981), 4 E.H.R.R. 1 at paras. 47–8 [*Le Compte*].
34. Van Dijk 1998, *ibid.* at 392–4; see also van Dijk 1990, *supra* note 15.
35. This view is set out convincingly in the dissenting opinion of Judge Loucaides in *Maaouia, supra* note 13 at O-IV3-8.
36. *Benthem, supra* note 32 at para. 34.
37. *Tre Traktörer Aktiebolag v. Sweden* (1989), 13 E.H.R.R. 309 at para. 42–43. The permit conferred "civil" rights because

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

it was essential for the applicant to carry on its business activities as a restaurant.

38. *Le Compte, supra* note 33.
39. *Feldebrugge v. Netherlands* (1986), 8 E.H.R.R. 425 at para. 40. The Court emphasized the public health insurance's private law features, including its resemblance to private insurance, the tie between the availability of benefits and the applicant's employment under a private law contract, and the personal, economic, and individual nature of the right, of crucial importance to a person who by reason of illness has no other source of income. These "confer[red] on the asserted entitlement the character of a civil right …"
40. *Salesi v. Italy* (1993), 26 E.H.R.R. 187 [*Salesi*]. This time, the Court did not rely on similarities between the statutory welfare assistance program and private schemes, but on the fact that Salesi suffered an interference with her means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in a statute giving effect to the Constitution. See also *Schuler-Zgraggen v. Switzerland* (1993) 16 E.H.R.R. 405 at para. 46. The European Court has recently further broadened the scope of art. 6(1) in *Vilho Eskelinen v. Finland,* no. 63235/00 (19 April 2007) [*Vilho Eskelinen*].
41. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992), para. 28.
42. James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) at 158.
43. These include: rights to acquire, lease, or otherwise contract in respect of movable and immovable property and intellectual property rights: *Convention relating to the Status of Refugees,* 28 July 1951, 189 U.N.T.S. 2545, Can. T.S. 1969/6, arts. 13, 14 [Refugee Convention].
44. *Kraska v. Switzerland* (1993), 18 E.H.R.R. 188.
45. Refugee Convention, *supra* note 43, art. 23.
46. Defined as "legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme": *ibid.*, art. 24(1)(b).
47. Recognition of refugee status is thus a *necessary* precondition to the exercise of the civil rights expressed in the Refugee Convention, even if it may not be *sufficient,* since many of these rights apply only once a refugee attains a specific level of attachment to the asylum state, usually ranging from physical presence to lawful presence and finally, to durable residence: Hathaway, *supra* note 42 at 156 *et seq.*
48. *Maaouia, supra* note 13 at para. 40.
49. *Ibid.* at paras. 38–39.
50. The Court relied on "an explanatory report" on the protocol which noted that the protocol "did not affect" the European Commission's interpretation of art. 6 denying that it applied to deportation proceedings: *ibid.* at paras. 35–37.
51. *Vilho Eskelinen, supra* note 40 at para. 61.
52. Van Dijk 1990, *supra* note 15; *Maaouia, supra* note 13 at paras. O-IV4-O-IV11.
53. *Maaouia, ibid.* at para. O-IV7.
54. *Ibid.*
55. *Ibid.* at para. O-IV7.
56. *Ibid.* at O-IV15–O-IV17.
57. As the dissenting judges put it: "Protocols add to the rights of the individual. They do not restrict or abolish them": *ibid.* at para. O-IV14.
58. See also H. Steenbergen, P. Boeles, & C. Wijnakker, "Case reports of the European Court of Human Rights" (2001), 3 Eur. J. Migr. & L. 97 at 101.
59. Art. XVIII of the American Declaration of the Rights and Duties of Man, 2 May 1948, 43 A.J.I.L. 133 simply provides that "every person may resort to the courts to ensure respect for his legal rights." Similarly, art. 8(1) of the American Convention on Human Rights, 22 November 1969, 65 A.J.I.L. 679 extends the right to a hearing to "the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." They are broad enough to extend the independence guarantee to refugee status determination or removal proceedings.
60. *Supra* note 12.
61. Art. 13 states: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."
62. *P.K., supra* note 12 at para. 4.9.
63. *Ibid.* at para. 7.5.
64. Human Rights Committee, Communication No. 1051/2002, *Ahani v. Canada,* 2004, UN Doc. CCPR/C/80/D/1051/2002 at para. 10.5.
65. Refugee determinations do not always occur in the context of an expulsion, to which Protocol 7 and art. 13 are limited: Peter Billings, "The Influence of Human Rights Law on the Procedural Formalities of the Asylum Determination Process" (1998) 2 Int'l J.H.R. 32 at 38. But see Christian Tomuschat, "A Right to Asylum in Europe" (1992) 13 H.R.L.J. 257 at 263.
66. For a more detailed discussion of the scope and content of art. 13 ICCPR, see Heckman, Deportation, *supra* note 14.
67. M. Nowak, *U.N. Covenant on Civil and Political Rights—CCPR Commentary* (Kehl am Rhein: N.P. Engel, 1993) at 244–5. A tribunal "established by law" is one whose jurisdiction, both in relation to subject matter and territorial application, is "determined generally and independently of the given case" rather than set arbitrarily by administrative fiat.
68. Committee on Human Rights, General Comment 13/21, Procedural Guarantees in Civil and Criminal Trials, UN-

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

GAOR, 21st Sess., Supp. No. 40, UN Doc. HRI\GEN\I\ Rev.1 (1984) at para. 3.

69. See R. Brody, "Introduction" in R. Brody, ed., *C.I.J.L. Bulletin No. 25–26, Special Issue—The Independence of Judges and Lawyers: A Compilation of International Standards* (Geneva: Centre for the Independence of Judges and Lawyers, 1990) at 3–13 [*C.I.J.L Special Bulletin*].
70. United Nations Basic Principles on the Independence of the Judiciary, in *C.I.J.L Special Bulletin, supra* note 69 at 14 [Basic Principles].
71. A/RES/40/146/13 Dec. 1985. To encourage states to give effect to these basic principles, the UN Economic and Social Council adopted "Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary," a document also endorsed by the General Assembly: Res. 44/162/ 15 Dec. 1989.
72. E/CN.4/Sub.2/1988/20/Add.1 [*Singhvi Declaration*] in *C.I.J.L Special Bulletin, supra* note 69 at 38.
73. See, in particular, *Valente v. The Queen,* [1985] 2 S.C.R. 673 [*Valente*] and *Canadian Pacific v. Matsqui Indian Band* [1995] 1 S.C.R. 3. Art. 11 of the Basic Principles, *supra* note 70 provides that "the terms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law." See also *Singhvi Declaration, ibid.*, art. 18. Art. 12 of the Basic Principles mandates guaranteed tenure until a fixed retirement age or the expiry of the judge's term in office: see also *Singhvi Declaration,* art. 16. The discipline, suspension, and removal of judges is strictly limited: Basic Principles, arts. 17–20; *Singhvi Declaration,* arts. 26–31. Art. 14 of the Basic Principles reserves to the judiciary the task of assigning individual cases to judges; see *Singhvi Declaration,* arts. 32–36. Art. 32 of the *Singhvi Declaration* confers on the judiciary or a body on which the judiciary is represented responsibility for court administration and court staff.
74. See Basic Principles, *supra* note 73, arts. 10 and 13; *Singhvi Declaration, supra* note 73, arts. 11 and 24.
75. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Administration of Justice and the Human Rights of Detainees: Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers—Final report by the Special Rapporteur, Mr. L. M. Singhvi,* UN Doc. E/CN.4/Sub. 2/1985/18 (1985) at para. 108 [*Singhvi final report*].
76. *Ibid.* at para. 11.
77. *Ibid.* at para. 14.
78. *Ibid.* at paras. 13, 14.
79. Committee on Human Rights, Communication No. 468/1991, *Bahamonde v. Equatorial Guinea,* 49th Sess., UN Doc. 49/40 (1993) at para. 9.4; Concluding Observations of the Human Rights Committee: Belarus, UN Doc. CCPR/C/79/Add.86 (1997) at paras. 13–14; Romania, UN Doc. CCPR/C/79/Add.111 (1999) at para. 10; Congo, UN Doc. CCPR/C/79/Add.118 (2000) at para. 14; Sudan, UN Doc. CCPR/C/79/Add.85 (1997) at para. 21; Lithuania, UN Doc. CCPR/C/79/Add.87 (1997) at para. 16.
80. To be recognized as a tribunal under art. 6, the decision-making body's function must be to "determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner": *Sramek v. Austria* (1985) 7 E.H.R.R. 351 at para. 36. It must have a power of binding decision in its area of jurisdiction over questions of fact and law: *Campbell and Fell v. U.K.* (1984) 7 EHRR 165 at 198 [*Campbell and Fell*]; *Le Compte, supra* note 33 at para. 51. But see *Bryan v. U.K.* (1995), 21 E.H.R.R. 342 [*Bryan*]. It need not be "a court of law of the classic kind, integrated within the standard judicial machinery of the country": *Campbell and Fell* at para. 76.
81. *Crociani v. Italy* (1980) 22 D.R. 147 at para. 8 (Eur. Comm. H.R.) at 221, para. 10; *Campbell and Fell, supra* note 80 at para. 78.
82. *Kleyn v. Netherlands* (2004) 38:14 E.H.R.R. 239 at para. 193 [*Kleyn*].
83. In relation to the separation of legislative and judicial powers, see *Stran Greek Refineries and Stratis Andreadis v. Greece,* (1994) 19 E.H.R.R. 293 and *McGonnell v. United Kingdom,* (2000) 30 E.H.R.R. 289. Regarding the separation of executive and judicial powers, see *Easterbrook v. United Kingdom,* (2003) 37:40 E.H.R.R. 812.
84. *Campbell and Fell, supra* note 80 at para. 79.
85. *Ettl v. Austria* (1987) 10 E.H.R.R. 255 at para. 38 [*Ettl*]; see also *Stallinger v. Austria* (1997) 26 E.H.R.R. 81.
86. *Ettl, supra* note 85 at paras. 20 and 40–41. In these circumstances, the Court noted, it was appropriate for Austria to rely on civil servants with expertise in the complex field of land consolidation.
87. For example, while the three-year term of members of the Board of Visitors in *Campbell and Fell* was relatively short, the Court allowed for the fact that they were unpaid, and might refuse longer appointments: *Campbell and Fell, supra* note 80 at 199, paras. 79–80.
88. *Campbell and Fell, supra* note 80 at para. 80.
89. *Morris v. United Kingdom* (2002) 34 E.H.R.R. 52 at paras. 68–9.
90. *Ibid.* at para. 72.
91. *Cooper v. United Kingdom,* (2003) 39 E.H.R.R. 8.
92. *Ibid.* at para. 124.
93. *Ibid.*
94. *Ibid.* at para. 125.
95. *Campbell and Fell, supra* note 80 at paras. 81–82.
96. *Bryan, supra* note 80 at para. 38.
97. *Le Compte, supra* note 33 at para. 51.
98. The Human Rights Committee has also held that an appellate hearing before a tribunal that complies with article 14(1) may cure the defects of an initial hearing before a non-compliant tribunal: Committee on Human Rights, Communication No. 387/1989, *Karttunen v. Finland,* 46th Sess., UN Doc. 46/40 (1992) at paras. 7.2–7.3.

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

99. See Mark Poustie, "The Rule of Law or the Rule of Lawyers? Alconbury, Article 6(1) and the Role of Courts in Administrative Decisionmaking" (2001), 6 E.H.R.L.R. 657 at 663.
100. *Albert and Le Compte v. Belgium* (1983) 5 E.H.R.R. 533 at 541–2 [*Albert and Le Compte*].
101. *Le Compte, supra* note 33 at para. 51. The European Court has refused to apply the composite approach to exempt first instance trial courts hearing criminal charges from full compliance with all art. 6(1) requirements: *De Cubber v. Belgium* (1985) 7 E.H.R.R. 236 at para. 32.
102. *W v. U.K.* (1987), 10 E.H.R.R. 29; *O v. U.K.* (1987), 10 E.H.R.R. 82; *B v. U.K.* (1987), 10 E.H.R.R. 87; and *R v. U.K.* (1987), 10 E.H.R.R. 74.
103. *B v. U.K., ibid.* at para. 82. It was common ground that the proceedings before the local authorities did not satisfy art. 6(1).
104. *Ibid.* at paras. 49 and 82. The Court could set aside a care order if, in making its decision, the local authority: acted illegally, *ultra vires,* or in bad faith; failed to consider relevant considerations, took into account irrelevant considerations, or came to a decision that no reasonable authority could have made (the standard of Wednesbury unreasonableness); or failed to act fairly or to observe statutory procedural rules.
105. For a more detailed discussion of this subject, see Gerald Heckman & Lorne Sossin, "How Do Canadian Administrative Law Protections Measure Up to International Human Rights Standards?" (2005) 50 McGill L.J. 193 at 225–233.
106. *Bryan, supra* note 80 at para. 45. See also *R. (on the application of Holding & Barnes Plc) v. Secretary of State for the Environment, Transport, and the Regions* [2001] H.R.L.R. 45 at para. 154 [*Alconbury*].
107. *Zumtobel v. Austria,* (1993), 17 E.H.R.R. 116 at para. 32 [*Zumtobel*]; see also *ISKCON v. U.K.* (Application No. 20490/92), March 8, 1994 at para. 4.
108. *Bryan, supra* note 80 at para. 47.
109. *Begum (Runa) v. Tower Hamlets LBC,* [2003] 1 All E.R. 731 (H.L.) at para. 42 [*Begum*].
110. *Immigration and Refugee Protection Act,* S.C. 2001, c. 27, s. 96 [IRPA].
111. *Ibid.*, s. 97.
112. The agency and portfolio were created by Order in Council on December 12, 2003: *Order Transferring Certain Portions from the Department of Citizenship and Immigration to the Canada Border Services Agency,* S.I./2003–215, C. Gaz. 2003.II.3231.
113. *IRPA, supra* note 110, s. 6.
114. *Ibid.*, s. 100(1).
115. *Ibid.*, s. 101.
116. Canada, Immigration and Refugee Board, The Refugee Protection Claim Process, online: <http://www.irb-cisr.gc.ca/en/about/tribunals/rpd/claimant/claimproc01_e.htm> [*Claim Process*].
117. *IRPA, supra* note 110, s. 100(4).
118. Citizenship and Immigration Canada, Immigration Manual PP-1, "Processing Claims for Protection in Canada" (7 January 2005), online: <http://www.cic.gc.ca/manuals-guides/english/ pp/pp01e.pdf> at 38–41 [PP-1].
119. *Refugee Protection Division Rules,* SOR/2002–228, ss. 1, 5, and 6 [*RPD Rules*].
120. *IRPA, supra* note 110, s. 112.
121. *Ibid.*, s. 114(1).
122. *Ibid.*, s. 112(2)(b).
123. Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, 5 December 2002, online:<http://www.cic.gc.ca/english/policy/safe%2Dthird.html> [Safe Third Country Agreement or Agreement]. The Agreement entered into force on December 29, 2004: CIC, Canada-US Safe Third Country Agreement, online: <http:/www.cic.gc.ca/English/ policy/menu-safethird.html> (last modified June 30, 2005).
124. *Ibid.*, art. 4. Similarly, the Agreement allows the return to Canada of asylum seekers arriving in the United States from Canada. On 29 November 2007, the Federal Court of Canada declared that the regulations that operationalized the Agreement were *ultra vires* the *IRPA* because the United States did not comply with its international obligations towards refugees and was not a safe country. It also held that the regulations violated the Canadian *Charter: Canadian Council for Refugees v. Canada,* 2007 FC 1262 [*CCR*]. The Federal Court of Appeal overturned the trial judgment, finding that the designation of the United States as a safe country was lawful so long as the Governor-in-Council was *of the opinion* that the United States complied with its international obligations, regardless of its "actual compliance." It dismissed the *Charter* challenge, finding that the Canadian Council of Refugees, a Canadian NGO that advocates for refugees, did not have standing to challenge the regulations under the *Charter* and that there was an insufficient factual basis upon which to find a *Charter* breach: 2008 FCA 229 [*CCR FCA*].
125. Agreement, *ibid.*, art. 4(2)(a)-(b); *Immigration and Refugee Protection Regulations,* SOR/2002–227, ss. 159.5(a)-(d) [*IRP Regs*].
126. Agreement, *ibid.*, art. 4(2)(c); *IRP Regs, ibid.*, s. 159.5(e).
127. Agreement, *ibid.*, art. 6. A claimant will not be returned to the United States if she faces the death penalty there, is being charged or convicted in another country of an offense punishable by the death penalty in that country, or is a national or stateless former habitual resident of a country subject to a Canadian moratorium on removals: *IRP Regulations, ibid.*, s. 159.6.
128. Agreement, *supra* note 123, Statement of Principles, Principle 3 [Statement of Principles].
129. PP-1, supra note 118 at para. 17.23.

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

130. *Ibid.* at para. 17.13. Canadian officials may also reconsider negative eligibility determinations at the request of a US port director: *ibid.* at para.17.19.
131. *IRPA, supra* note 110, s. 153(2).
132. The SAB comprises three members jointly appointed by the Minister and IRB Chair and three members appointed by the IRB Chair: CIC, News Release, "Minister Finley announces revised selection process for appointments to the IRB" (9 July 2007). online: <www.cic.gc.ca/english/department/media/releases/2007/2007-07-09.asp> [CIC release].
133. *IRPA, supra* note 110, ss. 153(1)(a),(c). The *Act* provides that no less than 10 per cent of RPD members must be barristers or notaries.
134. *Ibid.*, s. 162(1).
135. *Ibid.*, s. 163. Under the former *Immigration Act,* R.S.C. 1985, c. I-2, claims were heard by two-member panels unless the claimant consented to a single-member panel: ss. 69.1(7),(8).
136. *RPD Rules, supra* note 119, s. 16.
137. *Thamotharem v. Canada (Minister of Citizenship and Immigration),* 2006 FC 16 (T.D.) at paras. 70–1, reversed on other grounds, 2007 FCA 198 at para. 44.
138. *IRPA, supra* note 110, s. 170(c).
139. See, for example, Canada, IRB, *Guideline 7 - Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division* (1 December 2003), online: <http://www.irb-cisr.gc.ca/en/about/guidelines/preparation_e.htm> at para. 19.
140. *IRPA, supra* note 110, s. 107(1).
141. *Ibid.,* ss. 169(b), (d).
142. *Ibid.*, s. 25.
143. *Ibid.*, s. 110(1).
144. *IRPA, supra* note 110, s. 112(1).
145. *Ibid.*, s. 112(2)(b) and (d), respectively.
146. *Claim Process, supra* note 116 at para. 6.2; *IRP Regs,* s. 244(c), s. 160.
147. *IRP Regs, ibid.*, s. 160. If she applies for a PRRA within the fifteen-day deadline, her removal is stayed until the application is decided: *ibid.*, s. 162.
148. *IRPA, supra* note 110, s. 113(a). See also Lorne Waldman, *Canadian Immigration & Refugee Law Practice* (Toronto: LexisNexis Butterworths, 2004) at 375. Previously, the *Immigration Act* allowed such claimants to file a fresh claim for refugee protection and be heard again by the IRB, providing they had been outside of Canada for ninety days: *Immigration Act,* R.S.C. 1985, c. I-2, ss. 46.01(1)(c) and (5).
149. *IRPA, supra* note 110, s. 113(c). In certain circumstances, the PRRA officer may determine that an in-person hearing is required: *IRP Regs, supra* note 125, s. 167.
150. *IRPA, ibid.*, s. 114(1)(a).
151. *Ibid.*, s. 25. They may make an H&C application at the time they submit their protection claim.
152. Citizenship and Immigration Canada, IP5 - Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds (12 January 2005), online: <http://www.cic.gc.ca/manuals-guides/english/ip/ip05e.pdf>.
153. *Ibid.* at 8, para. 5.1.
154. *Ibid.* at para. 13.1.
155. *Ibid.* at 32, para. 13.6.
156. *IRPA, supra* note 110., s. 72(2)(b).
157. *IRPA, supra* note 110, s. 72(d).
158. *Bains v. Canada (M.E.I.)* (1990), 47 Admin. L. R. 317 (FCA) at para. 1.
159. *Ibid.* at para. 4.
160. *Coliseum v. Canada (M.E.I.)* (1991), 13 Imm. L.R. (2d) 24 (F.C.T.D.) at para. 4.
161. *Krishnapillai v. Canada (Minister of Citizenship and Immigration),* [2001] F.C.J. No. 1828 (C.A.) at paras. 28–31, online: QL (FCJ).
162. *IRPA, supra* note 110, s. 72(2)(e).
163. Federal Court of Canada, *Activity Summary-January 1 to December 31, 2007,* online: <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics>.
164. *Federal Court Act,* R.S.C. 1985, c. F-7, s. 18.1(4). To obtain relief, the applicant must establish that the decision maker acted without jurisdiction, acted beyond its jurisdiction, or refused to exercise its jurisdiction; failed to observe a principle of natural justice, procedural fairness, or other procedure that it was required by law to observe; erred in law in making a decision or an order, whether or not the error appears on the face of the record; based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; acted, or failed to act, by reason of fraud or perjured evidence; or acted in any other way that was contrary to law.
165. *Ibid.*, s. 18.1(3).
166. *IRPA, supra* note 110, s. 74(d).
167. *Samoylenko v. Canada (M.C.I.)* (1996), 116 F.T.R. 144 (T.D.) [*Samoylenko*].
168. *Canada (M.C.I.) v. Liyanagamage,* [1994] F.C.J. No. 1637 (C.A.).
169. *Pushpanathan v. Canada (M.C.I.),* [1998] 1 S.C.R. 982 at para. 25.
170. *Ibid.* at paras. 29–38.
171. *Dunmsuir v. New Brunswick,* 2008 SCC 9 [*Dunsmuir*].
172. *Law Society of New Brunswick v. Ryan* 2003 SCC 20 at para. 44.
173. *Canada (Director of Investigation and Research) v. Southam Inc.,* [1997] 1 S.C.R. 748 [*Southam*] at 776–7.
174. *Dunsmuir, supra* note 171 at paras. 45–48.
175. *Ibid. at* para. 53.
176. *Ibid.* at paras 43–49. See also *Mugesera v. Canada,* 2005 SCC 40 at para. 37 [*Mugesera*], which discusses the standard of review for decisions of the IRB's Immigration Appeal Division.
177. *Mugesera, ibid.* at para. 38. See *Dhindsa v. Canada (M.C.I.),* [2000] F.C.J. No. 2011 (QL) at para. 41–44 where the Federal Court held that it would "not revisit the facts and weigh

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

the evidence" or set aside credibility findings unless they were "clearly made without regard to the evidence", *i.e.,* if the evidence, viewed reasonably, was "incapable of supporting the tribunal's findings of fact."

178. *Sivasamboo v. Canada (M.C.I.)* [1994] F.C.J. No. 2018 at para. 22, online: QL (FCC).
179. See for example, *Khokhar v. Canada (Minister of Citizenship and Immigration),* 2008 FC 449 at para. 23.
180. *Sounitsky v. Canada (Minister of Citizenship and Immigration),* 2008 FC 345 at para. 18. Before *Dunsmuir,* most judges, noting that PRRA officers base their risk assessments on new evidence pointing to "changed circumstances," concluded that PRRA decisions involved questions of fact and upheld them unless they were patently unreasonable or involved erroneous findings made in a perverse or capricious manner: *Joseph v. Canada (M.C.I.),* [2004] F.C.J. No. 392 at para. 10 (T.D.), online: QL (F.C.C.).
181. *Baker, supra* note 29.
182. A "non-independent" decision maker lacks the objective guarantees of independence required of tribunals by conventional international law, including security of tenure, financial security and actual independence—in appearance and practice—from the executive and legislature, and is not necessarily actually or subjectively biased.
183. This argument is also elaborated in Heckman & Sossin, *supra* note 105 at 248 *et seq.* Claimants who fail to obtain leave receive an even less intense review.
184. The section "Critiques of the Canadian System by Treaty Bodies," below, discusses reports by the Inter-American Commission on Human Rights and views of the United Nations Committee Against Torture.
185. The Minister of Citizenship and Immigration may discipline or remove them from office before completion of their term only in exceptional circumstances, at the IRB Chair's request and following a public inquiry conducted by a Superior Court judge: *IRPA, supra* note 110, s. 176. Members must either be incapacitated, be found guilty of misconduct, fail in the proper execution of their office, or be placed in a position incompatible with the due execution of their office.
186. *Ibid.*, s. 153(d).
187. *Ibid.*, s. 159.
188. Under a system established by the federal government in 2004 to put an end to a history of rampant patronage in the selection of IRB members, an advisory panel of six members chosen and chaired by the IRB Chair carried out a merit-based, non-partisan assessment of candidates for IRB positions and provided the names of qualified candidates to the IRB Chair. These candidates' competences were further assessed by the Chair and expert IRB staff. The Minister of Citizenship and Immigration could then appoint members from a list of qualified candidates. Since July 2007, the Minister participates in selecting three of the six members of the advisory panel: CIC Release, *supra* note 132. Following this change, the IRB's Chair resigned his position, as did the members of the independent advisory panel, some of whom raised concerns that the government was seeking to re-politicize the refugee determination process; see Bruce Campion-Smith, "PM defends refugee board changes" *Toronto Star* (1 March 2007).
189. But see François Crépeau & Delphine Nakache, "Critical Spaces in the Canadian Refugee Determination System: 1989–2002" (2008), 20 I.J.R.L. 50.
190. [1989] 2 F.C. 363 (C.A.), aff'g [1988] 3 F.C. 308 (T.D.), leave to appeal to SCC refused (1989) 101 N.R. 157 (note) (S.C.C.) [*Mohammad*].
191. IAT members were appointed by the Governor-in-Council for fixed terms not exceeding ten years and held office during good behaviour.
192. *Mohammad (T.D.), supra* note 190 at para. 55.
193. *Mohammad, supra* note 190 at para. 76.
194. The Court minimized the connections between the Adjudication Directorate and the Enforcement Branch and overemphasized the significance of a generic oath of office and job description. Purporting to focus on objective guarantees that support a perception of sufficient institutional distance between adjudicators and the executive, it relied on a retired adjudicator's "feeling" that final decisions on a case were solely his, but downplayed his testimony that a superior officer had questioned the merits of his decisions.
195. *An act to amend the Immigration Act and other acts in consequence thereof,* S.C. 1992, c. 49, s. 47(1).
196. *Immigration Act,* R.S.C. 1985, c. I-2, s. 58(3).
197. *Ahumada v. Canada (M.C.I.),* [2001] F.C. 605 (C.A.) at para. 57.
198. *Ibid.* at para. 46.
199. *Ibid.* at paras. 54–55.
200. OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System,* OEA/Ser.L/V/II.106/Doc. 40 rev. February 28, 2000 at para. 64 [*IACHR Report*].
201. *Nalliah v. Canada (Solicitor General),* [2004] F.C.J. No. 2005 (T.D.), online: QL (FCC) [*Nalliah*].
202. *Order Transferring Certain Portions from the Department of Citizenship and Immigration to the Canada Border Services Agency,* S.I./2003–215, C. Gaz. 2003.II.3231 [emphasis added]. PSEP's portfolio includes emergency preparedness, national security, corrections, policing, oversight, crime prevention, and border services: Canada Border Services Agency, About the CBSA, online: <http://www.cbsa.gc.ca/agency/menu_e.html> (date accessed: 25 February 2005).
203. Canadian Council for Refugees, News Release, "New Border Agency Threatens Refugee Protection in Canada" (8 January 2004), online: <http://www.web.ca/~ccr> (date accessed: 25 February 2005).
204. *Order Transferring to the Department of Citizenship and Immigration the Control and Supervision of Certain Portions within the Canada Border Services Agency and Transferring from the Deputy Minister and Minister of Public Safety*

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

and Emergency Preparedness to the Minister of Citizenship and Immigration Certain Powers, Duties and Functions, S.I./2004–135, C. Gaz. 2004.II.1614; Government of Canada, News Release, "Government of Canada announces transfer of certain functions between Citizenship and Immigration Canada and the Canada Border Services Agency" (12 October 2004).

205. Challenges to PRRA applications conducted by CIC before the transfer of PRRA to CBSA have failed. See, for example, *Ariri v. Canada* (M.C.I.) (12 February 2003), IMM-871-03 (F.C.T.D.).
206. 2005 FC 739 (T.D.), upheld 2005 FCA 422, leave to appeal denied, [2006] S.C.C.A. No. 49, online: QL [*Say*].
207. Applicant's Memorandum of Fact and Law—Application for leave and judicial review, *Nalliah v. Canada (M.C.I.; Solicitor General),* IMM-9071-04 at para. 37.
208. Much of the information upon which this discussion is based is drawn from the Affidavits of Himmat Shinhat, Audrey Mitchell, and Michelle Tiffney, Respondent's Motion Record, *Nalliah v. Canada (M.C.I.; Solicitor General),* IMM-9071-04.
209. Citizenship and Immigration Canada, Immigration Manual PP-3, "PPRA" (June 2002), online: <http://www.cic.gc.ca/manuals-guides/english/pp/pp03e.pdf> at paras. 5.14 and 7 [PP3].
210. PP3, *supra* note 209 at 26, para. 7.
211. The Policy Unit provides interpretations of legislation, policy, and case law, advises on specific factual scenarios, and answers questions from individual PRRA officers regarding the appropriate application of the *IRPA, IRPA* Regulations and PRRA policy.
212. A training presentation on protecting PRRA officers from undue influence in the exercise of their duties states that PRRA and removals functions may be co-located "if a separate reporting structure is in place": *Shinhat affidavit, supra* note 208, Exhibit "C".
213. Tiffney affidavit, *supra* note 208 at para. 23.
214. Nalliah alleged that PRRA decisions had been expedited to meet removal dates scheduled by the enforcement unit, a claim denied by the government: Affidavit of Brena Parnes, Applicant's Motion Record, *Nalliah v. Canada (M.C.I.; Solicitor General),* IMM-9071-04 at para. 27.
215. Respondent's Memorandum of Argument, *Nalliah v. Canada (M.C.I.; Solicitor General),* IMM-9071-04 at para. 31 [Nalliah Memorandum].
216. Shinhat affidavit, *supra* note 208 at para. 25; Immigration and Refugee Protection Regulations, Regulatory Impact Analysis Statement (15 December 2001) Canada Gazette Part I 4477 at 4554 [RIAS]. See also *Sing v. Canada (Minister of Citizenship and Immigration),* 2007 FC 361, where the Federal Court, citing *Say,* determined that there was no reasonable apprehension that a PRRA officer's risk assessment decision would be biased against a protection claimant because the Minister had intervened against the claimant in prior IRB proceedings. The official who had intervened against the claimant and the PRRA officer were in two different units within CIC and each decision-maker had acted within its own statutory mandate. The Court noted, at para. 75, that "PRRA officers are professional decisionmakers, undoubtedly very much aware that their decisions are subject to the constraints imposed upon each and every decision made on a quasi-judicial basis."
217. *Say, supra* note 215 at para. 39.
218. Nalliah Memorandum, *supra* note 215 at para. 40.
219. See *Ettl, supra* note 85.
220. See *Morris, supra,* note 89. Contrary to the junior members of the Court Martial in *Cooper, supra* note 91, PRRA officers' views are subject to the scrutiny of superiors.
221. *Say, supra* note 206 at para. 44.
222. It is noteworthy that the Federal Court of Appeal has held that PRRA officers do not have jurisdiction to determine whether their enabling statute is constitutional or not: *Covarubias v. Canada (Minister of Citizenship and Immigration),* 2006 FCA 365, [2006] F.C.J. No. 1682 (QL); *Singh v. Canada (Minister of Citizenship and Immigration),* 2004 FC 288, [2004] F.C.J. No. 346. Writing extrajudicially, Federal Court Justice John Evans has suggested that such decisions recognize that immigration officers "lacked both the independence and the procedural powers needed to build a record that could form the basis on which a court could review a determination of a constitutional question": John Evans, "Principle and Pragmatism: Administrative Agencies' Jurisdiction over Constitutional Issues" in Grant Huscroft & Michael Taggart, eds., *Inside and Outside Canadian Administrative Law* (Toronto: University of Toronto Press, 2006) 377 at 403.
223. *IRPA, supra* note 110, s. 112(2)(b).
224. *CCR,* supra note 124 at paras. 154 and 191. The Court held that the stringent application by US authorities of a bar on asylum claims filed after one year, combined with the higher burden on protection claimants to successfully apply for withholding of removal, put claimants returned to the US at risk of *refoulement,* contrary to the Refugee Convention. It found that the US statutory provisions requiring the exclusion of persons who involuntarily provided support to terrorist groups also subjected claimants returned to the US to a serious risk of *refoulement.* The Federal Court of Appeal overturned this decision because, in its view, the motions judge improperly entertained the *Charter* challenge in the absence of a proper factual foundation: *CCR FCA, supra* note 124 at para. 103. It did not hold that such a challenge could not succeed in an appropriate case, advanced by a refugee claimant found ineligible under the Safe Third Country Agreement and who faced a real risk of *refoulement* in being sent back to the United States.
225. To uphold claimants' right to an independent adjudication of their claim, immigration officers have no choice but to invoke the public interest exception to the application of the Safe Third Country Agreement and find that claimants caught by the US one-year bar and "material support"

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

provisions are eligible to have their claims determined by the RPD. Automatic referral of such claims to the RPD for adjudication would be compatible with the expeditious administrative process contemplated by the statutory scheme. But see *CCR FCA, supra* note 124 at paras. 124–125, where, in a concurring judgment, Evans J.A. contemplates that CBSA officers themselves (assisted by guidelines) would make eligibility decisions for claimants who assert they will be refouled if returned to the United States under the Safe Third Country Agreement.

226. 2 May 1948, 43 A.J.I.L. 133.
227. *IACHR Report, supra* note 200 at para. 60. The Commission linked this right to be heard to "the principle of respect for due process which underlies various provisions of the American Declaration, most pertinently arts. II (equal protection), XVII (recognition of judicial personality and civil rights), XVIII (fair trial), and XXVI (due process)."
228. *Ibid.* at para. 64.
229. *Ibid.* at para. 70 [emphasis added].
230. Can. T.S. 1987 No. 36 [CAT].
231. Committee Against Torture, 25th Session, Concluding observations of the Committee against Torture : Canada. 22/11/2000, A/56/44, at para. 58(f).
232. *Ibid.* at para. 59(b) [emphasis added].
233. Committee Against Torture, 34th Session, Conclusions and Recommendations of the Committee Against Torture: Canada. 07/07/2005, CAT/C/CR/34/CAN. At para. 5(c).
234. Committee Against Torture, Communication No. 133/1999, *Enrique Falcon Ríos v. Canada,* UN Doc. CAT/C/33/D/133/1999 (17 December 2004).
235. The IRB panel's adverse credibility findings against Ríos have been criticized for their reliance on stereotypes and a lack of basic knowledge regarding the political situation in Chiapas: Cécile Rousseau *et al.,* "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board" (2002) 15 J. of Refugee Studies 43 at 59, 61, and 62.
236. *Ibid.* at para. 7.3.
237. A court reviewing the H&C decision would not substitute its own views for that of the H&C officer but would remit the case to another non-independent officer.
238. *Ibid.* at para. 7.5.
239. *Ibid.* at paras. 8.6, 9.
240. Committee Against Torture, Communication No. 273/2005, T.A. *v.* Canada, UN Doc. CAT/C/36/D/273/2005 (22 May 2006) [*T.A.*].
241. *T.A., ibid. at* para. 6.4; Committee Against Torture, Communication No. 183/2001, *B.S.S. v. Canada,* UN Doc. CAT/C/32/D/183/2001 (17 May 2004) at para. 11.6; Communication No. 282/2005, *S.P.A. v. Canada,* UN Doc. CAT/C/37/D/282/2005 (6 December 2006) at para. 7.4.
242. IRPA, *supra* note 110, s. 3(3)(f).
243. Gerald P. Heckman, *Prospects for Narrowing the Gap between Domestic and International Institutional and Procedural Safeguards in Canadian, American and Australian Refugee Protection Decisionmaking* (Ph.D. Thesis, Osgoode Hall Law School, York University, 2008) [unpublished].
244. *Hape, supra* note 9. Canada's international human rights obligations only inform the content of *Charter* protections: *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3. at para. 60.

Gerald P. Heckman (Ph.D., Osgoode Hall Law School) is Assistant Professor, Faculty of Law, University of Manitoba, Winnipeg, MB, Canada. *The author acknowledges the valuable research assistance of Julia Negrea, LL.B. student, Faculty of Law, University of Manitoba and the financial support of the Legal Research Institute of the University of Manitoba. The author also thanks the anonymous reviewer and the editorial staff at Refuge for their thoughtful comments and suggestions. To the extent feasible, the law as stated in this article is current to June 2008.*

© Gerald P. Heckman, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Thamotharem and Guideline 7 of the IRB: Rethinking the Scope of the Fettering of Discretion Doctrine

France Houle

Abstract

The author examines Guideline 7 – Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division *of the Immigration and Refugee Board. She critiques the use of the fettering of discretion doctrine when it is applied to procedural guidelines. She argues that it is based on a false ontology about the nature of rules and guidelines. She also critiques the use of the fettering of independence doctrine when applied to procedural guidelines aimed at enhancing the expediency, rather than consistency, of decision making. Her main argument is that Guideline 7 does not impede, per se, the ability of RPD members to decide according to their own conscience and opinion.*

Résumé

L'auteure examine la Directive 7 – Concernant la préparation et la conduite d'audience devant la Division de la protection des réfugiés. *Elle critique l'usage de la doctrine de l'entrave à la discrétion lorsqu'elle est appliquée à des directives procédurales. Elle argumente qu'elle est basée sur une fausse ontologie sur la nature des règles et des directives. Elle critique aussi l'usage de la doctrine de l'entrave à l'indépendance lorsqu'elle est appliquée à des directives procédurales qui ont pour fonction d'accroître la célérité, plutôt que la cohérence, du processus décisionnel. Son principal argument est que la Directive 7 n'affecte pas, en soi, la capacité des membres du tribunal de décider selon leur conscience et opinion.*

Introduction

Few purely adjudicative administrative tribunals use policy instruments such as guidelines to confine or structure their board members' discretion. The main concern with the use of such instruments is that they may negatively interfere with independence and impartiality of decision makers. But not all administrative tribunals share this concern. In Canada, the Immigration and Refugee Board (IRB or Board) has been very creative in its usage of a variety of policy instruments since its inception in 1989. Besides four sets of rules of procedure and practice, the Chairperson has issued eight guidelines, two jurisprudential guides, six persuasive decisions, thirteen policies, two instructions, and nine policy notes.[1] In this paper, I will examine one of the IRB's guidelines: *Guideline 7 – Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division (Guideline 7)*.[2] The reason for studying this guideline is because it is one of the most controversial policy instruments issued by the IRB. Although its validity was challenged in courts and the Federal Court of Appeal resolved the litigation in 2007 in favour of the IRB, this guideline is still the subject of much discussion in refugee circles.

Guideline 7 is a case management policy instrument. It is a procedural guideline which aims to enhance the expediency of the decision-making process of the Refugee Protection Division (RPD). As stated by the IRB in the text of Guideline 7, its main purpose is to make the best use of hearing time by the RPD. In fact, the IRB was, and still is, very preoccupied with the backlog of refugee claims. It has been a major problem for the Board since its early days and Guideline 7 is one of the tools which is part of the IRB action plan to increase the Board's efficiency in this regard.[3]

Section 3 of Guideline 7 contains the guideline at the heart of litigation. Paragraph 19 changes the order of questioning by having the RPD leading the inquiry in the hearing room:

> In a claim for refugee protection, the standard practice will be for the RPO [Refugee Protection Officer[4]] to start questioning the claimant. If there is no RPO participating in the hearing, the member will begin, followed by counsel for the claimant. Beginning the hearing in this way allows the claimant to quickly understand what evidence the member

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

needs from the claimant in order for the claimant to prove his or her case.

This new procedure has come to be known as "reverse order questioning." It is now the standard practice in front of the RPD. With this new procedural setting, claims are processed in the following manner: The RPD member assigned to a case makes a preliminary identification of the issues she considers to be problematic and central to the claim. This identification is based on the information disclosed by the claimant in his Personal Information Form.[5] Thereafter, the RPD member is required to fill in a File Screening Form identifying those issues in writing and to provide a copy of the form to the claimant with the notice to appear. At the hearing, the RPD (member or RPO) will start questioning the claimant on those issues identified in the File Screening Form, after which the claimant will be given the possibility of completing or correcting his answers to the questions previously asked by the RPD. In sum, the claimant can no longer tell his whole story during the hearing, unless he is successful in his application to vary the order of questioning under paragraph 23 of Guideline 7.[6] When an application to vary the order is allowed, the hearing will proceed the way it used to in most cases before Guideline 7 was issued. A claimant will present his case first and be questioned thereafter by the RPD.

Although Guideline 7 became operational on 1 December 2003, paragraph 19 became effective only on 1 June 2004, and from this date until 25 May 2007, Toronto-based claimants (for the most part) objected to the reverse order questioning procedure. Their view was that Guideline 7 was invalid because it violated the principles of procedural fairness and fettered RPD members' discretion. During this period of time, RPD members usually rejected this objection until several counsels for claimants decided to challenge the validity of these RPD decisions and Guideline 7 in front of the Federal Court. In 2006, two contradictory decisions emerged: *Thamotharem*[7] and *Benitez*.[8]

In January 2006, Mr. Thamotharem's application for judicial review was granted by Justice Blanchard of the Federal Court, who quashed the RPD's decision on the basis that Guideline 7 was an invalid fetter on the RPD members' discretion in the conduct of the hearing. However, Justice Blanchard rejected the applicant's allegation that Guideline 7 violated the principles of procedural fairness. In April 2006, Mr. Benitez's application for judicial review was dismissed by Justice Mosley of the Federal Court. Justice Mosley agreed with Blanchard J. that Guideline 7 did not violate the principles of natural justice, but he disagreed with his colleague on the issue that Guideline 7 fettered Board members' discretion. Both decisions were appealed to the Federal Court of Appeal. Justice Evans dismissed the appeals.[9] According to his ruling, Guideline 7 did not violate the principles of natural justice nor did it fetter RPD members' discretion in the conduct of the hearing. Applications for leave to appeal to the Supreme Court were filed and dismissed on 13 December 2007.[10]

Of the two main issues raised in both levels of courts, I will focus on examining the reasons on the fettering of discretion doctrine. I will focus on this issue because the legal parameters surrounding the power of public authorities, and administrative tribunals in particular, to issue guidelines and other policy instruments are underdeveloped in administrative law. Most notably, there is very little nuance in case law between the nature and purpose of guidelines which results in a linear application of the fettering of discretion doctrine to all guidelines without distinction. This is precisely the issue that this paper addresses. But before discussing it in more detail, it is necessary to briefly explain the problems raised by the fettering of discretion doctrine.

1. Fettering of Discretion Doctrine

The doctrine of fettering discretion tackles a classical problem in administrative law concerning the scope of discretionary powers. More precisely, the doctrine fixes the outer boundary of what a public authority ought not to do when exercising its discretionary powers. It ought not to transform its *power to choose* to exercise discretion in a particular way into a *duty to compel* a decision maker to exercise his discretion in a particular way.

The idea that a guideline cannot be mandatory is closely linked to a concept of legal norms: that there is a sharp distinction between "rules" and "discretion." Rules regulate the conduct of individuals and are enforced by public authorities. Legal rules are characterized as hard and mandatory. Their validity is assessed through the lenses of their conformity with the legal powers to make delegated legislation granted to that authority: "Is the rule *intra* or *ultra vires*?" This is a question engaging an interpretative exercise.

Discretionary powers are understood as the antithesis to rules as public authorities are entitled to make choices to determine the best course of action on a case-by-case basis. Contrary to rules, discretionary powers are characterized as soft and flexible. Unlike rule-making powers, discretionary powers are conferred with a variable, yet relative, degree of broadness, which makes the interpretation of their scope a far more difficult and fuzzy exercise to accomplish, with uncertain results on the excess of jurisdiction ground of review. Therefore, and more often than not, when public authorities exercise their discretion, the validity of their actions is assessed, not under the excess of jurisdiction ground of review, but under specific grounds better adapted to this type of power and classified under "abuse of discretionary powers." Under this ground, the judicial inquiry focuses on the

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

facts identified by public authorities to exercise their judgment. Discretion is abused when, for example, its exercise is based on improper purposes, irrelevant considerations, or bad faith.

However, as D. Mullan points out, as well as the Supreme Court in *Baker,* there "is no bright line distinction between exercising discretion and engaging in interpretation."[11] This statement is even truer when the validity of guidelines is under scrutiny for they are issued to put some normative constraints on the exercise of discretion. From this perspective, "rules" and "guidelines" share common characteristics which, in turn, raise the question of statutory jurisdiction to issue norms in the form of guidelines. But again, the interpretative exercise can often be inconclusive as guidelines do not need to be explicitly authorized by statute.[12]

In the legal literature, Carver wrote a paper entirely dedicated to *Thamotharem* and *Benitez* and discussed the problem of statutory jurisdiction to issue guidelines by asking the following question:[13] What is the legal significance of statutory authorization of non-binding guidelines? To answer his question, Carver points out firstly that s. 159(1)(*h*) of the IRPA confers to the Chairperson of the Board the power to issue guidelines to assist members in carrying out their duties. To his view, this power "appears to express the clear intention of Parliament to enhance the power of the IRB Chairperson to direct the Board's adjudicative activities." However, he further argues that this does not necessarily equate to a power to make subordinate legislation. This is correct, and in fact this interpretation is foreclosed by the IRPA. Indeed, s. 93 expressly states that: "[…] guidelines issued by the Chairperson under paragraph 159(1)(*h*) are not statutory instruments for the purposes of the *Statutory Instruments Act*." Nonetheless, his question is important because the Supreme Court decided in 1978 in *Capital Cities Communications* that administrative tribunals have an implied authority to adopt non-binding policy statements.[14] However, because this decision was taken in the context of a policy statement adopted by a regulatory agency, that is to say the CRTC, the issue remains open as to whether all types of administrative tribunals should, on the one hand, be recognized with implied authority to adopt policy statements. I will examine this point in part 3 of this paper.

On the other hand, when no explicit statutory authority is required, the guideline will be deemed valid as long as there is no obvious incompatibility between the guideline and the statute. One obvious incompatibility that has been sanctioned by courts is when a guideline *prescribes* a conduct to Board members, rather than providing guides to *assist* them in their exercise of a discretionary power. It is in this context that the doctrine of fettering of discretion was developed as a subclass of "abuse of discretionary powers" ground of review.

The fettering of discretion doctrine has been used primarily to assess the validity of policy instruments such as guidelines.[15] Judges examine whether Board members can exercise their discretion in each matter coming before them. The exercise of discretion must not be "determined automatically or fettered by a rigid policy laid down in advance."[16]

My main critique of this doctrine is that it is based on a false ontology about the nature of rules and guidelines. A very significant number of legal rules do not directly affect the rights and interests of individuals but confine and structure the powers granted to public authorities. In addition, many legal rules are not imperative (mandatory), but permissive and conditional (flexible). This is especially true in the case of procedural rules because most of them have to provide space for the principles of natural justice to operate effectively. It is for this reason that the line between a procedural rule and a procedural guideline is too often blurred to support a convincing argument based on the fettering of discretion doctrine unless, of course, a Board makes the obvious mistake of using imperative language in the text of the guideline, or any other markers,[17] showing that the Board clearly intended to leave no measure of meaningful discretion to be exercised by its decision makers. Presumably, the public administration now knows how to write its guidelines to meet the requirements of case law.

It is not at all clear that the fettering of discretion doctrine is helpful or adapted to especially examine the validity of procedural guidelines. The general question I am raising is whether an inquiry focusing on the mandatory character of a procedural guideline sheds light on an artificial problem, while obscuring real ones; problems that would be virtually impossible to bring to the surface because of the very framework of analysis imposed by this doctrine. This issue is related to the second question asked by P. Carver in his paper: Are guidelines dealing with issues of hearing process more problematic than guidelines addressing substantive issues? His answer to this question is that it "seems less appropriate to issue a guideline going to procedure than to substantive considerations." I disagree with this statement and I will develop my arguments to support my position in part 3 of this paper. Finally, in relation to this issue, Carver notes that there is a "[…] discomfort with the combining in *Thamotharem* and *Benitez* of an analysis of 'fettering discretion' with that of 'procedural justice'" because these concepts do not cover the same territory.[18] I agree with Carver and the next section is mainly dedicated to the kinds of legal discomforts that this ground of review raises, especially when applied to a procedural guideline.

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

As the case law evolves, however, there are some signs that the examination of the validity of a guideline, especially of a procedural guideline, is developing beyond a strict understanding of the fettering of discretion doctrine, to allow for a much deeper examination of the diversity in nature and purposes of guidelines. This may in turn trigger the development of a more complete framework of analysis aimed at assessing the validity of policy instruments, focusing on the interpretation of the enabling statute as a whole in order to verify the compatibility of a guideline with the statute of which it purports to increase the effectiveness. From this perspective, I will examine in part 4 the compatibility of Guideline 7 with the IRPA.

2. Two Distinct Analytical Perspectives

In order to be successful in court in proving that a guideline is invalid, a party must demonstrate that it leaves no measure of meaningful discretion to be exercised by the public authority; in other words, the guideline is binding on the decision makers. The validity of a guideline can be challenged on two grounds of review: the lack of jurisdiction of the Board to issue the guideline and the violation of the principles of natural justice. Arguments on each ground can be developed from two separate perspectives: instrumental and institutional. These perspectives are encapsulated in the three criteria which were set by the *Ainsley* decision and applied by the judges of the Federal Court and the Federal Court of Appeal in *Thamotharem* and *Benitez* to analyze the validity of Guideline 7: (1) the language of the policy, including its application on a case-by-case basis; (2) the practical effect of failing to comply with the policy; and (3) the evidence with respect to the expectations of the Commission and staff regarding the implementation of the policy instrument.[19]

First, a party may attempt to show that the language used in the guideline is mandatory and that, in practice, the guideline is applied by decision makers as if it were binding (criterion no. 1 of the *Ainsley* decision). I call this inquiry "instrumental" because it focuses on the guideline itself to determine if decision makers use this instrument not as a flexible but as a mandatory normative tool. Second, a party may attempt to show that there are institutional pressures such that decision makers feel obliged to apply the guideline. The inquiry will focus on the effect of a decision maker failing to comply with the guideline as well as the expectations of the Chairperson of the tribunal regarding its implementation (criteria no. 2 and no. 3 of the *Ainsley* decision). I call this inquiry "institutional" because it does not focus on the guideline itself, but on decision makers and the environment in which they work.

I will first review the Court's analysis of criterion no. 1 from the instrumental perspective. Second, I will examine the distinction between the application of criteria no. 2 and no. 3 when analyzed from the instrumental perspective and from the institutional perspective. I will argue that the instrumental perspective not only lacks relevancy to analyze a procedural guideline, but it also requires parties to gather evidence that is very difficult to collect. With the institutional line of inquiry, the examination of the validity of a procedural guideline is connected to the violation of the principles of natural justice. This analytical framework may prove to be more appropriate to assess the validity of guidelines depending on the purpose of the very guideline under scrutiny.

2.1 Instrumental Perspective

As said earlier, the foundation of the instrumental perspective is based on the premise that there is an ontological distinction between a rule and a guideline. According to the *Ainsley* decision, a guideline will be found invalid if it crosses "the Rubicon between a *non-mandatory guideline* and a mandatory pronouncement having the same effect as a *statutory instrument.*"[20]

This view is mainly encapsulated in the *Ainsley* analysis of the language and the application of a guideline (criterion no. 1). On this issue, the analysis of the Federal Court in *Thamotharem* and *Benitez* turned around two arguments. First, the question was whether or not the use of the verbs in the passage "the standard practice *will be* for the RPO to begin and if no RPO is participating at the hearing, the Board member *will* begin" is an indication of the mandatory character of the Guideline 7. The second argument was built on paragraph 23 of the guideline, which allows for the Board member to vary the order of questioning. The question was whether the wording of paragraph 23 was sufficiently flexible or whether the threshold was set too high. As written in Guideline 7, the order of questioning can be varied by a RPD member only in cases constituting *exceptional circumstances,* that is to say, only when claimants are *severely disturbed* or when a *child is very young.*[21] The two justices of the Federal Court approached the problem from different angles. Blanchard J. focused his analysis on the language of the guideline, while Mosley J. examined the evidence regarding its application by RPD members.

In *Thamotharem,* Justice Blanchard expressed the opinion that "viewed in its entirety, the language of Guideline 7 leaves little doubt that the thrust of the guideline indicates to Board members a mandatory process rather than a recommended but optional process […] is imperative."[22] In *Benitez,* Justice Mosley examined the evidence presented by the Board showing that RPD members have exercised their discretion to vary the order of questioning. Some forty decisions and excerpts of transcripts from hearings before various RPD members

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

were filed as new evidence in the Court's record. This evidence satisfied Justice Mosley that RPD members can choose to disregard the standard practice when they deemed it necessary.[23]

Justice Evans disagreed with both judges as to the manner in which the problem should be analyzed. He disagreed with Justice Mosley insofar as he was of the view that there should not be much if any significance attached to the differences in the records.[24] From Justice Evans's perspective, a judge should pay more attention to the language of a guideline than to the evidence regarding its application, because it "is inherently difficult to predict how decision makers will apply a guideline, especially in an agency, like the Board, with a large membership sitting in panels."[25] I agree with Justice Evans's opinion. From the perspective of the individual attempting to show the invalidity of a guideline, bringing clear evidence that the guideline is routinely applied as if it were mandatory is a highly difficult task. Many obstacles prevent outsiders from assembling this type of evidence.[26]

With respect to the language used in the text of a guideline, Justice Evans disagreed partly with the analysis of Justice Blanchard in *Thamotharem*. Even if both shared the view that Guideline 7 was imposing more than a "recommended but optional process,", Justice Evans stated that it was perfectly valid for a Board to establish how discretion would "*normally*" [Evans J. emphasis] be exercised as long as a "decision-maker may deviate from normal practice in the light of particular facts."[27] Here, Justice Evans indicated clearly that, unless there is explicit language showing the mandatory character of a guideline, all other signs indicating normative constraints on the exercise of Board members' discretion will be deemed valid.[28]

In this sense, Justice Evans recognized the existence of a continuum in (or a degree of) normativity: "legal rules and discretion do not inhabit different universes, but are arrayed along a continuum."[29] This view is in not only in accord with the diversity of legal norms found in statutes and regulations in contemporary public law, but also with the Board's usage of guidelines. The IRB is a very good example to show the case at point. When one looks at the policy instruments issued by the IRB, it becomes clear that, as a matter of fact, the IRB conceptualizes the mandatory character of its policy instruments in terms of degrees:

There is no doubt that, save for the "persuasive decisions," all the policy instruments of the IRB are not optional for the Board members. They are meant to regulate their conduct during proceedings, either in a substantive or in a procedural manner, and in a more or less constraining fashion depending on how quickly the problem perceived by the IRB should be solved. Indeed, the Chairperson's instructions are clearly imperative.

This diversity of policy instruments issued by the IRB is an eloquent testimony to the complexity of contemporary legal systems: they are not composed solely of formal sources of norms that we recognized as "law," but also of informal (explicit and implicit) norms.[30] It is suggested that it is from this perspective that courts have (or should have) recognized that boards are permitted to issue a broad range of guidelines without needing an explicit grant of statutory power. Indeed, policy instruments may often be the only viable solution to solve daily problems that boards encounter in their daily functioning.

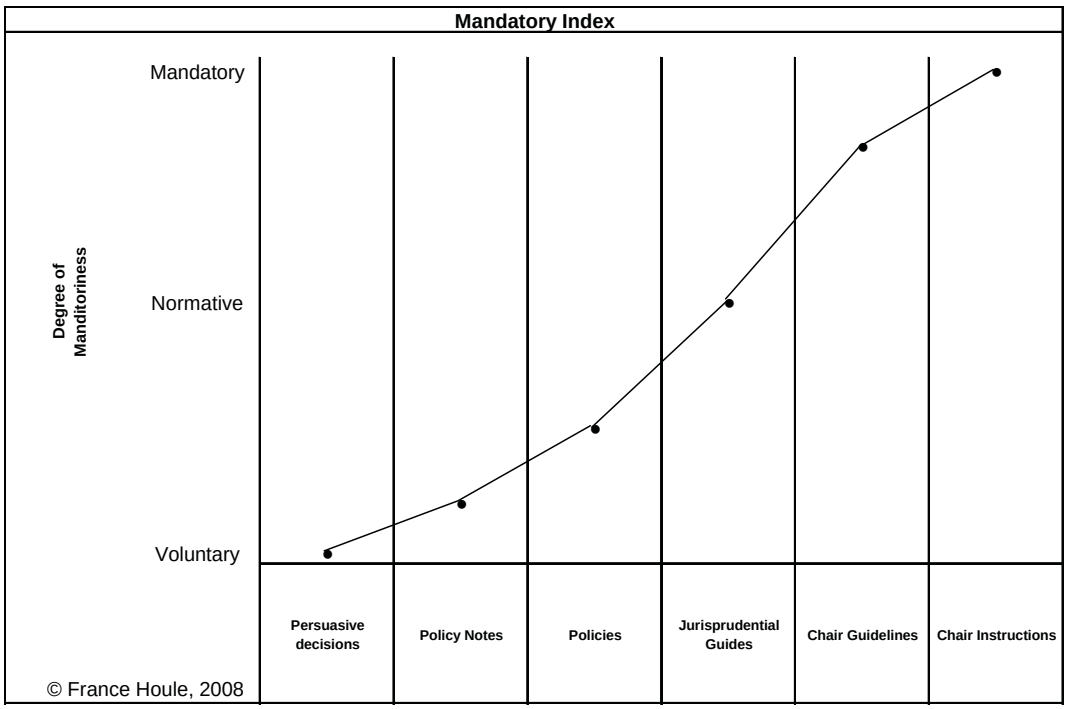
With respect to the specific problem of the mandatory character of a procedural guideline, the following question will provide the basis for the analysis: is it accurate that all procedural guidelines can never be mandatory? In my view, some procedural guidelines can be. The obvious example is that, when Parliament grants a power to a public authority to issue mandatory procedural guidelines, they will be valid and can "no more be characterized as an unlawful fetter on members' exercise of discretion."[31] In the case of Guideline 7, it is clear as Justice Evans pointed out in *Thamotharem* that Parliament has not authorized the IRB to issue mandatory guidelines. Section 159(1)(*h*) entitles the Chairperson to issue guidelines to *assist* members in the conduct of their duties and not to *prescribe* to them how to conduct their duties. However, in my opinion, s. 159(1)(*h*) of the IRPA does not preclude the possibility of issuing mandatory procedural guidelines. Two situations come to mind.

First, when a tribunal codifies well-established common law principles of natural justice, the guideline can take a mandatory form (for example, when case law would clearly state that claimants of a given category have a right to counsel). In this specific case, the guideline would simply codify positive law. Second, it can also be suggested that absent case law, it would be perfectly legal for a tribunal to issue guidelines which would confer greater or clearer procedural protection to claimants (and therefore prefer to resort to a statement of policy applicable across the board, than to the case-by-case incremental technique to implement changes).[32] Beside these two scenarios, guidelines must be drafted to ensure that the principles of procedural justice will operate effectively in the legal system in which they are applied.

One final issue is related to the proper field of jurisdiction between rule-making authority and policy-making authority. This question was discussed by Justice Evans in *Thamotharem* because in addition to the policy-making power conferred on the IRB by s. 159(1)(*h*) of the IRPA, s. 161(1)(*a*) of the Act also grants to the Board the power to make rules of practice and procedure. The questions asked were: Is there an exclusive domain for rules? If yes, what type of norms is comprised in it? If this field does not encom-

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Figure 1. IRB Guidelines/Mandatory Index



Note: This figure was made by the author from the description of each policy instrument provided by the IRB on its website, <http://www.irb-cisr.gc.ca/en/references/policy/rules/index_e.htm>. Here is a summary: *Persuasive decisions*: Unlike Jurisprudential Guides, decision makers are not required to explain their decision to not apply a persuasive decision in appropriate circumstances. Their application is voluntary. *Policies* are flexible instruments, and the degree to which they are mandatory varies with the content of the policy. They often contain elements which are mandatory, but may also provide general guidance or define areas in which the exercise of discretion is required; *Policy notes* are memoranda which serve as an informal way of providing policy guidance. *Jurisprudential guides*: The application of a Jurisprudential Guide is not mandatory. However, decision makers are expected to apply Jurisprudential Guides in cases with similar facts or provide reasoned justifications for not doing so. *Chairperson's guidelines*: While they are not mandatory, decision makers are expected to apply them or provide a reasoned justification for not doing so. *Chairperson's Instructions* provide formal direction that obliges specific IRB personnel to take or to avoid specific actions.

pass all the rules, do rule-making and policy-making powers overlap, and if yes, to what extent? Justice Evans expressed the general view that guidelines and rules do not have the same legal effects, while recognizing that the two can overlap.[33] As Justice Evans observed, the differences in the legal characteristics of statutory rules of procedure and Guideline 7 should not be overstated.[34]

In order to bring some precision to Justice Evans's view, it is interesting to look closely at the RPD rules of practice and procedure. *Refugee Protection Division Rules* can be divided into two categories, each comprised of roughly 50 per cent of all rules: those addressed directly to claimants and those addressed directly to RPD members[35] Of the 50 per cent of rules speaking directly to refugee claimants and the Minister of Citizenship and Immigration around 40 per cent of them do so in mandatory language ("must"). Since these rules impose practice and procedure duties on the parties, the Division had no choice but to proceed through a legislative instrument. This is one specific field reserved to legislation (primary and subordinate). Indeed, legal norms affecting rights and obligations of individuals must be stated in statutes or regulations.

The other 50 per cent of rules speak to RPD members (or RPO). Only around 10 per cent of rules are mandatory for Members and RPOs ("must"). However, for the vast majority of these rules, they codify common law principles (notice to appear, notice of decision, notice prior to the use of specialized knowledge) protective of claimants' rights and interests. As for the remaining 40 per cent of rules, they either give broad discretion to Board members or some meaningful dis-

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

cretion to exercise to determine procedural issues. As said earlier, policy instruments can also be used to achieve these two same results. As a consequence, one must conclude that, as far as norms speaking directly to the RPD are concerned, there is no striking difference between procedural rules and procedural guidelines. This entire field can overlap. However, if a guideline conflicts with a rule, the latter will prevail.[36]

When examining the validity of a procedural guideline, the question related to their mandatory character does not appear to be as significant as in the case of substantive guidelines. On this point, it is interesting to note that Justice Evans did not seem to attach so much importance to this factor in *Thamotharem* when he analyzed the question whether Guideline 7 was a fetter on RPD members' discretion. As he wrote: a policy instrument "*must not be so coercive* as to raise a reasonable apprehension that members' ability to decide cases free from improper constraints has been undermined."[37] The words used by Justice Evans are important because, as far as procedural policy instruments are concerned, it is possible to impose a fairly high level of constraints on decision makers when the problem to be solved warrants it. Indeed, his analysis of the constraints imposed on RPD members is revealing in this respect. As long as they serve the "legitimate interest" of the IRB, he does not find them "at all sinister,"[38] notably given the fact the IRB is the "largest administrative agency in Canada" where hearings are conducted "mostly by single members."[39]

In sum, the inquiry into the mandatory character of a guideline might be sufficient in some cases, for example, when a policy instrument speaks *directly to persons* and affects their rights and interests. On this point, it is important to note that Justice Evans cautioned judges on the use of the *Ainsley* criteria to examine all types of guidelines, for the policy statement that was considered in that case affected directly the rights and interests of businesses and thus more clearly bore the mark of a "rule."[40]

However, when a policy speaks *directly to public authorities* (such as Guideline 7, which is directed at the practice of RPD members by laying down the standard conduct that is expected from RPD members), this inquiry into the mandatory character of a policy instrument is bound to have less impact in contemporary administrative law. Indeed, from *Maple Lodge* and *Thamotharem,* we know that a guideline can have a normative effect (that is to say that it can regulate the conduct of public authorities) and that having a normative effect does not automatically mean that the guideline is mandatory and, therefore, invalid. In fact, it can be concluded from these judgments that the fettering of discretion doctrine can be clearly and easily applied to the seldom truly mandatory substantive guidelines. All other cases involving other normative guidelines would require clear evidence that the guideline fetters the discretion of decision makers. As said earlier, bringing such evidence to a court is a very difficult and complex task for a party contesting the validity of a guideline, if not impossible in the case of the IRB.

The instrumental perspective offers a superficial understanding of guidelines. It aims at targeting the most offensive guidelines (and especially those directly affecting the rights and interests of the persons). It does not allow for a deeper analysis of the effect of the guideline on the legislative design and on the role of the various actors into the legal system in which a guideline operates. Presumably for this reason, Justice Evans quickly moved away from a strict instrumental perspective to adopt an institutional perspective to examine the validity of Guideline 7.

2.2 Institutional Perspective

From an institutional perspective, guidelines are examined with the view to understand their role both in the operational environment of a board and more precisely in the legal environment set by statute to protect the independence of decision makers. In the context of an administrative tribunal, the institutional perspective recognizes that there can be internal tensions between the objectives of the institution *per se* (personified by the chairperson) and those of tribunal members. Criteria no. 2 and no. 3 of the *Ainsley* decision (the effects of failing to comply with the guideline for a board member and the expectations of a board with respect to the implementation of a guideline) aim at encapsulating this inner tension within a board. However, the development of the institutional perspective did not start in *Ainsley,* but in *Consolidated-Bathurst* of the Supreme Court.[41]

Although *Ainsley* was decided in 1994, Justice Doherty made no reference to *Consolidated-Bathurst* in her judgment. There are at least two reasons for which these two decisions remained disconnected. First, *Ainsley* concerned substantive guidelines while *Consolidated-Bathurst* concerned procedural guidelines (to be more accurate, a procedural practice). Second, the ground of review to contest the procedure of full board meetings in *Consolidated-Bathurst* was a breach of the rules of natural justice. The appellant's main argument against the practice of holding full board meetings was that these meetings can be used to fetter the independence of the panel members. For obvious reasons, this ground of review could not have been argued in *Ainsley* for it concerned substantive guidelines.

Nevertheless, judges used criteria no. 2 and no. 3 in *Thamotharem* and *Benitez,* and referred to *Ainsley* and *Consolidated-Bathurst,* either to determine if a public authority has jurisdiction to issue the impugned guideline (*Ainsley*) or to determine if the procedure violates the principles of natural justice (*Consolidated-Bathurst*). My claim is that applying

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

the *Ainsley* criteria no. 2 and no. 3 to a procedural guideline, such as Guideline 7, to determine if a board has jurisdiction to issue that guideline raises questions as to the usefulness of such an inquiry. Indeed, a party contesting a procedural guideline, such as Guideline 7, must bring clear evidence based on criteria no. 2 and no. 3 to show that it fetters RPD members' discretion, meaning here that it prevents the principles of natural justice to operate effectively in the decision-making process of this Board. As the analyses of Justices Blanchard and Mosley showed in *Thamotharem* and *Benitez,* this inquiry did not lead to very conclusive results.

In *Thamotharem,* Justice Blanchard first stated that he was not convinced that the monitoring exercise conducted by the IRB could be said "to be inappropriate or, on its own, constitute a clear indicator of fettering of a Board member's discretion,"[42] but then he moved on and wrote that he was "satisfied that there [was] *significant* evidence that the IRB made known to its members that they are expected to comply with the guideline save in exceptional cases."[43] In *Benitez,* Justice Mosley reached a completely different conclusion on this point. He found that there was *no* evidence on the record to suggest that the Chairperson "has threatened to, or has in fact, sanctioned any Board member for non-compliance with Guideline 7."[44] Thereafter, Justice Mosley found that there was evidence that monitoring procedures were voluntary and that "even if RPD members were asked to explain why they did not follow the guideline," there was "no evidence of any consequences flowing to those who chose to ignore or to not strictly apply them."[45] This line of inquiry does not lead to a relevant answer to the question as to whether the principles of natural justice can still operate effectively in the refugee determination process.[46]

Presumably, Justice Evans saw the problem and, for this reason, he decided to focus his analysis on the question as to whether Guideline 7 fettered RPD members' independence and impartiality. By this, he clearly shifted the analysis to the terrain of the violation of the principles of natural justice, following the path traced by the Supreme Court in *Consolidated-Bathurst*. This was an interesting move because it expands the application of *Consolidated-Bathurst* (*Tremblay* and *Ellis Don*) to all types of procedural policy instruments, rather than keeping it to the confines of full board meetings. Moreover, and more specifically in the context of the evolution of the case law pertaining to independence of administrative tribunal, Justice Evans also invites judges to show greater awareness in the protection of tribunals' sphere of adjudication. However, and as Evans J. rightly pointed out, adjudicative independence "is not an all or nothing thing, but it is a question of degree."[47] On this point, Justice Evans found that Guideline 7 does not create the kind of coercive environment which unduly constrains Board members' independence.[48]

Next, I will explore Justice Evans's reasons on this argument in more detail. For the moment, suffice it to say that I believe his view about the degree of influence that a guideline may exert on a board member to decide according to their own conscience and opinion is relevant depending on the nature and purpose of the guideline under review. On this point, it is not all that clear that this line of inquiry was relevant in the case of a procedural guideline, such as Guideline 7.

3. Nature and Purpose of a Guideline

In starting the discussion on the effect of Guideline 7 on the independence and impartiality of RPD members, Justice Evans recalled the basic principle that decision makers "must perform their adjudicative functions without improper influence from others, including the Chairperson and other members of the Board."[49] Thus, the discussion is framed in a specific context, that of a decentralized agency conferred with adjudicative powers. The degree of independence conferred on administrative tribunals in general varies depending on several factors.[50] I will not review the factors here. Suffice it to say that case law recognizes that a purely adjudicative tribunal such as the RPD, the decisions of which affect fundamental rights, is entitled to a high degree of independence.[51] The consequence flowing from this finding is two-fold.

First, it is not a given that such tribunals should be recognized with implicit powers to issue substantive as well as procedural guidelines. My claim is that both types of guidelines raise completely different legal problems with respect to independence of Board members. Substantive guidelines cannot be issued by purely administrative tribunals, for they raise a constitutional law problem.[52] Procedural guidelines can be based on implicit powers and their validity raises an administrative law problem. However, this question was not at issue in *Thamotharem* insofar as Guideline 7 is a procedural guideline and also because Justice Evans stated that section 159(1)(*h*) of the IRPA entitles the Chairperson to issue substantive as well as procedural guidelines.[53]

Nevertheless, the question that s. 159(1)(*h*) raises is whether it matters to distinguish between substance and procedure to determine if a guideline fetters the independence and impartiality of purely adjudicative tribunals, such as the RPD. My answer to this question is that it does. My claim is that the analysis of the mandatory character of a substantive guideline can be fairly straightforward. If a judge finds that such a guideline is mandatory in the sense that it leaves no measure of meaningful discretion to be exercised by decision maker, it could be found invalid on the fettering of discretion doctrine. However, in the case of a procedural guideline, the analysis of the mandatory character is more complex and answers should be more nuanced. This question will be examined first.

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Second, Justice Evans also added that the principle of independence can be tempered insofar as the jurisprudence recognized that "administrative agencies must be free to devise processes for ensuring an acceptable level of consistency and quality in their decisions."[54] This sentence encapsulates another important question for the examination of the validity of a policy instrument: the purpose of the tool. Justice Evans speaks of procedural tools aiming at fostering consistency. I agree with Justice Evans that when policy instruments aim at fostering consistency, it is very relevant to conduct an analysis within the framework of independence and impartiality. However, I disagree with Justice Evans when he writes that Guideline 7 is a tool that was created by the IRB to enhance consistency. The primary purpose of Guideline 7 is to foster expediency of decision making by RPD members. In my view, when such a purpose is assigned to a procedural guideline, it is questionable whether the independence and impartiality framework of analysis is helpful to reach conclusive findings with respect to the validity of such a guideline.

3.1 Substance and Procedure

Substantive and procedural policy instruments may exert different degrees of influence on decision makers. The basic legal framework created for purely adjudicative tribunals by Parliament confers a different degree of autonomy on these tribunals to determine issues of substance and of procedure. Thus, the analysis of the validity of substantive and procedural guidelines cannot be conducted within the same legal parameters, even if, in both cases, these policy instruments are issued to exercise some normative constraints on decision makers. However, the constraints should be proportionate to a meaningful preservation of the integrity of the powers granted to decision makers by the statutory framework.

It is not at all clear that a purely adjudicative tribunal is entitled to issue substantive guidelines, unless it is explicitly authorized by statute. One important reason militates in favour of this view: substantive guidelines are not compatible with the statutory mandate conferred by Parliament on this type of tribunal. Indeed, purely adjudicative tribunals do not have powers to make substantive regulations conferred on them, unlike regulatory agencies, the role of which is to regulate specific economic activities. Purely adjudicative tribunals are not entitled to change, modify, or adjust the application of statutory provisions through norms of general application of their own making. The only tool available to them is interpretation, insofar as one accepts the view that interpretation does have, through the passage of time, the effect of modifying the statute.

Decision makers' role in a purely adjudicative tribunal is to adhere to the views of Parliament as expressed in their governing statute, and not to the views of the government of the day nor to those of the Chairperson (contrary to regulatory agencies where both public authorities can exercise far more leadership through either guidelines, orders, or regulations). Therefore, purely adjudicative tribunals have little substantive autonomy when compared to other decentralized agencies. In this context, the examination of the mandatory character of a guideline should be strictly conducted because the distinction between "mandatory" and "permissive" guidelines matters a great deal. Mandatory guidelines would clearly constitute an excess of jurisdiction when issued by purely adjudicative tribunals, unless Parliament has expressly authorized a particular tribunal to resort to such mandatory policy instruments.

Moreover, the Chairperson of a purely adjudicative tribunal should be very careful in drafting substantive guidelines to ensure that he or she leaves sufficient room to decision makers to interpret the statute as they see fit given the facts of a case. Substantive guidelines must preserve the integrity of the substantive adjudicative power conferred upon them by Parliament and the normative constraints they impose on decision makers should be kept to a minimum. Judges should not hesitate to interfere when the content of a substantive guideline is not compatible with these parameters. An example of a good practice in this regard is the IRB. The Chairperson of the IRB was successful in devising substantive guidelines respectful of the independence of its members and to preserve their interpretative sphere of autonomy conferred by the IRPA. For example, Guidelines 4 provide a framework of analysis to guide members when they determine specific substantive issues.[55]

When examining the validity of procedural guidelines, two general questions should be discussed separately: first, the degree of autonomy of purely adjudicative tribunals with respect to procedural questions; second, the appropriate and valid degree of mandatory character of guidelines.

With respect to the degree of autonomy, it has long been a principle of administrative law that administrative tribunals are masters of their own procedure. Decision makers do not need explicit statutory powers to determine how cases will proceed in front of them. Therefore, the problem of formal legality (in the sense that a specific grant of power must be given in a statute) is irrelevant insofar as the procedure is compatible with the process established by Parliament. As a consequence, whether decision makers make procedural choices incrementally or through procedural guidelines (or through rules when the statute authorizes the use of this instrument) does not matter as long as their procedural decisions do not violate the principles of natural justice.

Whatever the procedural tool used by a tribunal, the principles of natural justice must be able to operate to ensure meaningful protection to parties of their right to be heard

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

by an impartial tribunal, or, at the very least, have a neutral effect on these protections (assuming that such as neutral effect is indeed possible). Therefore, the question of the validity of a guideline must be looked at from a concrete perspective (What is the effect of Guideline 7 on the right to be heard by an impartial tribunal of refugee claimants?), rather than an abstract perspective (Does the guideline leave a meaningful measure of discretion to be exercised?). With respect to Guideline 7, that is to say, to a procedural guideline aiming at fostering expediency, this concrete perspective is encapsulated in section 162(2) of the IRPA: "Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit."

With respect to the appropriate and valid degree of mandatory character of procedural guidelines, it is important to recall that its function in the decision making process of a board is of primary importance. As pointed out earlier, a guideline can take a mandatory form when its function is simply to codify positive law, or to confer greater or clearer procedural protection to claimants. Outside these two scenarios, the inquiry should focus on the question as to whether a procedural guideline leaves sufficient discretion to Board members to ensure that the principles of natural justice can operate effectively in the legal system in which it is applied. In other words, a board member must be able to determine what participatory rights to the procedure would be fair to grant to a claimant, given her requests for procedural protection in a given situation, and to decide in an impartial manner. However, not all procedural guidelines necessarily violate both principles of natural justice in and of themselves. In order to make a choice as to which principle may be violated, it is crucial to examine the purpose of the guideline. In relation to Guideline 7, I will analyze next two purposes: procedural consistency and procedural expediency.

3.2 Consistency and Expediency

At first glance, procedural guidelines potentially impact to a lesser extent on the independence and impartiality of decision makers than substantive guidelines do. Admittedly, among all types of guidelines, substantive guidelines exert the greatest influence on the ability of a decision maker to decide according to their own conscience and opinion, because they are issued for the main purpose of fostering consistency of public authorities' decisions. However, we know since *Consolidated-Bathurst* and *Tremblay* that the purpose of procedural guidelines can also be to foster consistency and, therefore, can also illegally impinge on members' independence.

In *Thamotharem,* Justice Evans analyzed the validity of Guideline 7 through the lenses of independence of board members. He based his analysis on the teaching of *Consolidated-Bathurst* and *Tremblay* because he saw some similarities of purposes of Guideline 7 and the full board meeting procedure. He viewed them both as policy instruments aiming at fostering consistency. If the purpose of Guideline 7 were truly to foster consistency, I would have agreed with Justice Evans's analysis, but my view is that such is not the case. The primary goal of Guideline 7 is to foster expediency of the RPD decision-making process.

Before going further into these explanations, a few words are necessary on the meanings of the concept of consistency. There are at least two meanings to the concept. The first meaning relates to a "thick" version of the concept; the second meaning, to a "thin" version. In its thick version, consistency refers to the principle "treat like cases alike."[56] It is about logical coherence of substantive reasons bringing a decision maker to decide one way or another. The thick version is about the "what" and requires a decision maker to not be affected by his personal biases and preferences. In this thick sense "consistency" is considered to be an aspect of the rule of law.[57]

In its thin version, consistency refers to the manner in which a case is decided: the procedure. Procedural consistency is about the "how" and is linked to fairness. The demand for fairness arises when there is a difference in the procedural treatment between cases. The demand is satisfied when the reasons that "justify a process that might end up treating cases differently even though their characteristic are the same."[58] It is precisely to meet the demand for fairness that Guideline 7 includes paragraph 23. Recall that paragraph 23 allows a member to vary the order of questioning by permitting the claimant to present his case first if the claimant shows that his circumstances are exceptional. Save for exceptional circumstances, all cases are treated through the reverse order questioning procedure.

In this sense, Guideline 7 fosters consistency, but only the thin version of consistency. Indeed, before the Chairperson issued Guideline 7, the order of questioning was within the discretion of each RPD board member. As a result the order of questioning was not uniform among regions in Canada or among members within a region. Therefore, Guideline 7 aims at fostering consistency of the procedure followed by RPD members across Canada. Unlike the full board meeting procedure examined in the Supreme Court trilogy, Guideline 7 has no impact (or negligible impact) on fostering substantive consistency. Therefore, the issue as to whether Guideline 7 creates a reasonable apprehension of bias does not appear to be particularly relevant to resolve the issue as to its validity. Resorting to the reverse order of questioning does not clearly impede the ability of RPD members to decide according to their own conscience and opinion. It may have an impact on the quality of the decisions, but not because they are

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

inconsistent (thick version), but because they were unfairly decided. On this point, all judges agreed that Guideline 7 was procedurally fair, but they also all agreed that violation of the principle of procedural fairness will be dealt with on a case-by-case basis.

However, this finding does not close the inquiry. Indeed, even if a procedural guideline does not violate the principles of natural justice or procedural fairness as found in case law, it can nonetheless be found invalid for incompatibility with the process established by the statute. A party contesting a guideline should demonstrate through legal interpretation that a guideline is not compatible with the statutory powers conferred to a board.

4. Compatibility of Guideline 7 with the IRPA

The Canadian Council for Refugees, intervening in *Thamotharem* and *Benitez,* raised the question as to whether Guideline 7 transformed the refugee determination process to such a point as to render it incompatible with the IRPA. None of the judges of the Federal Court of Appeal thought that Guideline 7 was incompatible with the IRPA, but no clear justifications were provided to support this statement. In this section, I will look at the compatibility of Guideline 7 with two provisions of the IRPA.

The first provision is s. 162(2).[59] It confers a duty on each division of the IRB to "deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit." Thus, the question I will examine first is whether Guideline 7 maintains a balance between expediency and fairness. The second provision is s. 170 *a*).[60] With it, the RPD had conferred upon it an explicit power to inquire with the promulgation of the IRPA.[61] This grant of explicit power appears to be an unknown legal phenomenon in the realm of purely adjudicative tribunals. This engenders an interpretative problem since case law does not provide meaningful parameters to guide the interpretation of the scope of the power to inquire when used by this type of decentralized public authority. Therefore, the interpreter has to start anew. This is the task to which I will turn in section 4.2 of this paper.

In the following section, however, I will first present some of the arguments which could be made in support of the view that Guideline 7 raises concerns with respect to its compatibility with the IRPA. My goal is to show that a more detailed analysis of the compatibility of Guideline 7 with the IRPA would have been gained in being conducted in *Thamotharem*.

4.1 Maintaining a Balance between Expediency and Fairness

To answer the question as to whether Guideline 7 maintains a balance between expediency and fairness, a return to paragraph 23 of Guideline 7 is essential. This paragraph entitles a RPD member to vary the order of questioning when she is of the opinion that exceptional circumstances exist. To exemplify what the Chairperson means by exceptional circumstances, paragraph 23 speaks of cases involving a "severely disturbed claimant" or a "very young child." However, it is not at all clear that these "examples" are merely "examples." They can be construed as constituting strict categories of situations for which a member will agree to vary the order of questioning, to the exclusion of other types of situations. In order to make this point, one has to examine the interplay between two IRB guidelines: Guideline 7 and Guideline 8 - Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada,[62] which became effective in December 2006. The effect of Guideline 8 is to limit the scope of the application of Guideline 7 in two ways: (1) to obtain an order varying the order of questioning; (2) to confine its application to the two "examples" provided in paragraph 23.

With respect to the first point, Guideline 8 specifies to Board members that they can resort to a whole range of procedures, such as varying the order of questioning, to accommodate the specific vulnerability of a claimant. Varying the order of questioning is only one means among eight proposed to Board members in Guideline 8.[63] Therefore, the application of paragraph 23 of Guideline 7 is only one possibility. And since paragraph 23 applies only to exceptional circumstances, it is reasonable to argue that Board members are implicitly required to grant an application to vary the order of questioning only after they examined other procedural accommodations laid down in Guideline 8.

With respect to the second point, Guideline 8 plays a significant role in the classification of refugee claims in terms of the degree of vulnerability of claimants. According to Guideline 8, there appear to be two levels of vulnerability: common and severe.

For the purposes of this Guideline, vulnerable persons are individuals whose ability to present their cases before the IRB is *severely impaired.* Such persons may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, and women who have suffered gender-related persecution.[64]

This Guideline addresses difficulties *which go beyond those that are common to most persons* appearing before the IRB. It is intended to apply to individuals who face *particular difficulty* and who require *special consideration* in the procedural

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

handling of their cases. It applies to the *more severe cases* of vulnerability. [Emphasis added][65]

Given that Guideline 8 clearly applies only to "the *more severe cases* of vulnerability" (referring in this to the language used by paragraph 23 of Guideline 7) and that it is only in these cases that the possibility of varying the order of questioning is open to accommodate claimants, it becomes rather clear that paragraph 23 of Guideline 7 has no life in and of itself: its scope is meant to be construed in light of Guideline 8. Therefore, it is reasonable to argue that when Guideline 7 speaks of "severely disturbed claimant" as being merely an example of situation for which the order of questioning can by varied, it is inaccurate. It is a strict and exclusive category of cases (together with "the very young child" category) for which paragraph 23 can come into play. As a consequence, it is unlikely that RPD members retain any measure of meaningful discretion to determine if they will grant an order to vary the order of questioning in the case of a claimant not falling into either one of the two categories set by paragraph 23. From this interpretation, it appears that the only discretion they have left is to determine whether varying the order of questioning is the appropriate procedure to accommodate the specific vulnerability of a claimant.

On a final note, it is important to say that, for the moment, it is not possible to check the validity of this interpretation. Even if the IRB produced some forty decisions in *Thamotharem* to show how paragraph 23 is applied by RPD members, the decision of the Court does not provide specific information on these cases to enable scholars to conduct proper research. In addition, the IRB appears to be very reluctant to publish these decisions in the Quicklaw (QL) databank. Indeed, we found only a couple of RPD decisions in which the member agreed to vary the order of questioning.[66] Although the panels agreed with the objection, their reasons were supposed to be found in an appendix to the decision, but were not made available through QL. As a result, there is no significant public information readily available on the parameters of the application of paragraph 23.

In sum, the interplay of Guidelines 7 and 8 raises the issue as to whether the creation of categories of claimants entitled to the procedural accommodation set out in paragraph 23 has the effect of favouring expeditiousness at the expense of fairness in determining claims for refugee status.

4.2 The Scope of the Statutory Power to Inquire

When a guideline is related to a specific statutory power, it is useful to first inquire as to the function of this guideline in relation to that power. Since I already developed this question in other papers, I will simply recall that a guideline can affect a legal system in different ways, such as delimiting its parameters by confining and structuring discretion, or by developing or by transforming it (at which point of course the legality of the guideline is clearly disputable).[67] With respect to Guideline 7, the IRB claims that its function is to delimit the scope of the power to inquire. More specifically, the Board is of the opinion that the power to inquire means that RPD members can "define what issues must be resolved in order for them to render a decision."[68] The IRB feels confident that Guideline 7 is compatible with the IRPA. Justice Evans agreed with this view, but for another reason. His argument is that Guideline 7 is compatible with the IRPA procedural model created for the RPD, which he qualified as inquisitorial. In this section, I will bring counter argument to dispute both points of view. I will start with an examination of the qualification that the refugee determination process is "inquisitorial," and will move thereafter to an examination of the IRB interpretation of the scope of the power to inquire.

The nature of the refugee determination process intrigues many researchers and scholars (including those among the IRB itself) since, in its official documents, the Board sometimes refers to a "non-adversarial process"[69] and at other times to an "inquisitorial process"[70] to qualify the decision making procedure of the RPD. The point is that there appears to be a difficulty in identifying the precise nature of the refugee determination process. It is clear that the claimant must discharge her burden of proof that she is a refugee or a person in need of protection. However, there is usually no opposite party to contest her claim or to check the truthfulness of her story. If the RPD member is of the opinion that the claim is not well-founded, he has to be somewhat entitled to challenge the claimant by inquiring into the claim, in order to ultimately make a determination according to his conscience and opinion. However, being able to inquire into a claim does not mean that the process is inquisitorial.

In common law (and civil law) an inquisitorial system is distinguished from an adversarial system. In an inquisitorial system, the judge has a prosecuting role. This procedure is characterized by the fact that all initiatives, from the first to the last day of the trial, are taken by the judge: the introduction of the instance, the direction of the trial, the gatherings of facts, and the assembling of the evidence.[71] An adversarial process is characterized by a procedure in which the parties take, exclusively or principally, the initiatives of introducing the instance, its direction, and its instruction.[72] Decision makers play no prosecutorial role: the function of judging and prosecuting are partitioned.

It is a given that the refugee determination process is not adversarial, but it is also legally inaccurate to speak of it as being inquisitorial. Board members do not prosecute refugee claimants: their role is not to find sufficient evidence to "make the Board's case" against a claimant. Beside its legal inaccuracy, the insistence on avoiding the word "inquisitorial"

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

to qualify the RPD process is important for two additional reasons. First, it sends confusing signals to Board members, especially those without legal training. Second, and most importantly, an insistence on the inquisitorial nature of the IRB process may trigger questions as to its constitutional validity. Recall that the Supreme Court decided in *Régie des permis d'alcool* that impartiality requires separation of functions between that of a "prosecutor" and that of an "adjudicator" within a board. Although this decision was based on the Quebec Charter and applied in the context of a regulatory board, it can be argued that a lack of separation between these functions can raise a reasonable apprehension of bias. Therefore, great caution should be exercised when qualifying a process, especially one followed by a purely adjudicative tribunal. In the case of the RPD, the word "inquisitorial" to qualify the process should be clearly banished.

As for the qualification of non-adversarial, it is accurate but it only highlights the fact of no opposite party to contest the claim. My view is that the emphasis should be put on what truly distinguishes the RPD process from other processes generally followed by purely adjudicative tribunals: its power to inquire into a claim.

In fact, the RPD process sits between the inquisitorial and the adversarial processes. On the one hand, the claimant takes the initiative to introduce the instance and participate in the gathering of facts. On the other hand, Board members are responsible for the direction of the process (which is notably highlighted by Guideline 7), but they also gather facts and assemble the evidence. For these reasons, I propose to qualify the RPD process as "investigative."[73]

This being said, however, it does not resolve the issue as to the proper interpretation of the scope of the power to inquire. It is precisely the scope of this power resting on RPD members' shoulders that is less clear. In other words, everybody agrees that the RPD has some active role to play in the proceedings, but the question is: what is exactly the scope of the inquiry power conferred on a decision maker acting in a purely adjudicative tribunal such as the RPD? In my research for some guidance on this point, I found two possible meanings.

In Quebec, the *Administrative Justice Act* sets the general procedural regime applicable to decisions made by boards exercising an adjudicative function. It enables decision makers to take measures to circumscribe the issues.[74] Before the hearing, a board can call a case management conference or a pre-hearing conference in view of reaching an agreement with the parties on the direction of the instance. Issues such as the following can be determined through such agreement: defining the questions to be dealt with at the hearing, determining how the conduct of the proceeding may be simplified or accelerated and the hearing shortened, examining the possibility for the parties of admitting certain facts or of proving them by means of sworn statements. This is also what Guideline 7 entitles RPD members to do, but with a significant difference. Recall that the IRB states in the Guideline that the power to inquire means that members *can define what issues must be resolved in order for them to render a decision.* A decision maker in charge of a case can determine *alone* what the issues are in a given case. He does have to reach an agreement with the claimant on this point. Indeed, even if the claimant or her representative can "notify the RPD as soon as possible of any issue it wants to add or delete, and explain why,"[75] the decision maker does not have to agree with the content of the notification. He "can add or delete issues even during the course of the hearing."[76]

Therefore, the question becomes whether the explicit grant of a power to inquire to RPD members means that the IRB can go as far entitling them to decide alone what the issues at stake are. In other words, the question comes down to the participatory right of refugee claimants. Do they have a right to determine with the IRB members the issues at stake pertaining to their claim? What would be the legal foundation of such a right (the IRPA, explicitly or implicitly, or the common law)?

My intention is not to answer these questions in this paper for it would require a lengthy analysis. Indeed, a proper analysis of the factors set in the *Baker* case would need to be conducted first.[77] Further, in-depth research on the scope and limit of the right to an oral hearing and the right to present evidence, *inter alia,* which are granted to refugee claimants in the IRPA,[78] would be clearly relevant to such an analysis. Of course, this analysis would also need to be contextualized by taking into account the specific environment of the refugee determination process, being shaped by statute, regulations, and the relevant policies of the IRB applicable to the Refugee Protection Division to fix a given problem.[79]

Conclusion

In this paper, I have proposed an examination of the scope and limits of the doctrine of fettering discretion to assess the validity of guidelines. As currently applied, this doctrine does not provide a deep and nuanced understanding of the multi-faceted functions of guidelines and other policy instruments used by public authorities in contemporary administrative law. Courts have focused their inquiry on the mandatory character of the guideline. When facing substantive guidelines, this framework of analysis reveals important problems with them. However, when applied to procedural guidelines, this type of inquiry is not as useful because these guidelines, just as procedural rules, are not generally meant to be mandatory.

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

My proposal is that the focus of the inquiry into the validity of a procedural guideline should be first on its compatibility with the decision making process established by statute, and in particular, with the procedural duties and powers granted to board members. In sum, the real issues are whether a guideline violates (1) the participatory rights of a claimant to a process or (2) the duty of Board members to decide independently and impartially.

Starting with the second ground (bias), the doctrine of "fettering the independence and impartiality" of board members, as enunciated by the Supreme Court in *Consolidated-Bathurst, Tremblay* and *Ellis Don,* and the Federal Court of Appeal in *Thamotharem* and *Benitez,* may be more or less relevant depending on the purpose of a procedural guideline. Indeed, procedural guidelines do not necessarily influence decision makers when they exercise their adjudicative function. Admittedly, those aiming at fostering substantive consistency ("treat like cases alike") of decisions do; those aiming at fostering procedural expediency ("justice delayed, justice denied") do not.

In the case of a guideline aiming at fostering procedural expediency, such as in Guideline 7, the examination of the effect of the guideline on the participatory rights of a claimant may prove to shed a more revealing light on the problems they may raise. In this case, it may be particularly relevant to ask oneself whether the guideline merely delimits (confines and structures) the procedural duties and powers of an administrative tribunal, or if it goes further and transforms the process, as the Canadian Council for Refugees submitted. In the future, courts could be asked to examine the issue as to whether claimants for refugee status have a right to define the issues at stake in their case and, if yes, whether Guideline 7, especially in light of the IRB case management system,[80] violates their participatory rights to the procedure.

Finally, closer attention should be paid to guidelines issued to enhance expediency of a decision making process. This type of guideline may pose a higher risk of violating the participatory right to the procedure than any other guideline (nature or purpose). In the case of a tribunal such as the IRB, the government of the day can exercise great pressure so that it increases the speed of its decisions to eliminate or reduce significantly a backlog for example. This goal is not in itself problematic: long delays in determining cases engender undesirable effects on the rights and interests of people as well as the legitimacy of a public institution. However, it remains a basic tenet of our legal system that expeditiousness should not overcome fairness. To keep this balance is crucial to maintain legitimacy and credibility of any decision making process.

Notes

1. For information on the IRB rules, see Immigration and Refugee Board, online: <http://www.irb-cisr.gc.ca/en/references/policy/rules/index_e.htm> (date accessed: 7 May 2008). The *Immigration and Refugee Protection Act,* 2001, c. 27, s. 161(1) [*IRPA*], provides statutory authority for the rules. For information on policy instruments used by the IRB, see Immigration and Refugee Board, online: *<http://www.irb-cisr.gc.ca/en/references/policy/index_e.htm> (date accessed 7 May 2008). See also on the same site the document entitled Policy Making in the Immigration and Refugee Board of Canada* (February 2006), which explains the difference between the types of policy instruments used by the IRB.
2. Guideline 7 – Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division *(October 2003), IRB, online: <http://www.irb-cisr.gc.ca/en/references/policy/guidelines/index_e.htm> (date accessed: 7 May 2008) [Guideline 7].*
3. *Thamotharem v. Canada (Minister of Citizenship and Immigration),* [2007] A.C.F. no 734 (QL); [2007] F.C.A. 198; 60 Admin. L.R. (4th) 247 (Décary, Sharlow, and Evans JJ.A.), paras. 19–21 [*Thamotharem* cited to A.C.F.].
4. A Refugee Protection Officer (RPO) is a civil servant working for the IRB, whose role is to assist members in the preparation of cases before, during, and after the hearing when he is scheduled for a hearing.
5. Donald Galloway, "Proof and Narrative: Reproducing the Facts in Refugee Claims" (Manuscript produced for the conference Best Practices for Refugee Status Determination: Principles and Standards for State Responsibility, held at the Monash University Centre, Prato, Italy, 29–30 May 29–30 2008). In this article, Galloway is very critical of the use that the IRB makes of the Personal Information Form.
6. Guideline 7, *supra* note 2 at para. 23: "The member may vary the order of questioning in exceptional circumstances. For example, a severely disturbed claimant or a very young child might feel too intimidated by an unfamiliar examiner to be able to understand and properly answer questions […]."
7. *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 8 (QL), [2006] FC 16, [2006] 3 F.C.R. 168 (Blanchard J.) [*Thamotharem* cited to F.C.J.].
8. *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 631 (QL); [2006] FC 461; [2007] 1 F.C.R. 107 (Mosley J.) [*Benitez* cited to F.C.J.].
9. *Thamotharem*, *supra* note 3; *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2007] A.C.F. no 735 (QL); [2007] F.C.A. 199 (Evans, Décary, Sharlow JJ.A.) [*Benitez* cited to A.C.F.]. Justice Evans's reasons in *Thamotharem* also applied to *Benitez:* see *Benitez* at para. 7.
10. *Daniel Thamotharem v. Minister of Citizenship and Immigration–and–Immigration and Refugee Board* (F.C.) (Civil) (By Leave) (32185): Coram: Bastarache / Abella / Charron; *Jorge Luis Restrepo Benitez v. Minister of Citizenship and*

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Immigration–and–Immigration and Refugee Board (F.C.) (Civil) (By Leave) (32180) : Coram: Bastarache / Abella / Charron.

11. David Mullan, *Administrative Law*, 3rd ed. (Toronto: Carswell, 1996) at para. 475; *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 54 [*Baker* cited to S.C.R.].
12. *Thamotharem*, *supra* note 3 at para. 56; *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 121 D.L.R. (4th) 79 (Ont. C.A.) at 83 [*Ainsley* cited to D.L.R.]. See Mullan, *supra* note 11 at para. 501; Martineau and al. v. The Matsqui Institution Inmate Disciplinary Board, [1978] 1 S.C.R. 118 at 129.
13. Peter Carver, "Guides' Honour: A Note on Procedural Guidelines and the Decisions in Thamotharem *v.* Canada (M.C.I.) and Benitez *v.* Canada (M.C.I)", (2006) Administrative Law Reports (4th) 279.
14. *Capital Cities Communications v. C.R.T.C.*, [1978] 2 S.C.R. 141 at 170 [*Capital Cities Communications* cited to S.C.R.].
15. Mullan, *supra* note 11 at paras. 479–481.
16. *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 [*Maple Lodge* cited to S.C.R.]; *Ainsley*, *supra* note 12.
17. For example, guidelines resembling those which have already been found invalid by courts, such as *Ainsley*, *supra* note 12; *Dlugosz* c. *P.G. du Québec*, [1987] R.J.Q. 2312 (C.A.).
18. Carver, *supra* note 13 at 289.
19. Ainsley Financial Corporation et al. v. Ontario Securities Commission et al. (1993) 14 O.R. (3d) 280 at paras. 46–53 (para. 46 states the criteria; 47–53 apply them). These criteria were referred to with approval by the Ontario Court of Appeal: *Ainsley*, *supra* note 12.
20. *Ainsley*, supra note 7 at 109, cited in *Thamotharem*, *supra* note 7 at para. 112.
21. See text of para. 23 of Guideline 7 in footnote 6.
22. *Thamotharem*, *supra* note 7 at para. 119.
23. *Benitez*, *supra* note 8 at para. 166.
24. *Thamotharem*, *supra* note 3 at para. 54.
25. *Ibid*. at para. 73.
26. First, a qualitative research would need to be made. The sample of research would comprise, at the very least, the applications to vary the order of questioning and the decisions made for each application. The percentage of such applications in relation to the total number of decisions made on a yearly basis by the RPD (around 25,000) is unknown, but even if it were only 1 per cent of all decisions, it means that 250 files would need to be reviewed. This is a huge task that would require human and financial resources that are clearly beyond the means of counsels and refugee claimants. But this is not all. One other hurdle awaits the researcher. The IRB publishes only a selected and small portion of RPD decisions. To access the unpublished decisions, an access to information request must be filed which would take months for the IRB to process, to not mention the costs to do so.
27. *Thamotharem*, *supra* note 3 at para. 78.
28. *Ibid*. at para. 74.
29. *Ibid*. at para. 58.
30. Roderick A. MacDonald, "Pour la reconnaissance d'une normativité juridique implicite et 'inférentielle,'" (1986) 1 Sociologie et Sociétés 47.
31. *Thamotharem*, *supra* note 3 at para. 65.
32. See Martineau et al. v. The Matsqui Institution Inmate Disciplinary Board, [1978] 1 S.C.R. 118, 123 (Laskin J. dissenting).
33. *Thamotharem*, *supra* note 3 at paras. 66 & 71.
34. *Ibid*. at para. 104.
35. *Refugee Protection Division Rules*, SOR/2002–230.
36. *Thamotharem*, *supra* note 3 at para. 98.
37. *Ibid*. at para. 85 [emphasis added].
38. *Ibid*. at paras. 86–87.
39. *Ibid*. at para. 88.
40. *Ibid.* at para. 96.
41. *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; [1990] S.C.J. No. 20 (QL) [*Consolidated-Bathurst* cited to S.C.J.].
42. *Thamotharem*, *supra* note 7 at para. 134.
43. *Ibid*. at para. 135.
44. *Benitez*, *supra* note 8 at para. 167.
45. *Thamotharem*, *supra* note 7 at para. 169; *Benitez*, *supra* note 8 at para. 170.
46. In addition, even if one accepts Justice Mosley's view that there was no evidence in the file to support the view that Guideline 7 fettered RPD members, my question is to which extent it would be possible to bring such evidence of threats and sanctions by the Chairperson to a court. Indeed, this type of evidence would not be divulged either by the IRB or members during their mandate and it is unlikely that record of it would be kept or that the Board would willingly give access to it. This evidence could probably be made by former RPD members (presuming that it would be possible to find former RPD members who would be disposed to testify) given the likelihood that their credibility and character would likely be sternly attacked by the Minister of Citizenship and Immigration or the IRB (after being allowed to intervene in the case).
47. *Thamotharem*, *supra* note 3 at para. 89.
48. *Ibid*. at para. 88.
49. *Ibid.* at para. 83.
50. *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at para. 83.
51. *Barreau de Montréal v. Québec (Procureure générale)*, [2001] R.J.Q. 2058 (Q.C.A.).
52. A purely adjudicative tribunal is the type of tribunal that resembles most a court and just like courts their function is to apply legal provisions. Therefore, they cannot base their decisions on the personal preferences of the government or the Chairperson, unless clear and express power is statutorily conferred to state those preferences through policy in-

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

struments: *Bell Canada v. Canadian Telephone Association Employees*, [2003] 1 S.C.R. 884 at paras. 37–38.
53. *Thamotharem*, *supra* note 3 at para. 90; *IRPA*, *supra* note 1, s. 159. (1).
54. *Thamotharem*, *supra* note 3 at para. 83.
55. Canada, Immigration and Refugee Board, Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution *(November 1996),* online: <http://www.irb-cisr.gc.ca/en/references/policy/guidelines/women_e.htm> (date accessed: 2 July 2008).
56. David A. Strauss, "Must Like Cases be Treated Alike?" (Public Law and Legal Theory Working Paper no. 24, University of Chicago, 8 May 2002), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=312180> (date accessed: 2 July 2008).
57. *Ibid*. at 18; *Consolidated-Bathurst*, *supra* note 41 at 47 (pdf electronic version).
58. Strauss, *supra* note 56 at 20.
59. The IRB refers expressly to this provision of the IRPA in the introduction of Guideline 7, *supra* note 2.
60. *Ibid*. in the section following the introduction.
61. *IRPA*, *supra* note 1, s. 170(*a*).
62. Guideline 8 – Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada (December 15, 2006), online: <http://www.cisr-irb.gc.ca/en/references/policy/guidelines/vulnerable_e.htm#1> (date accessed: 2 July 2008) [Guideline 8].
63. *Ibid*. at para. 4.2.
64. *Ibid*. at para. 2.1.
65. *Ibid*. at para. 2.3.
66. *X.Z.A. (Re)*, [2007] R.P.D.D. No. 19 (QuickLaw, Panel: R. Dawson, July 11, 2007); *F.F.I. (Re)*, [2005] R.P.D.D. No. 31 (QuickLaw. Panel: Steve Ellis, May 26, 2005); *Wang v. Canada (Minister of Citizenship and Immigration)*, [2006] R.P.D.D. (QL), Panel: Steve Ellis, March 28, 2006. Research done up until 1 May 2008.
67. France Houle, "La lecture des blancs dans le droit et la validité des règles administratives : essai sur deux modèles issus du positivisme juridique," in Ysolde Gendreau, ed., *Le lisible et l'illisible* (Montréal: Les Éditions Thémis, 2003); France Houle & Lorne Sossin, "Tribunals and Guidelines: Exploring the Relationship Between Fairness and Legitimacy in Administrative Decision-Making" (2006) 49:3 Canadian Public Administration 282.
68. Guideline 7, *supra* note 2 in the section following the introduction.
69. See, for example, Canada, Immigration and Refugee Board, *CRDD Handbook*, at para. 1.2.3.1, online: <http://www.irb-cisr.gc.ca/en/references/legal/rpd/handbook/handbook_e.pdf> (date accessed: 2 July 2008) [*CRDD Handbook*].
70. See, for example, Canada, Immigration and Refugee Board, *IRB News*, online: <http://www.irb-cisr.gc.ca/en/about/publications/irbnews/2004/issue01_e.pdf> (date accessed: 2 July 2008).
71. *Juriterm Plus: banque terminologique de la common law*, Université Moncton, Centre de traduction et de terminologie juridique, *s.v.* "*système inquisitoire*" (electronic resource), online: <http//www5.umoncton.ca/cttj/juriterm.dll/EXEC> (date accessed: 5 December 2008).
72. *Ibid*., *s.v.* "*système accusatoire*."
73. *Ibid*., *s.v.* "investigation": an investigation is an "inquiry, judicial or otherwise, for the discovery and collection of facts concerning a certain matter or matters."
74. *An Act Respecting Administrative Justice*, R.S.Q., c. J-3, s. 12.
75. Guideline 7, *supra* note 2 at para. 1.1.2.
76. *Ibid*. at para. 18.
77. *Baker*, *supra* note 11 at paras. 23–28. L'Heureux-Dubé J. proposed five factors: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself.
78. IRPA, *supra* note 1, section 170 *b)* and *e)*.
79. For examples, the case management system established through policies would be worth looking at: Canada, Immigration and Refugee Board, Fast Track Policy: Expedited Process *(March 2005),* online: <http://www.irb-cisr.gc.ca/en/references/policy/policies/exprocess_e.htm> (date accessed: 2 July 2008); Canada, Immigration and Refugee Board, *Policy on Oral Decisions and Oral Reasons (September 10, 2003)*, online: <http://www.irb-cisr.gc.ca/en/references/policy/policies/oral_e.htm> (date accessed: 2 July 2008).
80. *Ibid.*

France Houle has been a professor at the University of Montreal, where she teaches administrative law, since 1999. She is a member of the Research Centre on Globalization and Work, where she is developing a research program on migrant labour and public governance.

© France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

The Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada: A Critical Overview

Janet Cleveland

Abstract

This paper presents a critical overview of the Guideline on Vulnerable Persons, adopted by Canada's Immigration and Refugee Board (IRB) in December 2006 with the goal of providing procedural accommodations for vulnerable individuals appearing before the Board so that they are not disadvantaged in presenting their cases. Although the Guideline is a step in the right direction, it has several serious shortcomings, notably the fact that it is purely procedural in scope, applies only to persons whose ability to present their case is severely impaired, and does not give sufficient weight to expert opinions by mental health professionals.

Résumé

Cet article propose un coup d'œil critique sur le document Directives sur les procédures concernant les personnes vulnérables qui comparaissent devant la CISR, adopté par la Commission de l'immigration et du statut de réfugié du Canada en décembre 2006 dans le but de fournir des accommodements en matière de procédure pour les personnes vulnérables appelées devant la Commission, et cela afin qu'elles ne soient pas désavantagées pour présenter leurs cas. Bien que la Directive soit un pas dans la bonne direction, elle a plusieurs manquements sérieux, notamment le fait que sa portée est limitée en matière de procédures seulement, qu'elle ne s'applique uniquement qu'aux personnes qui ont des handicaps graves pour présenter leur cas, et n'accorde pas suffisamment d'importance à l'opinion d'expert présentée par les professionnels en matière de santé mentale.

Introduction

For many years, refugee advocates and mental health professionals have demanded that Canadian immigration authorities adopt policies to meet the needs of psychologically vulnerable asylum seekers and permanent residents. On December 15, 2006, Canada's Immigration and Refugee Board (IRB or Board) issued a guideline designed to respond to some of these concerns, *Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB (Guideline on Vulnerable Persons*, or Guideline 8).[1]

Psychological vulnerability may detrimentally affect asylum seekers and permanent residents in a variety of ways. First, it may affect the person's ability to coherently and persuasively present her case before the IRB. Procedural changes (*e.g.*, allowing a support person to be present) will often be helpful but may not be sufficient to overcome this disadvantage. For example, a person who has experienced torture or rape may well have difficulty telling her story to the Board despite procedural adjustments. Her account may still be marred by inconsistencies, vagueness, omissions, late disclosure, apparent lack of emotion, or other characteristics that can easily be mistaken for signs of untruthfulness. To ensure that vulnerable persons are not disadvantaged in presenting their case, it is therefore essential to take psychological problems into account when assessing the person's credibility in addition to allowing procedural accommodations.

Second, psychological problems may affect the person's ability to seek state protection or to relocate, and should therefore be considered when analyzing these aspects of the refugee claim. Third, some permanent residents or refugees may face removal for mental health related criminal offenses such as an assault committed while in the grip of psychot-

© Janet Cleveland, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

ic delusions or a robbery linked to drug addiction. In such cases, it would seem reasonable to take diminished responsibility into account. Fourth, psychological vulnerability should be considered in deciding whether a detained asylum seeker should be transferred to a community facility or released under a bond.[2] In the United Kingdom, for example, it is now unlawful to detain asylum seekers who have been tortured.[3]

Finally, the heightened vulnerability of psychologically disturbed persons is a relevant factor when assessing the risks they would face if returned to their country of origin. For example, a Roma woman who had suffered for years from severe depression, anxiety, and agoraphobia following an attack by skinheads was found to have compelling reasons not to return to Hungary, although the risks that she would face there would not amount to persecution for a less psychologically fragile person.[4] Similarly, the claim of an Ethiopian asylum seeker with chronic bipolar disorder and a history of suicide attempts was accepted on the grounds that the severe stigmatization and discrimination that she would experience in Ethiopia because of her mental illness amounted to persecution.[5]

These are just some examples of the many problems faced by vulnerable persons seeking status in Canada. The Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB (Guideline 8) addresses only one of these issues, that of procedural adjustments designed to attenuate some of the difficulties faced by vulnerable persons during IRB procedures. Although a praiseworthy initiative, the Guideline therefore falls far short of responding to all the needs of vulnerable persons appearing before the IRB.

In this paper, I first present a critical summary of Guideline 8, followed by an analysis of IRB and Federal Court decisions involving the Guideline. In a third section, I briefly critique the assumption expressed in Guideline 8 that serious vulnerability is exceptional among asylum seekers. Finally, I refute a number of misconceptions concerning reports by mental health professionals contained in the IRB *Training Manual on Victims of Torture*.[6]

Critical Overview of Guideline 8

Definition of Vulnerable Persons

Vulnerable persons are defined as "individuals whose ability to present their cases before the IRB is severely impaired,"[7] but also as individuals who have "severe difficulty in going through the hearing process or other IRB processes without special consideration being given to their individual situations,"[8] which appears to be a somewhat broader standard. The main goal of procedural accommodations is to ensure that "the person is not disadvantaged in the presentation of their case,"[9] which indicates that the focus is more on ensuring fairness than on minimizing distress. However, another objective is to "prevent vulnerable persons from being traumatized or re-traumatized by the hearing process or other IRB process."[10] This suggests that the Board should be prepared to adjust its procedures if the regular process is likely to cause significant distress, even if the person may be reasonably able to testify.

This more liberal interpretation is consistent with the remedial aim of Guideline 8. For example, a refugee claimant who is very reluctant to recount her rape may be able to overcome her reluctance and tell her story, but at the cost of reviving suicidal urges. In this instance, the person is ultimately able to present her case, but at a tremendous cost to her psychological integrity. An overly narrow interpretation of the Guideline focusing exclusively on impairment of the person's ability to present her case could lead to a refusal to recognize such a person as vulnerable and a failure to provide procedural accommodations that were in fact needed.

Vulnerability may be due to a variety of factors,[11] including (but not limited to):

- experiential factors, notably having experienced or witnessed torture, genocide, rape, gender-related persecution or other severe mistreatment; and
- innate or acquired personal characteristics such as age, mental or physical illness, or mental or physical handicap.

The Guideline states repeatedly that many of the individuals appearing before the IRB experience some degree of vulnerability and have difficulty going through the process for reasons such as language and cultural barriers, previous traumatic experiences, or the profound impact that the IRB decision may have on the person's life.[12] Having recognized these facts, the IRB could logically have concluded that a large proportion of those appearing before it may need some form of procedural accommodation. Instead, the Guideline emphasizes that it applies only to "the more severe cases of vulnerability" involving "difficulties which go beyond those that are common to most persons appearing before the IRB,"[13] while asserting that the IRB should treat everyone appearing before it with sensitivity and respect.[14]

If a significant proportion of individuals appearing before the IRB are, in fact, vulnerable, why not recognize them as such? Most of the procedural accommodations envisaged in Guideline 8 are not particularly taxing for the system. Why restrict them to cases in which the person's ability to present their case is severely impaired? Surely procedural accommodations should be allowed whenever there is reason to believe that they might make it easier for the person to tell their story or simply decrease the person's level of distress. Instead of setting such a high threshold for recognition as a vulnerable person it would seem to make more sense to set a lower

© Janet Cleveland, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

initial threshold, but then to take into account the relative severity of the person's impairment when deciding whether measures with broader systemic implications, such as priority scheduling, are warranted.

Identification of Vulnerable Persons

A person may be identified as vulnerable at any stage of the proceedings, preferably at the earliest opportunity.[15] The member assigned to hear the case on the merits is not bound by an identification made prior to the hearing.[16] Thus, the assigned member can recognize a person's vulnerability and order procedural adjustments even if this was refused before the hearing, but can also reverse a pre-hearing decision identifying the person as vulnerable. This latter perspective is liable to generate anxiety for the vulnerable person, which would seem to defeat the purpose of pre-hearing identification. It is to be hoped that assigned members will refrain from modifying pre-hearing decisions unless new evidence has been submitted.

Designated Representative

A designated representative will only be appointed if the person is either under eighteen years of age or unable to appreciate the nature of the proceedings,[17] a standard which is considerably narrower than the criteria for recognition as a vulnerable person.[18] In a number of cases, the Board has refused to appoint a designated representative but has gone on to recognize that the person was vulnerable and allowed procedural accommodations.[19] On the other hand, if an adult's ability to understand the proceedings is so impaired as to warrant the appointment of a designated representative, she is necessarily also severely impaired in her ability to present her case and should automatically be considered vulnerable.

Nature of Procedural Accommodations

The Board has "a broad discretion to tailor procedures to meet the particular needs of a vulnerable person"[20] such as allowing the person's lawyer to proceed first, allowing the presence of a support person, creating a more informal setting, or "any other procedural accommodation that may be reasonable in the circumstances".[21] Proceedings involving vulnerable persons should generally be scheduled on a priority basis given that the anxiety generated by delays may be particularly detrimental for such persons.[22] When questioning a vulnerable person, the Board must "attempt to avoid traumatizing or re-traumatizing" the person.[23] More specifically, Board members and Refugee Protection Officers are encouraged to adopt the approach outlined in the IRB's *Training Manual on Victims of Torture* in all cases involving vulnerable persons.[24] The *Training Manual* will be discussed in greater detail below.

Establishing Vulnerability: Expert Reports and Other Forms of Evidence

Although an expert report or other independent credible evidence is the preferred way to prove vulnerability,[25] this is not obligatory.[26] In several cases, the IRB has concluded that a person was vulnerable based on a letter from counsel describing behaviour consistent with mental health problems. There have also been cases in which the Board recognized the person as vulnerable and ordered an early hearing on its own initiative based simply on the claimant's Personal Information Form (PIF) as well as behaviour observed by Board staff.[27] The absence of expert evidence will not necessarily lead to a negative inference concerning vulnerability; the Board must consider whether it was "reasonably possible" to obtain such evidence.[28] It remains to be seen whether the often prohibitive cost of an expert assessment will be taken into account when deciding whether it was reasonably possible to submit such evidence.

The decision as to whether a person is vulnerable and needs procedural accommodations will almost always be made before the hearing on the merits begins, and therefore before the Board has had the opportunity to assess the person's credibility.[29] The Guideline clearly envisages that the decision as to vulnerability will generally be made on the basis of allegations whose credibility has not been tested.[30] Indeed, it specifies that identifying a person as vulnerable does not imply that the underlying facts are true or that the case is well-founded.[31]

On the other hand, the Guideline also states, "The weight given to the [expert's] report will depend, among other things, on the credibility of the underlying facts in support of the allegation of vulnerability.[32] This rule is relevant when the Board is deciding the merits of the case after hearing the claimant's testimony, although often applied too restrictively. However, it will rarely be relevant to a Guideline 8 application. At this stage of the proceedings the Board is not dealing with issues that lie within its exclusive jurisdiction, namely assessment of the person's credibility and of the merits of their claim, but rather with an issue that is primarily within the field of expertise of mental health professionals, namely psychological impairment. In almost all cases involving Guideline 8 applications, the Board has not had the opportunity to hear the applicant and assess her credibility, so it is hard to see on what basis the Board can override the conclusions of a mental health professional who has interviewed or treated the person and reached the professional opinion that she is psychologically fragile.

In short, if a qualified mental health professional submits a reasonably detailed report based on an assessment conducted according to professional standards and concludes that the person has mental health problems likely to impair her abil-

© Janet Cleveland, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

ity to present her case, this should be treated as conclusive proof of vulnerability for the purpose of procedural accommodations. On the other hand, the decision as to which procedural accommodations are appropriate remains within the Board's discretion insofar as it involves balancing the needs of the vulnerable claimant and the limitations inherent to Board resources and procedures, although significant weight should be given to the mental health professional's suggestions in this regard.

The fact that a person is initially identified as vulnerable does not prevent the Board member assigned to the case from rejecting the person's claim on the merits.[33] Conversely, the decision regarding vulnerability should be kept separate from the merits of the case. A person may be genuinely in need of procedural accommodations even if there are indications that her case is not well-founded. The right to procedural accommodations is based on the right to a fair hearing irrespective of the merits of the case. Even if there are serious inconsistencies or defects in pre-hearing procedures, this should not be taken into account when deciding an application for procedural accommodations, precisely because such inconsistencies or defects may well be linked to the person's impairment. For example, if an asylum seeker fails to disclose sexual abuse until shortly before the hearing or makes contradictory statements, this should not be held against her when deciding whether she is vulnerable.

Decisions Involving Guideline 8

The IRB does not formally track decisions involving Guideline 8, so no precise figures are available. However, an informal tracking mechanism initiated in mid-2007 shows that there have been very few applications under the Guideline since its adoption. Refugee Protection Division (RPD) records indicate that, as of May 2008, there had been approximately twenty-four decisions in Montreal concerning applications to have a person declared vulnerable, twenty-one in Toronto, and thirteen in Vancouver.[34] This is a tiny number, especially compared to the number of decisions rendered by the RPD each year. Although no figures were available for the other two IRB divisions, the situation there appears to be similar. Note that it is impossible to track cases in which Guideline 8 may have been cited orally during a hearing in support of a request for some form of procedural adjustment if this was not mentioned in the final decision.

The dearth of applications under Guideline 8 is all the more surprising given that very few have been refused. According to the internal RPD figures mentioned above, two out of twenty-four applications were refused in Montreal, two out of twenty-one in Toronto, and three out of thirteen in Vancouver, for an overall refusal rate of about 8 per cent. Furthermore, in several cases in which the Board refused to identify the person as vulnerable, it nonetheless made certain procedural accommodations. These figures suggest that there is a willingness on the part of the Board to make procedural accommodations where warranted, and that counsel should perhaps consider making greater use of Guideline 8 when there is reason to believe that the client is likely to have serious difficulty dealing with IRB proceedings.

For the period between December 2006 and July 2008, I found[35] eleven cases citing Guideline 8,[36] including an RPD decision and two Federal Court decisions which I will discuss in greater detail because they illustrate some of the Guideline's potential limitations.

Refugee Protection Division Decision

In a domestic violence case involving a fifty-seven-year-old Zimbabwean woman, the Board refused to recognize the applicant's vulnerability despite a detailed report in which the psychologist posed a diagnosis of post-traumatic stress disorder (PTSD) with significant depressive symptoms, affirming that the claimant had "experienced flashback and aversive emotional arousal during the interview" and that she had concentration and memory problems which would probably be exacerbated during the hearing.[37] The Coordinating Member wrote:

> I am not satisfied that the claimant's ability to present her case has been severely impaired within the meaning of subsection 2.1. The Guideline is not intended to apply to every case in which there has been serious trauma nor does it automatically apply in every case where PTSD (or other relevant disorder) has been diagnosed. There is no evidence in the present case of difficulties that are particularly severe or that cannot be handled in the usual manner. It simply does not meet the threshold under the Guideline.[38]

The member nonetheless accepted most of the procedural accommodations requested (female panel, informal hearing), but based his decision on the Guideline on Gender-Based Persecution rather than the Guideline on Vulnerable Persons.

This decision clearly illustrates the problems posed by the provisions limiting application of the Guideline to the "more severe cases of vulnerability"[39] in which the person's ability to present their case is "severely impaired."[40] In practice, the Board recognized that the claimant was in need of procedural accommodations, but refused to identify her as vulnerable under Guideline 8 for the sole reason that she was no more vulnerable than many other claimants. In my view, this result is completely contrary to the objectives of the Guideline. However, the fundamental problem lies not with the Board member's interpretation of the threshold criteria, although I

© Janet Cleveland, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

find it unduly restrictive, but rather with the criteria themselves.

As discussed above, restricting application of Guideline 8 to the very severely impaired is unfair. If there is credible evidence that the person is likely to have difficulty presenting her case before the Board, how can the fact that many other claimants experience similar difficulties justify a refusal to grant procedural accommodations that could help the person to more effectively present her case or simply reduce her distress? The decision to identify a person as vulnerable and to grant appropriate procedural accommodations should be based on the individual's limitations and needs, not on ranking the person on a scale of relative severity of impairment compared to other claimants. In other words, the fact that a large number of claimants may suffer from PTSD, depression, anxiety, or other forms of vulnerability cannot rationally justify refusal of procedural accommodations to those who actually need them simply because their level of impairment is unexceptional.

This decision also illustrates the potential for error inherent in allowing a Board member to override a mental health professional's report on an issue at the heart of the latter's expertise, psychological impairment, especially without having heard the claimant. The above-cited case of the Zimbabwean woman illustrates this point. The Board concluded that there was no reason to believe that her problems were particularly severe. To a mental health professional, however, her symptoms sound quite serious, particularly the fact that she displayed "flashback and aversive emotional arousal"[41] during the assessment interview. In clear, this indicates that as she was sitting in the psychologist's office recounting her traumatic experiences, she suddenly switched from remembering to actually reliving the experience, somewhat like a waking nightmare. During this flashback the woman showed signs of intense distress which probably included physiological reactions such as shaking, gasping, or sobbing. The psychologist also observed concentration and memory problems. This clinical picture strongly suggests that the woman would be likely to display similar symptoms during her refugee claim hearing, and that she was therefore a vulnerable person in need of procedural accommodations. Although the Board member in this instance was visibly competent and caring, he appears to have misjudged the severity of the claimant's impairment, probably in part because he did not fully understand the specialized terminology used by the psychologist.

Federal Court Decisions

At the time of writing, there have been only two Federal Court cases involving Guideline 8. In *Orozco*,[42] the Federal Court dismissed an application for judicial review of a decision refusing to reopen a refugee protection claim based on sexual orientation. The Court adopted a restrictive interpretation of Guideline 8, asserting that "a duty to accommodate above and beyond those already built into the IRB processes is triggered only in cases of severe vulnerability where an applicant's ability to present their cases [*sic*] is significantly and considerably impaired."[43] The Court also interpreted the Guideline's provisions concerning the content of expert reports as if they established minimal standards, whereas they are more likely intended as a "best practices" model aimed at helping clinicians understand what information should ideally be included in a full-fledged expert report.

Although both the RPD and the Federal Court discussed Guideline 8 at some length, it was arguably irrelevant to the proceedings. The initial claim was decided in 2005, before the adoption of Guideline 8. There was no allegation of vulnerability, no psychologist's report, and no request for procedural accommodations at the initial refugee protection hearing. Nor did subsequent counsel identify any accommodations that should have been made. The issue of vulnerability was first raised at the application to reopen, based on a psychologist's assessment conducted 15 months after the refugee hearing. The issue before both the RPD and the Federal Court was not whether the applicant was a vulnerable person as defined in Guideline 8, nor whether procedural accommodations should have been made, but instead, whether a breach of natural justice had occurred at the initial hearing.

In *Sharma*,[44] the Federal Court rejected an application for judicial review of a decision refusing refugee status to an Indian man who claimed to have been tortured by the police after a bomb went off in front of his office. His only son was also arrested and died of a brain hemorrhage while in police custody. The son's body carried multiple marks of torture.

The IRB (correctly, in my view) refused a pre-hearing application to designate a representative for the claimant and his wife but identified them as vulnerable and allowed them to be accompanied by a support person at the hearing, based on reports by the claimants' psychotherapist, social worker, and physician indicating that Mr. Sharma suffered from PTSD and depression. The medical report, citing X-ray results, also indicated that Mr. Sharma suffered from ongoing pain and limping due to a hip stress fracture, allegedly caused by having been suspended from the ceiling by his feet for extended periods during police interrogation. This was consistent with Indian hospital records documenting the treatment received immediately after the alleged torture. His wife was diagnosed with anxiety and major cardiac problems.

The Federal Court decision is troubling for two main reasons. First, the Federal Court asserts that it is entirely up to the Board member to decide whether the claimants' psychological vulnerability affected their ability to testify, without

© Janet Cleveland, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

even discussing the Board's decision to totally discount all four medical and psychological reports submitted by the claimants. In particular, the Court said nothing about the Board's complete failure to discuss the Canadian medical report linking the claimant's physical injuries to the alleged torture as well as confirming his psychological problems. This is contrary to the well-established principle that the Board must consider the psychological or medical evidence before it,[45] particularly a report based in part on objective evidence such as an X-ray.[46] Second, the Court concluded that "the Board member" was sensitive to the claimants' vulnerability and made the necessary procedural accommodations, ignoring the fact that two separate members were involved. Procedural accommodations were made by the Coordinating Member, who indeed seemed sensitive to the claimants' vulnerability, whereas the presiding member was openly confrontational and not in the least sensitive. The Court seems to imply that once procedural accommodations have been made, refugee claimants cannot subsequently argue that their psychological vulnerability prevented them from adequately presenting their case. This is incompatible with the remedial purpose of Guideline 8 and more particularly with s. 10.1, which states:

> The IRB ensures that all those who appear at its hearings or other proceedings are questioned with sensitivity and respect. This obligation is all the more important in the case of vulnerable persons. In probing the information provided by the person, the IRB will attempt to avoid traumatizing or re-traumatizing the vulnerable person.[47]

The fact that procedural accommodations have been made in no way decreases the Board's obligation to show a particularly high level of sensitivity and respect to vulnerable persons and to do everything in its power to avoid traumatizing them. This is incumbent on the Board in all cases in which a person has been recognized as vulnerable, without any need for counsel to explicitly remind the Board of its obligations.

In the *Sharma* case, the transcript of the IRB hearing shows that the Refugee Protection Officer and the presiding Board member, Sajjad Randhawa, took turns aggressively questioning the claimants, focusing on minute details and minor inconsistencies. Despite the chaotic and hostile manner in which he was questioned, the principal claimant's testimony was dignified and coherent. Indeed, the claimants told the same story throughout the proceedings, from the initial port-of-entry interview through detention proceedings to the refugee status hearing. The medical and psychological evidence was consistent with the claimant's description of the torture he underwent. After reading the entire Federal Court file, I believe that the Board hearing was profoundly unfair and that the Board decision flies in the face of the evidence. It would be of little theoretical interest to discuss the Board's decision in any detail because it focused on the particular facts of the case. Furthermore, the Board simply ignored that the claimants had been identified as vulnerable without discussing the issue.

It is perhaps paradoxical that, despite the hostile questioning and his well-documented psychological problems, Mr. Sharma's testimony was frank, plausible, and consistent. The problem did not lie with his inability to present his case, but rather with the Board member's failure to fairly and competently examine the evidence.

Is Serious Vulnerability Exceptional?

Guideline 8 is premised on the assumption that only a small proportion of the individuals appearing before the Board are vulnerable enough to require procedural accommodations. However, the scientific literature on psychological difficulties among adult asylum seekers suggests that this premise is erroneous (and this, without even taking into account vulnerabilities not due to mental health problems): first, because the prevalence of mental health difficulties tends to be quite high among asylum seekers during the first few years following their arrival, which is generally the period during which they will be involved in proceedings before the Board; and second, because many of these mental health problems are likely to impair the person's ability to adequately present their case before the Board. This question is too complex to examine in any depth in this paper, so I will just mention a few quick facts about the prevalence and impact of post-traumatic stress disorder and depression, the mental disorders that most commonly affect asylum seekers.

Asylum seekers are highly likely to suffer from PTSD and depression because they typically have been exposed to multiple traumatic events involving interpersonal violence, have suffered multiple losses, and are subject to considerable stress and insecurity linked to exile and the refugee claims process itself. The likelihood of developing PTSD is generally much higher in response to interpersonal violence, especially sexual violence, than following non-intentional trauma.[48] In addition, the probability of suffering from PTSD usually increases with the number of traumatic events to which the person is exposed.[49] In Mexico, for example, a study found that rates of PTSD were double the single-trauma rate among adults who had experienced two to three traumas, and triple the single-trauma rate among adults with four or more traumas.[50] Repeated traumatization not only increases the risk of developing PTSD but also reduces the likelihood of recovery, and is often associated with particularly severe and chronic mental health problems.

© Janet Cleveland, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

PTSD prevalence tends to be high in conflict zones. For example, a 1998 study of a large representative sample of the population of Algiers who had been exposed to widespread massacres for several years found that 37 per cent of the population had experienced full PTSD symptoms.[51] In countries that have gone through prolonged and extreme conflict, rates of PTSD may remain high for many years post-conflict. Thus, the same study found a PTSD prevalence of 28 per cent in a representative sample of the Cambodian population, some twenty years after the Khmer Rouge genocide and about eight years after low-intensity warfare had ended.[52] This is far higher than the 8 per cent lifetime prevalence in the United States.[53]

Individuals with PTSD are highly likely to also experience other mental disorders, particularly depression.[54] In Australia, for example, almost 60 per cent of individuals who had suffered from PTSD in the previous year had also experienced major depression during that period.[55] High rates of concurrent PTSD and depression are common among resettled refugees and asylum seekers.[56] Functional impairment is typically far greater among persons diagnosed with both PTSD and depression than those diagnosed with PTSD alone.[57]

Recurrent, involuntary, and distressing re-experiencing of the traumatic events is the hallmark of PTSD. Typically, the person is periodically flooded with vivid images (and sometimes sounds, smells and other bodily sensations) of the traumatic events, both during waking hours and in nightmares. Intrusive recollections are often triggered by reminders of the traumatic events, which may include seemingly innocuous cues (for example, seeing a red truck after a serious accident involving a similar vehicle).[58] Although traumatic memories are vivid, they are often narrowly focused on the core features of the event while peripheral features are not encoded.[59] For example, hold-up victims may be so intensely focused on the aggressor's gun that they do not register details of the person's face or clothing. Perception of time is often distorted in relation to traumatic events.[60] In some cases, confusion or inability to remember details about traumatic events may occur because the person is overwhelmed by intense emotions that paralyze her ability to think clearly (somewhat akin to "blanking out" because of severe anxiety about tests or public speaking). Insomnia and difficulty concentrating are also very common PTSD symptoms. These difficulties are compounded when the person is also depressed.[61] Depression frequently leads not only to difficulty concentrating and a general slowing of mental processes, but also to a general listlessness and sense of despair which may prevent the person from presenting their case convincingly. All of these symptoms can seriously impair claimants' ability to present their case during proceedings before the IRB.[62]

The IRB Training Manual on Victims of Torture

The IRB *Training Manual on Victims of Torture*[63] is, with some notable exceptions, a remarkably thorough, well-informed, and thoughtful document on dealing with asylum seekers and refugees who have been subjected to torture. As suggested in Guideline 8, much of the manual is also highly relevant when dealing with other vulnerable persons, particularly the many asylum seekers and refugees who have been exposed to other forms of organized violence such as rape, civil war, police brutality, death threats, domestic violence, and so on. The manual discusses issues such as the effect of post-traumatic stress on memory, concentration, and ability to tell one's story and the implications for credibility assessment. It also describes in considerable detail best practices for decision makers and RPOs when questioning vulnerable persons, advocating a technique based on the "Golden Rule," which is to "Let the claimants tell their stories in their own words and at their own pace."[64] The manual makes detailed suggestions for techniques to put the claimant at ease and build a relationship of respect and trust, as well as suggestions on how to approach sensitive topics such as torture or sexual abuse in a way that balances the need to probe the claim and test credibility, on the one hand, and to avoid re-traumatizing the claimant, on the other. Since Guideline 8 clearly encourages decision makers and RPOs to adopt the approach described in the *Training Manual* when dealing with vulnerable claimants, counsel could certainly draw upon it to support requests for a non-confrontational hearing in which the claimant is invited to describe the alleged incidents "in his or her own words and without interruption."[65]

Although the information in the *Training Manual on Victims of Torture* is generally excellent, it contains a number of seriously misleading statements in its section "Malingering and PTSD."[66] These misconceptions appear to be largely based on a single article by Michael R. Harris and Philip J. Resnick, a continuing education text designed to teach mental health professionals techniques for the differential diagnosis of suspected malingerers in a clinical setting.[67] The original article contains a number of oversimplifications, and the authors of the IRB *Training Manual* also appear to have misinterpreted some portions of the article. Here are some responses to the main misconceptions in the Training Manual's "Malingering and PTSD" section.

Misconception 1: Mental health professionals can be easily fooled by malingerers because diagnosis of PTSD and other mental disorders rests essentially on unverifiable self-reported symptoms. Mental disorders are easy to fake because defined

© Janet Cleveland, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

by subjective criteria and lists of symptoms are easily available.

This is similar to saying that IRB decision makers are easily fooled because their decision rests almost entirely on the claimant's testimony, with little independent evidence to corroborate or contradict it. While it is true that deciding refugee claims presents a challenge, competent decision makers who know how to question a claimant and assess credibility, who are well-informed about country conditions, and who carefully examine all the evidence should generally be able to make well-founded decisions (although, like mental health professionals, they are not infallible!).

Although Harris and Resnick do write that PTSD is easy to fake because it is defined almost completely by subjective criteria and because lists of symptoms are easily available, they then go on to describe a series of techniques that allow detection of such malingering. These elementary techniques are familiar to any competent mental health professional. For example, Harris and Resnick write:

> Inconsistency between the reported symptoms and clinical observations, the patient's reports and collateral history, symptom patterns with known psychiatric illnesses, or the patient's reported symptoms and their actual known functioning are all frequently seen in malingerers. Clinicians should be particularly careful to ask open-ended questions in suspected malingerers and let patients tell their complete story with few interruptions. Details can be clarified later with specific questions.[68]

Further, they also write:

> The clinician should insist on detailed descriptions of symptoms. Malingering patients may know which symptoms to report but may be unable to give convincing descriptions or examples from their personal life. Behavioral observations during the examination may assist in evaluating symptoms of irritability, exaggerated startle response and difficulty concentrating.[69]

Again, one can draw a parallel with situation facing a Board member listening to an asylum seeker reciting a story "acquired" from a smuggler. At one level, one might say that it is easy for asylum seekers to draw on published accounts of successful claims to concoct a story calculated to fool Board members. On the other hand, a skilful Board member will, in most cases, quickly realize that the claimant's story is paper-thin and that she is unable to elaborate on the background circumstances surrounding the fabricated narrative. Likewise, it is indeed relatively easy for would-be malingerers to find descriptions of psychiatric symptoms and to recite them during an assessment, but this definitely does not mean that they can easily deceive a competent professional.

Mental health professionals conducting a clinical assessment do not rely solely on the patient's self-reported symptoms (*e.g.*, nightmares, insomnia) but also base their assessment on direct observation of the patient's behaviour. According to DSM-IV criteria,[70] for example, clinicians cannot pose a diagnosis of PTSD on the basis of self-reported symptoms alone; they must also observe certain specific behaviours such as exaggerated startle response, hypervigilance, irritability, or difficulty concentrating during the assessment interview. Such behaviours are very difficult to fake. More generally, mental health professionals undergo years of training during which accurate diagnosis of mental disorders is of central importance, as well as seeing dozens, if not hundreds, of patients suffering from such disorders over the years. They learn to reliably recognize the constellation of self-reported symptoms and behaviours that characterize different disorders. Part of their job is to detect malingering or exaggeration of symptoms, not only for the purpose of expert reports but also in order to decide whether medication or other treatment is warranted.

Misconception 2: Mental health professionals are reluctant to consider the possibility of malingering, even in obvious situations, for fear of damaging the therapeutic relationship based on unconditional acceptance.

Mental health professionals perform two main functions, assessment and treatment, involving two distinct attitudes and skill sets. During assessment, the professional's main concern is to accurately identify the precise nature of the person's mental health problems. A clinical assessment typically involves a series of detailed questions about the person's current difficulties; their emotional, cognitive, and physical symptoms; the circumstances in which the symptoms first appeared and how they evolved over time; relevant family and personal history; current psychosocial circumstances that may impact the person's mental state. While questioning the patient, the clinician will of course be attentive to the behaviours indicative of the person's cognitive and emotional state, such as body language, facial expressions, paralinguistic cues, emotional expression, nervousness, slow reactions, apathy, etc. The clinician will also closely monitor the patient's narrative for any sign of concentration problems, incoherence, bizarre ideation, etc. In most cases, the clinician will have formed a working hypothesis quite early in the assessment process because the person's symptoms and behaviours fit a recognizable diagnostic pattern that the professional has learned to identify through years of training and experience. The rest of the interview will serve to test the hypothesis, to flesh out the diagnosis, and to better understand the needs of this particular patient. If clinicians note any apparent inconsistencies or exaggerations in the patient's account, they will probe further to determine whether this is a sign of ma-

© Janet Cleveland, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

lingering or, on the contrary, an indication that the person's problems are more severe than initially thought or that the diagnosis should be revised.

Accuracy is of paramount importance during assessment. Although making moral judgments about patients is to be avoided, making well-informed cognitive judgments about the patient's condition is at the heart of mental health professionals' expertise and training. Detection of malingering is important for clinical as well as forensic reasons in order to avoid prescribing unnecessary medications or other treatment.

During treatment, the role of the mental health professional shifts to a focus on empathic listening and support. This is the stage at which many schools of psychotherapy advocate an attitude of unconditional acceptance, which means that the therapist should listen to the patient and try to understand her on her own terms in order to build the relationship of trust that is essential to psychotherapy. Throughout the treatment process, however, the professional will continue to monitor behavioural and narrative cues in order to further refine the diagnosis.

Harris and Resnick's assertion that psychiatrists are often reluctant to consider the possibility of malingering is based on studies conducted in clinical contexts such as emergency rooms rather than a forensic context. They quite rightly point out that in a clinical context, mental health professionals should be cautious before concluding that a patient is malingering because of the risk of overlooking symptoms of suicidal ideation, potential psychotic decompensation, or other serious problems. Even patients who exaggerate or fabricate symptoms may well have other, genuine mental health problems. Again, there are parallels in the field of refugee protection. For example, individuals who have genuinely suffered persecution sometimes make the mistake of basing their claim for asylum on a fabricated story because some unscrupulous smuggler has assured them that it's a winner. Others may lie about certain facts out of fear that they might be detrimental to their claim. Although lie detection is important, clinicians need to keep in mind that a person who malingering or exaggerating symptoms may be genuinely ill, just as IRB decision makers should remind themselves that a person who is lying or embellishing may nonetheless be a genuine refugee.

Misconception 3: "Psychiatrist's ability to detect lies in strangers is little better than chance" and their confidence in their ability to detect malingering is unrelated to their actual ability.

This statement is extraordinarily misleading. In support of this assertion, Harris and Resnick quote Paul Ekman's 1985 book *Telling Lies*.[71] In fact, Ekman states that scientific studies show that "few people do better than chance in judging whether someone is lying or truthful,"[72] and that this applies not only to the general population but also to professionals whose job involves detection of deception, be they psychiatrists, police officers, polygraph examiners, or others. Furthermore, the person's confidence in their ability to detect lies is unrelated to their actual ability. In the twenty years since Ekman wrote these words, multiple scientific studies of deception detection have confirmed his findings, consistently showing that not only psychiatrists and clinical psychologists, but also judges, police officers, customs officials, parole officers, polygraph examiners, and auditors are on average no better than non-professionals in detecting deception, which means little better than chance.[73] A recent paper reviewing the results of over two hundred scientific studies involving a total of more than 24,000 participants confirmed that professionals whose job involves detection of deception were in general no more accurate at lie detection than the general population, and that average accuracy is about 54 per cent (just 4 per cent better than chance).[74] The only professional groups who appeared to be somewhat more accurate at detecting deception were US Secret Service and CIA agents, although this finding may well be spurious because of small group size.[75] Psychiatrists and clinical psychologists were at least as good as US federal and state judges at distinguishing truth from lies, although both judges and mental health professionals were only very slightly better than the general population.[76] The same studies show that there is little or no relation between confidence in one's ability to detect deception and actual ability. On the other hand, some individuals are consistently above average in their ability to detect deception, but this appears to be linked to their cognitive style rather than to their profession, gender, age, or other demographic characteristics.[77] Several studies indicate that observing a person over a longer period of time and, better yet, in different contexts tends to increase accuracy.[78]

Studies of deception detection generally involve viewing a brief videotaped excerpt of a person either lying or telling the truth about a particular event. This is similar to the task facing a mental health professional or an IRB decision maker who is trying to decide whether a refugee claimant is telling the truth about the traumatic events experienced in the country of origin. However, it may well be somewhat different from the main task performed by mental health professionals during assessments, which is to determine whether a constellation of symptoms and behaviours are consistent with a typical diagnostic picture. In the latter case, the clinician is comparing the symptoms displayed and recounted by the patient to a diagnostic template. It would seem plausible that it would be easier for a clinician to accurately identify symptoms that are inconsistent with a diagnostic template about which she is an expert than to judge the veracity of a narrative about a unique incident, which cannot be compared to a template and about which the listener has no

© Janet Cleveland, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

specialized knowledge. In other words, I would predict that mental health professionals' ability to detect malingering would generally be considerably better than chance because this involves identifying deviations from a characteristic pattern of symptoms that the professional has seen many times before. Be that as it may, the one thing that has been conclusively demonstrated by multiple scientific studies is that mental health professionals are at least as good as judges, customs officials, police officers, or the general population at distinguishing truth from lies.

Misconception 4: Mental health professionals "may" rely solely on symptom checklists or leading questions or self-reporting, not spend enough time with the patient, be swayed by vivid stories, not be sufficiently knowledgeable, or be otherwise incompetent or unprofessional

The *Training Manual* states that there are "a number of reasons why a claimant might be able to fool the ordinary professional," notably because professionals "may" engage in a host of poor practices such as relying solely on leading questions or symptom checklists, not spending enough time with the patient, being swayed by vivid stories, not being sufficiently knowledgeable, and so on.[79] This highly prejudicial assertion is purely hypothetical: a claimant "might" be able to fool a professional, who "may" be incompetent. There is absolutely no evidence as to the frequency of such practices. Obviously, in any profession, be it mental health, law, or any other, one can find individuals who are unethical or do shoddy work. This says nothing about the integrity or competence of the profession as a whole.

Some of the examples of supposed shoddy practices by mental health professionals are visibly based on misinterpretation of the quoted source. For example, the manual states, "In one study the use of leading questions or symptom checklists allowed malingerers unfamiliar with psychiatric disorders to qualify for diagnoses of major depression and posttraumatic stress disorder."[80] In fact, this was a study in which college students were provided with a list of symptoms drawn from the DSM-IV description of four disorders, including PTSD and depression, and asked to check off the symptoms that they thought were experienced by people suffering from these disorders.[81] Not surprisingly, faced with a list of symptoms, a large proportion of the college students were able to guess which ones to endorse. This is very different from convincing a mental health professional that one is actually experiencing such symptoms during a face-to-face assessment interview or therapy session.

In the real world, mental health professionals do not pose a diagnosis of PTSD or depression or any other diagnosis based only on the patient's answers to a symptom checklist. To do so would be contrary to elementary professional ethics. In addition, many diagnoses cannot be made solely on the basis of self-reported symptoms. Before posing a diagnosis of PTSD, for example, the clinician must also observe certain behaviours and be convinced that the person's ability to function in daily life is at least somewhat impaired. If used at all in the context of a clinical assessment, questionnaires are filled out after the interview as an additional means to check the diagnosis. Symptom checklists are primarily used for research, particularly in the context of anonymous studies in which respondents have no incentive to invent or exaggerate symptoms.

Other assertions, such as "The professional may not spend enough time with the claimant" or "may not being [sic] sufficiently knowledgeable about PTSD and/torture [sic]"[82] are not sourced and appear to be purely gratuitous. The manual certainly provides no evidence to support them.

The reason that I have discussed at such length the *Training Manual*'s misleading statements about mental health professionals is that such negative stereotypes of mental health professionals appear to be quite pervasive within the IRB. This impression is based on interviews with former Board members and on analysis of a large number of recent Refugee Protection Division decisions (2004–2008) involving psychiatric or psychological evidence. It is certainly disturbing to read such caricatural negative stereotypes in the *Training Manual on Victims of Torture*, which is otherwise a very thoughtful and well-researched document. Even more disturbing, this type of negative stereotyping too often leads Board members to discount expert reports written by competent mental health professionals and based on thorough clinical assessments.

Conclusion

The adoption of the *Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB* is clearly an important step in the right direction. Thus, it explicitly recognizes the principle that vulnerable persons appearing before the Board have the right to procedural accommodations to ensure that they receive a fair hearing. The Guideline defines sources of vulnerability in broad and inclusive terms and confirms that Board members have considerable discretion to devise procedural accommodations tailored to fit the vulnerable person's particular needs. Decision makers are strongly encouraged to adopt the approach proposed in the *Training Manual on Victims of Torture* when questioning vulnerable persons in order to minimize re-traumatization. So far, the Board has accepted most applications made under Guideline 8, indicating that there is a genuine desire to take the needs of vulnerable persons into account.

For the moment Guideline 8 serves only to provide procedural accommodations. However, one can reasonably argue that in order to achieve the Guideline's stated purpose of ensuring that vulnerable persons are not disadvantaged in

© Janet Cleveland, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

presenting their case, Board members should also take such persons' psychological difficulties into account when assessing their credibility. Such an interpretation would go a long way toward making the refugee protection processes fairer.

However, there are a number of problems with the Guideline. First, limiting application of the Guideline to cases involving exceptionally severe impairment is unduly restrictive. Procedural accommodations should be permitted whenever there is reason to believe that they might make it easier for the person to tell her story or decrease her level of distress. Second, Board members do not have the expertise to review a mental health professional's opinion as to the applicant's mental health status. For the purpose of procedural accommodations, a report by a qualified mental health professional concluding that the person has mental health problems likely to impair her ability to present her case should be treated as conclusive proof of vulnerability.

Ultimately, though, the main problem with Guideline 8 is the fact that it is purely procedural and does not address the many other problems faced by vulnerable asylum seekers and permanent residents, briefly outlined in the introduction to this paper. There is an urgent need for immigration authorities, refugee rights advocates, and mental health professionals to make a concerted effort to develop policies designed to better meet the needs of vulnerable persons. It is to be hoped that the *Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB* will prove to be the first step on a long road toward greater fairness for vulnerable persons seeking protection in Canada.

Notes

1. Guideline 8 – Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada, online: Immigration and Refugee Board, <http://www.irb-cisr.gc.ca/en/references/policy/guidelines/vulnerable_e.htm#note1> [Guideline on Vulnerable Persons].
2. *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27, s. 58(3).
3. UK Home Office guidelines state that detainees should be given a physical and psychological examination within twenty-four hours of admission and that torture survivors should never be detained other than in exceptional cases. In December 2008, the UK government was condemned to pay £38,000 in damages to a female torture survivor from Cameroon who had been unlawfully detained after seeking asylum in the UK. *Torture survivor's six-month detention in UK signals urgent need for asylum reform*, Medical Foundation for the Care of Victims of Torture, online: <http://www.torturecare.org.uk/news/latest_news/2294> (date accessed: 8 January 2009).
4. C.Y.R (Re), [2008] RPDD 10 (QL).
5. *TWQ (Re)* [2007] RPDD No. 26 (QL), *X (Re),* 2007 CanLII 49705 (IRB).
6. *Training Manual on Victims of Torture*, online: Immigration and Refugee Board, <http://www.irb-cisr.gc.ca/en/about/tribunals/rpd/victorture/index_e.htm)> [*Training Manual*].
7. *Guideline on Vulnerable Persons*, *supra* note 1, ss. 1.4, 2.1, 3.1.
8. *Ibid.*, s. 1.5.
9. *Ibid.*, s. 5.1.
10. *Ibid.*, s. 3.3.
11. *Ibid.*, ss. 1.5, 2.1.
12. *Ibid.*, s. 1.2, 2.2.
13. *Ibid.*, s. 2.3.
14. *Ibid.*, s. 1.5, note 3.
15. *Ibid.*, s. 7.1.
16. *Ibid.*, s. 7.5.
17. *Immigration and Refugee Protection Act*, *supra* note 2, c. 27, s. 167(2); and *Guideline on Vulnerable Persons*, *supra* note 1, s. 12.1.
18. *Sharma c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2008] CF 908 [*Sharma*].
19. *C.H.F.(Re),* [2007] RPDD 9 (QL), *X (Re)*, [2007] CanLII 47772 (IRB); *Sharma, supra* note 18.
20. *Guideline on Vulnerable Persons*, *supra* note 1, s. 4.1.
21. *Ibid.*, s. 4.2h).
22. *Ibid.*, s. 9.
23. *Ibid.*, s. 10.1.
24. *Ibid.*, s. 10.1, note 10.
25. *Ibid.*, ss. 2.4, 7.3.
26. *Ibid.*, ss. 7.3, 8.6.
27. Information provided by Marie Chevrier and Patricia Auron of the IRB.
28. *Ibid.*, s. 2.4, 7.3, 8.6.
29. *Ibid.*, s. 5.1.
30. *Ibid.*, ss. 5.2, 5.3.
31. *Ibid.*, s. 5.2.
32. *Ibid.*, s. 8.5.
33. *Ibid.*, s. 5.2.
34. Information provided by Marie Chevrier and Patricia Auron of the IRB.
35. A search of the Federal Court, RefLex, Canada Legal Information Institute (IRB), and Quicklaw (IRB) databases was last carried out on January 8, 2009, using the following keywords: (refugee and vulnerable and guideline) OR "Guideline on Procedures with Respect to Vulnerable"
36. In *Canada (Citizenship and Immigration) v. Jama*, [2007] CanLII 12831 (IRB), the Immigration Division refused to compel the Minister to issue a Danger Opinion concerning a detained refugee, noting that Guideline 8 does not apply to the Minister's officers; in *Evdokimov v. Canada (Public Safety and Emergency Preparedness)*, [2007] CanLII 47283 (IRB), the Immigration Appeal Division rescinded a removal order against a permanent resident with schizophre-

© Janet Cleveland, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

nia and substance abuse who had committed numerous criminal offenses, alluding briefly to the Guideline; in *XZA (Re)* [2007] RPDD 19 (QL), *X (Re)* [2007] CanLII 48212 (IRB), the Board accepted to reopen the case of a fourteen-year-old girl who, after her initial hearing, disclosed to her therapist that she had undergone severe sexual and physical abuse by relatives in her country of origin; in *TWQ, supra* note 5, an Ethiopian woman with bipolar disorder was allowed to submit a substantially amended Personal Information Form (PIF) after admitting that her original narrative was untruthful, and was later accepted as a refugee based on the risk of severe stigmatization; in *CHF (Re),* [2007] RPDD 9 (QL), *X (Re)*, [2007] CanLII 47772 (IRB), a Rwandan genocide survivor with PTSD was identified as vulnerable based on a psychologist's report indicating that he was very reluctant to talk about his experiences and tended to become confused about some of the details of his story; in *HKL (Re),* [2007] RPDD 9 (QL), *X (Re),* [2007] CanLII 47401 (IRB), a young intellectually handicapped Albanian woman who claimed to have been raped by her boyfriend was considered vulnerable; in *SXV (Re),* [2007] RPDD 41, *X (Re)* [2007] CanLII 60075 (IRB), a sixteen-year-old girl who had suffered severe sexual abuse was considered vulnerable; in *X (Re),* August 1, 2007, RPD file TA6-14695, a woman with chronic PTSD and intermittent memory problems due to a subarachnoid hemorrhage following a cerebral aneurysm was identified as vulnerable.

37. *IYT (Re),* [2007] RPDD 14 (QL), *X (Re),* 2007 CanLII 47287 (IRB).
38. *Ibid.* at para. 10.
39. *Guideline on Vulnerable Persons*, *supra* note 1,s. 2.3.
40. *Ibid.*, s. 2.1.
41. *IYT, supra* note 39 at para. 4.
42. *Orozco v. Canada (Citizenship and Immigration)* 2008 FC 270, affirming *BIP (Re)*[2007] RPDD 20 (QL), X (Re), [2007] CanLII 47726 (IRB)
43. *Ibid.* at para. 30.
44. *Sharma c. Canada (Citoyenneté et Immigration)* 2008 CF 908, affirming Kirpal Sharma and Santi Sharma, December 13, 2007, RPD files MA6-04257 & MA6-04258.
45. See *e.g. Afonso v. Canada (Minister of Citizenship and Immigration)* [2007] FC 51; *Villarreal Zempoalte v. Canada (Citizenship and Immigration)* [2007] FC 263; *Assouad v. Canada (Minister of Citizenship and Immigration) [2006] FC 955;* Henry v. Canada (Minister of Citizenship and Immigration) *[2006] FC 1060;* Myle v. Canada (Minister of Citizenship and Immigration) *[2006] FC 871*; Sivarajathurai v. Canada (Minister of Citizenship and Immigration) *[2006] FC 905;* Tesema v. Canada (Minister of Citizenship and Immigration) *[2006] FC 1417;* Martinez Martinez v. Canada (Minister of Citizenship and Immigration) *[2006] FC 403;* Ruiz v. Canada (Minister of Citizenship and Immigration) *[2005] FC 1339.*
46. *See* Ameir v. Canada (Minister of Citizenship and Immigration) *[2005] FC 876.*
47. Guideline on Vulnerable Persons*,* supra *note 1, s. 10.1.*
48. Ronald C. Kessler *et al*., "Posttraumatic Stress Disorder in the National Comorbidity Survey" (1995) 52 *Archives of General Psychiatry* 1048; Ronald C. Kessler, "Posttraumatic Stress Disorder: The Burden to the Individual and to Society" (2000) 62:suppl. 5 *Journal of Clinical Psychiatry* 4; Naomi Breslau *et al*., "Trauma and Posttraumatic Stress Disorder in the Community" (1998) 55 *Archives of General Psychiatry* 626; Naomi Breslau, "Epidemiology of Trauma and Posttraumatic Stress Disorder" in Rachel Yehuda, ed., *Psychological Trauma* (Washington, DC: American Psychiatric Association Press, 1998), at 1–29; Mark Creamer, Philip Burgess, & Alexander C. McFarlane, "Post-traumatic Stress Disorder: Findings From the Australian National Survey of Mental Health and Well-being" (2001) 31 *Psychological Medicine* 1237; Fran H. Norris *et al*., "Epidemiology of Trauma and Posttraumatic Stress Disorder in Mexico" (2003) 112 *Journal of Abnormal Psychology*.
49. Grant N. Marshall *et al.*, "Mental Health of Cambodian Refugees 2 Decades After Resettlement in the United States" (2005) 294 *Journal of the American Medical Association* 571; Richard F. Mollica *et al.*, "Dose-effect Relationships of Trauma to Symptoms of Depression and Post-traumatic Stress Disorder Among Cambodian Survivors of Mass Violence" (1998) 173 *British Journal of Psychiatry* 48; Norris *et al*., *supra* note 48; Zachary Steel *et al*., "Long-term Effect of Psychological Trauma on the Mental Health of Vietnamese Refugees Resettled in Australia: A Population-based Study" (2002) 360 *The Lancet*.
50. Norris *et al.*, *supra* note 48.
51. Joop T. V. M. de Jong *et al.*, "Lifetime Events and Posttraumatic Stress Disorder in 4 Postconflict Settings" (2001) 286 *Journal of the American Medical Association* 555.
52. *Ibid.*
53. Kessler *et al*., *supra* note 48; Kessler, *supra* note 48.
54. Breslau, *supra* note 48; Creamer, Burgess, & McFarlane, *supra* note 48; Kessler *et al.*, *supra* note 48; Marshall *et al.*, *supra* note 49; Richard F. Mollica *et al.,* "Longitudinal Study of Psychiatric Symptoms, Disability, Mortality, and Emigration Among Bosnian Refugees" (2001) 286 *Journal of the American Medical Association* 546; Shakeh Momartin *et al*., "Comorbidity of PTSD and Depression: Associations With Trauma Exposure, Symptom Severity and Functional Impairment in Bosnian Refugees Resettled in Australia" (2004) 80 *Journal of Affective Disorders* 231; Arieh Y. Shalev *et al*., "Prospective Study of Posttraumatic Stress Disorder and Depression Following Trauma" (1998) 155 *American Journal of Psychiatry* 630.
55. Creamer, Burgess, & McFarlane, *supra* note 48.
56. Marshall *et al*., *supra* note 49; Shakeh Momartin *et al*., "Dimensions of Trauma Associated With Posttraumatic Stress Disorder (PTSD) Caseness, Severity and Functional Impairment: A Study of Bosnian Refugees Resettled in Australia" (2003) 57 *Social Science & Medicine* 775; Momartin *et al.*, *supra* note 54; Derrick Silove *et al.*, "Anxiety, Depres-

© Janet Cleveland, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

sion and PTSD in Asylum seekers: Association with Pre-migration trauma and post-migration stressors" (1997) 170 *British Journal of Psychiatry* 351.

57. Richard F. Mollica et al., "Disability Associated With Psychiatric Comorbidity and Health Status in Bosnian Refugees Living in Croatia," *Journal of the American Medical Association* 281 (1999): 433–439; Momartin *et al.*, "Comorbidity of PTSD and Depression," *supra* note 54; Momartin *et al.*, "Dimensions of Trauma," *supra* note 56; Shalev *et al.*, *supra* note 54.
58. Anke Ehlers, Ann Hackmann, & Tanja Michael, "Intrusive Re-experiencing in Post-traumatic Stress Disorder: Phenomenology, Theory, and Therapy" (2004) 12 *Memory* 403.
59. Sven-Ake Christianson, "Emotional Stress and Eyewitness Memory: A Critical Review" (1992) 112 Psychological Bulletin 284; Jane Herlihy, Peter Scragg, & Stuart Turner, "Discrepancies in Autobiographical Memories—Implications for the Assessment of Asylum Seekers: Repeated Interviews Study" (2002) 324 *British Medical Journal* 324.
60. Ehlers, Hackmann, & Michael, *supra* note 58; Robert J. Ursani, Carol S.Fullerton, & David M. Benedek, "Peritraumatic dissociation: Time perception and cerebellar regulation of psychological, interpersonal, and biological processes," in Eric Vermetten, Martin Dorahy, & David Spiegel, eds., *Traumatic Dissociation: Neurobiology and Treatment* (Washington, DC: American Psychiatric Publishing, 2007).
61. Momartin *et al.*, "Comorbidity of PTSD and Depression," *supra* note 54.
62. Herlihy, Scragg, & Turner, *supra* note 59; Cécile Rousseau *et al.*, "The complexity of determining refugeehood: A multidisciplinary analysis of the decision-making process of the Canadian Immigration and Refugee Board" (2002) 15:1 *Journal of Refugee Studies* 43; Zachary Steel, Naomi Frommer, & Derrick Silove, "Part I—The mental health impacts of migration: the law and its effects. Failing to understand: refugee determination and the traumatized applicant" (2004) 27 *Int'l. J.L. & Psychiatry* 511.
63. *Training Manual*, *supra* note 6.
64. *Ibid.* at 26.
65. *Ibid.* at 36.
66. *Ibid.* at 43–47.
67. Michael R. Harris and Philip J. Resnick, "Suspected Malingering: Guidelines for Clinicians" (2003) 20 *Psychiatric Times* 68.
68. *Ibid.* at 69.
69. *Ibid.* at 72.
70. *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Washington, D.C.: American Psychiatric Association, 1994) [DSM-IV].
71. Paul Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage* (New York: Norton, 1985).
72. *Ibid.* at 162.
73. Charles F. Bond, Jr., & Bella M. DePaulo, "Accuracy of Deception Judgments" (2006) 10:3 Personality and Social Psychology Review 214; Paul Ekman & Maureen O'Sullivan, "Who Can Catch a Liar?" (1991) 46:9 *American Psychologist* 913; Paul Ekman, Maureen O'Sullivan, & Mark G. Frank, "A Few Can Catch a Liar" (1999) 10:3 *Psychological Science* 263; Eugenio Garrido, Jaume Masip, & Carmen Herrero, "Police Officers' Credibility Judgments: Accuracy and Estimated Ability" (2004) 39:4 *International Journal of Psychology* 254; Stephen Porter, Mike Woodworth, & Angela R. Birt, "Truth, Lies, and Videotape: An Investigation of the Ability of Federal Parole Officers to Detect Deception" (2000) 24:6 *Law and Human Behavior* 643; Aldert Vrij, *Detecting Lies and Deceit: The Psychology of Lying and the Implications for Professional Practice (*Chichester: Wiley, 2000); Aldert Vrij & Samantha Mann, "Who killed my relative? Police Officers' ability to detect real-life high-stake lies" (2001) 7:2 *Psychology, Crime & Law* 119.
74. Bond & DePaulo, *supra* note 73.
75. *Ibid.*; Ekman, O'Sullivan, & Frank, *supra* note 73.
76. Ekman & O'Sullivan, *supra* note 73; Ekman, O'Sullivan, & Frank, *supra* note 73.
77. Ekman & O'Sullivan, *supra* note 73; Garrido, Masip, & Herrero, *supra* note 73; Porter, Woodworth, & Birt, *supra* note 73; Vrij, *supra* note 73.
78. Garrido, Masip, & Herrero, *supra* note 73; Porter, Woodworth, & Birt, *supra* note 73; Vrij, *supra* note 73.
79. *Training Manual*, note 65 at 44.
80. *Ibid.* at 44, note 52.
81. Paul R. Lees-Haley and John T. Dunn, "The Ability of Naive Subjects to Report Symptoms of Mild Brain Injury, Post-Traumatic Stress Disorder, Major Depression, and Generalized Anxiety Disorder" (1994) 50:2 *Journal of Clinical Psychology* 252.
82. *Training Manual*, note 65 at 45.

Janet Cleveland, Ph.D., is a researcher on refugee protection issues affiliated with the Research Institute of the McGill University Health Centre and the McGill University Oppenheimer Chair in International Public Law. She is also a clinical psychologist and former lawyer. *Funding for the study on which this article is based was provided by a grant from the Canadian Institutes of Health Research to a research team composed of Cécile Rousseau (Principal Investigator), Janet Cleveland, François Crépeau, and Laurence Kirmayer.*

© Janet Cleveland, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Abandoning Refugees? An Analysis of the Legal Framework Governing Non-compliant Claimants in Canada

Martin Jones

Abstract

The refugee status determination (RSD) process in Canada, like the RSD processes of other states, currently rejects one in fifteen refugee claims based upon the non-compliance of refugee claimants with the rules of the process. Most commonly this is due to a claimant's failure to provide requested information or his or her failure to attend a scheduled hearing. These "abandonment" decisions result in the expedited removal of claimants without access to further review. Despite the drastic consequences of such decisions, the framework within which they are made neither has been comprehensively outlined nor has its application been catalogued, which is the aim of this paper. It argues that while the formal provisions of the domestic framework are both inconsistent with international law and in excess of the delegated authority through which it is constructed, the Court's application of the framework has been generous to refugee claimants.

Résumé

Le processus de détermination du statut de réfugié (DSR) au Canada, tout comme les processus de DSR d'autres états, rejette actuellement une revendication du statut de réfugié sur quinze, basé sur le non-respect des règlements du processus par les demandeurs du statut de réfugié. Le plus souvent, la raison est qu'un demandeur n'a pas soumis les informations demandées, ou ne s'est pas présenté à une audience régulière. Ces décisions pour « abandon » donnent lieu à un processus accéléré de renvoi des demandeurs sans accès supplémentaire à un réexamen. Malgré les conséquences drastiques de telles décisions, le cadre dans lequel elles sont faites n'a pas été suffisamment élaboré dans tous ses détails, ni leur application cataloguée, ce qui est l'objectif de cet article.

The most likely outcome of a refugee claim in Canada is acceptance. However, another highly possible outcome is abandonment. In the first half of 2008, out of a total of 8,311 decisions made in refugee claims, 535 (or 6 per cent) were decisions to declare a refugee claim to have been abandoned.[1] In some offices of the Immigration and Refugee Board (the Board), abandonment decisions account for one-tenth of decisions rendered.[2] Abandonment can be the outcome of an even larger percentage of refugee claims in Canada from certain countries of origin.[3] Even countries of origin with very high rates of acceptance can be plagued by significant numbers (both absolutely and relatively) of abandoned refugee claims. Furthermore, the issue of abandonment is not particular to Canada. In recent years in the United Kingdom refusals because of "non-compliance" have accounted for a similar proportion of decisions rendered.[4] In 2008, the practice of Greece in declaring as "interrupted" very large numbers of cases attracted condemnation by the United Nations High Commissioner for Refugees (UNHCR).[5]

It has been suggested that these high rates of abandonment decisions raise concerns regarding the population of refugee claimants in Canada (and elsewhere). These concerns have commonly prompted the drafting of provisions allowing for the expedited removal of individuals who abandon their requests for asylum. Such provisions simply raise the ante for the refugee claimant and underscore the potentially catastrophic consequences of an abandonment decision. Yet despite accounting for a sizable percentage of refugee claim outcomes, the law governing the abandonment of refugee claims in Canada (and elsewhere) has not been the object of study. The purpose of this paper is to explore the legal frameworks which govern the manner in which these refugee claimants are dealt with by the administrative tribunals and courts of Canada charged with deciding their cases. The non-compliance of such claimants with the administrative machinery used to determine their worthiness for protection

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

poses a conundrum: to what extent is compliance with the procedures of the country of asylum required in order to be entitled to its protection?

The answer to this question must be discerned within the bounds of the legal frameworks governing abandonment decisions, both international and domestic. The latter largely restrict abandonment decisions to situations where a claimant has failed to provide required information or to attend his or her hearing before the decision maker. Unfortunately, in determining whether either of these circumstances has occurred the latter domestic framework in significant ways is inconsistent with Canada's international obligations and its own schema of delegated authority. However, while the judiciary have failed to explicitly address these failings in the domestic frameworks, their decisions have read into the framework a requirement of intention that in many ways implicitly addresses the gaps of the domestic framework. To answer the question posed earlier, compliance with the procedures of the country of asylum is only required insofar as it is an indication of a continuous intention to seek the protection of Canada.

This article will begin by outlining the legal framework which governs decisions to abandon refugee claims. There are both international law and international practice that are relevant to determining the proper process that should be followed. In addition, Canada's legislation governing refugee protection, and its delegated legislation, provide limits on the reasons for and methods through which a claim can be declared abandoned. After establishing and critiquing the legal framework, the article will review its application by Canadian tribunals with a view to indicating the specific deficiencies in the legal framework that the jurisprudence has filled.

Legal Framework

As a term, "refugee status determination" (RSD) is somewhat misleading; the process of RSD does not "fix conclusively or authoritatively" (determine) the status of a refugee claimant. At international law, it is well established that refugee status exists before any status determination conducted by a state party to the *Convention relating to the Status of Refugees* (the *Refugee Convention*)[6] or the office of the UNHCR.[7] RSD, through its process of gathering and interrogating information about the refugee claimant's situation in his or her country of origin, simply "recognizes" the pre-existing and independent status (or lack thereof) of the claimant. Logically then the status of an individual at international law persists regardless of whether a state or UNHCR in fact recognizes the "true" status of the claimant—or for that matter whether or not the refugee assists the state in recognizing his or her true status.

And yet the pragmatic task of managing migration requires that the status of a person be known to the state. RSD exists in domestic law to allow a state's immigration bureaucracy to label a particular individual seeking protection as either "legitimate" (refugee) or "illegitimate" (non-refugee) and to thereby grant him or her access to (or refuse access to) various benefits accruing from that status. As the process typically unfolds, a refugee claimant's status is adjudicated based upon information gathered by state agents largely through documentary sources, written statements, and oral statements given during interviews and hearings. In Canada, this function is performed by the Refugee Protection Division (the RPD) of the Immigration and Refugee Board.[8] The nuance of a non-complaint but nonetheless *bona fide* refugee is lost in the functionalism of this process.

The legal framework that governs the decision making of the RPD is necessarily a parochial one, that of domestic law. But Canadian law requires that this framework be interpreted, as much as possible (and especially where there is silence), in keeping with Canada's international legal obligations. It is for this reason that the guidance of the latter will be outlined, including international practice, below before proceeding to a more detailed analysis of the domestic legal provisions.

International Legal Framework

International law, as a principal source of Canada's obligation to offer protection to refugee claimants, provides a framework within which abandonment decisions must be made. While international treaties are not formally a part of Canadian law unless implemented by statute,[9] the values reflected in international human rights law "may help inform the contextual approach to statutory interpretation and judicial review."[10] International instruments and practices will be discussed below insofar as they relate to the right to asylum, the right to due process, the norms of refugee determination, and other considerations. While not explicitly addressing the topic of abandonment of refugee claims, international law will be shown to strongly suggest that any decision to abandon should be made with sensitivity to the claimant's situation, with caution and only after full procedural rights have been accorded a claimant. International instruments and customs with respect to refugee determination and other civil proceedings will be shown to require a fair hearing with the claimant being given a reasonable opportunity to retain counsel and an interpreter before any decision with respect to abandonment is made.

The right to asylum[11] is guaranteed in numerous international declarations, agreements, and treaties.[12] The most comprehensive assessment of asylum, otherwise known as refugee protection, is provided by the *Refugee Convention*

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

(and the *Protocol Relating to the Protection of Refugees*[13] [the *Protocol*] of 1967). Unfortunately, although not surprisingly, neither of these international agreements deals with the procedures by which a refugee claim should be made or determined.[14] Consequently, concerning the issue of abandonment both treaties are silent.[15]

Both these international treaties accept that the right to asylum is not without obligation on the claimant. Article 2 of the *Refugee Convention* requires that a refugee claimant conform to the laws and regulations in the country of asylum (although it provides no explicit consequences for those claimants who fail to so conform). Article 31 predicates relief from prosecution for unlawful entry upon a refugee presenting himself or herself without delay to the authorities and showing good cause for his or her illegal entry. Numerous of the socio-economic rights provided to refugees in the *Refugee Convention* are provided only to refugees "lawfully" present, staying or residing.[16] Notwithstanding these provisions, the *Refugee Convention*'s treatment of *non-refoulement* and expulsion (with respect to *bona fide* refugees[17]) states that only the most serious and criminal breaches of domestic law will allow for expulsion or forced return.[18]

While the *Refugee Convention* and the *Protocol* may be silent on the proper procedures by which refugee status is determined (and thus through which claims are abandoned), the UNHCR has issued guidelines. Canadian courts have given weight to the pronouncements of UNHCR, and have, in particular, accepted the importance of the UNHCR *Handbook:* "[it]must be treated as a highly relevant authority in considering refugee admission practices."[19] The UNHCR *Handbook* states (at paragraph 190) that any decisions regarding refugees should be made in the context of their disadvantaged situation:

> It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs.

Furthermore, UNHCR has declared in the *Handbook* that a claimant "should receive the necessary guidance as to the procedure to be followed" and that a refugee determination authority must understand that a claimant may "still feel apprehensive vis-à-vis any authority."[20] In addition, in commenting on developments in asylum procedures, UNHCR has emphasized that the principle of fairness shall be not superseded by the goal of efficiency.[21] Thus it would appear that abandonment, like any other determination of a refugee claim, should occur only after a decision maker has ensured that the claimant has received adequate guidance and assistance.

Numerous international human rights treaties provide insight into the striking of a balance between "fairness" and "efficiency" that is necessary in any administrative process. Decisions that affect an individual's legal rights or civil status are generally required by international law to comply with a particular balance of fairness and efficiency: such decisions must meet the standards of due process. For example, Article 14 of the *International Covenant on Civil and Political Rights* (*ICCPR*) provides an overarching right to all those facing "a determination of … his rights and obligations in a suit at law" to "a fair and public hearing by a competent, independent and impartial tribunal established by law." Unfortunately, the minimum standards prescribed by the *ICCPR* (and also dealt with by Canada in its periodic reports to the treaty monitoring body[22]) only explicitly apply to criminal trials. Some jurisprudence suggests that Article 14 of the *ICCPR* does not apply to immigration proceedings.[23] However, even if Article 14 does not apply, Article 13 guarantees that expulsion will only occur lawfully "in pursuance of a decision reached in accordance with law" and only after the individual concerned has been allowed "to submit the reasons against his expulsion" to a competent independent authority.[24] Thus, the *ICCPR* guarantees a hearing, or at a minimum the right to make submissions on the topic.[25]

While the international treaties may not explicitly define the elements of what constitutes a "fair hearing" in refugee determination in general or abandonment decisions in particular, the ultimate consequence of these decisions suggests that a high standard of due process is required:

> Most of the countries examined in this paper [comparing refuge determination regimes] do not have the death penalty. Yet for a refugee wrongly rejected and returned to the country from which he has fled, death may be the result. The potential consequences of an error in refugee determination require the highest standards for the determination systems. However, none of the systems comes close to the protection offered to an accused criminal, where the potential harm from error is a good deal less.[26]

The analogy of due process guarantees in refugee determination systems and capital trials is apt.[27] In the context of administering the death penalty case (when consular access rights were violated) the Inter-American Court has held as follows with respect to due process:

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

> It is obvious that the obligation to observe the right to information becomes all the more imperative here, given the exceptionally grave and irreparable nature of the penalty that one sentenced to death could receive. If the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life.
>
> Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result.[28]

This logic applies equally to the nature of an abandonment decision and its consequences which, after the removal of the claimant, is effectively irreversible and which is potentially the cause of inestimable harm to a *bona fide* refugee. Pursuing this logic, the Federal Court frequently has considered the potentially dire consequences of abandonment in assessing the fairness of the decision.[29] Thus, in addition to requiring a hearing, international law requires that any abandonment process provide the claimant with procedural rights—and that these rights be rigorously enforced.

Particular Refugee Determination Guidelines

While there is no universally accepted system of refugee determination, procedural rights afforded refuge claimants in other refugee determination systems may provide guidance about generally accepted notions of procedural rights in the context of refugee determination. As noted in the Federal Court of Appeal's decision in *Rahaman,*[30] Canadian courts should look to accepted international norms when interpreting aspects of the *Refugee Convention* which are undefined.[31]

As noted earlier, the UNHCR, through its *Handbook,* has provided some general guidance on general refugee determination procedures. In addition, the Executive Committee (ExCom) of UNHCR has adopted a resolution[32] requiring a refugee determination process to include, among other elements, (i) the provision of guidance to the refugee claimant as to the procedure to be followed, (ii) the provision of the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned, and (iii) the opportunity for a refugee claimant, of which they should be duly informed, to contact a representative of UNHCR. UNHCR's own refugee status guidelines for its own decision makers require it not to abandon (close) a refugee claim unless the decision maker loses contact with a claimant for more than six weeks following the scheduling of an interview.[33] Even where cases are "closed," requests for a "re-opening" of the claim should "generally be granted."[34]

The Council of Europe has adopted a general framework of substantive and procedural rights which give substance to the prescription against the *refoulement* of refugees. The Council's *Resolution on Minimum Guarantees for Asylum Procedures*[35] states, in part, as follows:

1. 13. Asylum-seekers must be informed of the procedure to be followed and of their rights and obligations during the procedure, in a language which they can understand. In particular:
2. – they must be given the services of an interpreter, whenever necessary, for submitting their case to the authorities concerned. These services must be paid for out of public funds, if the interpreter is called upon by the competent authorities,
3. – in accordance with the rules of the Member State concerned, they may call in a legal adviser or other counselor to assist them during the procedure,
4. …
5. 14. Before a final decision is taken on the asylum application, the asylum-seeker must be given the opportunity of a personal interview with an official qualified under national law.

The European Union's binding minimum procedural standards also require a hearing in most cases.[36] Exceptions to this provision are permitted only where the decision is positive,[37] where there has been a prior interview of some kind,[38] or where evidence already provided by the refugee claimant indicates that the claim is manifestly unfounded.[39] Even where a decision is made to abandon a refugee claim due to the failure of a refugee to attend an interview, the *EU Procedural Directive* allows for the right of reopening where good cause for non-attendance is shown.[40]

Thus the right to a hearing is not only required by international law, but also customarily accorded in other refugee determination systems. Furthermore, applying both the UNHCR and European frameworks, an abandonment decision should not be made before a claimant has been accorded a reasonable opportunity to retain legal counsel and the services of an interpreter (if required). The right to counsel and an interpreter is a right that predates a hearing and it is a right that persists throughout the determination procedure. Where a claim is abandoned, a refugee claimant should have the ability to reopen his or her claim upon establishing good cause for the abandonment. As will be seen below, Canadian law frequently fails to provide these procedural protections.

Other International Law Considerations

As noted at the outset of this discussion on international law and practice, there is little explicit guidance in international

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

law with respect to abandonment decisions; not all countries even have such procedures. However, there is much broader international jurisprudence on "manifestly unfounded" claims. While in Canada, the statutory framework separates abandonment determination from the determination of whether a claim is manifestly unfounded, in practice the result is identical: an expedited removal process with no access to subsequent risk assessments.[41] In some limited sense, an abandonment decision can be seen as a "manifestly unfounded" decision in a different guise.[42] It is therefore instructive that even "fraudulent applications" (which form a subset of UNHCR's definition of manifestly unfounded refugee claims) should be accorded procedural protections, including the right to an oral hearing.[43] This suggests that determinations of abandonment, which are made without alleging fraud, should accord the claimants similar procedural protections.

Domestic Legislative Framework

The jurisprudence on abandonment has built up over a significant period of time. As a result, both the current and previous legislative frameworks must be reviewed. The *Immigration Act*[44] was the governing statute for refugee protection in Canada from 1978 to 28 June 2002.[45] The Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board had jurisdiction over the determination of refugee claims in Canada—and consequently the abandonment of refugee claims—between its establishment in 1993[46] and 27 June 2002. Since 28 June 2002, under the *Immigration and Refugee Protection Act*[47] (*IRPA*), the Refugee Protection Division of the Board has had jurisdiction over refugee claims and their abandonment.

The decision by the Board, under both the *Immigration Act* and the *IRPA,* to declare a refugee claim to be abandoned is a final decision. A valid abandonment decision causes the Board to become *functus officio* over the refugee claim as it represents the final disposition of the claim. Under both the *Immigration Act* and the *IRPA,* a declaration of abandonment by the Board has severe consequences for a claimant. A conditional removal order (which is typically issued shortly after a claimant makes a refugee claim) becomes effective upon the abandonment of the claim by the Board and the notification thereof of the claimant.[48] Under the *IRPA,* an abandonment decision can have the further effect of barring the claimant from being eligible to seek refugee or other protection in Canada in the future.[49]

Immigration Act *provisions relating to abandonment*

Under s. 69.1(6) of the *Immigration Act* the CRDD had the discretionary power to declare a refugee claim to be abandoned. The two condition precedents to the exercise of this power were (i) the default of the claimant in the prosecution of the refugee claim, and (ii) the provision to the claimant of a "reasonable opportunity to be heard" on issue of abandonment.[50]

The *Immigration Act* defined the first condition precedent to abandonment as any of the following: the failure to appear for a hearing,[51] the failure to file a completed Personal Information Form (PIF),[52] and "in the opinion of the Division" being "otherwise in default in the prosecution of the claim."[53]

As a matter of practice, the CRDD considered the failure to provide a PIF within the prescribed time period (from 28 to 42 days depending on the methods of service and filing[54]) as being "otherwise in default in the prosecution of the claim." In her practice notice[55] on the subject, the Chairperson of the Board advised counsel that "[i]f a PIF is not filed within the prescribed time, a notice to appear for a show cause hearing will be issued."[56]

The second condition precedent for the abandonment of a refugee claim under the *Immigration Act* was the provision to the claimant of a "reasonable opportunity to be heard."[57] While a "reasonable opportunity" was not defined in the *Immigration Act,* Rule 32 of the *CRDD Rules* provided some guidance on the matter. Rule 32(1) required service of a notice of an abandonment hearing. Thus, at a very minimum the Board was required to hold a hearing on the subject and to notify the claimant of this hearing.[58]

The *Immigration Act* did not explicitly state the circumstances under which the CRDD should abandon a refugee claim. The power to abandon was a discretionary power. However, the *Immigration Act* did provide guidance to the CRDD concerning the general principles of its operation. Section 68(2) of the *Immigration Act* requires the CRDD to "deal with all proceedings before it as informally and expeditiously as the circumstances and the considerations of fairness permit."

Echoing this mandate, the *CRDD Rules* allowed the CRDD to "take whatever measures are necessary … to dispose of the matter expeditiously"[59] and to allow a party to remedy non-compliance only where "the proceeding will not be unreasonably impeded."[60] However, neither of these provisions allowed the CRDD to waive a hearing concerning an abandonment decision before declaring a claim to be abandoned.

Immigration and Refugee Protection Act *provisions relating to abandonment*

While the *Immigration Act* provided a framework for abandonment particular to refugee claimants, the *IRPA* provides a general framework for abandonment governing all divisions

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

of the Board, including the RPD.[61] Once again, the power to abandon is discretionary.

Section 168(1) of the *IRPA* allows any division of the Board to abandon a matter "if the Division is of the opinion that the applicant is in default in the proceedings." While the *IRPA* in its statutory provisions for abandonment does not, unlike the *Immigration Act,* explicitly require that a refugee claimant be provided with a reasonable opportunity to be heard concerning the abandonment, other provisions of the *IRPA* and the *Refugee Protection Division Rules* (the *RPD Rules*) do set out such a requirement in most cases.

Being in "default in the proceedings" is defined by s. 168(1) of the *IRPA* as including situations where (i) a claimant fails to appear for a hearing, (ii) a claimant fails to provide information required by the RPD, or (iii) a claimant fails to communicate with the RPD after being requested to do so.

With respect to the failure to provide required information, the *RPD Rules* distinguish "information" from "documents."[62] Thus the failure to provide required information may lead to abandonment but the failure to provide required documents may only lead to abandonment if it leads to the RPD making the further conclusion that the claimant is "in default of the proceedings." Required information includes (i) the claimant's contact information,[63] and (ii) counsel's contact information.[64] Arguably, as the PIF is described as a document in the *RPD Rules*[65] (as opposed to as a set of information in the *CRDD Rules*[66]), failure to file a PIF *simpliciter* cannot provoke an abandonment decision; there must be a concomitant finding of "default in the proceedings."

With respect to failure to communicate with the RPD, the *RPD Rules* (as noted above) do require certain notifications of information to be provided by the claimant to the RPD. However, the term "request" in s. 168(1) suggests a claimant-specific non-universal communication[67] which would preclude universally required notifications. Furthermore, as the failure is defined as one of "communication," it would appear that the deficiency concerns the act (or failure thereof), and not the content, of communication.

Although specified in the definition of being in "default of the proceedings," these three instances do not provide an exhaustive definition of being in default. In addition to these instances, the *Commentaries on the RPD Rules* warns that where a claimant "is not prepared to proceed, the Division may determine that the proceeding before it has been abandoned." Thus being unprepared (or more likely unwilling) to proceed would also be considered as being explicitly in default of the proceedings. As with the *Immigration Act,* the lists of defaults that may lead to abandonment set out in the *IRPA* should not be seen as exhaustive. Clearly, the RPD retains the ability to find other circumstances as being indicative of default.

The abandonment provisions of the *IRPA* do not explicitly provide for a reasonable opportunity to be heard prior to abandonment. However, s. 170(b) of the *IRPA* does require the RPD to hold a hearing in "any matter before it." Consequently, it can be inferred that even a matter destined for abandonment is guaranteed a hearing on the subject. However, as obvious as this might seem, a problematic exception to this rule is set out in the *RPD Rules*. This exception is discussed further below.

However, dealing first with the rule in general before considering the exception, s. 170 of the *IRPA* requires (i) that the RPD must hold a hearing "in any proceeding before it"; (ii) must notify the claimant of the hearing; and, (iii) must give the claimant "a reasonable opportunity to present evidence, question witnesses and make representations" at the hearing.[68] In addition, the *RPD Rules* require that, with the exception noted below, the claimant be provided with an "opportunity to explain why the claim should not be declared abandoned."[69] Unlike the *CRDD Rules,* the *RPD Rules* do not require prior written notification of the claimant where the claimant is present and it would be fair to proceed without written notice.[70]

The exception to the requirement in the *RPD Rules* to give a claimant a reasonable opportunity to be heard is where the claimant has failed to advise the Board, the Minister, or counsel of his or her whereabouts.[71] In such a case, under Rule 58(1), the RPD is not required to hold an abandonment hearing. Indeed, according to this rule, the RPD is not required to give the claimant any opportunity to explain why the claim should not be declared abandoned.

Although it is beyond the scope of this paper to exhaustively examine the subject, it would appear that Rule 58(1) of the *RPD Rules* is void insofar as it is *ultra vires* the rule-making powers conferred upon the Chairperson of the Board. This analysis is based upon the following factors: (i) Rule 58(1) improperly qualifies a statutory right; (ii) the statutory right in question is not ambiguous; (iii) any other interpretation would infringe unduly upon the rights of refugee claimants; and (iv) any other interpretation would infringe on the construction of the statute required by its domestic and international legal context. The impact of each of these factors upon the conclusion that Rule 58(1) is *ultra vires* is discussed in sequence below.

Firstly, Rule 58(1) is *ultra vires* insofar as it improperly qualifies a statutory right. The rule in question clearly infringes upon s. 170(b) which requires a mandatory hearing in all refugee proceedings. In addition, the rule also infringes upon subsections 170(c) and (e) which require notice of a hearing and the right to make representations (at a hearing or otherwise).

The *RPD Rules* are made under the power of s. 161 of the *IRPA*. In subject matter, the rule in question falls within the

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

scope of s. 161(1)(b) (and also s. 161(1)(d)[72]). However, as a delegated instrument, it cannot exceed the authority of its parent statute.[73] In this case the statute clearly lays out a scheme of mandatory hearings in all refugee matters. Furthermore, unlike other statutory schemes, there is no explicit power conferred to the Chairperson to make rules allowing for exceptions to the statutory scheme.[74] As stated by Dussault and Borgeat, a regulation exceeds the authority of its authorizing statute insofar as it authorizes "administrative discrimination":

> However, the criteria for discrimination [of human rights legislation] set out in these provisions are not the only ones that are subject to judicial supervision insofar as the exercise of a regulation-making power is concerned. Indeed, the courts often consider that Parliament alone must possess this delicate power which consists in disadvantaging one category of citizens in relation to another.[75]

Unauthorized discriminatory regulatory provisions—in the neutral sense of "discriminatory" used above—have been struck down by the courts.[76] The rule in question exceeds the authority delegated to the Chairperson insofar as it is discriminatory; moreover the discrimination in question improperly qualifies the rights guaranteed in the statutory scheme. As a result, the rule in question is quite likely *ultra vires*.

Secondly, there is no ambiguity in the *IRPA* surrounding Parliament's desire to guarantee a hearing to all refugee claimants. If anything, the French-language version of s. 170(b) is even stronger than the English-language version.[77] The significance of s. 170(b) is reinforced both by the absence of a similar provision guaranteeing hearings in relation to the other divisions of the Board[78] and also by the absence of a similarly clear and unambiguous provision guaranteeing a hearing in the *Immigration Act*.[79] A similar provision guaranteeing hearings was also included in the Government's previously proposed legislation on refugee claims that died on the order paper with the end of the 36th session of Parliament.[80] Even the regulatory statement accompanying the prepublication of the *RPD Rules* provides no justification or explanation of Rule 58(1).[81] The lack of ambiguity in the statutory scheme requiring hearings in matters before the RPD undermines any broad interpretation of the Chairperson's power to make rules making exceptions from the provisions of the statute.

Thirdly, to construe the *IRPA* otherwise would be to unduly encroach upon the right of a refugee claimant to a hearing. As stated in *Maxwell on the Interpretation of Statutes* (12th ed., 1969, at pages 251–52) and quoted with approval in *Leiriao v. Val-Bélair* (Town)[82]:

> Statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction in the same way as penal Acts. It is a recognized rule that they should be interpreted, if possible, so as to respect such rights, and if there is any ambiguity the construction which is in favour of the freedom of the individual should be adopted.

This approach has been previously applied by the Supreme Court of Canada to refugee determination.[83] Thus any possible (unseen) ambiguity in the statute and regulations should be interpreted to protect a claimant from being deprived of his or her right to a hearing.

Fourthly, any interpretation should also be in keeping with the domestic and international framework of refugee protection. Section 3(2) specifically deals with the objectives of the *IRPA* in relation to refugee protection. These objectives include the following: (i) "to fulfil Canada's international legal obligations with respect to refugees", (ii) "to grant … fair consideration to those who come to Canada claiming persecution", and (iii) "to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system."[84] None of these purposes, except with a very oblique reading, is contemplative of establishing special procedures to deal with uncooperative refugee claimants. While the objectives do speak of "expediency" as an objective, the jurisprudence is clear that fairness has priority over expediency as a goal when assessing the exercise of discretionary power; a similar priority should apply to the interpretation of statutory objectives.

Furthermore, there is a broader domestic legal context within which to consider the provisions of the *IRPA* and the *RPD Rules*. Section 7 of the *Canadian Charter of Rights and Freedoms* is relevant insofar as it requires that certain actions are in accordance with the principles of fundamental justice; the right to a fair hearing provision of s. 2(e) of the *Canadian Bill of Rights*[85] also provides for the right to a fair hearing in accordance with those same principles of fundamental justice.

With respect to the *Charter,* the jurisprudence indicates that inland refugee determination engages s. 7 of the *Charter* and therefore must be in keeping with the "principles of fundamental justice."[86] *Baker*[87] (and later *Suresh*[88]) set out a context driven approach to the determination of procedural safeguards. Following this approach, the important and final nature of a decision to abandon a refugee claim as well as the clearly judicial nature of the RPD's activities suggest a high level of procedural protection, including the right to an oral hearing or the right to make representations. While the jurisprudence has recently allowed for less than an oral hearing, notably in both *Baker* and *Suresh* (above), the processes in question in those cases were not directly related to

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

refugee determination, administratively structured, discretionary, and based upon policy considerations. The refugee determination process does not possess any of these features, which may mitigate in favour of less than the right to a full oral hearing.

With respect to the *Canadian Bill of Rights,* although of less import since the adoption of the *Charter,* the jurisprudence indicates that s. 2(e) guarantees the following minimum standard of conduct by a quasi-judicial body:

> Under s. 2(e) of the Bill of Rights no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and *must give to him the opportunity adequately to state his case.*[89]

The international legal context of Canada's refugee determination system is, as acknowledged in the stated purposes of the *IRPA* quoted above, that the *IRPA* seeks to implement the obligations towards refugees recognized under international law. As noted in both *Baker* and *Suresh* (above) and as stated previously by the Supreme Court of Canada in *National Corn Growers Assn. v. Canada (Import Tribunal)*[90]:

> … [I]n circumstances where the domestic legislation is unclear it is reasonable to examine any underlying international agreement. In interpreting legislation which has been enacted with a view towards implementing international obligations, as is the case here, it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations.

As noted at the outset of this paper, in the discussion of the international legal framework of refugee determination, there is both a general acceptance of the right to due process, including an oral hearing, in refugee determination and a practical accordance of an oral hearing to refugee claimants.

In closing, concern about Rule 58(1) is not purely of theoretical concern. Indeed, it is possible to conceive of a situation (for example, involving a claimant with mental illness or a claimant who has simply traveled to a remote location for work) where counsel (and the Minister and the Board) may not know the contact information of the claimant but counsel may have information or witnesses relevant to the issue of abandonment. In such a case, Rule 58(1) would allow the Board to dispense with a hearing notwithstanding its clear utility. It is also clear that there are groups of refugee claimants, such as unaccompanied minors, who should seldom (if ever) be abandoned without some inquiry as to their circumstances.

Provisions such as Rule 58(1) erode the rights of refugee claimants. In the past, the jurisprudence has allowed the Board to assume a claimant had "implicitly waived" some rights in relation to abandonment proceedings; however such waivers have always been restricted to rights accorded by the Board's rules and never statutory rights.[91] It would be an ominous expansion of the scope of the Board's power to allow it to deem statutory rights "implicitly waived" and thereby bypass statutory guarantees of a hearing.

The *IRPA,* like the *Immigration Act,* mandates that proceedings be dealt with as expeditiously as possible.[92] However, unlike the *CRDD Rules,* the *RPD Rules* provide some guidance concerning what information to consider when deciding whether to abandon a claim. The RPD must consider (i) the explanations given by the claimant at the hearing, (ii) whether the claimant is ready to start or continue the proceedings, and (iii) any other relevant information.[93] These considerations are technically subject to waiver under Rule 69 of the *RPD Rules*—although it is difficult to imagine such a waiver.

Remedies to abandonment decision

There are two courses of action available to a claimant seeking to challenge the decision by the Board to abandon his or her refugee claim. A claimant may (i) apply for leave for judicial review with the Federal Court, and/or (ii) request by way of motion[94] that the Board reopen its decision to declare the claim to be abandoned. These remedies are independent of each other and may be pursued in sequence or in tandem. In both cases, given that an abandonment hearing involves findings of both fact and law, if the reviewing body finds an error it should almost always grant relief.[95] The result of both a successful judicial review (of an abandonment decision) and a successful motion to reopen should be the quashing of the declaration of abandonment and remittance either (i) to a new panel of the Board for a rehearing of the issue of abandonment, or (ii) to a new panel of the Board for a determination of the claimant's refugee claim.[96]

The *Immigration Act* and the *IRPA* allow for judicial review with the leave of the Federal Court of abandonment decisions. An application for leave for judicial review must generally be initiated within fifteen days of receipt by a claimant of the abandonment decision.[97] The judicial review must be contemporaneous with the abandonment decision—and not any later conclusion of proceedings (with the exception of motions to reopen, discussed below).[98] With the exception (discussed below) of extending the time limit for the filing of

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

the application, the Court will require strict adherence to the rules of court for claimants seeking to set aside abandonment decisions.[99] The standard of review is correctness concerning issues of natural justice and procedural fairness and reasonableness *simpliciter* for all other issues.[100]

Unusually, the Court has shown a willingness to consider new evidence at the judicial review where the new evidence provides an exculpatory explanation for the alleged default in prosecution which resulted in abandonment *and* the new evidence was not previously available.[101] Furthermore, the Court has also drawn negative inferences where such new evidence would be reasonably expected to be presented upon judicial review.[102]

Obviously, the rejection of a motion to reopen can also be the subject of judicial review.[103]

A limited body of jurisprudence indicates a willingness of the Federal Court to grant an extension of the deadline for filing for judicial review where the delay is directly a result of seeking redress through a motion to reopen before seeking judicial review of the underlying abandonment decision.[104] However, sequential judicial reviews of both an abandonment decision and then a denial of a motion to reopen may be barred by the doctrine of *res judicata.*[105]

An alternative remedy is to apply by way of motion to the Board to set aside the abandonment decision and to reopen the claim. As at common law, only a valid abandonment decision causes the Board to become *functus officio,* such a motion must challenge the validity of the Board's decision. To do so, the motion should present evidence that was not previously before the Board indicating that the claimant was denied natural justice.[106] Rule 55 of the *RPD Rules* codifies this common-law rule by explicitly providing for a motion to re-open based upon the "failure to observe a principle of natural justice."[107]

A motion to reopen must be filed as quickly as possible with the Board. Any delay between the abandonment decision and the filing of a motion to reopen necessitates a clear and complete explanation.[108] In addition, any default that can be remedied (for example, the failure to file a PIF) should be remedied as soon as possible and no later than the filing of the motion.[109]

The Board and the Courts have established that motions to reopen will be granted where they show the abandonment decision to have been contrary to the principles of natural justice.[110] As the requirements of natural justice primarily relate to the right to receive a fair hearing, a motion will be most likely to succeed when it challenges an abandonment decision made in the absence of the claimant.

According to the *CRDD Rules,* the *RPD Rules,* and principles of natural justice, the Minister must be given an opportunity to respond to any motion.[111] Although not explicitly stated in the jurisprudence or the relevant rules, the standard of review is proof on a balance of probabilities.[112] The principle of *res judicata* applies to motions to reopen; therefore, a claimant will generally only be entitled to consideration of one such motion.[113]

The most significant disadvantage of a motion to reopen is that not only does it *not* bar removal pending the Board's determination of the motion but also the courts have been hesitant to stay execution of a removal order where a motion to reopen is pending.[114] However, the Board has exercised its jurisdiction to decide a motion where a claimant is outside of Canada[115] and where a claimant has been deported and subsequently returned to Canada.[116] Although the current practice of the Board is not to provide formal written reasons explaining its determinations of motions to reopen, the Registrar of the Board does provide, upon request, a transcript of the (usually brief) "endorsement" that appears on the file justifying the decision.[117]

Jurisprudence

For a variety of reasons, not least of which is the fact that the *IRPA* has been in effect for a shorter period of time than the *Immigration Act,* most of the jurisprudence concerning the abandonment of refugee claims has been decided under the *Immigration Act.*[118] As noted earlier, abandonment decisions can be remedied through an application to the Board or through judicial review in the Federal Court. Although technically possible if a case before the Federal Court is certified to concern a matter of "general importance,"[119] there have been few decisions of the Federal Court of Appeal dealing directly with abandonment.

Although both the *Immigration Act* and the *IRPA* are structured so as to allow the Board to expand the possible grounds for abandonment, in fact the jurisprudence appears to limit the grounds. The jurisprudence does not often stray beyond the defaults in prosecution explicitly defined in the statutes and limits even those defaults, as discussed below, by adding a required mental component. However, the jurisprudence has relatively generously construed a claimant's reasonable opportunity to be heard on the subject of abandonment. The decisions of the Board and the Federal Court will be discussed below insofar as they relate to both these elements of the abandonment scheme. Both the jurisprudence's interpretation of the legislative framework's definitions of "default in prosecution" and its understanding of the requirement that a claimant have a "reasonable opportunity to be heard" will be discussed in sequence below.

Default in Prosecution

A default in prosecution of a refugee claim provokes an abandonment hearing. The statutorily defined (under both the

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Immigration Act and the *IRPA*) defaults (which are also the most common in the jurisprudence) are (i) failing to submit a PIF within the deadline, and (ii) failing to appear for a hearing. A third common default is a claimant's deliberate refusal to proceed with the hearing of his or her claim by the Board.

As discussed below, in order to be sufficient for abandonment any default must include not only the act constituting default but also an accompanying mental intention.[120] The level of mental intention required includes not only wilful acts but also acts of wilful blindness. It is the lack of required mental intention which is the most common "defense" offered at an abandonment hearing. Obviously, any such defense only prevents abandonment if it is believed by the Board.[121] The claimant bears the burden of proof. The third ground of default cited above (the refusal to proceed with the hearing of his or her claim) does not allow a claimant to bring into question whether the act is deliberate.

In assessing any default of prosecution of his or her refugee claim, the Board must consider the matter holistically.[122] The history of the file, including delays and breaches of the rules attributable to the claimant, are appropriate matters for consideration by the Board.[123] The Board has also considered the claimant's actions before the referral of the claim to the Board.[124] As stated by Nadon, J. (albeit in *obiter dicta*) in *Kavunzu v. M.C.I.125:*

> It seems to me that the "default" has to be interpreted having regard to all the circumstances of the case, i.e., the date of the claimant's arrival, whether or not a personal information form was filed, whether or not counsel was retained in a timely manner, one or more previous absences when directed to appear, etc. Therefore, in my view, when a claimant fails to comply with an appearance date, the Refugee Division should have regard to all of the circumstances I have mentioned in deciding whether the claimant in the case before it "is otherwise in default in the prosecution of the claim."

Unfortunately, the Board does not need to consider these matters within the context of its own (relatively) slow process.[126] Also, the jurisprudence is at the very least silent, and likely opposed, to the consideration of the relative merits of the refugee claim in the holistic determination of whether there has been a default.[127] On this point, a clearly well-founded claim would seem to suggest that a (reasonable) claimant would not deliberately default in its prosecution—thereby circumstantially corroborating the claimant's proffered explanation. However, the Board does not explicitly consider this in the jurisprudence as a corroborative factor in assessing the claimant's explanation for default—although many of the Court's and the Board's decisions do seem to imply the converse.

While the Board can consider the matter holistically, the focus of abandonment proceedings is in the past actions (or inactions) of the claimant. A subsequent demonstrated willingness to prosecute the claim (for example, on the occasion of the abandonment hearing) does not prevent the Board from declaring the claim to be abandoned.[128] However, notwithstanding that it does not prevent an abandonment decision, the Board must at least accurately consider the willingness of a claimant to proceed with his or her claim at the abandonment hearing.[129]

Perhaps the most common default that leads to abandonment proceedings is the failure by a claimant to file a completed PIF with the Board within the prescribed time period. As the PIF provides the Board with the claimant's core biographical data and material allegations of risk, the default in the timely filing of the PIF is considered to be a serious default; extensions to the deadline for the filing of the PIF are only granted according to Board policy on an "exceptional" basis. In order to remedy a default in filing a PIF, the Board may grant an adjournment of the abandonment hearing to allow the claimant to file a PIF before the resumption of proceedings.[130] However, obviously a better practice is to ensure the PIF is filed well before the abandonment hearing—although this will not automatically vitiate the need for a hearing.

There are two commonly cited reasons for the failure to file a PIF within the required time period: (i) the failure to receive the PIF, and (ii) difficulties in answering the questions contained within the PIF. These reasons will be discussed in sequence below.

Firstly, a claimant's failure to file a PIF may be explained by his or her failure to receive a PIF.[131] Notwithstanding the Ministry's notice to the Board that it has served the claimant with the PIF, it may not have been received by the claimant or it may have been received late.[132] Although the *CRDD Rules* and *RPD Rules* allow for deemed service, the failure to receive a PIF provides an exculpatory explanation for failing to file the PIF within the prescribed time period. If a claimant provides uncontradicted evidence that he or she has *not* received a PIF, there is no reason to declare the claim abandoned.[133] In such a case, the default in question is not deliberate.

Secondly, a PIF may not have been filed in a timely manner because of difficulties in completing the PIF. However, any explanation offered by a claimant for delay in filing the PIF must carefully account for the complete period of the delay.[134] Difficulty in meeting with counsel or an interpreter, in the absence of evidence of no other alternative, is not a sufficient reason for delay (or at least a lengthy delay) in the filing of the PIF.[135] The lack of receipt of disclosure from the Board or the Ministry is not an acceptable "difficulty" in failing to complete the PIF.[136]

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

In keeping with its practice notice on the subject,[137] the Board must consider any pending (perhaps *post facto*) requests for an extension of the PIF deadline before declaring a claim to be abandoned.[138] Obviously, the default (of failing to file before the deadline) is remedied if an extension is granted. The mere denial of a request to extend the PIF deadline (and a consequent failure to file the PIF by the deadline) cannot automatically result in the abandonment of the claim as the grounds for determining extension requests and for making abandonment decisions are different.[139]

In relation to difficulties in completing the PIF attributable to counsel, care must be taken to distinguish errors of counsel that result in a default from errors of counsel that deny a claimant a reasonable opportunity to be heard on the subject of abandonment. While, as discussed below, the latter have been found to vitiate an abandonment decision, the Board and the Courts have shown a less forgiving attitude to the former, often abandoning claims where delays or failures were due to the delays or negligence of counsel.[140]

Failing to attend a hearing as required by the Board can result also in the abandonment of a refugee claim. This is sometimes combined with the failure to file a PIF—as when a claimant commits the former, is ordered to appear for an abandonment hearing and then fails to attend the hearing. As noted above, in order for an abandonment to occur there must exist both the act of failing to attend the hearing and the intention of not pursuing the claim.[141] There may be an exculpatory reason for failing to attend a hearing. Once the Board has determined that the claimant has been notified of the hearing in accordance with its procedures, the Board is entitled to presume from the claimant's failure to attend that he or she is deliberately in default of prosecution of his or her refugee claim.[142] However, where the claimant does attend for at least some of the hearing, this presumption is arguably rebutted.[143]

The commonly cited explanations for a claimant's failure to appear include: (i) lack of knowledge of the hearing date; (ii) physical inability to attend; (iii) misunderstanding as to the hearing date; (iv) illness; and (v) unwillingness to proceed. These reasons will be discussed in sequence below.

Firstly, the lack of awareness of a hearing dates provides a complete explanation for failing to appear. This explanation is to failing to attend a hearing what alleging a failure to receive the PIF is to failing to file a PIF. However, unlike service of the PIF, the Board is normally responsible for service of notice of hearing dates. The records of the Board will therefore normally establish that the Board notified the claimant, at the very least, by post of the hearing date.[144] To rebut this presumption of notice the claimant must provide credible evidence that he or she did not receive notice of the hearing through no fault of his or her own[145] and establish that he or she was otherwise diligently prosecuting the claim.[146] As a matter of credibility, where a claimant admits residing at the address of service and there is no evidence of the notice not having been delivered, it will be difficult for the Board to accept the claimant's evidence that he or she did not receive notice of the hearing.[147]

Obviously, if the claimant is in fact informed of the hearing date by some other means an error by the Board in notifying the claimant is irrelevant.[148] Failing to receive a notice as a result of knowingly failing to advise the Board of his or her address is equally not an adequate excuse; a claimant who places himself in a position where communication is difficult or non-existent cannot plead lack of knowledge of what was occurring for excusing delay or a failure to appear.[149]

Finally, a claimant may in some circumstances successfully rely upon the negligence of counsel to explain his or her alleged lack of knowledge of a hearing date. The impact of such negligence in abandonment decisions is discussed below under the topic of what constitutes a reasonable opportunity to be heard.

One possible reason for failing to attend a refugee hearing is a claimant's misunderstanding of or forgetfulness of the date of the hearing. However, a bald assertion of a misunderstanding about a hearing date or the requirement to attend is unlikely—absent a cogent explanation—to be accepted.[150] Language difficulties (and the lack of competent interpretation) can sometimes result in a genuine misunderstanding.[151] When such an explanation is proffered, the Board can reasonably seek corroboration of the account through, for example, his or her account of contact with counsel.[152]

The impossibility of the claimant attending the office of the Board may provide an acceptable explanation for the claimant's absence;[153] mere difficulty or "logistical problems" in attending will not generally provide an acceptable explanation.[154] However, in the face of repeated denials of a claimant's request for a change of venue, a claimant's continued failure to attend (despite practical impossibility) may well result in abandonment.[155] Furthermore, while being in custody may provide an excuse for a claimant's absence, failure to advise the Board of this fact (thereby preventing the Board from addressing this issue) may provide an independent reason for abandonment.[156] Ultimately, in both the situation of a claimant in custody and the situation of a claimant quite distant from the Board's office the rules of the Board (allowing for release from custody to attend a hearing and attendance at a hearing by teleconference) will prevent either explanation from being accepted indefinitely.

Although similar to being physically unable to attend, medical illness is different insofar as it is a phenomenon which the Board has no real ability to remedy. Medical illness is obviously a valid explanation for failing to attend a

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

hearing. As an event outside of the control of the claimant (or, where it is the illness of counsel, outside of the control of counsel), failure to appear as a result of infirmity should not result in the abandonment of a refugee claim—although it is likely to provoke an abandonment hearing. In the case of such illness, the Board expects the claimant to present "clear, detailed and unequivocal documentation"[157] of the illness.[158] Any qualified medical personnel providing such documentation should be aware of its use as an explanation for the claimant's absence.[159]

At an abandonment hearing resulting from the claimant's illness, if the Board does not impeach the claimant's (or counsel's) evidence of illness the Board cannot declare the claim to be abandoned.[160] Furthermore, lacking any medical expertise, the Board should not substitute its own opinion concerning the claimant's medical condition for that of a qualified medical practitioner treating the claimant.[161] However, the lack of medical evidence does leave it open to the Board to disbelieve that the claimant was ill.[162] Any medical evidence must not only establish illness, but also that the illness was serious enough to prevent the claimant from attending the hearing.[163]

On occasion, a claimant does attend his or her hearing but advises the Board that he or she is unable or unwilling to proceed with the hearing. Although such an action may lead to the claimant removing himself or herself from the hearing room (and thereby being in breach of the requirement to attend), the Board's determination of abandonment usually correctly focuses on the underlying intention of the claimant not to proceed. The Board may treat such an action as evidence of a default in the prosecution of the claim.

The most common explanation for such action is the lack of availability of counsel. While claimants have the right to counsel, this right is not absolute.[164] Where a claimant refuses to proceed with qualified counsel, delays in retaining counsel, or retains unavailable counsel the Board may find that the claimant has defaulted in the prosecution of the claim.[165] This is especially likely when a claimant retains new counsel at the last minute who is unable or unwilling to proceed.[166] With respect to delay, a delay as short as three weeks in retaining new counsel (when previous counsel was unavailable on the hearing date) has been found by the Board to indicate a lack of diligence in the prosecution of the claim.[167]

Reasonable Oppoortunity to Be Heard

The Board is generally required to hold a hearing on the subject of abandonment before declaring a claim to be abandoned. As always, the Board must advise the claimant of the hearing and must allow the claimant a reasonable opportunity to address the issue at the hearing.[168] The failure to provide a reasonable opportunity to be heard does not require a finding of deliberate fault; it can occur without the knowledge of Board (for example, due to postal or interpretation error).[169] Furthermore, although in practice most breaches of a reasonable opportunity to be heard result in prejudice, prejudice is not a condition precedent to relief.[170]

The requirements of notice and an opportunity to be heard will be discussed in sequence below, along with other circumstances which (in the peculiar situation of an abandonment hearing) may lead to a denial of a reasonable opportunity to be heard.

The abandonment hearing is normally scheduled on a peremptory basis.[171] As with other proceedings before the Board, and as discussed above under the heading of failure to appear, the Board must generally notify the claimant of abandonment proceedings. While under the *CRDD Rules* the required "notice" was defined in terms of written notice, even the new *RPD Rules* require a notice of some kind (in order to make the proceedings "fair" under Rule 58(2)(a)). The potential exculpatory explanations cited above in relation to failing to attend a hearing generally apply to abandonment proceedings as well.

In order for the notice of the abandonment hearing to be meaningful, the claimant (and counsel) must understand the default in prosecution that is being alleged by the Board. Normally this is set out in the Notice to Appear for the abandonment hearing. Where the Notice to Appear mistakenly describes the default, the Board must issue a new notice or obtain the consent of the claimant (or counsel) to amend the defective notice.[172] While the *RPD Rules* allow an abandonment proceeding to occur without written notice, the requirements of "fairness" would require that the Board explicitly inform the claimant and counsel of the default that is being considered.

Adjournments may be granted to obtain additional evidence corroborating the claimant's explanation for the alleged default. However, such adjournments are neither automatic, nor without limit.[173] Despite the relative urgency of abandonment proceedings, the record must not indicate a "too-rigid and too-rushed performance by the CRDD panel."[174] In other words, the Board must not schedule an abandonment hearing in undue haste or without heeding its own directives and practice on the scheduling or adjournment of hearings.[175]

As with any hearing, a claimant has the right to counsel[176] and the Board has an obligation to ensure that a guardian *ad litem* (designated representative) is appointed for any legally incapable claimant.[177] The claimant (or counsel on the claimant's behalf) may make representations on the subject of abandonment and introduce evidence. Perhaps given the limited focus of the proceedings, where counsel is present but the claimant is absent the claimant can be said to have had a

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

reasonable opportunity to be heard.[178] However, the Board's failure to request or to consider evidence tendered or submissions of counsel will prevent a party to an abandonment hearing from having a reasonable opportunity to be heard.[179]

The law on natural justice and a reasonable opportunity to be heard in the context of refugee hearings generally applies to abandonment proceedings. It is unlikely that, where the circumstances are brought about or contributed to by the claimant, the Board or the Court will allow the claimant to rely upon them in order to gain relief.[180] Although not an exhaustive list of possible defects, the abandonment jurisprudence suggests three common breaches of a reasonable opportunity to be heard: (i) failures of counsel; (ii) interpretation errors; and (iii) duress.

Firstly, defects in the actions of counsel can deny a claimant the reasonable opportunity to be heard. In relation to the conduct of counsel, while the jurisprudence on the denial of a reasonable opportunity at an abandonment hearing is generally equivalent to the jurisprudence of denial of natural justice more generally, the severe consequences of an abandonment hearing have caused the Court and the Board to adopt a more forgiving (at least, for the rights of a claimant) approach to the failures of counsel.[181]

In order to breach the requirements of natural justice, the failure of counsel must be serious enough to "deny the applicant the opportunity of a hearing."[182] For example, the failure of counsel to advise the claimant of a hearing date—especially an abandonment date—can deny a claimant a "reasonable opportunity to be heard."[183] In such a case, the claimant must have reasonably relied upon counsel[184] and the failure of counsel should be unambiguous.[185] However, where there is some shared fault on the part of the claimant (for example, in failing to advise the Board of an address change or in ignoring a notice sent by the Board), the courts have been reluctant to grant relief.[186]

Secondly, interpretation errors can vitiate a claimant's ability to present evidence and his or her right to understand the proceedings. Briefly, although interpretation defects need not be shown to prejudice the claimant in an abandonment proceeding, it must be established that a complaint concerning interpretation was made at the first available opportunity.[187]

Thirdly, duress can also vitiate a reasonable opportunity to be heard. The Federal Court of Appeal has held that where a person is not free to bring up facts, a reasonable opportunity to be heard has not been provided:

> … that an immigration inquiry, held at a moment when the person concerned was under the direct influence of a third party (her husband) and not free to bring up facts as they were, could be seen as having breached the rules of natural justice, with the result that the decision that followed was a nullity under the Charter and the adjudicator could reconsider his decision … [188]

Of course, credibility is almost always a condition precedent to the establishment of duress.[189]

Conclusion

The abandonment of a refugee claim is an aspect of refugee determination that has received little specific attention. However, given the seriousness of the consequences to the claimant and the general recognition of the danger of *refoulement,* due process guarantees should be strictly applied. In assessing the statutory structure under which abandonment decisions and the related jurisprudence are made, it would appear that the judiciary—if not the legislative or executive branches—have adopted a properly cautious approach.

It must be always remembered that the power to abandon is a discretionary decision. Although the framework of abandonment is centred around an understanding of default and a reasonable opportunity to be heard, the core of the decision is the Board's exercise of its discretion. For example, while the jurisprudence deals with abandonment in terms of a required mental intention, an alternate method of analysis is that mental intention is not a necessary element of the default but rather a factor that mitigates in favour of the Board refusing to exercise its discretion to abandon a refugee claim notwithstanding a default. A similar argument can be made that some of the unusual cases regarding the definition of a reasonable opportunity to be heard can be better understood as instances where a reasonable opportunity was given but other circumstances mitigated against the exercise of discretion.

Understanding the issue of abandonment as the exercise of discretion also places renewed focus on its boundaries: those imposed by the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter.*[190] The most significant boundary in the case of refugee claims facing abandonment is the internationally accepted understanding that *bona fide* refugees should never be refused protection, even if there has been non-compliance with various administrative rules. As the High Commissioner himself noted in a recent address to ExCom:

> While UNHCR supports measures to combat misuse of asylum systems, I am concerned that in some cases indiscriminate measures have led to non-admission, denial of access to asylum procedures, and even incidents of refoulement.[191]

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Ultimately it is this denial of access and danger of *refoulement* that must inform abandonment proceedings and decisions.

Notes

1. Personal email correspondence with the Canadian Council for Refugees dated 7 September 2008 (on file with author).
2. *Ibid.* Referring to the Central Canada offices of the Board. The variation between offices of the Board has declined significantly; in 2001 almost one-quarter of claims before the Vancouver office of the Board were declared abandoned (against a national average of 10 per cent). Immigration and Refugee Board, *Immigration and Refugee Board Statistics for 2001: Convention Refugee Determination Division* (Ottawa, February 2002).
3. In previous years, almost a quarter of claims made against China and India were declared abandoned.
4. *United Kingdom Asylum Statistics 2007* (Home Office Statistical Bulletin, November 2008) Table 4.2 at 40. Non-compliance rates vary between country of origin with EU Accession States (18 per cent) and China (40 per cent) being the top countries of origin for non-compliance.
5. UNHCR "UNHCR Position on the Return of Asylum-Seekers to Greece under the Dublin Regulation" (15 April 2008)
6. 28 July 1951, 189 U.N.T.S. 150, Can. T.S. 1969/6 (entered into force 22 April 1954, accession by Canada 2 September 1969) [*Refugee Convention*}.
7. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* HCR/IP/4/Eng/REV.1 (1979) (UNHCR 1979) (Reedited, January 1992) (the UNHCR *Handbook*) at ¶ 28.
8. Most claimants in Canada are eligible to have their refugee claims determined by the RPD. A small number of claimants are eligible to have their refugee claims determined by a Pre-Removal Risk Officer of the Ministry of Citizenship and Immigration. This paper will focus on the former process insofar as it involves the overwhelming majority of refugee claimants and has, as a possible outcome, abandonment. For a more detailed discussion of the alternative processes by which a refugee claim can be determined (and an enumeration of the claimants to which such processes apply, see Martin Jones and Sasha Baglay, *Refugee Law* (Toronto: Irwin Law, 2007), c. 2 and 8.
9. See *Francis v. The Queen,* [1956] S.C.R. 618, at 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission,* [1978] 2 S.C.R. 141, at 172–73.
10. *Baker v. Canada (M.C.I.),* [1999] 2 SCR 817 at para. 69.
11. The "right to asylum" is used as shorthand for the right to protection against return to a country in which a person would face persecution. The description of this protection as a "right" is not without controversy; it is never described as such in treaty law and the only treaty with such a provision died on the drafting table. Nonetheless, it is used here for the sake of brevity in lieu of the longer locution of "the right to enjoy a prohibition upon forced return to the state in which one would risk persecution as a refugee."
12. Including Article 14 of the *Universal Declaration of Human Rights;* Article 1 of the *Declaration on territorial Asylum;* and Article 22(7) of the *American Convention on Human Rights.*
13. 606 U.N.T.S. 267, entered into force 4 October 1967.
14. Paragraph 189 of the UNHCR *Handbook, supra* note 7.
15. The silence of the *Refugee Convention* and the *Protocol* on the appropriate methods of refugee status determination does not in any way imply that the implementation of appropriate methods is not fundamental to both instruments: "Whilst the instrument may not provide expressly for determination of refugee status, such a determination is nevertheless an inherent requirement." *UNHCR Executive Committee Sub-Committee on International Protection Note on Determination of Refugee Status under International Instruments,* 24 August 1977 (SCIP EC/SCP/5).
16. For example, see the right of association (Article 15, "refugees lawfully staying"), to the right to self-employment (Article 18, "refugees lawfully present"). The leading treatise on the linkage between refugee rights and their status ("attachment") to their country of asylum is James Hathaway's *magnum opus: The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005).
17. The term "*bona fide* refugee" is used throughout this paper to indicate a refugee claimant who is *in fact* (not withstanding any finding by a court or administrative body to the contrary) within the definition of Convention refugee set out in the *Convention.* While the term "refugee" could also be used, the term *bona fide* refugee is used to avoid any confusion with "refugee claimant" and an individual (who may or may not be a *bona fide* refugee) who has been determined by an administrative body to be deserving of protection as a refugee.
18. Articles 32 and 33 of the *Convention* allow for expulsion and *refoulement* only on grounds of, respectively, national security or public order; and danger to the security or community of the country of refuge. See also *Hoang v. Canada (M.E.I.)* (1990), 13 Imm. L.R. (2d) 35 (F.C.A.) at para. 41.
19. *Chan v. Canada (M.E.I.)* [1995] 3 S.C.R. 593 at para. 46.
20. Paragraphs 192(ii) and 198 of the *UNHCR Handbook* and *Addendum to the Report of the United Nations High Commissioner for Refugees: Report of the Twenty-Eighth Session of the Executive Committee of the High Commissioner's Programme,* General Assembly Official Records: Thirty-Second Session, Supplement No.12A (A/32/12/Add.1) (1977).
21. *UNHCR's observations on the European Commission's proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status (COM[2000] 578 final, 20 September 2000)* UNHCR (Geneva, July 2001).

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

22. *Fourth Periodic Reports of States Parties Due In 1995: Canada* CCPR/C/103/Add.5. (State Party Report) (15 October 1997).
23. See the European Court of Human Rights decisions on a similarly worded provision in *X v UK* (App 3325/67) (1967) 10 YB 528 and *Agee v. UK* (App 7729/76) (1976). More recently, the UN Human Rights Committee appeared willing to revisit the issue in *A v. Australia* (Communication 560/1993) (1997). However, while an Article 14 complaint was deemed admissible with respect to a complaint concerning refugee determination and other immigration proceedings, on the facts no determination was made on the merits.
24. An exception to these procedural protections is allowed "where compelling reasons of national security otherwise require."
25. The use of Article 13 presupposes that an RSD decision is a decision relating to expulsion. In Canadian law, the effect of RSD on expulsion is more ambiguous. Generally, under s. 49(2) of the *IRPA,* a negative RSD decision (including an abandonment decision) simply causes an underlying conditional removal order to become effective and enforceable. While abandonment decisions are not directly decisions to "expel" it can be argued that under the doctrine of reasonable foreseeable consequence an abandonment hearing, as an immediate trigger of removal proceedings, is an act within the purview of safeguards concerning expulsion.
26. David Mattas, "*Fairness in Refugee Determination*" (Oxford Symposium on Refugees, 19 August 1985) [revised] at 2.
27. The seriousness of the consequences of a decision (*i.e.* in the case of refugee proceedings and capital trials, respectively, *refoulement* and execution) has been cited as a factor in determining the appropriate procedural standards: *Gargano v. Canada (Minister of Employment and Immigration)* (1994), 85 F.T.R. 49; *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817. The consequences of an erroneous refugee decision have, in the policy literature, been described more euphemistically as "grave" and "potentially life-threatening." The tragic irony of RSD, and the underlying point of view of this article, is that despite such severe consequences the procedural entitlements of a refugee claimant are relatively minimal.
28. Inter-American Court of Human Rights *Advisory Opinion OC-16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* at 70 (paras 135–136), 1 October 1999 as requested by the United Mexican States.
29. See *Taher v. M.C.I.* [2002] F.C.T. 991.
30. *Rahaman v. M.C.I.* [2002] F.C.A. 89.
31. "Only when faced with completely unequivocal statutory language should the Court conclude that an Act of Parliament derogates from international norms respecting the protection of human rights." per *Rahaman, ibid.*
32. "Determination of Refugee Status" UNHCR Executive Committee Conclusion No. 8 (XXVIII) (12 October 1977).
33. UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate* (September 2005) at § 9.1.
34. *Ibid.* at § 9.2.
35. *Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures,* Official Journal C 274, 19 September 1996
36. Article 12 of the *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status* Official Journal L 326, 13/12/2005 13 (the *EU Procedural Directive*).
37. Article 12(a).
38. Article 12(b).
39. Article 12(c). This provision applies only to a very limited number of claimants who have made claims for refugee protection where the information they have already provided indicates that (i) the claim is unfounded due to the claimant being from a country declared to be a safe country of origin or a safe third country of transit (Article 24(4)(c)); (ii) the claimant has been "clearly unconvincing" in his or her claim (Article 24(4)(g)); the applicant has previously been denied protection and has submitted a new application which does not raise new evidence (Article 24(4)(h)); and the application is merely in order to frustrate a removal decision (Article 24(4)(j)).
40. Article 20(1)(a). The right to reopen requires establishing that "his/her failure [to attend an interview] was due to circumstances beyond his control."
41. Beyond consideration of a refugee claim by the RPD of the Board, the *IRPA* provides two other possible avenues of risk assessment for refugees (in addition to another applicable immigration-related applications). Firstly, the *IRPA* (ss. 112–114 and ss. 160–174 of the *Immigration and Refugee Protection Regulations [SOR/2002-227]* [the *IRPA Regulations*]), a pre-removal risk assessment [PRRA] can be requested by most individuals who have been refused refugee protection before their removal from Canada. The PRRA is performed by an immigration officer, does not normally involve a hearing or interview, and uses short limitation periods (all submissions and evidence are due within thirty days of notification). As a result, the success rate in PRRA applications is about 2 per cent. The UN Committee Against Torture has criticized the PRRA procedural protections, most recently in its decision in the matter of *Communication 2006/927: Sogi v. Canada* UN CAT/C/39/D/297/2006 (esp. at ¶ 10.5). Both The second avenue of risk assessment is (under the provisions of the *IRPA* s. 110g) an appeal to the Refugee Appeal Division of the Board. Unfortunately, the statutory provision in question is not currently in force and individuals declared to have "no credible basis" and who have "abandoned" their claims are not allowed such an appeal.
42. It would be more appropriate to consider refugee claimants facing abandonment procedures as potentially "unco-

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

operative" claimants as opposed to "fraudulent" claimants. Unfortunately, the UNHCR has provided limited guidance on the consequences for such uncooperative claimants and there is very little other international guidance on the subject. See the UNHCR *Handbook* at para. 205 generally.

43. *UNHCR Position on Manifestly Unfounded Applications for Asylum* (UNHCR, Geneva, December 1992)/
44. R.S. 1985, c. I-2.
45. 28 June 2002 was the date on which the *Immigration and Refugee Protection Act*, the successor legislation to the *Immigration Act*, came into effect.
46. Although the Immigration and Refugee Board was established on 1 January 1989 by the *Refugee Act*, the CRDD in the form discussed in this paper (including the abandonment provisions of s. 69.1) did not come into force until 1 February 1993 by virtue of 1992, c. 49. The *CRDD Rules* discussed in this paper came into force on the same date.
47. 2001, c. 27.
48. *Immigration Act*, ss. 28(2)(b) and 32.1(6)(b); *IRPA*, s. 49(2)(d).
49. *IRPA*, s. 101(1)(c), s. 112(2)(d).
50. *Immigration Act*, ss. 69.1(6).
51. *Immigration Act*, s. 69.1(6)(a).
52. The PIF is a ten-page questionnaire canvassing the claimant's biographical details, education, past employment, residential history, travel abroad, documents, and basis of claim. It is the primary document in the Board's assessment of a refugee claim. *Immigration Act*, s. 69.1(6)(b) via s. 46.03(2) and Rule 14(1) of the *Convention Refugee Determination Rules* (*CRDD Rules*) SOR/93-45.
53. *Immigration Act*, s. 69.1(6)(c).
54. Rules 14(2) and 35(4) of the *CRDD Rules*.
55. *Chairperson's Practice Notice: Timely Filing of Personal Information Forms (PIF's)* (5 May 1998).
56. *Ibid*.
57. *Immigration Act*, s. 69.1(6).
58. Rule 32(2) of the *CRDD Rules* further required the Board to advise a refugee claimant that, if their claim was not abandoned after the abandonment hearing, the Board "will forthwith commence or resume the hearing into the claim or application." While this requirement was met on the Board's standard notices of abandonment hearing, it was not the Board's routine practice to immediately proceed into the hearing of a claim after setting aside the abandonment issue.
59. Rule 39 of the *CRDD Rules*.
60. Rule 40 of the *RPD Rules*.
61. The other divisions of the Board, the Immigration Division and the Immigration Appeal Division, deal with the issuance of removal orders, the revocation of permanent resident status, and appeals of removal orders and revocations of statuses.
62. See Rules 3 to 5 of the *RPD Rules*.
63. Rule 4(1) of the *RPD Rules*.
64. Rule 4(4) of the *RPD Rules*.
65. Rule 5 of the *RPD Rules*, specifically Rule 5(1), states: "The claimant must complete the Personal Information Form and sign and date the included declaration …"
66. Rule 14(1) of the *CRDD Rules* states "A person concerned shall provide the Refugee Division with information respecting the claim …"
67. The *Oxford English Dictionary*, 2d ed., defines "request" as (in part): "The act, on the part of a specified person, of asking for some favour, service, etc.; the expression of one's desire or wish directly addressed to the person or persons able to gratify it."
68. Sections 170(b), (c), and (e), respectively, of the *IRPA*. As with the *EU Procedural Directive*, s. 170(f) provides for no hearing where a claim is accepted (under the "expedited hearing" program of Rule 19 of the *RPD Rules*).
69. Rule 58(2) of the *RPD Rules*.
70. Rule 58(2)(a) of the *RPD Rules*. However, it is unlikely to be fair to proceed in such a manner where the claimant is without counsel: *Mani v. Canada* (Minister of Citizenship and Immigration), 2004 FC 376.
71. The exception, under Rule 58(1) of the *RPD Rules*, is where the claimant has not filed his or her PIF within the prescribed period and neither the RPD, nor the Minister, nor counsel for the claimant, is aware of the contact information of the claimant.
72. Section 161(1)(b) is cited at least insofar as the waiver of a hearing may be seen as a consequence of failing to provide the Board with the address information required by Rules 4(1) and (2).
73. René Dussault and Louis Borgeat, *Administrative Law: A Treatise*, 2d ed., vol. 1, trans. by Murray Rankin (Toronto: Carswell, 1985) [Dussault and Borgeat] at 364–365.
74. For an example of the impact of an explicit statutory power to provide for exceptions in statutory instruments on the determination of whether a statutory instrument is *ultra vires* see *Telecommunication Workers Union et al. v. British Columbia Telephone Company, Canadian Telephone & Supplies Ltd.* [1985] 1 S.C.R. 840.
75. Dussault and Borgeat at 435, quoted sympathetically in the judgment of Dube J. of the Federal Court Trial Division in *Canada v. St. Lawrence Cruise Lines Inc.* [1996] 2 F.C. 371.
76. In the context of municipal law see *Re: Bunce and Town of Coburg*, [1963] 2 O.R. 343 (C. A.).
77. The French-language text of s. 170(b) states that the RPD must "dispose de celle-ci par la tenue d'une audience" [dispose of it by the holding of a hearing].
78. See, for example, s. 173(a) which provides for only a qualified ("where practicable") requirement for a hearing before the Immigration Division and s. 171 which does not provide for a hearing before the Refugee Appeal Division.
79. The *Immigration Act* treats the right to hearing with more ambiguity, dealing with it in passing and in an explicitly qualified manner. Section 69.1(1) requires the Board to "commence a hearing into the claim" as soon as practicable. Section 69.1(6) limits the Board to simply the provision of

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

"a reasonable opportunity to be heard" in abandonment proceedings.

80. See Bill C-31, s. 165(b). Note the substantive changes between that provision and s. 170(b) of the *IRPA* related to the inclusion in *IRPA* of teleconferencing provisions (s. 164 of the *IRPA*) and the shift of the provision of notice to its own subsection (s. 170(c) of the *IRPA*).
81. See *Canada Gazette, Part I*, Vol. 135, No. 50 (9 December 2001) at 4702 *et seq*. (Note: Rule 58 was numbered Rule 59 in the first prepublication.)
82. [1991] 3. S.C.R. 349 (L'Heureux-Dube, in dissent—although not on this point).
83. See *Singh et al. v. M.E.I.* [1985] 1 S.C.R. 177 at 200 (per Wilson J.).
84. Subsections 3(1)(b), (c), and (e), respectively.
85. 1960, c. 44.
86. *Singh v. M.E.I.*, [1985] 1 S.C.R. 177.
87. See *Baker v. M.C.I.* [1999] 2 S.C.R. 817.
88. *Suresh v. Canada (M.C.I.)*, [2002] SCC 1.
89. *Duke v. The Queen*, [1972] S.C.R. 917 at 923 [emphasis added].
90. [1990] 2 S.C.R. 1324.
91. For example, in the matter of *Soto Ibacache v. M.C.I.* IMM 4244–96 (Tremblay-Lamer J.) the Court approved of the Board's failure to serve the claimants (who had not provided the Board with an address) with a notice to appear for an abandonment hearing. While it may be true, as the Court states, "no one is bound to do the impossible," the holding of hearing is not an impossible act. Notwithstanding the anticipated absence of a claimant, the Board may nonetheless convene a hearing—especially when counsel has been retained.
92. Section 162(2) of the *IRPA*.
93. Rule 58(3) of the *RPD Rules*,
94. What were formerly "motions" under the *CRDD Rules* are now "applications" under the *RPD Rules*. Notwithstanding the change in terminology, the term "motion" has been employed in this paper to maintain consistency.
95. *Kabir v. M.C.I.* [2001] F.C.T. 1267 (Nadon J.).
96. The jurisprudence documents a haphazard array of remedies—ranging from a *de novo* abandonment hearing to a hearing on the merits of the claim to a "new hearing on reinstatement."
97. *Immigration Act*, s. 82.1(1) and (3); *IRPA*, s. 72(2)(b).
98. *Cortez v. M.C.I.* [2001] FCT 1197 (Nadon J.).
99. *Valenzuala Barrientos v. M.C.I.* IMM 2481-96 (Noel J.).
100. *Kastrati v. Canada (Citizenship and Immigration)*, 2008 FC 1141. Even before the recent decision of the Supreme Court of Canada mandating such an approach in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Court generally applied the standard of reasonableness *simpliciter* to abandonment decisions: *Forgacs v. M.C.I.* [2001] F.C.T. 235 (Blais J.). This standard has also been described as that of "serious scrutiny" per Lemieux J. in *Ahmad v. M.C.I.* IMM 5626-98.
101. *Ou v. M.C.I.* IMM 5559-97 (McGillis J.). For an opinion distinguishing *Ou* see *Iantbelidze v. M.C.I.* [2002] F.C.T. 932 (Heneghan J.).
102. *Stumf et al. v. M.C.I.* IMM 5975-99 (Simpson J.).
103. However, a judicial review application of the denial of a motion to reopen can only be based upon defects in the Board's analysis of the motion and not the correctness of the underlying abandonment decision: *Kononov v. MCI* [1999] F.C.J. No. 1121; *Diraviam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1470; *Ali v. MCI* 2004 FC 1153; although, the Court entertains the possibility of a contrary view in *Vranici v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1417.
104. *Powar v. M.C.I.* IMM 365-99 (Teitelbaum J.).
105. See *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 generally for the doctrine of "issue estoppel" which prohibits renewed litigation where (i) the same question has been decided; (ii) the decision was final; and (iii) the parties in both proceedings are the same. However, an exception to "issue estoppel" may be made in the (unlikely) event that new evidence becomes available between the judicial review of the abandonment decision and the subsequent judicial review of the denial of the motion where the much quoted conditions laid out in *Fenerty v. The City of Halifax* (1920), 50 D.L.R. 435 at 437-438 (N.S.S.C.) are met. The Court has issued conflicting opinions depending on the order in which judicial review is pursued: in *Lin v. Canada (Minister of Employment and Immigration)*, [2005] F.C.J. No. 634 (judicial review of the abandonment decision first) the Court held a subsequent judicial review application to be *res judicata* whereas in *Xu v. Canada (Minister of Citizenship and Immigration),* 2006 FC 718 (judicial review of the reopening decision first) the Court held a subsequent judicial review application not to be completely barred by *res judicata.*
106. *CRDD V97-00999* (Jackson, 9 September 1999).
107. Rule 55(4). While the wording of Rule 55(4) does not preclude motions to reopen being granted on other grounds, the Court has interpreted the provision as providing the sole ground for reopening. See *Wackowski v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 315 (F.C.) at ¶ 12 and *Ali v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1153 at ¶ 24.
108. *Forgacs v. M.C.I.* [2001] F.C.T. 235 (Blais J.). In *CRDD V90-00988* (Groos, Robles, 8 September 1992) the Board allowed an almost three-year delay where "[u]ntil recently, all contacts which the claimant apparently had with immigration officers would suggest to any reasonably well-informed observer that his refugee claim remained outstanding despite the decision that he had abandoned his claim."
109. *CRDD T96-01786* (Sarzotti, 29 August 1996).
110. The leading case on the Board's power to reopen hearings where natural justice has been denied is *Gill v. Canada (M.E.I.)*, [1987] 2 F.C. 425 (C.A.).

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

111. *Rojas Rojas v. M.C.I.* [2002] F.C.T. 802 (Dawson J.). Although the Minister must be served with the notice of motion, a review of the Board's jurisprudence indicates it is rare for the Minister to actively oppose a motion.
112. See *Key Point Guide to Refugee Law for CRDD Members* (Legal Services, Immigration and Refugee Board, November 2000) at 46: "The standard of proof with respect to the determination of facts is the civil standard of balance of probabilities." See also *Note on Burden and Standard of Proof in Refugee Claims* (UNHCR, Geneva, 16 December 1998) at para. 8.
113. *CRDD M99-11272* (Pergat, 10 April 2001).
114. See *Wydrzynski v. M.C.I.* IMM 1002-00 (Heneghan J.). In addition, arguably the Federal Court has no jurisdiction to grant interlocutory relief unless there is an underlying application for judicial review *before the Court*.
115. *CRDD TA0-11584* (Rucker, 30 January 2002).
116. *CRDD U92-02932, U93-03410* (Smith, 26 April 1994).
117. The provision of such an endorsement has been found to comply with both the statutory requirements of the *IRPA* and common-law requirements of procedural fairness: *Ali v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1153. However, such an endorsement must nonetheless provide a "meaningful" justification of the decision: *Javed v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1458.
118. In addition, since the coming into force of the *IRPA* both the overall number of claimants and the number of decisions per year have decreased substantially. There has also been a concurrent reduction in the availability of legal aid to seek judicial review in most provinces which has likely reduced the number of review applications before the Federal Court. On the effect of this latter issue, see Austin Lawrence and Pauline de Jong *A Synthesis of the Immigration and Refugee Legal Aid Research* (Department of Justice, 2006).
119. *Liyanagamage v. Canada (Secretary of State)* (1994), 176 N.R. 4 (F.C.T.D.).
120. Given the clear statutory language in both the *Immigration Act* and the *IRPA* it is perhaps more accurate to state that such actions can constitute defaults but that, given that the power to abandon is discretionary in nature, the Board should not declare a claim to be abandoned unless there is an accompanying mental guilt. See the conclusion (below) for an elaboration of this point.
121. For an example of an extraordinary tale (of abduction causing a failure to appear) that was not believed see *CRDD V97-03027* (Jackson, 11 August 1999).
122. The Board must consider "the full picture of the course of conduct" per *Clavijo Albarracin v. Canada (Citizenship and Immigration)*, 2008 FC 1143.
123. *Ahmad v. M.C.I.*, *supra* note 100.
124. *CRDD T96-01671, T96-00204, T96-00205* (Morrison, Okhovati, 23 May 1997).
125. IMM 4351-98.
126. *Levieva et al. v. M.C.I.* [2002] F.C.T. 163 (Dawson J.).
127. The jurisprudence's consistently followed pattern of determining the issue of abandonment before considering the merits of the claim seems to suggest that the latter will not be considered in determining the former.
128. *Ghassan v. M.E.I.* IMM-2843-93 (Denault J.); *Abdelhar v. M.C.I.* IMM 5253-97 (Blais J.); *CRDD M94-05728, M94-05729, M94-05730* (Boisrond, Longchamps, 5 March 1996).
129. *Atwal v. M.C.I.* IMM 791-98 (Simpson J.).
130. See the Board's actions described in the Court's judgment in *Levieva et al. v. M.C.I.* [2002] F.C.T. 163 (Dawson J.).
131. The Minister serves a claimant with the PIF under s. 100(1) of the *IRPA* and Rule 3(1) of the *RPD Rules* (previously s. 46.02 of the *Immigration Act* and Rule 6(1)(c) of the *CRDD Rules*).
132. The latter has been proven through the use of the postmark on the envelope in which the PIF is mailed to the claimant by the Ministry. See *Rakrouk v. M.C.I.* [2001] F.C.T. 258.
133. *Cirahan v. M.C.I.* IMM 1650-97 (Muldoon J.) (in the context of an application for a stay of removal pending judicial review of the abandonment decision).
134. *Obiter dicta* in *CRDD VA1-01901* (Jackson, 9 April 2002).
135. *CRDD V99-00687* (Jackson, French, 24 June 1999).
136. *RPD VA2-01049* (Jackson, 16 July 2002); for a different conclusion see *CRDD VA1-02258* (Jackson and Gibbs, 22 October 2001).
137. *Chairperson's Practice Notice on the Timely Filing of Personal Information Forms (PIFs)* (5 May 1998) and *Commentary on RPD Rules—Rules 5 and 6*.
138. *Perez Lopez v. M.C.I.* IMM 5716-99 (Teitelbaum J.).
139. *Rahman v. Canada(Minister of Citizenship and Immigration)*, 2005 FC 430; *Tajadodi v. Canada (Minister of Citizenship and Immigration),* 2005 FC 1096.
140. *CRDD M93-06035* (Jumelle, Lavoie, 6 September 1993); *CRDD V99-00687* (Jackson, French, 24 June 1999). However, for an opposite position see *Masood v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1224.
141. CRDD Handbook (Immigration and Refugee Board, 31 March 1999) at 17–4 quoted with approval in *CRDD T98-05059* (Stanwick, Cram and Bubrin, 22 December 2000).
142. *Powar v. M.C.I.* IMM 365-99 (Teitelbaum J.) quoting *Aubut v. Minister of National Revenue* 126 N.R. 381 at 383 (F.C.A.) with approval.
143. See the rather unusual facts of *Atwal v. M.C.I.* IMM 791-98 (Simpson J.) in support (albeit in *obiter dicta*) of this proposition. Notwithstanding such a usual presumption, the disappearance of the claimant in the midst of the hearing, like any other event, must be judged in the context of all the circumstances of the case per *CRDD T96-01671, T96-00204, T96-00205* (Morrison, Okhovati, 23 May 1997).
144. The Board is advised by the Ministry upon the referral of the matter (i) the method of service of the PIF by the Ministry, and (ii) the current address (if known) of the claimant. See *CRDD VA1-01901* (Jackson, 9 April 2002) for a

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

case where the abandonment was set aside when the Board failed to take note of this information.

145. *Ou v. M.C. I.* IMM 5559-97 (McGillis J.); *Zaouch v. M.C.I.* IMM-3051-95 (Richard J.) ; *Rodriguez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 629.
146. *Hurtado Izauierdo v. M.C.I.* IMM 4695-97 (Rouleau J.).
147. *CRDD T93-12255* (Sarzotti, 3 March 1998).
148. *CRDD V96-01897* (Robles, Brisson, 26 March 1998).
149. *Mussa v. M.E.I.* IMM-6043-93 (18 July 1994) quoted sympathetically in *CRDD TA0-11584* (Rucker, 10 January 2002); see also *CRDD V96-01387* (Robles, 12 March 1997) where a claimant was found to be under a duty to notify the Board of address changes even after the Board lost (albeit temporarily) jurisdiction over the matter.
150. *Cavus v. M.C.I.* IMM-4494-98 (Nadon J.).
151. *Escorcia Trejo v. Canada (Citizenship and Immigration)*, 2008 FC 1207.
152. *Bello Perez v. S.G.C.* IMM-5662-93 (Joyal J.),
153. *CRDD V93-02255* (Neuenfeldt, 25 October 1994).
154. *CRDD U97-01304* (Bubrin, Sarzotti, 1 November 1999).
155. *CRDD T96-01786* (Sarzotti, 29 August 1996).
156. *CRDD TA0-11584* (Rucker, 10 January 2002).
157. *CRDD M95-04338* (Singer, Colavecchio, 7 November 1996).
158. See also *CRDD U96-04629* (MacAdam, Wright, 13 January 1998).
159. *CRDD M96-02461* (Handfield, Ndejuru, 4 November 1997).
160. *Thurairajah et al. v. M.C.I.* IMM 6083-99 (O'Keefe J.).
161. *Levieva et al. v. M.C.I.* [2002] F.C.T. 163 (Dawson J.).
162. *Kabari v. M.C.I.* IMM 1095-99 (Pinard J.).
163. *CRDD U96-04629* (MacAdam, Wright, 13 January 1998); *CRDD T96-01035* (Sarzotti, 3 April 1998).
164. *Pilnitz v. M.C.I.* IMM-1205-96 (Tremblay-Lamer J.); *Dadi v. M.C.I.* IMM-4195-98 (Pinard J.).
165. *CRDD TAO-03876 et al.* (Eustaquio, Antemia, 14 August 2000); *CRDD T96-01671* (Morrison, 7 November 1997); *CRDD M95-02129* (Roussy, Dionne, 20 November 1996).
166. *CRDD M93-03537* (La Salle, Marien-Roy, 26 October 1995); *Gapchenko v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 427; *Davila Ruiz v. Canada (Citizenship and Immigration)*, 2008 FC 915.
167. *CRDD U97-00975* (Wright, MacAdam, 25 February 1998).
168. This must include, where appropriate, considering allowing the claimant to present evidence "otherwise than by personal appearance" (*i.e.* through tele- or video-conferencing technology). *Sundaram v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 291.
169. *Gulishvli v. M.C.I.* [2002] F.C.T. 1200 (Kelen J.).
170. *Kabir v. M.C.I.* [2001] F.C.T. 1267 (Nadon J.).
171. The setting of abandonment hearings on this basis does not constitute a violation of natural justice: *Enahoro v. Canada (Minister of Citizenship and Immigration),* 2006 FC 430.
172. *Kavunzu v. M.C.I.* IMM 4351-98 (Nadon J.) This case was decided under the more restrictive *CRDD Rules;* the *RPD Rules* now provide that written notice is not always required.
173. *CRDD M93-10303* (Yassini, Champoux Ohrt, 1 March 1995).
174. *Cirahan v. M.C.I.* IMM-1650-97) (Muldoon J.).
175. *Zulquerain v. M.C.I.* IMM 751-00 (O'Keefe J.).
176. The discussion above on the limits to the right to counsel is applicable to the right to counsel at abandonment hearings.
177. *Stumf et al. v. M.C.I.* [2002] F.C.A. 148 (Sharlow J.A. per *coram*).
178. *Bello Perez v. S.G.C.* IMM-5662-93 (Joyal J.).
179. *Ding v. M.C.I.* IMM 3149-99 (Campbell J.); *Rojas Rojas* [2002] F.C.T. 802 (Dawson J.).
180. *Bhullar v. M.C.I.* IMM 1862-99 (Pinard, J.)
181. *Mahood v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 1480; *Muqeem v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 465.
182. *Shirwa v. Canada (M.E.I.)*, [1994] 2 F.C. 51 (T.D.) at 60–61 (Denault J.).
183. *Ahmad v. M.C.I.*, *supra* note 100.
184. The language abilities (or lack thereof) are frequently a reason cited in support of the reliance by a claimant upon counsel.
185. *Taher v. M.C.I.* [2002] F.C.T. 991 (Pinard J.).
186. Contributory negligence will remove the ability of a claimant to benefit from the mistake of counsel: *Masood v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1224.
187. *Mohammadian v. M.C.I.* IMM-6500-98 (Pelletier, J.); See also *Iantbelidze v. M.C.I.* [2002] F.C.T. 932 (Heneghan J.) for interpretation problems in the context of abandonment proceedings.
188. *Longia v. Canada (M.E.I.)*, [1990] 3 F.C. 288 (C.A.) at 294 (referring to *Kaur v. Canada (M.E.I.)*, [1990] 2 F.C. 209 (C.A.) with approval).
189. *CRDD V97-03027*, *supra* note 121.
190. See *Baker*, *supra* note 10. .
191. UNHCR *Opening Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugee at the Fifty-third Session of the Executive Committee of the High Commissioner's Programme* (30 September 2002),

---

Martin Jones is a research associate at the Centre for Refugee Studies and the Managing Editor of Refuge. He previously practiced refugee law, regularly representing individuals in abandonment proceedings.

© Martin Jones, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

The Many Faces of "Prima Facie": Group-Based Evidence in Refugee Status Determination

Jean-François Durieux

Abstract

The majority of the world's refugees have secured a legal status without resort to an individual examination of their claims. The practice of "group" determination, particularly in Africa, is interesting in several aspects, not least in that it allows a real-time assessment of a need for international protection. While these positive aspects should not be lost as many jurisdictions in the developing world are equipping themselves with individual asylum procedures, it is equally important to clarify, and hopefully to harmonize, the procedural and evidentiary standards applicable to group determination.

How presumptions operate—including their rebuttal or removal—is a question worth examining, and not only with regard to refugee status determination (RSD) in mass influx situations. Legal presumptions and other evidentiary shortcuts have also been introduced into individual RSD procedures in industrialized states. These include mechanisms that are highly problematic from a protection point of view, such as the "safe country of origin" presumption of a "manifestly unfounded" claim. However, administrative bodies and courts have also, from time to time, used some form of prima facie admission of evidence in order to lighten the burden of asylum applicants, while speeding up the RSD process.

Furthermore, this article argues that extralegal presumptions, based on implicit value judgments about national or subnational groups, almost invariably colour the interviewing and decision-making processes in individual cases. This finding makes it all the more necessary : to (i) to re-assess the significance of "risk-group affiliation" as an element of the refugee definition; and (ii) formally recognize the role of evidentiary shortcuts in RSD, and recommend appropriate standards for their operation.

Résumé

La majorité des réfugiés du monde ont obtenu un statut légal sans examen individuel de leurs revendications. La pratique de la détermination collective de la qualité de réfugié, particulièrement en Afrique, est intéressante par plusieurs aspects, non des moindres étant qu'elle permet une évaluation « en temps réel » du besoin de la protection internationale. Bien qu'il soit important de ne pas perdre de vue ces aspects positifs — alors que beaucoup de juridictions dans les pays en voie de développement adoptent des procédures de détermination du droit d'asile au niveau individuel — il est également important d'éclaircir, et aussi peut-être d'harmoniser, les normes en matière de procédures et en matière d'élément de preuve applicables à la détermination collective.

Comment fonctionnent les présomptions — y compris leur réfutation — est une question qui vaut la peine d'être étudiée de plus près, et cela pas seulement dans le contexte de la Détermination du statut de réfugié (DSR) dans des situations de mouvement collectif. La présomption légale et les raccourcis en matière de règles de preuve ont aussi été introduits dans des procédures de DSR individuel dans les pays industrialisés. Parmi, on retrouve certains mécanismes qui posent problème d'un point de vue de la protection, tel la présomption de « revendication manifestement non fondée » dans des cas de « pays sans risque ». D'autre part, des entités administratives et des tribunaux ont aussi, de temps à autre, fait usage d'une forme quelconque d'admission de preuve prima facie dans le but d'alléger le fardeau des demandeurs d'asile tout en donnant un coup d'accélération au processus de DSR.

En outre, cet article fait valoir que les présomptions extrajudiciaires fondées sur des jugements de valeur implicites concernant des groupes nationaux et sous-nationaux, exercent presque à tout coup un effet pervers sur les processus

© Jean-François Durieux, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

d'interview et de prise de décision dans les cas individuels. Cette conclusion rend encore plus impératif le besoin de : (i) réévaluer la signification d' « affiliation à des groupes à risque » en tant qu'élément dans la définition du réfugié; et (ii) reconnaître formellement le rôle que jouent les raccourcis en matière de règles de preuve dans la DSR et recommander des normes appropriées pour leur utilisation.

Introduction

This article is about determination of refugee status on a group basis. More specifically, I explore how refugee status determination (RSD) processes take group characteristics into account for the distribution of the burden of proof between the individual asylum seeker and the state from which protection is sought. For the sake of conciseness I focus on first-instance decision making, and I make no distinction between those procedures within which an oral hearing is an integral part of decision making and those within which the processes of interview and adjudication are clearly separated.

Group-based determination of refugee status is usually associated with instances of large-scale influx of asylum seekers from a same country or cluster of countries. The most authoritative reference on the subject is to be found in UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status,*[1] and this is, therefore, where my inquiry will start. Paragraph 44 of the *Handbook* reads as follows:

> While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been under circumstances indicating that members of the group could be considered individually as refugees. In such situations, the need to provide assistance is extremely urgent and it may not be possible for purely practical reasons to carry out individual determination of refugee status for each member of the group. Recourse has therefore been had to the so-called "group determination" of refugee status, whereby each member of the group is regarded prima facie (i.e. in the absence of evidence to the contrary) as a refugee.

A critical reading of this text gives rise to a couple of issues. First, it is not immediately clear where a "norm" is to be found, according to which refugee status must be determined on an individual basis; nor what this "individual basis" actually covers. While it is beyond the scope of this article to consider the broader implications of this normative statement, some of these will inevitably surface during the course of my inquiry. At this stage, however, I would like to focus on another problematic aspect of the above-quoted paragraph from the *Handbook,* which seems to have escaped the attention of most commentators.

Whereas the second sentence of this paragraph appears to encapsulate the logic of the whole, it is in effect dispensable—in other words, the entire paragraph still makes perfect sense if one jumps over the second sentence and connects the third sentence immediately with the first one. This is because the text actually conflates two distinct and different (albeit possibly overlapping) scenarios, in only one of which the size of the influx matters.

There can be no question that a large-scale influx of asylum seekers may trigger an emergency in host countries, *i.e.* it is capable of overwhelming the processing resources of these countries to the point where, as the *Handbook* puts it, it is no longer *possible* to carry out individual examination of refugee claims. However, does this scenario exhaust the mentioned "circumstances indicating that members of the group could be considered individually as refugees"?

Certainly not, in my view. Such circumstances can be found, within or without a mass influx scenario, wherever a clearly identifiable segment of the population of a country is patently and systematically persecuted, and any number of the persecuted group's members seek protection across the border. In this scenario, the rationale for group determination is not that individual screening is *not possible*—instead, it is that such detailed screening is *not necessary.*

Of course, there have been and will be situations in which resort to group-based determination is both a matter of efficiency and the result of an objective analysis of the causes of the flow. Nonetheless, the distinction between *not possible* and *not necessary* remains essential, because it makes clear that group-based determination is not a mechanism reserved for mass influx situations. To the contrary, my contention is that a measure of group-based determination is inherent in *any* process applying the refugee definition to individual asylum seekers, regardless of their numbers.

Let it be clear that I am referring here to the refugee definition contained in Article 1 A(2) of the Refugee Convention, as amended by the 1967 Protocol. Some commentators have asserted that the extensive use of group-based determination by African states is a corollary to the "expanded" refugee definition in the 1969 OAU Convention, and that this instrument is the main source and authority for *prima facie* recognition of refugee status.[2] As we have noted elsewhere, this erroneous construction has been readily exploited by European policy makers, always keen to stress regional differences if these can back an argument in favour of a dubious "protection in the region" doctrine.[3]

Refugee grounds such as "events seriously disturbing public order in either part or the whole"[4] of the country of origin may indeed evoke the threat of massive displacement. But so may persecution on ethnic or religious grounds. In any event, as explained above, the notion of "group" in RSD does

© Jean-François Durieux, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

not only (nor even mainly) refer to the size of the asylum-seeking caseload, but indeed to the very motivation of their flight.

It does not take a legal expert to notice that the Convention refugee definition is intended to protect persons who fear persecution because of their membership in a group. Four of the five grounds stipulated by Article 1A(2)—race, religion, nationality, and particular social group—cannot be construed as anything but "groups." As for "political opinion," while indeed it can theoretically be held by a sole individual or a few isolated persons, it is not likely to attract persecution unless it is prevalent among—or imputed to—a sizable section of the population of the country of origin.[5]

To assert that the refugee criteria in the Refugee Convention are "highly individualistic"[6] is, therefore, an incorrect reading of the refugee definition. The plain language of Article 1A(2) supports the interpretation which, as early as in 1990, the US Asylum Regulations proposed, namely that a fear of persecution upon return can be considered reasonable where "the applicant can show a pattern or practice of persecution of a group of persons similarly situated and his or her own inclusion in, and identification with, such a group of persons."[7]

In the following, I shall refer to such groups of similarly situated persons as "groups at risk." I argue that this notion is intrinsic to the Convention refugee concept. Should this proposition be properly factored into RSD processes, the latter would gain in transparency, consistency, efficiency, and, ultimately, fairness.

Refugee Law and Groups at Risk

There is no escaping the fact that the law and practice of industrialized states has distanced itself considerably from the "group" approach to refugeehood, which was the norm under the League of Nations regime. Practically since the entry into force of the Refugee Convention, but more noticeably since the 1980s, a recurrent jurisprudential stream in Europe and North America has insisted that persecution necessarily implies a singling out of the individual, even where entire segments of the population of the country of origin are subjected to severe discrimination or targeted for ill-treatment.[8] Some jurisdictions, notably the Dutch Council of State, have upheld this position relentlessly until this day. While others have ostensibly banned the "singling-out" requirement, they may still keep a cautious distance from group-based determination. To be sure, eligibility guidelines routinely stress that each asylum case has to be decided on its singular merits. An adjudicator may read into this commonsense instruction an encouragement to look for distinguishing features that are in a way unique to the claimant before him or her. Such a "highly individualistic" approach is misguided and should be questioned as a matter of principle. For the time being, though, I will only argue that it is not antithetic to the "group at risk" approach, which I am propounding. Rather, it adds an "individualized" requirement *on top of* a group-based determination ["you, the individual claimant, must convince me that you are personally more at risk of persecution than all other members of a group, which is itself the target of persecution in your country"]—and this begs the obvious question of who is expected to establish that the group is being persecuted, or discriminated against, in the first place.

While admitting the lack of hard empirical data on this point, I contend that the way interviewers and adjudicators approach asylum claims is more often than not coloured by these officials' outlooks on particular groups. In a similar vein, Towle and Stainsby warn that historical, cultural, political, and other biases for, or against, certain caseloads or nationalities of asylum seekers may lead to predetermined eligibility outcomes and cause disparities in recognition rates among national jurisdictions.[9] This finding should not scare us, at least so far as *positive* inclinations are concerned. After all, the image of a refugee among the public at large, in any society in which the concept is current, is likely to take the form, not of an isolated individual, but of a "typical" refugee *population:* the boat people from Vietnam, the Bosniaks, the Afghans, the Iraqis, the people of Darfur … The official who hears refugee status claims will inevitably be influenced by these public perceptions of particular situations (which, admittedly, are not always specific as to groups at risk within the larger population) as "refugee" situations. Unlike the man on the street, though, this official will normally have the benefit of detailed country-of-origin information, in addition to personal knowledge developed through previous interviews. Country-of-origin information is seldom neutral, and never perfectly objective. Nonetheless, it displaces the centre of subjective gravity from the individual interviewer or adjudicator to a more general level, from where it can influence a large number of decisions, hence increasing consistency of decision making on similarly situated claims.

For their own peculiar reasons, though, states tend to conceal even their positive biases towards particular groups of asylum seekers behind the smokescreen of a person-centered assessment, within which persecution is (in my view, wrongly) construed as an individual experience in both its effect and its causation. This is not to say that groups at risk are completely absent from the assessment, but rather that either their conceptual influence is implicit, rather than explicit; or they are explicitly removed from the ambit of the Refugee Convention and consigned to discretionary forms of protection.

Be that as it may, industrialized states have experimented with a wide variety of measures acknowledging, to varying

© Jean-François Durieux, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

degrees, the relevance of group membership to a determination of a "need for international protection" writ large. States in the developing world, especially in Africa, have evolved their own group determination mechanisms, with an eye on mass influxes. A full inventory of all explicit and implicit acknowledgements of the "group at risk" dimension in state practice worldwide is clearly beyond the scope of this paper. I will rely instead on a few examples, in order to illustrate the following point: the group-at-risk methodology offers interesting evidentiary shortcuts in refugee status determination, thereby reducing the complexity and opacity of procedures and lightening the burden of proof for the applicant.

A preliminary observation is in order: a *lighter* burden on the asylum seeker is not the necessary consequence of all evidentiary shortcuts. Ironically, the only "legal" presumption affecting material RSD in the current law of industrialized states is a negative one—namely, the designation of "safe countries of origin." On its face, the safe country of origin notion (as codified in the EC directive on asylum procedures[10]) does not trigger a presumption of substance. The automatic labelling of the claim as "manifestly unfounded" in view of the claimant's nationality does not entail an equally automatic denial of the claim, but rather an acceleration of the qualification procedure.[11] In practice, though, accelerated procedures are so devoid of basic guarantees of fairness that their only possible outcome is a negative decision—unless, that is, the applicant is able to establish that there exist exceptional circumstances making the country of origin "unsafe" for him or her personally.

We can all agree—including, I am sure, the drafters of this clause—that this evidential burden is simply impossible to meet. I certainly do not know how to make the safe country notion work as a fair mechanism. However, I can find some comfort in a reading *ab absurdo* of this practically non-rebuttable presumption. Here is how it goes: where the country of origin is considered generally safe, the claimant must prove the existence of highly personal circumstances that make him or her, individually, a potential target of persecution. In good logic, where the country of origin is *not* regarded as generally safe, *i.e.,* where it is acknowledged that persecution may happen there, the claimant should *not* be required to relate his or her fear of persecution to individual circumstances or "special distinguishing features" over and above those of groups at risk of persecution. As I explained before, this is also what the plain language of the Convention definition suggests.

Two Basic Questions

We can now return to the mainstream of our discussion. Henrik Zahle has usefully observed[12] that determination of refugee status consists in answering two main questions:

- the question of "group-risk existence" (*e.g.*, are Ahmadis persecuted in Pakistan, and if so what risk does an Ahmadi living in Pakistan run of actually being persecuted?); and
- the question of "group-risk affiliation" (*e.g.,* is the person, or are the persons, in front of me [a] Pakistani national[s] and does she/ do they profess the Ahmadi faith?). To be complete, however, one should add to the question of group-risk affiliation that of *identification* with the risk group, as set out in the above mentioned 1990 US Asylum Regulations.

I propose that we examine these two concepts in turn.

The question of "risk-group existence" can be broken down into a set of interrogations: Who determines the existence of a group at risk? Through which process? In what terms is it defined?

Who Determines, and Through Which Process?

It is possible to identify seven levels at which the existence of a *prima facie* refugee group can be established:

A. *In a multilateral agreement.* This was standard procedure in Europe in the 1920s and 1930s, when under the auspices of the League of Nations a series of treaties and arrangements were concluded with regard to specific categories of refugees, usually defined by reference to their nationality, coupled with lack of protection from the state of origin.[13] As noted above, the contemporary refugee regime has departed from this selective and highly predictable approach to refugee protection. Nonetheless, the notion that *ad hoc* multilateral arrangements may be an effective way of resolving specific refugee situations is not entirely absent from the regime: though not binding in the same way as their League of Nations precursors, multilateral arrangements concerning particular caseloads of asylum seekers have resurfaced in recent times, in the form of comprehensive plans of action [CPA].[14] It must be noted, however, that such plans do not necessarily formulate blanket assumptions about the refugee character of individuals in the group: to be sure, the landmark CPA adopted by the second international conference on Indo-Chinese refugees in 1989 prescribed, as part of a comprehensive set of humanitarian undertakings, a systematic screening, against Refugee Convention criteria, of all asylum seekers having left Vietnam after a set cut-off date.[15]

B. *By UNHCR.* The UN refugee agency is often called upon to make broad-brush assessments of the eligibility, under its mandate from the UN General Assembly, of large groups of asylum seekers in need of immediate protection and assistance. Whether and to what extent such assessments translate into states' obligations varies from one situation to another, as Jackson has thoroughly documented.[16] It is worth recalling, however, that UNHCR is also deeply—though

© Jean-François Durieux, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

often grudgingly—involved in individual refugee status determination, either as an add-on to, or more problematically as a substitute for, state-run processes. Furthermore, several industrialized states, while they run their own asylum procedures, attach much credit to UNHCR's "reading" of particular refugee-producing situations, on the ground that UNHCR's extensive field presence places its staff in a privileged position with regard to gathering and assessing first-hand information on events in source countries. While this is a correct assumption, it is also true that UNHCR faces serious limitations when it comes to releasing—as opposed to just compiling—information on groups at risk in countries of origin. More than any individual state, UNHCR must be wary of adverse reactions, including damaging accusations of bias, by states of origin and/or their political friends—or, conversely, their political enemies if UNHCR appears to be "soft" on certain source countries. Such accusations are all the likelier to be forthcoming, since the organization does not have the necessary resources to ensure a "universal" coverage of all refugee-producing situations, nor to update its information base with sufficient regularity. Due to those significant limitations, UNHCR's eligibility guidance on groups at risk remains incomplete in two ways: (i) it deals with a small number of source countries, including many but certainly not all quantitatively major ones; (ii) it usually stops short of recommending a *prima facie* finding of refugeehood on the basis of risk-group affiliation/ identification alone. This at times leads to rather ambiguous formulations. Thus, UNHCR's eligibility guidelines on Afghan asylum seekers, dated 31 December 2007, go into a detailed "profiling" of groups and categories of Afghan nationals facing a heightened risk of being persecuted—only to conclude that "UNHCR considers the above-mentioned categories to be linked to the grounds enumerated in the refugee definition, and *where such claimants are able to establish a well-founded fear of persecution,* international protection is merited."[17] It is not at all clear, be it from this sentence or from the rest of the guidelines, what—besides their belonging in a group designated as "at risk"—may make the fear of the profiled asylum seekers well-founded.

C. *By the EU Council.* This is a very specific feature of the European asylum regime, and arguably a rather theoretical scenario. Nonetheless, the mechanism instituted by the 2001 Temporary Protection directive,[18] following almost a decade of experimentation with the "temporary protection" concept in Europe, is worth a mention in this discussion, both for what it does and for what it does not do. On the positive side, the directive contains a definition of "beneficiaries" that includes persons fleeing persecution *en masse, i.e.,* it recognizes that people fleeing areas of endemic violence or armed conflict may well fall within the scope of Article 1A of the Refugee Convention.[19] On the down side, the decision-making process itself is particularly cumbersome, considering that it is meant to respond to an emergency situation.[20] More critically still, the interim protection system that the directive envisages falls short of *prima facie* recognition of refugee status. Rather, it leaves the question of refugeehood, and also of eligibility for subsidiary protection, in suspense for the duration of the temporary protection "regime." What happens (short of return) at the end of that road is rather confusing, since a bizarre hiatus persists between the 2001 definition of "beneficiaries of temporary protection" and that of persons eligible for international protection under the 2004 Qualification Directive.[21]

D. Executive Designation Authorized by Law. This is the most common modality of group determination, both within and outside a mass influx scenario. Here are three illustrations, out of a potentially large number of similar examples.[22] Tanzania's Refugees Act of 1998 provides that the Minister of Home Affairs may, by notice published in the *Gazette,* declare any group of persons to be refugees for the purpose of that Act. Ministerial declarations or orders, based on a similar provision in the now-repealed Refugees Control Act of 1966, have been issued in Tanzania on a regular basis.[23] Still within a context of large-scale influx, but without reference to "refugee" status as such, one can mention Austria's Aliens Residence Act of 1993, which allowed the Federal Government to grant, by decree, a temporary residence status to people fleeing their country of origin "during times of heightened international tension, armed conflict or other circumstances that endanger the safety of entire population groups."[24] Before the ink got dry on this new Act, a decree was issued to grant temporary residence to people from Bosnia and Herzegovina who had arrived before July 1993. The third example is found in the law of the Netherlands, one of very few European states in which the government has retained the power to designate, under the operation of its asylum law, groups and categories of persons as worthy of special humanitarian protection. Pursuant to Article 29 (1) (d) of the 2000 Aliens Act, an "asylum" residence permit may be granted to an alien whose return to the country of origin would, in the Minister's judgment, constitute particular hardship in light of the general situation there. The Ministry of Justice's explanatory notes make it very clear that this power is entirely discretionary and does not reflect or engage the international law obligations of the state. The reference to "an alien" notwithstanding, the operation of Article 29 (1) (d) is triggered by the executive designation of groups and categories of persons in need of protection. Regulations have been issued outlining the "indicators" that should guide the Minister in deciding whether or not a grant of "categorized protection"—as this mechanism is known in

© Jean-François Durieux, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

the Netherlands—is warranted. These are: (i) the nature of violence in the country of origin, and specifically the extent of violations of human rights and humanitarian law, the degree of arbitrariness, and the intensity as well as geographical spread of the violence; (ii) the activities undertaken by international organizations, to the extent that these represent a benchmark for the position of the international community regarding the situation in the country of origin; and (iii) the policies of other EU Member States.[25] Though, as per standard Dutch practice, the designation of a new protected category is discussed in Parliament before it is enacted by the Minister of Justice, the latter has not been questioned so far about the respective weight she or he attaches to these three indicators.[26]

E. Internal Instructions or Recommendations. I refer here to more or less binding guidance provided to first-instance adjudicators by the administrative authorities to whom they report, insofar as such guidance relates to groups at risk in specific source countries. By far the most elaborate practice in this regard is that of the UK Home Office, whose case workers can, and indeed must, rely on a wide array of country-specific Operational Guidance Notes (OGN). OGNs are issued from time to time, and regularly updated, by the Asylum Policy Unit of the Home Office, in respect of major source countries of asylum claims in the UK; fifty-two OGNs are currently available on the Home Office's website. An OGN typically covers issues of both fact and law, its objective being to facilitate and harmonize the application of refugee (or subsidiary protection) criteria to particular situations. OGNs follow a standard format, whereby an overall country assessment leads to a listing and analysis of "main categories" or "main types" of claims, each section being wrapped up with some conclusions as to eligibility for refugee or other protected status.

F. Authoritative Guidance from Reviewing Bodies. The designation of groups at risk, as part of general country of origin information, is usually considered a matter of fact, which is not subject to judicial review by higher courts.[27] On the other hand, where appeal tribunals or boards engage in a *de novo* assessment of all material elements of a claim, their findings on risk-group existence are bound to have an impact on the future jurisprudence of first-instance bodies. In the UK, the Asylum and Immigration Tribunal has developed its own country guidance system "in response to concerns over the inconsistency of appeal outcomes arising from differential assessments by tribunal members of the conditions in countries of origin producing asylum applicants."[28] In this modality, country guidance is not—as with the Home Office—a matter of issuing administrative instructions, but a distinctive form of tribunal litigation: it is issued through judicial decisions, typically made on a set of cases raising a similar country issue. Robert Thomas describes three techniques used by the Tribunal in such cases, two of which are relevant to our discussion: namely, the identification of "risk categories" within specific source countries, such as Palestinians in Iraq; and the identification of "risk factors" which, alone or in combination, contribute to making return to the country of origin a more dangerous proposition for individual applicants, even though the group they belong to (*e.g.,* Sri Lankan Tamils) is not in itself a group at risk. Whether country guidance issued in this way should be regarded as binding, persuasive, or authoritative is discussed at some length in Thomas's paper.[29] For our purposes, it is enough to observe that the Home Office refers to the Tribunal's country guidance cases extensively in its own OGNs.

Albeit in a very different judicial setting, the brush of Dutch administrative tribunals with the notion of "group persecution" can also be mentioned here, in particular the position of the Rechtseenheidskamer (law harmonization chamber) which, between 1994 and 2001, performed the role of consistency monitor among administrative tribunals at a time when the Council of State had no competence in asylum cases. In a decision of July 2000, the tribunal acknowledged that group persecution may exist in some countries, and that in such cases the applicant who can establish membership in the group in question benefits from a presumption of refugeehood. However, it stopped short, in the case at issue, of designating the Reer Hamar clan of Somalia as such a "persecuted group."[30]

G. In the Individual Case. The question of risk-group existence is seldom raised as such in asylum hearings, which tend to emphasize the personal circumstances of the claimant—themselves understood more as *events* having affected him or her personally than as *characteristics* which she or he may share with a larger group. The claimant is definitely not encouraged to stress the collective dimension of his or her fear of persecution—nor, for that matter, to present his or her own view of the general situation in the country of origin, which is supposed to be known to the adjudicator. On the one hand, it may be argued that to require the individual claimant to prove the existence of groups at risk is to place an unfair burden on him or her. On the other hand, I contend that assumptions about groups at risk—or not at risk—are almost always present in the mind of the interviewer and inevitably affect the course of the hearing. The problem for the claimant, obviously, is that such assumptions are implicit and therefore difficult to relate to (where they are positive) or to challenge (where they are not). The only way out of this catch would seem to be for both parties to share, as it were, their respective "maps of the world,"[31] in other words, to disclose the group-based evidence that each of them is bringing into the assessment of the claim. Preferably, such disclosure should

© Jean-François Durieux, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

take place before the hearing, so that the latter can focus exclusively on those material elements of the claim on which there has been no prior agreement. The UK Home Office has recently launched a pilot project that features such a pre-hearing conference. I cannot tell what weight is attached to group-based factors of risk in this process, which I have not (yet) been able to observe in person. However, the Home Office's practice of country guidance through public domain OGNs, which I described above, suggests that a good part of the conference may actually be devoted to comparing notes about groups at risk. This methodology presents two main advantages: it is participatory, and it is transparent. There is no escaping its downside, though: there will always be a *first* claim made by a member of a *new* group at risk—and it can be argued that the more detailed existing country guidance is, the harder it will be for this "first new" claim to be recognized as valid. The objective of lightening the claimant's burden of proof is clearly met where the group at risk, of which she or he is a member, appears on the adjudicator's "map of the world." If it does not, and the map in question is, in the words of Popovic, "unwavering," the burden on the applicant may well become unbearable.

In What Terms Is the Group-at-Risk Defined?

At least two ingredients appear indispensable to the description of a group at risk in the RSD context: one is the *source country* (*i.e.,* the nationality of members of the group, or, if they are stateless, the country of habitual residence); the other is a *time frame,* which can be expressed either (i) through a cut-off date of departure from the country of origin or arrival in the host country; or (ii) by reference to "dated" events in the country of origin.[32] It is interesting to note, however, that eligibility guidance directed mainly at individual determination processes, such as OGNs, UNHCR guidelines, or "country guidance cases" are not always precise as to the temporal validity of their risk assessments. It must be assumed that they represent the issuing authority's reading of the situation at the time of writing, but claims entering a refugee status determination procedure at that time may not be decided upon until months later. It seems logical to require, therefore, that any risk-group existence determination should be supported by time-specific country information, as well as regularly and systematically updated.

Beyond the (obvious) nationality element and the (not so obvious) time frame, the wide variety of processes through which groups at risk come to light in RSD is mirrored in very different levels of detail in the representation of such groups. Formulations will also vary according to the significance given to the risk-group notion in the overall assessment of the claim. Here, it is worth recalling that not all instruments referred to in the previous section identify groups at risk *as such*—they may, *e.g.*, refer to types of claims, which is an obviously more open as well as more neutral description. Save in situations of large-scale influx, membership in the group is rarely conclusive evidence of a need for international protection: more often, it is only indicative of the direction, which an inquiry into the personal circumstances of the claimant ought to take.

Thus, while an OGN designates former members of parties to the conflict in Colombia as a risk-group, it considers a grant of asylum appropriate only where the claimant establishes that he or she has been "kidnapped in the past and/or [has] encountered serious harassment or threats from either FARC, ELN or AUC, and such treatment has been for political reasons."[33] This last requirement, in particular, appears dangerously circular: if it cannot even be assumed that the harassment of ex-members of armed groups is politically motivated, the very notion of risk group loses all relevance in this context. To be relevant, the notion must be susceptible of use as a "reading grid," a lens through which the refugee definition is projected against the background of country-of-origin information. A straightforward illustration can be found in another OGN, in respect of the Democratic Republic of Congo, which concludes its analysis of the situation of Banyamulenge Tutsis in that country with the following statement: "If it is accepted that the claimant is of Banyamulenge origin, a grant of asylum is likely to be appropriate."[34]

Tutsis from the Democratic Republic of Congo also benefit, on account of their sole ethnicity, from "categorized protection" in the Netherlands. In contrast, the protected category of Sudanese from Darfur is defined by a mix of innate characteristics, place of origin, itinerary, and other elements of personal history: non-Arabs from North, West, or South Darfur are eligible unless they resided without difficulties for a period of six months or more in the north of the country. The notion of internal relocation alternative thus creeps into the definition of a group at risk, which, as noted by the International Centre for Migration Policy Development in a 2006 study, is a bit of a paradox.[35] I will briefly revert to this point further down.

I have already alluded to the way groups with a *prima facie* need for protection are identified where they arrive in large numbers over a short period of time. In most such cases, what states attempt to define through the adoption of special criteria is a *fait accompli,* in the sense that the emergency is in full swing already. One must acknowledge the peculiar difficulty of adopting precise definitions in the heat of an influx. The refugee-producing crisis may be too current to permit a detailed analysis of its causes, which are likely to be complex in any event. Neighbouring states may also be wary that their attitudes towards fleeing persons do not aggravate international tensions, or close the door to

© Jean-François Durieux, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

quiet diplomacy for the resolution of the crisis. Receiving states and UNHCR may be tempted, therefore, to resort to broad-brush characterizations. The judgmental "massive violations of human rights" and the more neutral "events seriously disturbing public order" become handy catchphrases, erasing important distinctions among groups at risk and among the types of risk they actually incur. Such distinctions are important, not only in order to calibrate the protection response, but also in order to identify the appropriate durable solutions.[36] Even where they are faced with large-scale influxes, therefore, states should aim at the most precise description possible of their causes, including time and space parameters. While this is not an easy task, it is not an impossible one: after all, the circumstances leading to involuntary displacement are usually well known and sufficiently documented before they manifest themselves through cross-border flows.

The next set of questions concerns *inclusion in,* and *identification with,* groups at risk.

What Is the Claimant's Burden of Proof?

Designation of a group at risk undoubtedly provides an "evidentiary shortcut" in the RSD process. Nevertheless, the individual member of the group is not relieved of all evidential burden: she or he must satisfy the authority that she or he belongs in, and/or is identified with, the group at risk. It is, simply put, the degree of precision in the definition of the group that will determine the evidential burden to be discharged by the individual claimant.

While in theory all persons belonging to the discriminated group are equally at risk, one must accept that the particular position of individuals within the group may be relevant, as it may determine the level of repression expected from the authority (*i.e.,* the threshold between discrimination and persecution). Whether the individual's position in the group may also affect the likelihood of persecution, *i.e.,* the well-foundedness of the fear, is more debatable. The UK Home Office's guidance in respect of, *e.g.*, Falun Gong members from China or Ahmadis from Pakistan holds that members of these groups have no persecution to fear if they lie low; in other words, the likelihood of persecution depends on their membership in the group being "visible" to the potential persecutor. This further level of discrimination is in my opinion not required for a correct application of the refugee definition. To be sure, an assessment of "visibility" is highly problematic within a qualification process that is, in essence, an "essay in prediction":[37] the "unexceptional Ahmadi"[38] may have been discreet so far, but this is no guarantee that she or he will be able, let alone willing, to remain "invisible" in the future.

To What Standard Must the Evidential Burden Be Discharged?

In attempting to distinguish between the *existence* of a group at risk and the *affiliation* to such a group, "the difference in focus and in the types of information asked for reasonably demand a distinction to be made when assessing the evidence."[39]

To say that a risk group exists is another way of stating that members of the group have a well-founded fear of being persecuted. This does not mean that it is more likely than not they will be: a reasonable likelihood is a more appropriate standard. On the other hand, where group affiliation is at issue, the standard can be raised: there must be a relatively high degree of certainty that the applicant is who he claims to be (in terms of affiliation with a designated group).[40] This point was not lost to the Dutch Ministry of Justice as it elucidated the rules of evidence applicable to claims to "categorized protection": in order to arrive at a decision on this matter,

> one must not in the first place consider whether the asylum seeker's statements regarding the substance of his or her claim are credible. What is primarily at issue is whether the asylum seeker belongs to a category that has been designated for a grant [of categorised protection]. *It goes without saying that identity and nationality must be established well beyond doubt.*[41]

These are facts, indeed, that are not subject to speculation, but from which significant inferences are about to be drawn. Is this to say that group-based RSD requires *more* certainty regarding identity and national origin than an individualized approach? If this is the case, what additional evidence is required, and in what form? And above all: what are the consequences if it is not adduced to the satisfaction of the adjudicator? These are questions worth exploring further, against the challenging backdrop of wilful destruction of identity documents; forging, swapping, and confiscating passports; and other practices, for which people-smuggling rings that control many of the asylum seekers' flight routes have become notorious.

Rules of evidence find their application within procedures, and issues of burden and standard of proof may, in the final analysis, be determined by the setting, within which evidence is being adduced by the asylum seeker, to the effect that he or she belongs in, and can be identified with, such risk group as has been defined. In mass or diffuse influx situations, the simple act of coming forward may constitute the beginning and the end of the qualification process. Thus, in Tanzania following the 1994 ministerial declaration in favour of refugees from Burundi,[42] the eligibility procedure was actually dispensed with through a summary process of

© Jean-François Durieux, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

registering family units upon admission into a refugee camp, which served assistance at least as much as protection purposes. In such situations, it appears that the main control of the integrity of the process is exercised by the refugee population itself, through an informal co-optation mechanism that does not necessarily reflect the criteria set by the host state.[43] While a stricter screening exercise can be envisaged at a later stage, it is likely to cause major disruption in the affected settlements if it results in deregistration of a substantial number of residents. The few studies that have been undertaken on this topic[44] paint a rather confused picture, suggesting that group determination procedures that are fair, credible, and efficient in refugee emergencies remain, by and large, to be invented. In this connection, an ongoing initiative in the Americas probably deserves attention. In the areas of Ecuador bordering on Colombia, the Ecuadorian government and UNHCR register asylum seekers originating from any of nine administrative departments of Colombia, on the understanding that they are more likely than not to meet the refugee definition criteria of the Ecuadorian law. UNHCR has proposed to the government to introduce an enhanced registration and profiling system, which would obviate the need for registered Colombian asylum seekers to go through the regular RSD procedure.[45]

Rebuttable Presumption, or Not?

The evidentiary shortcut described in the preceding sections can be loosely described as the operation of a presumption: upon proof of a few facts, the law presumes another relevant fact—in essence, a well-founded fear of being persecuted. Some features of this evidentiary process make it difficult, however, to assimilate fully to a rebuttable presumption of law, the effect of which is to change the allocation of the risk of losing regarding a particular issue.[46]

First, as we have seen, the "presumption" of refugeehood is not always established by law. Second, in RSD one can hardly speak of two parties with conflicting interests, both at risk of "losing the case": the official representing the state does not have a case to lose; rather his or her job is to ensure the proper application of a common good, albeit that this may involve a refutation of the claimant's evidence.

This observation leads us into a third conceptual obstacle: if refugeehood on a group basis stems from a presumption, this presumption is not *stricto sensu* rebuttable. Let us assume that the asylum seeker has made a *prima facie* case of refugeehood; in other words, has met the burden of proof to the satisfaction of the "law"—*i.e.* the criteria set by the "group determiner" are not in dispute. The *Handbook* states that this person must be regarded as a refugee in the absence of evidence to the contrary. But what can such evidence consist of?

Clearly, the state would be in contradiction with itself if it were to dispute, in an individual case doubtlessly belonging to a designated group, the existence or even the risk of persecution in the country of origin. Under the League of Nations, when refugees were primarily defined in relation to their membership in a group, the fact of not enjoying national protection was also part of the definition. The cursory screening of individual refugees would involve, therefore, some inquiry into this fact, notably as regards any evidence that the individual had effectively and voluntarily maintained ties with the state of origin. This evidence, if we assume that it was produced by the official as would normally be the case, was indeed "evidence to the contrary" because non-availment of national protection was an integral part of the definition. In contrast, when Hungarian refugees sought refuge in Germany following the 1956 revolution (and the Refugee Convention was deemed applicable), each applicant was automatically recognized and documented as a refugee unless she or he presented a security risk.[47] While it was the responsibility of the state to establish the existence of such a risk, this was clearly not tantamount to producing "evidence to the contrary": what was at issue was not the refugee character of the individual in question, but whether, as a refugee, the individual could safely be granted asylum or any other facility in Germany.

Though African state practice is extremely poor with regard to screening "non-refugees" out of designated refugee groups, the attempts made by Zambia, Tanzania, and the DRC/Zaire all point to a similar concern for national security.[48] The tragic experience of the Rwandan exodus following the 1994 genocide brought to light the very real possibility that refugee flows might be "contaminated" by the presence of serious offenders, war criminals, or *genocidaires*. Without underestimating the practical difficulties involved, this is probably the clearest case, under Article1 of the Convention, for "rebutting" the "presumption" of refugeehood in individual cases: that is, where an exclusion clause may be invoked. Even in this case, however, it may be incorrect to describe the "contrary move" of the receiving state as a rebuttal of the presumption. In all legal rigour, the assessment of exclusion grounds is a separate test, distinct from the assessment of inclusion (which is what the so-called presumption is about).[49]

In contrast, a finding of "internal protection"—the availability within the country of origin of a safe relocation alternative to asylum seeking abroad—is normally regarded as part and parcel of the inclusion process. Can the state that has designated a group as "at risk" dispute the existence of the risk in an individual case by arguing that this particular claimant availed, or could/should have availed, himself or herself of an internal flight/relocation alternative inside

© Jean-François Durieux, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

the country of origin? This would indeed be "evidence to the contrary," capable of rebutting the group-based presumption of refugeehood. To introduce this parameter into the assessment seems, however, to defeat the purpose of procedural and evidential simplification. Designations of "protected categories" in the Netherlands have attempted to square this circle by "objectivizing" internal protection, notably in the cases of Somalia and Sudan: instead of probing the potential of an *hypothetical* relocation to a relatively safe and stable part of the country, the "categorized protection" assessment includes the *fact* of prior problem-free residence in such a part, which in turn is interpreted as evidence of the current and future availability of internal protection. This additional criterion injects several layers of complexity into the evidentiary process, and multiple shifts in the allocation of the burden of proof, that may well offset the positive effect of group-based RSD in terms of efficiency and consistency.

Tentative Conclusions

Undoubtedly, the main argument in favour of group-based RSD is its efficiency. It avoids the need for fresh decisions on the same material in situations of common application, with the associated resource implications. This consideration is clearly predominant in mass influx situations. As we have seen, though, there is in such situations a risk that efficiency may be achieved at the expense of certainty: because of an overly broad or vague definition of the groups at risk, and/or as a result of procedural faults, the receiving state is not entirely confident about the "refugee" character of all those admitted as refugees; such indeterminacy may also be detrimental to the asylum seekers themselves where—as in the case of EU-styled temporary protection—they find themselves in a legal limbo and with an inferior status. There is no reason, however, why efficiency and certainty cannot be reconciled, especially in those states where resources are available to be applied to the regular updating and distillation of country information, and to the monitoring and control of asylum decisions.

To admit group-based evidence in RSD is also advantageous in that it is bound to increase decisional consistency. It can be argued that it enhances consistency in two ways: at one level, it ensures that like cases are treated alike; on a more conceptual plane, it makes RSD more consistent with the refugee definition itself.

Consistency is an element of fairness, not least because it breeds predictability. Where groups at risk are clearly identified, the claimant knows what she or he is supposed to prove and is aware of the inferences that will be made from his or her statements. Admittedly, the above benefits can only be reaped if the process is sufficiently transparent: any group-based evidence must be squarely "above the table" and all possible inferences must be explicit. I set out on this inquiry with a particular understanding of a "lighter" burden of proof, whereby the claimant is required either to prove fewer facts in issue, or to produce evidence to which the claimant has easier access. However, issues surrounding sufficiency of, and access to, evidence can hardly be resolved in the abstract: whereas risk-group affiliation may be easier to prove in some situations, this will not be the case in others. In the final analysis, therefore, I find that fairness will be better served by a transparent and precise definition of groups at risk than by a sheer reduction of definitional criteria.

There is, on the other hand, a distinct risk of artificiality in any attempt at classification or categorization, which is somehow inherent in group-based RSD. Thomas rightly warns: "Country guidance prioritizes certainty and consistency over individual justice. In particular, country guideline determinations, it has been argued, seek to impose artificial certainty on what are often uncertain and rapidly changing country situations."[50] In a similar vein, Legomsky identifies complexity and dynamism as essential ingredients of the subject matter with which asylum adjudicators must contend.[51] Not only is categorization somewhat artificial, it is also, inevitably, selective: as noted above, fairness will be trumped if the asylum seeker is faced with an unwavering "map of the world," on which the group to which she or he belongs does not figure.

I am not recommending, in any case, that group-based RSD should be the exclusive, or even the preferred, approach to applying the refugee definition. It is neither feasible nor desirable to reduce RSD to a process of fitting individual applicants into neatly defined categories. While refugee definition criteria are not "highly individualistic," they are not "highly collective" either. In particular, there will always be situations in which group-based discriminatory measures (and/or measures of general application) do not meet the threshold of persecution, *except for* those individuals who do actively resist them. The assessment required in such deserving cases cannot be exhausted by the two recommended steps of risk-group existence and risk-group affiliation. On the other hand, it does not make those steps redundant either. What is recommended, in short, is a balanced approach, one that avoids both the temptation of excessive emphasis on individual circumstances and the dangers of exclusive reliance on group characteristics.

Individual and group determination processes are rarely discussed together, or, if they are, it is mainly with a view to stressing their allegedly irreconcilable differences. In the global North, not only does the *Handbook*'s mantra according to which refugee status "must normally be determined on an individual basis" hold its ground, it has actually been taken to such undesirable extremes as the "singling out" re-

© Jean-François Durieux, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

quirement. It has also failed to produce consistent or credible outcomes.[52] At the other extreme, there seems to be a consensus that large-scale influxes—to which some sort of group determination is the typical response—follow their own rules, which in turn are deemed to be less rigorous and somehow less worthy of legal analysis than individual RSD. Were it not for the formalization of temporary protection in Europe, which is a very recent phenomenon, one might even suspect that group determination is perceived in the industrialized world as a symptom of underdevelopment, an incomplete mechanism to which developing countries resort by default, for want of a better way.

Regrettably, neither UNHCR nor African states have made much effort to dispel this negative perception of their group determination practices. The recommendation of the 1979 Pan-African Conference on Refugees, calling for a thorough study of these practices, remains a dead letter, despite being reiterated on the occasion of the 30th anniversary of the 1969 OAU Convention.[53] The lack of systematic compilation and comparative analysis undoubtedly reinforces the feeling that not much can be learned from *ad hoc* mechanisms and disparate pieces of legislation, and relegates group determination to insignificance. True, there are serious conceptual and procedural weaknesses in African refugee law as it applies to groups of refugees. In my view, though, it would be a mistake to throw the baby away with the bathwater and to simply dismiss African practice of group-based RSD. There are two important reasons for this.

Firstly, there has been in recent years a steady push for African states that have not yet equipped themselves with "regular" (*i.e.,* individual) RSD procedures, or whose existing procedures have somehow gone out of use, to overcome those deficiencies. Some real progress has been achieved in this direction, including the accompanying development of legal counselling services for asylum seekers and the surge of capacity-building projects benefiting national RSD authorities.[54] While this trend is welcome, it is not exempt from risk: African states will no doubt be tempted to adopt the restrictive practices of their European partners, the export value of which has already been tested in Europe's "near abroad" in a way that has not, by any yardstick, enhanced the protection available to genuine asylum seekers. As they engage in regulating and/or revamping individual RSD procedures, African states with a past or current practice of group determination should be encouraged not to discard this practice, but rather to factor it into a comprehensive approach to refugee protection on their territories. Such a "comprehensive" approach—this is my second and final point—does not only mean *coexistence* of individual and group determination processes within domestic jurisdictions, though this would in any event be useful, particularly in states likely to face large-scale influxes from time to time due to their geostrategic location. It also means the *interpenetration* of critical elements of both individual and group-based processes. As I hope this article has made clear, the value of such an exercise would extend far beyond the confines of Africa.

Notes

1. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (re-edited 1992)
2. Jennifer Hyndman and Bo Victor Nylund, "UNHCR and the Status of *Prima Facie* Refugees in Kenya," *International Journal of Refugee Law* 10 (1998): 21; Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism," *International Journal of Refugee Law* 3 (1991): 185, 189.
3. Jean-François Durieux and Jane McAdam, "Non-Refoulement Through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies," *International Journal of Refugee Law* 16 (2004): 4.
4. Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969), Article I (2).
5. In some cases, however, "political opinion" may be hard to reconcile with membership in a group, *e.g.,* where "a person is aware of contending political forces and affirmatively chooses not to join any faction;" *Bolanos-Hernandez v. INS,* 767 F.2d 1277 (9th Cir. 1984).
6. Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), 529, but *contra:* 129; also *contra,* Thomas Spijkerboer, "Subsidiarity in Asylum Law. The Personal Scope of International Protection," in *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* ed. Daphne Bouteillet-Paquet (Brussels: Bruylant, 2002), 20–28.
7. 8 CFR para.208.13 (b) (2) (iii); para. 208.16(b) (92).
8. See J. Crawford and P. Hyndman, "Three Heresies in the Application of the Refugee Convention," *International Journal of Refugee Law* 1 (1989): 152; Kazimierz Bem, *Defining the Refugee: American and Dutch Asylum Case-law, 1975–2005* (Amsterdam: Vrije Universiteit, 2007), 29–35, 129–141.
9. Richard Towle and Richard Stainsby, "Strengthening Protection Capacity and Consistency in Refugee Status Determination: A Global Perspective" (paper presented to the conference Best Practices for Refugee Status Determination, Monash University Prato Centre, 29–30 May 2008).
10. Council of the European Union, *Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* (1 December 2005), Articles 29 [NB: quashed by the Court of Justice of the European Communities in 2008], 30 and 31.

© Jean-François Durieux, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

11. *Ibid.*, Articles 23 and 28. Compare with the assignation of "simple claims" to a fast-track hearing or expedited process in the Canadian procedure: Immigration and Refugee Board of Canada, *Policy no. 2005-01: Fast Track Policy: Hearings Process* (14 March 2005), 2.
12. Henrik Zahle, "Competing Patterns for Evidentiary Assessments," in *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, ed. Gregor Noll (Leiden and Boston: Martinus Nijhoff, 2005), 21.
13. For a description of these arrangements, see *e.g.* Goodwin-Gill and McAdam, 16–20; James Hathaway, "The Evolution of Refugee Status in International Law," *International and Comparative Law Quarterly* 33 (1984) 348–380.
14. See *e.g.*, Alexander Betts, *Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA* (New Issues in Refugee Research, Working Paper No. 120,UNHCR, Geneva, January 2006).
15. See Sten A. Bronee, "The History of the Comprehensive Plan of Action," *International Journal of Refugee Law* 5 (1993): 534; Shamsul Bari, "Refugee Status Determination under the Comprehensive Plan of Action," *International Journal of Refugee Law* 4 (1992): 487; UN Doc. A/CONF.148/2 (26 April 1989).
16. Ivor C. Jackson, *The Refugee Concept in Group Situations* (Cambridge: Cambridge University Press, 1999).
17. UNHCR, *UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers* (Geneva: UNHCR, 2007), <http:// www.unhcr.org/cgi-bin/texis/vtx/refworld> (emphasis added).
18. Council of the European Union, *Directive 2001/55/EC on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof* (20 July 2001) .
19. *Ibid.*, Article 2.
20. See Article 5.1: "The existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council."
21. On this point, see *e.g.* Jean-François Durieux and Agnes Hurwitz, "How Many Is Too Many: African and European Legal Responses to Mass Influxes of Refugees," *German Yearbook of International Law* 47 (2004): 105.
22. For an overview of the law and practice of African states, in particular, see Bonaventure Rutinwa, *Prima Facie Status and Refugee Protection* (New Issues in Refugee Research, Working Paper No. 69, UNHCR, Geneva, October 2002).
23. *Ibid.*, 8–9.
24. *Bundesgesetz mit dem der Aufenthalt von Fremden in Osterreich geregelt wird (Aufenthaltgesetz)* (1 July 1993), section 12, as cited by Joanne Van Selm, *Refugee Protection in Europe: Lessons of the Yugoslav Crisis* (Leiden and Boston: Martinus Nijhoff, 1998), 190.
25. These are unofficial translations. For full text of the 2000 Aliens Act, Aliens Decree and Aliens Circular C2/5, see <http:// www.wetten.overheid.nl>.
26. Interview with officials of the Ministry of Justice, The Hague, 19 May 2008.
27. Nonetheless, "failure to take account of a country guidance case, even though it is a decision on fact only, will entail an error of law in that a material consideration will have been ignored": UK Court of Appeal [2007] EWCA Civ 297 (4 April 2007); also [2005] EWCA Civ 982222 [27].
28. Robert Thomas, "Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom," *International Journal of Refugee Law* (2008) 20 (advance access: 2). Note that the Court of Appeal remains critical of the country guidance mechanism instituted by the AIT: see, *e.g.*, [2007] EWCA Civ 297 (4 April 2007).
29. *Ibid.*, 28–32.
30. RV 2000, 12; see Bem, note 8 above, 127–128.
31. I am borrowing this term from Aleksandra Popovic, "Evidentiary Assessment and Non-Refoulement: Insights from Criminal Procedure," in Noll, *Proof, Evidentiary Assessment, and Credibility in Asylum Procedures*, note 11 above, 41.
32. Pursuant to Article 5 of the 2001 Temporary Protection directive (note 20, above), the Commission's proposal to the Council should include, at a minimum, a description of the specific groups to whom temporary protection will apply; the date of temporary protection taking effect; and an estimation of the scale of the flow.
33. Home Office, *Operational Guidance Note: Colombia* (4 May 2007), <http://www.unhcr.org?cgi-bin/texis/vtx/refworld/rwmain?docid=422c832e4>.
34. Home Office, *Operational Guidance Note: DRC* v 8.0 (20 August 2007), <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificasylumpolicyogns/drcongoogn?view=Binary>. Compare this with the designation, in the Netherlands, of the same Banyamulenge Tutsis from DRC as beneficiaries of "categorized protection" under Art. 29 (1) (d) of the Aliens Act, which in practice rules out the recognition of those claimants as Convention refugees.
35. International Centre for Migration Policy Development (ICMPD), *Comparative Study on the Existence and Application of Categorized Protection in Selected European Countries* (Vienna, January 2006), 15, 22.
36. One further consideration is that the application of a cessation clause based on change of circumstances (as per Art. 1 C 5 of the Refugee Convention) in effect requires that the *original* circumstances—including of time and space—justifying a grant of international protection be clearly spelled out at the time of the influx.
37. Goodwin-Gill and McAdam, note 6 above, 542.
38. [2005] UKIAT 00033 KK, cited in Home Office, *Operational Guidance Note: Pakistan* (15 March 2007), 5.
39. Henrik Zahle (2005), note 12 above, 22.

© Jean-François Durieux, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

40. *Ibid.*
41. Circulaire, 5.4 (free translation; emphasis added).
42. Cited and discussed in Rutinwa, note 22 above, 9.
43. *Ibid.*, 14—observing that when Lukole camp was established in 1997 for Burundian refugees, "some 12,275 Rwandese managed to be admitted into the camp by claiming themselves to be Burundians" because "they were not sure whether they would successfully undergo the individualised refugee status procedure which was mandatorily applied to asylum seekers from Rwanda."
44. See notes 2, 23, and 24, above.
45. UNHCR, *Application of the broader refugee definition in Ecuador* (Geneva, Bureau for the Americas, October 2007); on file with the author. "Profiling" of asylum seekers is also being piloted by UNHCR within the context of "mixed migratory flows," notably across the Mediterranean: see UNHCR, The Ten-Point Plan of Action (1 January 2007), <http://www.unhcr.org/protect/483df0fb04.html>.
46. Steve Uglow, *Evidence: Text and Materials* (London: Sweet and Maxwell, 1997), 760.
47. Ivor C. Jackson, note 16 above, 117–119.
48. Rutinwa, note 24 above, 13, 14.
49. On the related but distinct issue of "combatants" and armed elements infiltrated among designated refugee caseloads, see Stephane Jaquemet, *Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or Non-International Armed Conflict Become an Asylum Seeker* (Geneva: UNHCR, Legal and Protection Policy Series No.6, 2004), 35; Durieux and Hurwitz, note 21 above; George Okoth-Obbo, "Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa," *Refugee Survey Quarterly* 20 (2001): 79.
50. Robert Thomas, note 28 above, 36.
51. Stephen H. Legomsky, "Learning to Live with Unequal Justice: Asylum and the Limits to Consistency," *Stanford Law Review* 60 (2007), 441.
52. See, *e.g.*, Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," *Stanford Law Review* 60 (2007): 295; and for a critical analysis, Stephen H. Legomsky, "Learning to Live with Unequal Justice: Asylum and the Limits to Consistency," *Stanford Law Review* 60 (2007): 413.
53. *Recommendations from the Arusha Conference on the African Refugee Problem* (1979), Recommendations 2.4 and 2.5, reprinted by Scandinavian Institute of African Studies, Uppsala; Special OAU/UNHCR Meeting of Government and Non-Government Technical Experts on the 30th Anniversary of the 1969 OAU Convention, *Comprehensive Implementation Plan* (Conakry, 29 March 2000), Action Five (ii), reproduced in *Refugee Survey Quarterly* 20 (2001): 36.
54. See Barbara Harrell-Bond, "Starting a Movement of Refugee Legal Aid Organizations in the South," *International Journal of Refugee Law* 19 (2007): 729; on UNHCR's Strengthening Protection Capacity project, see <http:// www.unhcr.org/protect/43d644142.html>.

Jean-François Durieux is Deputy Director, Division of Operational Services, UNHCR Geneva. When this article was written J.F. Durieux was Departmental Lecturer in International Human Rights and Refugee Law at the University of Oxford. The views expressed in this article are the author's own and do not necessarily reflect the position of the United Nations or UNHCR.

© Jean-François Durieux, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Explaining Inequality in the Implementation of Asylum Law

Peter Mascini

Abstract

The goal of this research was to identify factors that account for procedural and substantive inequality in implementing asylum law. The decisions of ninety-eight caseworkers of the Dutch Immigration and Naturalization Service on an asylum application were related to their answers on a questionnaire. Caseworkers differ in the extent of available information on an asylum application they take for granted and in their final decisions on it. These differences result from work pressure, the caseworkers' reputation, their role definition, political opinion, and professional background, and policy. Intensifying feedback and decreasing work pressure can achieve more consistent and careful decisions.

Résumé

Le but de cette étude était d'identifier les facteurs responsables pour les inégalités de fond ainsi que des inégalités relatives à la procédure dans l'application de la loi sur le droit d'asile. Les décisions de quatre-vingt dix-huit agents chargés du cas du Service néerlandais pour l'immigration et la naturalisation concernant une demande d'asile furent reliées à leurs réponses à un questionnaire. Les agents chargés du cas diffèrent sur la somme d'information dont ils disposent concernant une demande d'asile qu'ils tiennent pour acquis et aussi dans leurs décisions finales concernant la même demande. Ces différences sont causées par la tension au travail, la réputation de l'agent chargé du cas, leur définition de leur rôle, leurs opinions politiques, leurs antécédents professionnels et les politiques en place. Accroître la rétroaction et faire baisser la tension au travail aideront à atteindre des décisions plus cohérentes et consciencieuses.

Introduction

The predominant opinion in the literature on the implementation of law is that the translation of general laws in decisions about specific cases unavoidably leaves room for choices.[1] This is called discretion. On the one hand, the freedom of choice enables officials to individualize decisions. This means that they can take into account more characteristics of a case than are formally relevant. On the other hand, it can lead to inequality before the law. This means that officials decide differently on comparable cases. Inequality before the law can refer either to the decision procedure or to the substance of the decision.[2]

The best way to study the individualization of decisions is to ask the *same officials* to decide upon *different cases* that are formally identical, but that differ in other respects. In this way it is possible to find out, for example, whether they are more likely to grant a disablement benefit for a sick breadwinner with years of work experience than for an inexperienced single person with the identical sickness. The relation between the use of discretion and inequality before the law can best be studied by asking *different officials* to decide on *one identical case.* Then it is clear from the start that all eventual different outcomes are unrelated to the legitimacy of the application itself. This paper is directed exclusively to the inequality before the law that can result from the use of discretion. The goal is to find causes of procedural and substantive inequality. For this reason ninety-eight officials responsible for the implementation of asylum policy in the Netherlands—so-called decision employees—were presented an identical fictitious asylum application and were asked what they would decide on it.[3] Subsequently, these answers were connected to their answers on a questionnaire.

The implementation of asylum policy is a suitable subject for finding out how discretion results in procedural and substantive inequality. On the one hand, previous research has already demonstrated that both forms of inequality are

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

no exception in relation to the implementation of asylum policy. Regarding procedural inequality, Smit[4] has shown, for example, that decision employees indeed only request a test to establish the age of minor asylum seekers if there are serious doubts about the stated age, but that in some cases where there were also well-founded reasons to doubt, no age test was requested. Quite a few others have shown that the implementation of asylum policy results in substantive inequality before the law as well. At the level of nations,[5] states (*i.e.,* cantons),[6] regions,[7] asylum-seekers centres,[8] and individual professionals,[9] similar or even identical asylum applications have different outcomes. On the other hand, little is known about the causes of both forms of inequality.[10] In other words, it is well known that the implementation of asylum policy results in both forms of inequality but it is hardly known what causes them. The goal of this study is to reveal some particular causes.

Explanations were sought in the working conditions of the decision employees, and in their personal characteristics. Explanations regarding the institutional context were not taken into account because data were only collected systematically at the level of the individual employees. The next section is about the hypotheses. Then follows section three about the collection of the data, the research design, the operationalization, and the analytic strategy. Section four is about the results, and the final section is about conclusions and recommendations.

Theory and Hypotheses

Procedural Inequality

According to Lipsky,[11] officials—"street-level bureaucrats"—are unable to do justice to the specific characteristics of individual cases because they are chronically plagued by a lack of time. In order to deal with the continuous flow of new cases, street-level bureaucrats often accept incomplete information and information that clients deliver themselves because the collecting of missing information and of information gathered independently of the interested party is usually difficult and time-consuming.

However, the fact that the shortage of time is inherent in the work of street-level bureaucrats does, of course, not imply that they all suffer of it to the same extent. Therefore, differences in work pressure could cause variation in the extent to which they are prepared to decide on the basis of incomplete or client-dependent information. There are indeed several indications that officials are more willing to accept the information that is present about a case as they are under more work pressure: time constraints encourage immigrant inspectors to rely on simplifying categories when questioning travellers[12] and social workers take fewer cues into account when dealing with accusations of elder mistreatment as the caseload of the county in which they work is higher.[13] So, the expectation is that officials who are responsible for the implementation of asylum policy are more willing to accept the obtainable information on an asylum application as they perceive more work pressure (hypothesis 1a). Furthermore, it can be expected that especially newer employees perceive a lot of work pressure (hypotheses 1b). Usually the most important task of officials is to make decisions on individual cases and since newer employees are still learning to do the job they may need more time to make a decision than experienced employees.

The second reason why officials might differ is the extent to which they take for granted the information that is present about a case refers to the quality of their reputation. When making actual decisions, employees take into account their experiences with previous cases—their so-called *prior knowledge.*[14] This means that decisions about individual cases cannot be seen in isolation from the outcomes of previous ones: "Decision-makers, then, do not see and treat cases as self-contained, isolated entities, but rather as practical tasks embedded in known and foreseeable courses of institutional actions."[15] Administrators use their experience with the outcome of previous decisions in particular to protect their own reputation and that of their organization.[16] This means that they try to gain recognition for their decisions and to prevent them from being overturned. Employees who have been successful in this respect in the past are expected to have the least problems with taking for granted the information that is available about a case. After all, they have received few signals that this has decreased the carefulness of their decisions. This means that it is to be expected that decision makers are more inclined to live with the available information on an asylum application as they have a better reputation (hypotheses 2).

Substantive Inequality

Differences in the extent to which caseworkers take for granted the disposable information on an application refers to procedural inequality. Those who decide not to take it for granted will eventually base their decisions on different data then those who do. After all, only the former decide to complement or verify the information on hand. Subsequently, how can these differences in their final decisions be explained?

Researchers often mention the importance of role definition. Most street-level bureaucrats are primarily responsible for the distribution of scarce resources to fulfill the needs of clients. Several researchers have demonstrated that this responsibility is related to role conflicts. Some emphasize the importance of controlling the distribution of scarce resources, while others give more priority to fulfilling the needs of clients. These two types of employees are often distinguished.

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

For example, "hard-liners" are opposed to "soft-liners,"[17] "gatekeepers" to "advocates,"[18] and "bureaucrats" to "professionals."[19] Among Canadian[20] and British[21] immigration officials one also finds "gatekeepers" and "facilitators," respectively "doves" and "hawks."

Researchers who mention role definition refer to at least one of the following five attitudes: preferring either a restrictive or lenient policy, defining a role as gatekeeper, defining a role as client advocate, doubting the integrity of clients, and, finally, formalism. The fact that role definition has different definitions suggests that this concept consists of a complex of related attitudes that provide a coherent vision—or "theory-in-use"[22]—about the preferred implementation of policy. The expectation is that "hard-liners" combine a preference for a restrictive policy with doubts about the integrity of clients, with a formalistic work attitude, and with giving high priority to their role as gatekeeper and low priority to their role of client advocate; while "soft-liners" take the opposite position in all respects. One question addressed in the present study was whether these five attitudes indeed form a coherent theory-in-use.

Although some researchers doubt that role definition really influences decisions,[23] this has been demonstrated to be the case in many policy domains. Examples refer to disablement benefits,[24] financial provisions on divorce,[25], labour permits,[26] provision of housing,[27] and public assistance.[28] Nagi suggests that the impact of individual attitudes on the implementation of policy is greater as the general public debate about the stinginess or open-handedness of service organizations increases.[29] The more often personnel are confronted with contradictory social norms the more they are forced to depend upon their own convictions. If Nagi is right, then role definition should certainly have an effect on the implementation of asylum policy. The Dutch Immigration and Naturalization Service (IND) has been criticized frequently by both supporters and opponents of restricting asylum policy, with the result that its personnel think that they can never do the right thing in the eyes of the media, politicians, or pressure groups.[30] Because of the contradictory demands of the social environment regarding the implementation of asylum policy, it is to be expected that the preference for a lenient asylum policy results in granting permits (hypothesis 3a).

However, it is not likely that role definition comes out of the clear blue sky. Decision makers not only do their job, but also take part in society more broadly as citizens. Moreover, they bring their professional background to their work. Both can influence their role definition. According to Stone,[31] both a person's work experience and the nature of his or her profession[32] are relevant factors of professional background. Experienced co-workers, so-called "agency veterans," would be more cynical about clients than would newer employees, either because experience makes it easier to recognize cheating clients or because employees become frustrated about the limited possibilities that bureaucratic organizations generally offer to meet the needs of clients. In relation to the nature of one's profession, Stone contrasts people who work within the judicial system to caregivers. The former are more likely to have a negative attitude towards clients because they are regularly confronted with the darker side of human nature and because they are used to treating people as potential suspects.[33] Caregivers usually have a positive attitude towards clients because in their work affective values such as helping and looking after people are stimulated. If men are indeed socialized through their profession, as Stone maintains, then this ought to have a lasting effect on their role definition. In other words, if caseworkers have worked within the judicial system or as caregivers of asylum seekers, then this should still be noticeable in their present role definition as caseworker. So, it is to be expected that inexperienced employees (hypothesis 3b), people without a professional history within the judicial system (hypothesis 3c), and decision makers who have worked as asylum-seeker aid workers (hypothesis 3d) are most in favour of a lenient asylum policy.

With respect to the influence of political convictions on role definition, Stone[34] emphasizes the importance of conservatism and of fear of economic deterioration (*status anxiety*). Both would result in a negative attitude towards clients. Conservatives take a negative stand because they emphasize the importance of civil duties, while clients make an appeal to civil rights.[35] Perceived economic threat causes a negative attitude because the status position of civil servants deteriorates in comparison to citizens who get help. Among the general population, fear of economic deterioration and conservatism also result in the preference for a restrictive immigration policy.[36] People who are fearful of economic deterioration oppose immigration because they fear that this will deplete social services and will increase competition in the job market. In the case of conservatism, it is the conviction that the lack of commonly held norms and values undermines social cohesion. Because of this, it is to be expected that conservatism (hypothesis 3e) and perceived economic threat (hypothesis 3f) lead to disapproval of a lenient asylum policy.

Finally, substantive inequality might be caused by the reputation of the decision maker. A predictable hypothesis is that employees get more freedom of choice as their reputation is better. This would mean that the personal attitude towards the carrying out of asylum policy has more effect on the eventual decision as the reputation of the caseworker is better (hypothesis 4a). Next, there are indications that the influence of the reputation depends on the context. For example, Scott did an experiment in which he asked students to take

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

the role of a caseworker and to make a decision on a request for public assistance.[37] Contrary to his expectation students who were told that a superior would check their decisions did not make more consistent decisions than those who were not told so but simply refused more often. According to Scott the reason for this was that the students only had to account for their positive decisions. The certitude that only grants of public assistance were scrutinized by superiors encouraged respondents to refuse public assistance. Fleurke and de Vries[38] showed that, under other conditions, the wish to protect one's own reputation can inversely also lead to granting. This would be especially likely to occur when the clients of street-level bureaucracies are organized well. In this case, officials run the risk that their refusals will be attacked. These findings indicate that officials accommodate their decisions with the risks involved for themselves. Those who have a reputation for being too restrictive especially run a risk when they refuse, while the reverse is true for the employees who are known for their leniency. This leads to the expectation that caseworkers grant a permit more often as their reputation for being too restrictive is stronger, while the reverse is true for those with a reputation for being too lenient (hypothesis 4b).

Data, Research Design, Operationalization, and Analytic Strategy

Data

During the collection of the data in the fall of 2002, the implementation of asylum policy was spread over five regions of the Netherlands and, within the regions, over one or more units. Selections have been made at both levels. Originally, the intent was to restrict the project at the regional level to the Northwest and the Central regions. The reason for this was that previous research had shown that these were the most restrictive and the most lenient respectively.[39] Later, the Southwest region was also included because the IND wanted to spread the burden of the research more evenly within the organization. At the unit level, selection took place solely in the Central region because the Northwest and the Southwest each had only one asylum unit. Three out of five asylum units were selected in the Central region. One unit offered to participate of its own volition; the others did so at my request. I did not know anything about the units beforehand. Everybody within the units was asked to participate except for the unit managers and the people who were still learning to do the job. Ninety-eight decision makers co-operated and the response rate was 94.2 per cent.

Research design

All ninety-eight respondents were presented the same fictitious asylum application with the request to prepare a decision on the permit for temporary residence as asylum seeker (henceforth: asylum permit) and on the permit for residence as unaccompanied minor immigrant (henceforth: permit for minors). An interview followed shortly after, during which respondents were asked to explain their decisions. During the interview, supplementary information about the application was presented and respondents were again asked to make both decisions. In addition, respondents handed in a questionnaire that they completed beforehand. Transcriptions of the interviews were made and, after coding the decisions, they were connected to the survey data. In an accompanying letter, which was also explained orally, respondents were urgently asked not to deliberate with anybody about the case, but instead to prepare it individually. This was done to make sure that the decisions not only referred to an identical case but were also made under identical circumstances.

However, there were two disadvantages attached to this procedure. They had to do with the possibility of generalizing the findings to actual implementation practice. First, respondents were not allowed to deliberate about the case with others, while in practice deliberation is an essential element of their work. This means that decisions are normally taken in a less individual fashion than in the present case. In addition, decisions are usually controlled. This means that mistakes can be corrected. However, it is not likely that these limitations have had a huge impact on the findings. Specifically, to the question whether internal control would have led to other decisions, only 2.5 per cent answered affirmatively and 10 per cent did not preclude this. The great majority thought that this would not have led to other decisions.

Another disadvantage of the research procedure was that respondents knew that their decisions were based upon a fictitious case. The effect of this may have been that some decision makers did not prepare themselves as thoroughly on the fictitious case as they would have done on a real application. The first thing that was done to limit this negative consequence was to limit the preparation time as much as possible. This was done by presenting just one application, hence, a short one. Secondly, an attempt was made to make the application as realistic as possible, so that the respondents would "forget" they were preparing a fictitious case. For example, the application was printed on paper with the logo of the Ministry of Justice, and as many standard phrases as possible were used. Also, real events and situations were processed in the application. Information was gathered from official messages, newspaper articles, and files of real asylum applications. Apparently, this succeeded well, because, when the interview was over, several respondents asked whether it concerned a "real" application, although the accompanying letter stated that the case was fictitious.

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

If it was so important to present a realistic application, why then was an existing one not used? I wanted to keep the chance on differing decisions in my own hands. I artificially increased the chance of finding differing decisions by increasing the number of decisions that had to be made on the application and by focusing the application on parts of the asylum policy that contain room for discretion.[40] These two strategies were effectuated in four ways.

Firstly, the application focused on an unaccompanied asylum seeker who was older than sixteen on his arrival in the Netherlands, but was evidently younger than eighteen at the moment of data collection. Caseworkers have to test whether minors that are *not* eligible for an asylum permit are eligible for a permit for minors. This means that two decisions must be made with minor asylum seekers and just one with adults. However, the official test for minors is regulated in great detail and substantial room for discretion exists only with respect to applicants who fall within the category chosen here. With respect to this category, it has to be determined whether the person concerned is unaccompanied, independent, and if not, whether there are possibilities for reception in the country of origin. These three tests all offer possibilities for differences in interpretation.

The second way was by building an extra phase into the research procedure. Respondents were asked to make decisions not only after reading both interview reports, but also after reading the corrections and amendments to the reports. The total number of decision proposals came down to four because of the extra phase (the decision on the asylum permit and permit for minors in the first and second phase).

Thirdly, Chechnya was chosen as the region of origin. This federal republic is one of the few areas that is officially considered unsafe, but to which categorical protection policy no longer applies. When a country has officially been declared safe, asylum permits are rarely granted, while if a country applies for categorical protection, an asylum permit is automatically granted unless contraindications are present or the identity or nationality of the applicant is doubted. So, Chechnya is a region of origin that offers room for both grants and refusals. The fact that it is official policy to refuse refugees from Chechnya because they have a flight alternative somewhere else in the Russian Federation is not an insurmountable problem. This policy cannot be applied automatically because it is also stated officially that people with a Caucasian appearance can run into discrimination and, consequently, may be granted an asylum permit.

The last way is by focusing the application on trauma policy. This policy was revised profoundly with the introduction of the Asylum Act 2000 and had not yet taken its definite shape in every aspect. Because the many questions caseworkers posed to the policy departments about the manner in which the trauma policy should be applied to specific cases, complementary policy was made in the form of answers to questions, memos, and a guideline. Furthermore, symposia were organized to explain this policy and a more elaborate version of it was in the pipeline (in the form of a so-called Intermediate Aliens Circular Message (TBV)). In the application, events were described to which concepts of the trauma policy like "severe abuse," "non-criminal detention," and "cause of departure" applied and which were often unclear to the personnel.

Operationalization

Two models were tested. The first dealt with the explanation of procedural inequality (whether or not to take for granted the information provided on the application) and the second with the substantive inequality (refusing versus granting).

Taking for granted the information available about the asylum application was measured on the bases of the decisions proposed on the fictitious case. With respect to both the asylum permit and the permit for minors one could choose between not taking for granted the available information (*i.e.,* postponing the decisions to complement or to verify this information) and taking it for granted (*i.e.,* refusing or granting permits). People were first asked to choose after reading an interview report about the nationality, identity, and journey of the applicant and one about his motives for fleeing (phase one) and then again after reading corrections and amendments to both reports (phase two). Table 1 shows that the decisions of the caseworkers differ a lot. The four decisions were combined after a reliability test proved that this would result in an internally consistent measurement instrument (α=0.70). The factor loadings of the four decisions to either take the available information for granted or not are respectively: asylum permit first phase (0.61), permit for minors first phase (0.82), asylum permit second phase (0.59), permit for minors second phase (0.87). The compounding of the four decisions resulted in five categories that increasingly indicate an acceptance of taking the available information for granted: (i) postponing all four (18.4%); (ii) postponing three (3.1%); (iii) postponing two (29.6%); (iv) postponing one (26.5%); (v) postponing none of the four decisions (22.4%).

Perceived work pressure consists of a scale that is made up of five items with "no" and "yes" as answering categories. This scale was taken from Jetten and Pat.[41] This scale is internally consistent (α=0.76, see Appendix 1, Table 2). A high score means a lot of perceived work pressure.[42]

The reputation of the decision maker was measured with the help of six indicators for both positive and negative feedback on previous decisions. Positive feedback was measured with the number of compliments that respondents had received since the introduction of the Aliens Act 2000 for *grants*

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Table 1. Decisions on the asylum application (Frequencies, percentages, N=98).

	After reading the reports		After reading corrections and amendments	
	Asylum permit	Permit for minors	Asylum permit	Permit for minors
No	38.8	54.1	8.2	51.0
Maybe	48.0	29.6	66.3	33.7
Yes	13.3	16.3	25.5	15.3

and *refusals* respectively. The percentage of compliments for grants and refusals respectively is distributed as follows: (i) zero times (79.8; 81.1); (ii) one time (7.4; 3.2); (iii) two times (7.4; 2.1); (iv) three to five times (3.2; 7.4); (v) more than five times (2.0; 6.3). Negative feedback was measured in the first place on the basis of the number of times that an employee had to revise a decision under pressure from colleagues or superiors since the implementation of the Aliens Act 2000. This can either refer to the number of times that one granted under pressure from colleagues when one wanted to *refuse* originally, or to the number of times that one wanted to *grant* in first instance but eventually refused. The answers to both questions are distributed as follows: (i) zero times (41.8; 58.2); (ii) one time (30.6; 20.4); (iii) two times (19.4; 15.3); (iv) more than two times (8.2; 6.1). Furthermore, negative feedback was measured on the basis of the outcome of appeals made by asylum seekers against refusals by the IND. This refers to the proportion of appeals granted by the IND and by the appellate court that decision makers knew of personally.[43]

The more compliments employees received, the less often they had to reverse decisions under pressure from colleagues or superiors; and the less often they were confronted with appeals granted by the IND and by the appellate court, the better their reputation. So, these six indicators were added up, after multiplying the scores for negative feedback by minus one, and after standardizing the scores. A high score indicates a good reputation.

Experience distinguished less experienced employees who were not authorized to sign decisions (46.9 per cent) from experienced employees who were authorized to do so (53.1 per cent).

Granting was measured on the basis of the four decisions proposed by the respondents with respect to the application. One could choose between refusing, postponing, and granting the asylum permit and the permit for minors in first and second instance. Postponing can eventually result in either a refusal or a grant and is therefore defined as the middle category. An internally consistent scale was constructed by combining these four decisions (α=0.73). Their factor loadings were as follows: asylum permit first phase (0.57); permit for minors first phase (0.90); asylum permit second phase (0.56); permit for minors second phase (0.89). The scale consists of the following nine categories, indicating increasingly the decision to grant permits. This variable is distributed as follows: (i) (7.1%); (ii) (16.3%); (iii) (21.4%); (iv) (7.1%); (v) (27.6%); (vi) (4.1%); (vii) (11.2%); (viii) (1.0%); (ix) (4.1%).

The preference for a lenient asylum policy consists of the combination of the five following attitudes: preference for the further restriction of asylum policy, role definition as gatekeeper, role definition as advocate, distrust in the credibility of asylum seekers, and formalism (see above). The internal consistency of the scales measuring these attitudes ranged from sufficient to good, with the exception of formalism (see Appendix 1, Table 3). The formalism scale was nonetheless used in the analysis because of the high factor loadings of all items.

Principal component analysis with the five scales resulted in one factor with an Eigenvalue of more than 1. This factor explains 50 per cent of the total variance. This shows that the five attitudes that are used alternately in the literature for the operationalization of role definition indeed correlate strongly, as expected. The factor loadings are: for the preference of a restrictive asylum policy –0.87; for role definition as gatekeeper, –0.74; for role definition as advocate, 0.65; for distrust in the credibility of asylum seekers, –0.73; and for formalism, –0.48. The attitudes with negative factor loadings were multiplied by minus 1, so that a high score indicates a preference for a lenient asylum policy.

Reputation for being too restrictive has to do with the extent to which employees, according to others, refuse too often and do not grant often enough. This was measured with the help of the same six indicators that were used to measure the reputation for being a good decision maker (for the scores on these six items, see the operationalization of the latter variable). These items were however categorized differently. Based on the presupposition that compliments are meant to stimulate manifested behaviour, this implies that the number of compliments for *grants* indicates a reputation for being too restrictive, while the reverse is true for *refusals.* The

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

number of times that an employee granted under pressure from colleagues when one wanted to *refuse* originally indicates a reputation for being too restrictive, while the reverse is true for the number of times that one wanted to *grant* in first instance but eventually refused. The number of granted appeals or granted courts of appeal employees recalled by employees indicates a reputation for being too restrictive. These six indicators were added up after multiplying the number of compliments for refusals and of the number of refusals under pressure from others by minus one, and after standardizing the scores. A high score indicates a reputation for being too restrictive.

The reputation of the decision maker multiplied by the preference for a lenient asylum policy is an interaction term that is incorporated in the model to see whether caseworkers accommodate their decisions to a larger extent to their role definition as they have a better reputation (hypothesis 4a).

Professional past within the judicial system was considered; 6.1 per cent have worked in the past in the judicial system as (fraud) investigator or policy officer, and 93.9 per cent have not.

Former asylum-seeker aid workers included 15.3 per cent who have helped asylum seekers either as volunteers or professionals, and 84.7 per cent who have not.

Conservatism has to do with the rejection of cultural differences. This variable consists of the combination of authoritarianism, distrust in human nature, political party preference, and multiculturalism. "Authoritarianism" expresses the conviction that individuals should conform to formal rules and official authorities because otherwise they will admit to their destructive primal instincts and impulses. This was measured with the help of eight items, which are part of the F-scale for authoritarianism of Adorno *et al.*[44] or of research that is based upon it, and produces an internally consistent scale (α=0.71, see Appendix 1, Table 4). This aversion to deviant behaviour implies simultaneously a distrust in human nature and, as research has demonstrated, a preference for right-wing parties.[45] Political party preference is measured on the basis of the question on which party one would vote for if there were elections for Parliament. The answers were categorized in ascending order with respect to conservatism: (i) Green Left Party, Socialist Party, or considering either the Green Left Party and the Social Democratic Party (34.6); (ii) Social Democratic Party or Democratic Party (32.6); (iii) Republican Party, Christian Democratic Party, Christian Union, doubters, and non-voters (32.6).[46] Distrust in human nature is measured independently with the help of Wrightsman's "Philosophy of human nature" scale (α=0.77).[47] "Multiculturalism" consists of the conviction that foreigners are an improvement for society instead of a threat. This scale is also internally consistent (α=0.73, see Appendix 1, Table 4).

Principal Component Analysis with all four measures resulted in one factor with an Eigenvalue of 2.0. This factor explains 51.1 per cent of the total variance. The factor loadings of the different components are as follows: authoritarianism, 0.77; political party preference, 0.54; distrust in human nature, 0.68; and multiculturalism, –0.86. The score for multiculturalism was multiplied by minus 1, so that a high score indicates conservatism.

Perceived economic threat concerns the estimation of the actual level of welfare and of the expected decrease of welfare in the future. This attitude was measured with the help of eight Likert items used previously in the survey "Cultural changes in the Netherlands 1992" (see Appendix 1, Table 5).[48] The scale for perceived economic threat is sufficiently internally consistent (α=0.67).

Analytic Strategy

The hypotheses were tested by way of bivariate correlations and multiple regressions. For reasons of readability two figures will be presented in the main text of the following section that only depict the significant beta coefficients generated by the linear regressions (method "enter," weight estimates "ordinary least squares"). More complete and detailed results are presented in Appendix 2, Tables 6 and 7. Both tables show that the mutual correlations between the independent and intermediate variables did not have an unusually large effect on the results and did not cause problems with multicollinearity. Both tables show that correlations between the independent and intermediate variables did not have a distorting effect on the results. This can be deduced from the fact that the correlations and beta coefficients of the three models tested resemble each other with respect to direction and strength. Moreover, test results incorporated in both tables demonstrate that multicollinearity has not influenced the reliability of the results negatively. As a rule of thumb, "variance inflation factors" (VIF) of more than 10 indicate problems with multicollinearity.[49] The value of all explaining variables is below 2.5. In short: the results shown in Appendix 2 make clear that the results depicted in both figures to follow are robust and consistent.

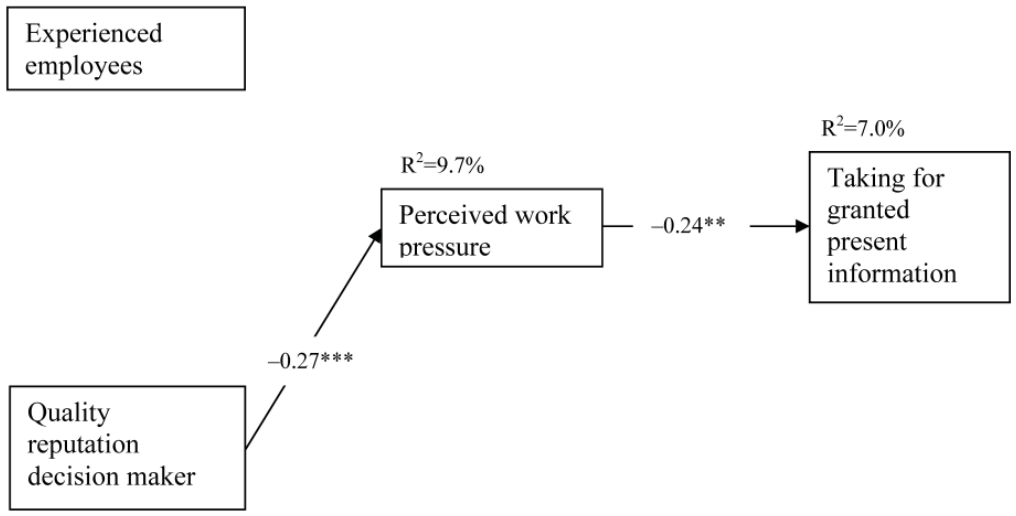
Findings

Procedural Inequality

The explanation of the extent to which decision makers take the information that is available on the asylum application for granted is depicted in Figure 1. It shows that the more work pressure employees perceive the more willing they are to take this information for granted. In correspondence with hypothesis 1a it is true that employees are less willing to spend time and energy to complementing or verify information about an asylum application as they perceive more work pressure.

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Figure 1. Explanation of the extent to which decision makers take the information that is available on an asylum application for granted based on perceived work pressure, reputation, and experience (Betas, N=97).



* p<0.10 ** p<0.05 *** p<0.01

However, hypothesis 1b was rejected. Experienced workers do indeed perceive less work pressure than do those with less experience (β=–0.16), but this effect is (just) not significant (p=0.10). A possible explanation for this is that experienced employees have more tasks and responsibilities than the less experienced. In fact, an extra task that the experienced workers have is the checking of the work of their less experienced colleagues. Thus, it is possible that experience decreases work pressure, but that this is compensated for by the fact that it leads to new tasks and responsibilities.

Hypothesis 2 was also rejected. Employees are indeed more willing to take the available information for granted as their reputation is better (β=0.17), but this effect is (just) not significant (p=0.11). Indirectly, a good reputation has a reverse effect. After all, the perceived work pressure that increases the chance of taking the available information for granted is least among the employees with the best reputations. This is understandable because employees need less time to process the criticism they receive on their decisions as their reputation is better. This leaves caseworkers with the best reputations the most time to test the uncorroborated presuppositions about the eligibility of the application or to verify the information that the interested asylum seeker has provided. This difference can occur because the caseload of the caseworkers is not adapted to the amount of feedback they receive on their decisions. So, an unintended consequence of feedback is that employees are more inclined to take for granted the information that is obtainable on an asylum application because it takes time to process it.

Experience, reputation, and work pressure explain seven per cent of the total variance of taking for granted the ready information on an asylum application.

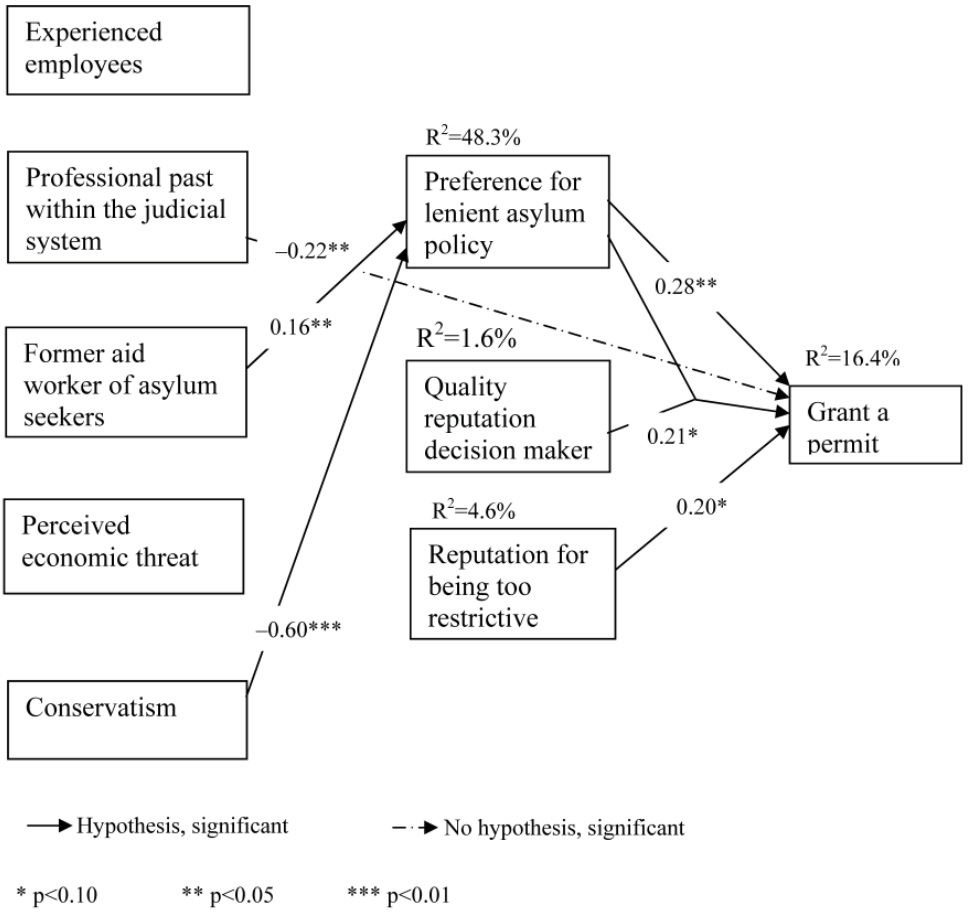
Substantive Inequality

Figure 2 depicts the explanation of the differences in final decisions. It shows that supporters of a lenient asylum policy grant most often. This corresponds with hypothesis 3a. The preference for a lenient asylum policy is greatest among employees with a past as asylum-seeker aid worker and among liberal employees. These findings confirm hypotheses 3d and 3e. This means that the personal preference for the implementation of asylum policy has an effect on the outcome of the asylum decision and that role definition is dependent on the political and professional background of the caseworker.

Hence, hypotheses 3b, 3c, and 3f were rejected. Contrary to hypothesis 3b, experienced workers do not oppose a lenient asylum policy more than inexperienced ones. In other words, people with much experience are not more negative and cynical towards asylum seekers than people with little experience. The absence of this difference might be explained by the fast turnover of personnel within the IND. It is plausible that especially highly motivated people stay the

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Figure 2. Explanation of differences in deciding to grant a permit based on role definition, quality and kind of reputation, and background characteristics (Betas, N=97).



longest and that those who become cynical because of the stories "they have heard so often already" leave the organization quickly. So, it is possible that experience does lead to role definition as "hard-liner," as was expected, but that this influence is invisible in organizations with a high turnover, because of the self-selection of employees.

Hypothesis 3c was rejected because a professional past within the judicial system leads to refusing independently of role definition, while it was predicted that this would be so because of an aversion to a lenient asylum policy. Even now that this is known, it is not easy to understand why it is so, for this direct effect can *not* have anything to do with the fact that these people have become more distrustful towards asylum seekers because this is an element of role definition.

Contrary to hypothesis 3f, fear for economic deterioration does not lead to favouring a lenient asylum policy. Although the negative correlation between both attitudes is considerable ($r = -0.27$; $p < 0.01$; not depicted in Figure 2), this effect completely disappears when controlling for conservatism. This means opposition to a lenient asylum policy is entirely caused by the fact that there are many conservatives among the employees who perceive much economic threat. Perceived economic threat does have an independent effect on the rejection of a lenient asylum policy among the general public,[50] although the effect of conservatism and negative stereotyping of foreigners is much stronger. Hence economic motivations do not have an effect on either the racism of pupils[51] or on negative attitudes towards ethnic minorities,[52] while opposing cultural differences do have these effects. This means, in fact, that the rejection of hypothesis 3f in combination with the affirmation of hypothesis 3e underlines that the attitude toward cultural differences determines negative attitudes towards aliens to a greater extent than economic motives.

Next, hypotheses 4a and 4b, with respect to the influence of the reputation on the final decisions, are affirmed. Attitude

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

towards the implementation of asylum policy has a greater impact on the outcome of the decisions made as the reputation of the employee is better. This means that caseworkers get more discretion to decide as they please, as their reputation is better. The sort of reputation also has an effect on the final decision. Employees who are known to be too restrictive grant most often, while the reverse is true for the employees with a reputation for being too open-handed. This means that employees accommodate their actual decisions to the feedback that they got on previous decisions. In other words, this feedback restrains them from deviating too much from dominating decision norms. However, both effects are not very strong. The operationalization of the reputation of the decision makers possibly shows why not. It shows that decision makers do not get much feedback on their previous decisions: they rarely revise their decisions under pressure from colleagues or superiors, they receive even fewer compliments on their decisions, and it is really exceptional that they are aware of the outcome of appeals made against their own decisions. So, one can assume that the influence of the reputation on the outcome of decisions increases as the feedback is intensified.

Altogether, role definition, professional background, political attitudes, and reputation explain over 16 per cent of the total variance in the decisions to grant permits.

Complementary Explanation

The qualitative interviews about the case exposed yet another cause of substantive inequality. This is the application of semi-official policy such as memos and policy guidelines. The next example is about the application of internal memos. Several people working in the Central region refused an asylum permit based on the trauma policy because they thought that the applicant did not meet the criteria for serious abuse enumerated in an internal memo. The criteria were that the person in question had to have undergone treatment by a physician and had to have been unable to work or to function normally for at least six weeks. This memo did not exist in the other regions and, consequently, many caseworkers in the other regions granted an asylum permit because of the abuses the applicant had undergone during his detention.

The second example shows that also the answers of policy departments to questions asked by individual employees about the way sections of the policy should be applied to specific cases lead to substantive inequality. An employee decided to grant an asylum permit based on trauma policy because of the answer of a policy department to a question of hers. She had asked whether traumatizing events that take place during the flight could ever lead to a permit. The national policy department answered that this is possible. She then granted an asylum permit because, in the file of the applicant, it was written that he was forced through a minefield during his flight. However, the majority did not even consider this event because they assumed that traumatizing events could only result in a permit when they were the direct motive to flee.

There are two reasons why not everybody conforms to the answers of policy departments. The first is because usually only one or two people know of an answer. Answers are not fed back systematically. Secondly, employees tend to consider the answers more as advice than as coercive guidelines. This can be explained by the fact that according to the caseworkers the answers are frequently ambiguous or contradictory. Consequently, they feel more or less free to choose whether or not to act in line with the answer.

In short, in addition to the personal characteristics of the decision makers, the selective application of semi-official policy also causes inequality in the execution of asylum policy.

Conclusions and Recommendations

This research demonstrated that the implementation of asylum policy is accompanied with procedural and substantive inequality. Some decision makers decide to postpone decisions to complement or verify the information that is available on an asylum application, while others take this information for granted. Hence, some decision makers grant a permit on this application while others refuse it. In itself these findings prove little about the extent of both forms of inequality in the implementation of asylum policy because the case that was presented to the decision makers was deliberately constructed to maximize the chance of differing decisions. However, in combination with the studies cited in the introduction these findings indicate that both forms of inequality are no exception.

Current study also showed that the working conditions and the characteristics of individual employees cause both forms of inequality. Procedural inequality is caused by perceived work pressure. In particular, employees who perceive much work pressure decide to take the information that is available on an application for granted, and work pressure is highest among employees with the worst reputations. The latter need the most time to process criticism on their previous decisions so they have the least time left for complementing and verifying information on asylum applications. Substantive inequality is caused by the attitude, background, and reputation of caseworkers. Supporters of a lenient asylum policy grant residence permits most often. This role definition is most common among employees who have worked as asylum-seeker aid workers and among liberals. Employees with a professional past within the judicial system are most inclined to refuse permits independent of their role defin-

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

ition. Hence, role definition has more effect on the final decision, as the reputation of a decision maker is better. This means that employees get more discretion to decide as they please, as their reputation is better. Employees are also more likely to grant a permit as their reputation for being a too restrictive decision maker is stronger. This means that feedback prevents employees from deviating too much from the dominant decision norms. Finally, substantive inequality depends also on semi-official policy guidelines that are location specific and that are applied selectively.

So the implementation of asylum policy results in systematic differences. One could dispute the societal importance of this conclusion by reasoning that the decisions of the IND employees are not final: asylum seekers can appeal negative decisions in court. However, the appeal procedure does not guarantee unambiguous outcomes. After all, it has occurred, for example, that trial judges base their own decisions on previous ones. They are more likely to sentence when they have read the charges before the trial, than when they have not.[53] The reason for this is that in countries like Germany and the Netherlands the charges do not contain the demurrer of the defendant. And although files of asylum applications do contain the point of view of the asylum seeker, the communication within the asylum procedure usually has a negative effect on the representation of asylum seekers.[54] Hence, trial judges, as well as immigration officials,[55] are not only inclined to stick to previous decisions because they base their decisions on selective information but also because this is most efficient. This is what Lipsky[56] called "rubber-stamping." On the basis of these findings, it is to be expected that judges are also inclined to go along with the decisions of the IND, as Spijkerboer[57] has argued with respect to the Dutch High Court. And, indeed, research has demonstrated that appeals do not decrease regional differences in the execution of asylum policy in the Netherlands.[58] So, it is not at all sure that systematic differences dissolve because of the right to make an appeal in court.

This means that it is logical to try to cancel out the causes of procedural and substantive inequality at the source. Which points of departure do the findings of this study offer to achieve this? Recruiting and selecting can help to establish a balanced staff with respect to role definition, political attitudes, and professional background. However, the best possibility to advance the unequivocal implementation of asylum policy is probably by intensifying feedback on decisions. After all, the limited amount of feedback that decision makers receive already decreases the impact of their role definition on decisions and causes them to conform to the dominant decision norms. These effects can be enlarged by complimenting caseworkers more often, making them revise their decisions more often if internal control gives rise to this, and confronting them systematically with the outcome of appeals made against their own decisions. It would also help if the answers given by policy departments to questions about the way policy sections should be applied in specific cases were fed back systematically and if it would be made clear what the status of these answers is.

However, if the intensification of feedback were not combined with measures to decrease work pressure, then it would result in less careful decisions. After all, such feedback would be at the expense of the time that employees have left to complement and verify the information that is available on an asylum application. First of all, work pressure can be diminished by stopping early the slimming down of the IND because of the decreasing influx of asylum seekers since 2000.[59] Another possibility is to reverse the sharp increase in the percentage of applications that is decided on in the fast-track procedure instead of the normal procedure. Nowadays manifestly unfounded claims and claims deemed not to require "time-consuming investigation" enter the fast-track procedure. However, as a result of the vagueness of the parameters defining who should enter this procedure, in combination with the emphasis put on efficiency in the present political climate, applications are included in the fast track that do not belong there.[60] And because these applications have to be decided on within forty-eight working hours, this implies that caseworkers have insufficient time to investigate the eligibility of these applications and that the asylum seekers have insufficient time to prepare themselves for the interviews and to collect evidence to substantiate their claims. The tightening of the criteria to include applications in the fast track can help to prevent decisions being made on the basis of uncorroborated presuppositions and unverified information because they are made under too much work pressure.

In any case, the recommendations are no plea against discretion as such. Asylum policy cannot possibly anticipate all unique characteristics of individual asylum applications while these characteristics can definitely be relevant for the eligibility of the applications. Therefore, it is desirable to give decision makers the freedom to take into account these unique factors when making decisions. What has to be prevented, though, is that identical applications are decided upon differently because of the use of discretion, because "where workers' discretion leads to unfair and unequal treatment of clients, with no compensation benefits, it should be desirable to reform systems by removing this unredeemed source of unfairness."[61] This certainly applies to the execution of asylum policy that can have huge consequences for the people involved.

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Appendix 1
Factor and reliability analyses measurement instruments

Table 2. Factor and reliability analysis of perceived work pressure (Percentages, factor loadings, and Cronbachs alpha).

	% yes	FI
Do you have to work fast?	32.7	0.82
Do you have to do a lot of work?	43.8	0.70
Would you like to calm down in your work?	73.5	0.82
Do you generally have enough time to finish your work?	83.7	-0.54
Do you work under time pressure?	52.6	0.67
Cronbachs alpha		0.76

Table 3. Factor and reliability analysis of the preference for a lenient asylum policy (Percentages, first and second-order factor loadings, and Cronbachs alphas).

	% agree (strongly)	FI
Support for a restrictive asylum policy		
The asylum procedure in our country attracts newcomers.	10.4	0.66
A restrictive asylum policy is in the interest of genuine refugees.	63.2	0.62
The High Court is too much on the side of the IND.	4.2	-0.50
The benefit of the doubt should be applied more often.	21.7	-0.47
Too many asylum seekers who are not eligible obtain a residence permit.	27.7	0.79
The Dutch government should do more to deter asylum seekers from coming to our country.	16.6	0.69
Cronbachs alpha		0.74
Second-order factor loading		-0.87
Distrust of the credibility of asylum seekers		
Solicitors ascribe contradictions in interview reports too easily to cultural differences, language problems, or the bad health of the asylum seeker.	43.9	0.56
Many inconsistencies in reports of asylum seekers are caused by communication problems.	18.3	-0.55
Asylum seekers know exactly what to say to get a residence permit.	29.6	0.53
Asylum seekers exaggerate their problems during interviews.	47.4	0.57
Legal aid represents the interests of asylum seekers too one-sidedly.	20.7	0.70
The asylum policy forces asylum seekers more or less to lie about documents and journey.	20.4	-0.51
Asylum seekers who bring to the fore essential information later on in the procedure usually have good reasons to do so.	9.2	-0.69
Cronbachs alpha		0.68
Second-order factor loading		-0.73

Table 3 (cont'd)

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

	% agree (strongly)	FI
Defining role as gatekeeper		
If the IND did not exist, then the Netherlands would be flooded with immigrants.	37.2	0.42
If we apply the rules leniently, the housing of asylum seekers would quickly become unaffordable.	44.3	0.79
Politicians have denied for too long that the Netherlands is too small and too full to afford an open-handed asylum policy.	22.7	0.72
A restrictive asylum policy is necessary to take the pressure off the spending of public money.	36.7	0.75
The economic value of asylum seekers should never play a role in the asylum policy.	74.5	-0.39
A lenient immigration policy results in a situation in which social services like unemployment benefits and rent subsidy become unaffordable.	16.5	0.87
Cronbachs alpha		0.74
Second-order factor loading		-0.74
Formalism		
There ought to be a possibility for employees to refuse to agree to decisions they are principally opposed to.	68.0	-0.41
The intent of the law is more important than the letter of the law.	55.8	-0.72
A personal interpretation of the rules is not necessarily wrong.	43.9	-0.61
The only possibility of taking a good decision is to imagine the person behind the asylum seeker.	78.6	-0.55
The literal application of all regulations does not always result in the best decision.	29.6	-0.67
Cronbachs alpha		0.53
Second-order factor loading		-0.48
Defining role as advocate		
Internationally the Netherlands should lead the way in the protection of human rights.	60.2	0.64
The Refugee Convention and the European Convention of Human Rights represents one of the most fundamental democratic values there is.	75.5	0.66
The Netherlands should definitely remain a safe haven for people persecuted in other countries.	96.9	0.72
The importance of the protection of human rights vanishes in the present political climate.	56.2	0.61
Abolishing the Refugee Convention would mean a setback for our present civilization.	68.4	0.72
Cronbachs alpha		0.68
Second-order factor loading		0.65
Eigenvalue second-order factor		2.5
Percentage of the variance explained by the second-order factor		50.0

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Table 4. Factor and reliability analysis for conservatism (Percentages, first and second-order factor loadings, and Cronbachs alphas).

	% agree (strongly)	FI
Authoritarianism		
Young people sometimes get rebellious ideas, but as they grow up, they ought to get over them and settle down.	13.2	0.66
What this country needs most, more than laws and political programs, are a few courageous, tireless, devoted leaders in whom the people can put their faith.	7.2	0.46
Because of fast changes, it is difficult to know what is right and wrong.	12.2	0.51
People can be divided into two distinct classes: the weak and the strong.	3.1	0.59
Most of our social problems would be solved if we could somehow get rid of immoral, crooked, and feebleminded people.	6.1	0.54
Most people disappoint when you get to know them better.	3.0	0.58
If people would talk less and work more, everybody would be better off.	10.3	0.75
Because of the many opinions about good and evil, it is unclear what to do.	7.2	0.46
Cronbachs alpha		0.71
Second-order factor loading		0.78
Distrust in human nature		
Most people are not really honest for a desirable reason; they're afraid of getting caught.	15.3	0.69
People usually tell the truth, even when they know they would be better off by lying.	8.2	-0.47
It's pathetic to see an unselfish person in today's world, because so many people take advantage of him.	27.6	0.49
Most people would cheat on their income tax if they could gain by it.	28.6	0.58
"Do unto others as you would have them do unto you" is a motto that most people follow	27.6	-0.62
People claim that they have ethical standards regarding honesty, but few people stick to them when the chips are down.	32.7	0.69
Most people inwardly dislike putting themselves out to help other people.	40.8	0.68
People pretend to care more about another than they really do.	27.6	0.74
Cronbachs alpha		0.77
Second-order factor loading		0.68
Multiculturalism		
Having many cultural groups in the Netherlands makes it difficult to develop a sense of unity.	43.9	-0.68
I find it hard to show understanding for customs of ethnic minorities.	4.1	-0.75
Dutch people can learn a lot of good things from ethnic minorities.	64.3	0.75
The mixing of different minority groups unavoidably causes problems.	53.1	-0.56
Marriages between partners with a different ethnic background are doomed to fail.	4.1	-0.69
In the present political climate too much emphasis is laid upon the problems caused by foreigners.	57.1	0.55
Cronbachs alpha		0.73
Second-order factor loading		-0.86
Political party preference		
Second-order factor loading		0.67
Eigenvalue second-order factor		1.8
Percentage of the variance explained by the second-order factor		60.1

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Table 5. Factor and reliability analysis of perceived economic threat (Percentages, factor loadings, and Cronbachs alpha).

	% agree (strongly)	FI
In the future, I will be able to afford less luxury.	26.5	0.61
Sometimes I worry that I will have to change my present way of living.	17.3	0.40
The future will be better for the people than the present.	6.1	0.48
My welfare will decrease in the coming years.	24.5	0.65
The government does enough to increase the welfare of people like me.	21.4	-0.38
In one year, the economic situation in our country will have worsened.	46.9	0.64
In the near future, there will be an economic crisis with high unemployment.	16.5	0.66
Our country is wealthy at the moment.	95.9	-0.56
Cronbachs alpha		0.67

Appendix 2 Regression analyses and test for multicollinearity

Table 6. Explanation of the extent to which decision makers take the information that is present on an asylum application for granted based on perceived work pressure, reputation, and experience (Correlates, bèta's, and variation inflation factors, N=97).

	r	1	2	3	
					VIF
Perceived work pressure	0.18**	0.18**		0.24**	*1.0*
Experienced employees	0.08		0.08	0.12	*1.1*
Quality reputation decision maker	0.10		0.10	0.17	*1.1*
R^2%		3.1	1.7	7.0	

* p<0.10 ** p<0.05

Table 7. Explanation of differences in deciding to grant a permit based on role definition, quality and kind of reputation, and background characteristics (Correlations, bèta's, and variation inflation factors, N=97).

	r	1	2	3	
					VIF
Preference lenient asylum policy	0.17**	0.18*		0.28**	*2.0*
Quality reputation	-0.11	-0.06	-0.03	-0.01	*1.3*
Preference lenient asylum policy X quality reputation	0.16*	0.23**	-0.24**	0.21*	*1.2*
Reputation for being too restrictive	0.11	0.17	-0.06	0.20*	*1.5*
Experienced employees	-0.06		-0.03	-0.07	*1.1*
Professional past within the judicial system	-0.21**		0.10	-0.22**	*1.3*
Former aid worker asylum seekers	-0.08			-0.08	*1.1*
Perceived economic threat	-0.03			-0.01	*1.3*
Conservatism	-0.02			0.24	*2.4*
R^2%		9.5	5.7	17.4	

* p<0.10 ** p<0.05

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Notes

The data reported on is current to the fall of 2002.

1. Keith Hawkins, *The Uses of Discretion* (Oxford: Clarendon Press, 2001).
2. Roy Sainsbury, "Administrative Justice: Discretion and Procedure in Social Security Decision-Making," in *The Uses of Discretion,* ed. Keith Hawkins (Oxford: Clarendon Press, 2001), 297–8.
3. Decision makers base their decisions on data that have been collected by others.
4. Monika Smit, "De komst van jonge alleenstaande asielzoekers en hun asielprocedure" [The Arrival of Young Unaccompanied Asylum Seekers and Their Asylum Procedure], *Familie- en jeugdrecht* 20 (1998): 174–180.
5. Elspeth Guild, *Moving the Borders of Europe* (Nijmegen: Katholieke Universiteit Nijmegen, 2001).
6. Thomas Holzer, Gerald Schneider, and Thomas Widmer, "Discriminating Decentralization: Federalism and the Handling of Asylum Applications in Switzerland, 1988–1996," *Journal of Conflict Resolution* 44 (2000): 250–76.
7. Peter Mascini, "Regionale Verschillen in Uitvoering Van Asielbeleid" [Regional Differences in Carrying Out Asylum Policy], *Sociologische Gids* 49 (2002): 292–312.
8. N. Doornbos and J.P.P. Sellies, *Het overlegmodel in de asielprocedure: een onderzoek naar de werking van het overlegmodel in het aanmeldcentrum Schiphol en de onderzoeks- en opvangcentra Oisterwijk en Schalkhaar* [The Deliberation Model in the Asylum Procedure: An Evaluation of the Deliberation Model in the Application Center Schiphol and the Asylum Seekers Centers Oisterwijk and Schalkhaar] (Nijmegen: Instituut voor Rechtssociologie, 1997).
9. William Branigin, "Nation's Political Asylum System Draws Criticism from Both Sides: Handling of Contrasting Cases Illustrates Inconsistency in Process," *Washington Post,* July 7, 1996; Nienke Doornbos *De papieren asielzoeker: institutionele communicatie in de asielprocedure* [The Paper Asylum Seeker: Institutional Communication in the Asylum Procedure] (Nijmegen: GNI, 2003); Nienke Doornbos and Leny E. de Groot-van Leeuwen, "Vierentwintiguursbeslissingen over asielzaken" [Fast Track Decisions on Asylum Applications], *Migrantenstudies* 14 (1998): 233–247; Doornbos and Sellies.
10. But see: Doornbos and De Groot-Van Leeuwen.
11. Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 1980).
12. Janet A. Gilboy, "Deciding Who Gets In: Decisionmaking by Immigration Inspectors," *Law and Society Review* 25 (1992): 571–599.
13. Carolyn L. Clark-Daniels and Steven R. Daniels, "Street-Level Decision Making in Elder Mistreatment Policy: An Empirical Case Study of Service Rationing," *Social Science Quarterly* 76 (1995): 460–73.
14. Gilboy.
15. Robert M. Emerson and Blair Paley, "Organizational Horizons and Complaint-Filing," in *The Uses of Discretion,* ed. Keith Hawkins (Oxford: Clarendon Press, 2001), 234.
16. Keith Hawkins, "'Fatcats' And the Prosecution in a Regulatory Agency: A Footnote on the Social Construction of Risk," in *Organizations, Uncertainties and Risk,* ed. James F. Short, Jr., and Lee Clarke (Boulder, San Francisco, and Oxford: Westview Press, 1992).
17. Sarah Brants, "De macht van het onderhandelen: de penitentiair inrich-tingswerker als street-level bureaucrat" [The Power to Negotiate: The Prison Worker as Street-level Bureaucrat], *Amsterdams Sociologisch Tijdschrift* 30 (2003): 349–365.
18. Lipsky.
19. Naomi Kroeger, "Bureaucracy, Social Exchange, and Benefits Received in a Public Assistance Agency," *Social Problems* 23 (1975): 182–96.
20. Geneviève Bouchard and Barbara Wake Carroll, "Policy-Making and Administrative Discretion: The Case of Immigration in Canada," *Canadian Public Administration* 45 (2002): 239–57.
21. Leanne Weber, "Down That Wrong Road: Discretion in Decisions to Detain Asylum Seekers Arriving at UK Ports," *Howard Journal* 42 (2003): 248–62.
22. Chris Argyris, "Theories of Action That Inhibit Individual Learning," *American Psychologist* 31 (1976): 638–54.
23. Patrick G. Scott, "Assessing Determinants of Bureaucratic Discretion: An Experiment in Street-Level Decision Making," *Journal of Public Administration Research and Theory* 7 (1997): 35–57; James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (New York: Basic Books, 1989).
24. Sainsbury.
25. Susan Edwards and Ann Halpern, "Regional "Injustice: Financial Provision on Divorce," *Journal of Social Welfare Law* 2 (1990): 71–88.
26. Anita Böcker and Lilian Clermonts, *Poortwachters van de Nederlandse arbeidsmarkt: arbeidsvoorziening en de verlening van tewerkstellingsvergunningen* [Gatekeepers of the Dutch Labor Market: Labor Provision and the Granting of Labor Permit] (Nijmegen: Katholieke Universiteit, Faculteit der rechtsgeleerdheid, 1995).
27. Simon Halliday, "Institutional Racism in Bureaucratic Decision-Making: A Case Study in the Administration of Homeless Law," *Journal of Law and Society* 27 (2000): 449–71.
28. Kroeger.
29. Saad Z. Nagi, "Gate-Keeping Decisions in Service Organizations: When Validity Fails," *Human Organization* 33 (1974): 47–58.
30. Yaël Vinckx, "De bunkermentaliteit van de IND" [The Bunker Mentality of the IND], *NRC-Handelsblad,* February 2, 1998.
31. Clarence N. Stone, "Attitudinal Tendencies among Officials," in *The Public Encounter: Where State and Citizen*

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Meet, ed. Charles T. Goodsell (Bloomington: Indiana University Press, 1981).
32. Wilson.
33. Peter K. Manning, "Police Lying," *Urban Life and Culture* 3 (1974): 283–306.
34. Stone, 50.
35. Dick Houtman, "Welfare State, Unemployment, and Social Justice: Judgments on the Rights and Obligations of the Unemployed," *Social Justice Research* 10 (1997): 267–88.
36. Peter Burns and James G. Gimpel, "Economic Insecurity, Prejudicial Stereotypes, and Public Opinion on Immigration Policy," *Political Science Quarterly* 115 (2000): 201–25; Christian Dustmann and Ian Preston, "Racial and Economic Factors in Attitudes to Immigration," *Social Science Research Network, Working Papers Series* (2000).
37. Scott.
38. F. Fleurke, and P.J. de Vries, "Bureaucratie presteert beter op maatwerk" [Custom Making Results in Better Achievements for Bureaucracies], *Bestuurskunde* 6 (1998): 297–319.
39. Mascini.
40. As a result of the deliberate choices, the variation in decisions in the present case is probably greater than in the average asylum application. This means that this research cannot answer the question regarding the extent to which the implementation of asylum policy results in inequality before the law. However, as stated in the introduction, the aim of the present study was to trace causes for this.
41. Bert Jetten and Michiel Pat, *Werkdruk en welzijn in het werk* [Work Pressure and Wellbeing on the Job] (Assen: Van Gorcum, 1999).
42. The item "Do you generally have enough time to finish your job" loads negatively on the "perceived work pressure" factor. This item was therefore multiplied by minus 1, just like any other item with a negative factor loading.
43. Only 5.1 per cent of all caseworkers knew the number of appeals filed with the IND against their decisions and their outcome, while just 8.2 per cent knew this with respect to the number of appeals filed with the appellate court. Employees who knew of none of the outcomes were given the score of 0 for the proportion because as long as employees are not aware of the outcomes on appeals it is unlikely that these will influence their decisions.
44. T.W. Adorno, E. Frenkel-Brunswik, D.J. Levinson, and R.N. Sandford, *The Authoritarian Personality* (New York: Harper & Row, 1950).
45. See, for example, Dick Houtman, *Class and Politics in Contemporary Social Science: "Marxism Lite" and Its Blind Spot for Culture, Sociological Imagination and Structural Change* (New York: Aldine de Gruyter, 2003).
46. There are two reasons why the category "people with a preference for a right-wing party" can be combined with the category "doubters and non-voters." First, it has been demonstrated that new right-wing parties attract a lot of former non-voters. M. Minkenberg, "The New Right in Germany: The Transformation of Conservatism and the Extreme Right," *European Journal of Political Research* 22 (1992): 55–81; R. Eatwell, "The Rebirth of the 'Extreme Right' in Western Europe?" *Parliamentary Affairs* 53 (2000): 407–25. Second, factor analyses based on political party preference, authoritarianism, distrust in human nature, and multiculturalism showed that the factor loadings of these two categories differ little: (1) Green Left Party, Socialist Party, or considering either the Green Left Party and the Social Democratic Party (-0.47); (2) Social Democratic Party or Democratic Party (-0.12); (3) Doubters and non-voters (0.22); (4) Republican Party, Christian Democratic Party, Christian Union (0.57).
47. Lawrence S. Wrightsman, *Assumptions About Human Nature: Implications for Researchers and Practitioners,* 2nd ed. (California, London, and New Dehli: Sage Publications, 1992).
48. F. van Vlaardingen, *Culturele veranderingen in Nederland 1992* [Cultural Changes in the Netherlands 1992] (Codeboek P1152) (Amsterdam: Steimetzarchief, 1994).
49. Ronald R. Hocking, *Methods and Applications of Linear Models: Regression and the Analysis of Variance* (New York, Chichester, Brisbane, Toronto, and Singapore: John Wiley & Sons, 1996), 274.
50. Burns and Gimpel; Dustmann and Preston.
51. Mark Elchardus and Jessy Siongers, "Racisme, een kwestie van smaak? Een onderzoek bij jongeren uit het 4e en 6e jaar secundair onderwijs in Vlaanderen," [Racism, a Matter of Taste? A Study among Adolescents from the Fourth and Sixth Grade of Secondary Education in Flanders], *Sociologische Gids* 50 (2003): 259–284.
52. Marcel Coenders, Marcel Lubbers, and Bas van de Meerendonk, "Similarities and Differences in Exclusionism: Attitudes towards Ethnic Minorities and Lesbians and Gay Men" (paper presented at the Marktdag sociologie, May 22, 2003, Nijmegen).
53. Bernd Schünemann and Wolfgang Bandilla, "Perseverance in Courtroom Decisions," in *Criminal Behavior and the Justice System: Psychological Perspectives,* ed. Hermann Wegener, Friedrich Lösel, and Jochen Haisch (New York: Springer-Verlag, 1989).
54. Doornbos.
55. Weber, 257.
56. Lipsky.
57. Thomas Spijkerboer, "De afdeling en de rechtsstaat: het hoger beroep in vreemdelingenzaken" [The High Court and the Constitutional State: The Court of Appeal in Asylum Cases], *Nederlands juristenblad* 42 (2002): 2082–2088.
58. Mascini.
59. Erik Snel, Jan de Boom, and Godfried Engbersen, "Migration and Migration Policy in the Netherlands," *Report for the Continuous Reporting System on Migration (SOPEMI) of the Organisation of Economic Co-operation and Development (OECD)* (Rotterdam: Ercomer—EUR/ RISBO/ Erasmus University, 2003).

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

60. Human Rights Watch, *Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy,* vol. 15 (Washington, London, and Brussels, 2003).
61. Lipsky, 197.

Peter Mascini is an assistant professor of sociology at Erasmus University of Rotterdam, the Netherlands, and a member of the Amsterdam School for Social Science Research (ASSR). His research focuses on the legitimation, application, and enforcement of rules, policy instruments and laws. A recent article he wrote with Marjolein van Bochove on gender and asylum has been published in International Migration Review.

The research on which this paper is based is part of a larger research project about differences in the implementation of asylum policy that was made possible by fellowships of the Dutch Organization for Scientific Research (NWO) and of the Erasmus University of Rotterdam. This research would not have been possible without the cooperation of the Dutch Immigration and Naturalization Service (IND), especially of the unit managers and the asylum caseworkers. I want to thank all of them, but, of course, the responsibility for the content of this paper is entirely mine.

© Peter Mascini, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

The Use of COI in the Refugee Status Determination Process in the UK: Looking Back, Reaching Forward

Jo Pettitt, Laurel Townhead, and Stephanie Huber

Abstract

In the context of Refugee Status Determination (RSD), while the primary form of evidence is the testimony of the asylum applicant, objective evidence in the form of Country of Origin Information (COI) is recognized as an important—and potentially crucial—tool in decision making.

A research project of the Research and Information Unit (RIU) of the Immigration Advisory Service (IAS) examines the use of COI in the RSD process in the UK from initial decision to final appeal. The findings highlight the high level of inconsistency in the understanding of and the application of COI in RSD in the UK. It will demonstrate the need for this issue to be urgently addressed in the interest of just and effective decision making in the UK, and help inform discussions at the European and international levels.

Résumé

Dans le contexte de la Détermination du statut de réfugié (DSR), bien que la forme principale de preuve reste le témoignage du demandeur d'asile, des preuves objectives sous la forme de Country of Origin Information (COI) (« Information du pays d'origine ») est reconnue comme étant un outil important — et potentiellement très utile — pour le processus décisionnel.

Un projet de recherche du Research and Information Unit (RIU) (« Unité de recherche et de l'information ») de l'Immigration Advisory Service (IAS) (« Service consultatif sur l'immigration ») examine l'utilisation du COI dans le processus du DSR au Royaume Uni, à partir de la décision initiale jusqu'à l'appel final. Les conclusions soulignent le niveau élevé d'incohérence dans la compréhension du COI et de son emploi dans le DSR au Royaume Uni. Elles démontreront l'urgent besoin de s'attaquer à ce problème afin qu'on puisse prendre des décisions justes et effectives au Royaume Uni, et aussi pour aider à guider les débats à l'échelle de l'Europe et au niveau international.

Introduction

The importance of the use of country information in Refugee Status Determination (RSD) processes is well established and generally accepted. However, a study of its use in the RSD process in the UK highlights the shortcomings of its usage in practice.

This paper will draw on the preliminary findings and recommendations reached by a project entitled The Use of Country of Origin Information in the Refugee Status Determination Process in the United Kingdom, which the Research and Information Unit (RIU) of the Immigration Advisory Service (IAS)[1] is in the process of finalizing.[2]

The focus of this paper will be on the way in which country information is used in the process of determining asylum claims made in the UK.

This article will start by briefly examining country of origin information (COI) and its use in the RSD process before considering the findings reached through three individual studies that form the essence of the project. The three studies examine the use of COI in first and second instance decision making by focusing on Home Office policy documents (known as Operational Guidance Notes, or OGNs), Reason for Refusal Letters (RFRLs), and Appeal Determinations. Preliminary findings highlight an unacceptable level of inconsistency in the understanding and application of COI in the RSD process, and demonstrate the need for this issue to be addressed in order to enhance the process of determining asylum claims made in the UK. The findings of each of the studies will conclude with recommendations to decision makers on the way in which the use of COI can be improved in the interest of just and effective decision making.

© Jo Pettitt, Laurel Townhead and Stephanie Huber, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Establishing a "Well-Founded" Fear: The Use of COI

Due to the highly complex and individual nature of asylum claims it cannot be assumed that decision makers at any level hold in their minds the necessary range and depth of information relating to all of the many countries of origin of asylum seekers whose status it falls to them to determine.

The principal role of COI in the RSD process is, therefore, to provide information which enables decision makers to assess whether an asylum seeker's subjective fear is based on objective circumstances.[3] The need for this assessment is rooted in the concept of a "well-founded fear" contained in the refugee definition in Article 1A(2) of the Refugee Convention.[4]

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* confirms that to establish whether a claim is "well-founded" calls for an objective assessment of the applicant's fear:

> 42. As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. *The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation.* A knowledge of conditions in the applicant's country of origin—while not a primary objective—is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.[5] (Emphasis added.)

Furthermore, a 2004 UNHCR report on COI states:

> 9. The information needed to assess a claim for asylum is both general and case specific.
>
> *Decision makers must assess an applicant's claim and his/her credibility and place his/her "story" in its appropriate factual context, that is, the known situation in the country of origin.* Credibility assessment is itself a function of best judgement, facts and the interviewer's ability to draw appropriate inferences. To aid the decision-making process, the COI used needs to be as accurate, up-to-date and comprehensive as possible.[6] (Emphasis added.)

In October 2006, changes to the Immigration Rules were introduced in the UK, which set out in detail the criteria for granting asylum or humanitarian protection, based on the EC Council Directive 2004/83/EC (EU Qualification Directive).[7] Article 4 of the EU Qualification Directive deals specifically with "Assessment of facts and circumstances" relating to a claim for international protection, whilst Article 4(3) highlights the importance of COI to decision makers as follows:

> The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:
>
> (a) *all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied* […][8] (Emphasis added.)

Furthermore, a paper prepared for the International Association of Refugee Legal Judges (IARLJ) Biennial World Conference in November 2006[9] on judicial criteria for assessing COI states:

> 1. In the course of dealing with asylum appeals judges will depend to a great extent for their ability to make sound judgments on having before them up-to-date and reliable country background information or "Country of Origin Information" (COI). *The probative value of an asylum seeker's evidence has to be evaluated in the light of what is known about the conditions in the country of origin.*[10] (Emphasis added.)

As has been demonstrated, it is both accepted and understood at the highest level that COI should assist the decision maker in both assessing claimants' credibility and in assessing whether they might be at future risk of persecution if returned to their country of origin or any other (relevant) third country. More problematic is the issue of what constitutes COI and how it is put to use by decision makers themselves.

What Is COI; What Is the Problem with COI?

A number of issues identified through the research project[11] are underpinned by the fundamental problem of the lack of a clear understanding of the role and limits of COI in providing "factual" evidential support in asylum determinations. This is rooted, to an extent, in the more basic problem of "what is COI"?

Although COI is the most commonly used term, and the one adopted in this paper, in the UK there is no uniformity in the description of material about the countries where asylum seekers come from or have passed through. Such material may be referred to as country information, country of origin information, country materials, country evidence, objective evidence, or country bundles.

© Jo Pettitt, Laurel Townhead and Stephanie Huber, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

According to the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), COI in the asylum process is:

> [Any information that] should help to answer questions by decision makers and legal advisers about the political, social, cultural, economic and human rights situation as well as the humanitarian situation in countries of origin.[12]

Potential sources of COI may span many academic and professional disciplines since there is no independent field of study that defines or delimits what is and what is not classifiable, or usable, as COI for the purposes of RSD. A source of information only becomes COI when it is used as such in RSD processes and is not, for the most part, produced for use in the asylum process. Materials sought to be relied upon as COI may have been prepared in academic, policy, or campaigning environments in which notions about fact and objectivity differ from those used in the legal context.[13] All this has significant bearing on why asylum decision makers often appear dissatisfied with the content and/or presentation of country information sources and on why there is an uncomfortable level of uncertainty and inconsistency in the submission and treatment of these materials.

"Objective facts," ready to be applied to the specifics of the case in hand, are rarely found in COI materials.[14] Interpretation of COI in light of the circumstances of the case will therefore almost always be required. However, the interpretative step involved in bringing relevant COI to bear on specific cases is opaque. The decision maker will seek to make objective "findings of fact" about different aspects of a claimant's case.[15] Where this involves consideration of documentary evidence, including COI, it must first be decided what weight to attach to the available sources, before determining on their precise application to the questions at hand. When competing and inconsistent versions of the factual situation are presented, the decision maker must award preference to one source (which might include the claimant's own account) over another.

In light of this, it is apparent that the process by which quality standards are applied to the selection of sources of COI, and by which sources are weighted and then applied to the case in hand, are of critical importance. While some efforts to address this issue have been made,[16] a coherent approach has yet to emerge among practitioners and decision makers alike, resulting in the high level of inconsistency and uncertainty mentioned above and demonstrated in the remainder of this paper.

The COI Research Project

The Research and Information Unit (RIU) of the IAS is currently in the end phase of a project entitled "Using country of origin information to improve decision making." From the outset, the title implied three important assumptions:

1. There are currently problems with or there is room for improvement in decision making, at any or all levels (*i.e.*, from initial decision through to final appeals).
2. COI is in some sense under-used or the (mis-) use of COI is a contributing factor in the current problems in decision making.
3. Using COI differently would result in improved decision making.

Consequently, the project's main aim is to contribute in a positive manner to improving the quality of decision making in RSD in the UK, by examining the use of COI (*e.g.* nature, purpose, source, application) from initial decision to final appeals.

The project consists of three main parts:

1. conceptualizing COI and its use in RSD;
2. examining IAS caseworkers' use of COI, especially with regard to merits testing; and
3. individual studies focusing on the use of COI in first and second instance decision making through studies of Home Office policy documents (Operational Guidance Notes (OGNs), Reason for Refusal Letters (RFRLs), and Appeal Determinations).

The remainder of this paper will focus on part 3 of the project, examining the use of COI in first and second instance decision making.

Preliminary findings highlight the high level of inconsistency in the understanding and application of COI in the RSD process, and demonstrate the need for this issue to be addressed in the interest of just and effective decision making in the UK. Although UK-focused, some of the findings reflect the reality in other countries. This article highlights areas of concern and draws out key recommendations which can, hopefully, be applied universally.

The Operational Guidance Note Study

According to the UK Border Agency's website OGNs provide a "brief summary of the general, political and human rights situation in the country."[17] Their primary purpose is to provide "clear guidance on whether the main types of claim are likely to justify the grant of asylum, humanitarian protection or discretionary leave."[18] The COI contained in OGNs is sourced from "the most recent country of origin information" produced by the Home Office COI Service (COIS), part of the Research Development and Statistics (RDS) branch of the Home Office, which is removed from the asylum policy

© Jo Pettitt, Laurel Townhead and Stephanie Huber, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

and decision-making process.[19] The OGNs are produced by the Country Specific Asylum Policy Team (CSAPT), which is part of another branch at the Home Office, the Asylum and Appeals Policy Directorate (AAPD).

Consequently, OGNs can be summarized as follows:

- OGNs are *policy* documents;
- OGNs *do* provide COI; and
- the COI *is* selected for a specific application.

The latter point is confirmed by the Home Office in a response to the Advisory Panel on Country Information (APCI) in February 2007.[20] In the note,[21] the Home Office explained that the "OGNs are policy guidance documents rather than COI documents; and the country material within them is specifically selected to support that policy function."[22] It further explains that

> The country material cited in OGNs is selected / summarised specifically in order to provide sufficient explanation—alongside wider policy considerations and case law—of the guidance given on particular categories of claims. This country material does not seek to provide detailed information on all aspects of an issue and is not a substitute for the COI provided in COIS products. OGNs explicitly instruct decision makers to refer to the relevant COIS product/original sources for the full picture.[23]

The project included this particular study since OGNs are seen and used as consultation and even first-decision-making tools by Home Office case workers. A study commissioned by the Home Office in 2003[24] and discussions within the APCI[25] suggest that limited time to assess claims may prompt Home Office caseworkers to rely on the minimum amount of country information possible, with some caseworkers only referring to the OGN.

At the outset the main concern of this study was with the COI component of the OGN on which policy decisions are based, and was not to contest the policy conclusions that the CSAPT has drawn.

Due to limited time available six OGNs were selected amongst the existing fifty-two. Despite the constraints of a limited sample all OGNs examined raised similar observations and issues of concern. Furthermore, the six OGNs are representative: some of them are complemented by or draw their country information from COI products produced by the Home Office COIS,[26] whilst others do not.

The countries covered are: Afghanistan, Israel, Gaza and the West Bank, Kenya, Nigeria, Uganda, and Zimbabwe.

The six sample OGNs enabled us to reach the following conclusions:

- *The country information often fails to reflect the full range of current sources on an issue of critical importance to decision makers.* Despite the fact that the Home Office might argue that OGNs are only intended to be seen as policy guidance documents, the reality is that some caseworkers might solely refer to OGNs and hence only see the COI that is provided in them. OGNs have also been used as a source of COI by immigration judges. Given the Home Office's own statement quoted above that COI in OGNs is not a substitute for other COI, and the limitations with the COI described below, this is a worrying trend.
- *The country information relies heavily on the respective Home Office COIS Report.* Home Office COIS reports have often been criticized for being out of date and are a collation or summary of COI material published by others.[27] Since OGNs rely greatly on direct quotations from "secondary" sources of COI Reports, it would be more appropriate to quote directly from the original source and reference them accordingly.
- *The country information is selected for a specific application, which distorts the reality in the country of origin and results in misleading conclusions.* It became apparent that in the OGNs that were examined the language used painted a less dire situation in the country of origin than the original sources or even the Home Office COIS reports suggest. Moreover, it becomes apparent that certain information was omitted to fit the sought policy conclusion.
- *Policy conclusions do not appear to be consistently supported by the presented COI.* Despite the fact that it was not the purpose of this study to contest the policy conclusions in OGNs, it is necessary to observe that certain policy conclusions are drawn in OGNs which are not supported by the selected and presented COI.
- *The "facts/findings" on a country are not always substantiated by the referenced sources.* Generally poor, unclear, and incorrect footnoting and referencing made it difficult to double-check where the country information was taken from. This showed a lack of transparency, which is one of the four pillars of a proper COI research methodology, along with relevance; reliability and balance; and accuracy and currency.[28]

A possible approach in overcoming these shortcomings would be to advocate for the removal of COI from OGNs and include the conclusions only. According to the Home Office's response to the APCI in February 2007, the format and content of OGNs are "currently being reviewed" and a key aim "will be to reduce the country material in OGNs to the minimum necessary for the understanding of the guid-

© Jo Pettitt, Laurel Townhead and Stephanie Huber, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

ance. This will ensure that users refer to the relevant COI Service product for COI."[29] Moreover, the amount of COI material in OGNs for which there are no "[…] COIS COI products—has become more extensive than envisaged. To avoid this, in future, a COI product will be produced for all countries for which there is an OGN."[30]

This would be an important improvement since through the work of the Research and Information Unit at IAS several distinct misuses of country information contained in OGNs have been observed. Firstly, the study on the use of COI in Reason for Refusal Letters (RFRLs) shows that out of eighty-three RFRLs examined, the OGN was used and cited as a source of COI in seventeen cases. In seven of these cases, the OGN was the only source of COI that was made reference to in the RFRL and in all of these cases the COI was insufficient to address the specific issues of the case. Secondly, the study on the use of COI in Appeal Determinations has so far found that in one instance out of eleven determinations examined[31] the OGN has been used as a source of COI.[32] Moreover, in a January 2007 judgment by the European Court of Human Rights,[33] the Court relied on several occasions on COI contained in the May 2006 OGN for Somalia to substantiate its finding that a particular group was at risk on return and not able to internally relocate.[34] Lastly, a March 2007 Angolan *Response to Information Request* (RIR)[35] and a September 2006 Albanian RIR[36] by the Immigration and Refugee Board of Canada (IRBC) referred to country information contained in the Angolan and Albanian OGN respectively as part of their research answer on whether human rights abuses still continue in the Angolan enclave of Cabinda and whether state protection is available to homosexuals in Albania.[37] No specific reference was made to the fact that this particular piece of COI was taken from a policy document.

The main conclusion to emerge from this study is that the COI provided in OGNs should not be seen as country information or as objective evidence. OGNs should be used with caution and with an awareness of their stated purpose: The COI in OGNs exists as part of a policy document produced by a domestic governmental body responsible for RSD in an adversarial system. Notwithstanding the concerns described above as to the quality and transparency of the COI in OGNs, their objectivity *must* be questioned. Taken out of context the country information contained in OGNs might invite further misuse.

The Reason for Refusal Letter Study

Initial decisions on applications for asylum in the UK are made by Home Office caseworkers—case owners since April 2007 under the New Asylum Model (NAM)—and are based on the applicant's screening interview record, the Statement of Evidence Form, and the full interview record. Decisions may also incorporate further representations, including objective evidence in the form of COI, from the applicant's legal representative.

According to the Home Office *Asylum Policy Instructions* case owners are instructed and obliged to access and make use of COI in considering and deciding an application for asylum.[38]

The decision to refuse an application is given in the form of a Reason for Refusal Letter (RFRL). The RFRL should set out the applicant's case and present the findings and decision of the Home Office set against objective evidence.[39]

Quality concerns about the initial decision-making process have been widely expressed in the UK, for example, by Amnesty International and the Medical Foundation for the Care of Victims of Torture (Medical Foundation).[40] Such concerns, among others, have been specifically addressed since 2005 in the form of the Quality Initiative (QI) project conducted by UNHCR within the Home Office.[41] Above all, the Home Office has also committed itself to the improvement of initial decision making in the introduction of the New Asylum Model.[42]

However, the experience of IAS COI researchers, based on case specific COI research conducted for approximately one hundred asylum cases per month, suggests that the use of COI in initial decision making, as reflected in RFRLs, remains problematic. Specific areas of concern are:

- consistency in the use of COI,
- adequacy of referencing of COI, transparency of sources,
- appropriate selection of COI, and
- application of COI to case related questions

The RFRL study examined in depth a sample of eighty-three RFRLs for eight "asylum producing" countries over a six-month period, dating from January 2007 to June 2007, with the aim of eliciting objective data about the use of COI in initial decision making. The RFRLs were selected from the cases of IAS clients only and are therefore not necessarily taken to be representative of all asylum cases. It was anticipated that data extracted from this sample might reflect changes that have been undertaken by the Home Office, both in respect of the QI project and in the initial phase of the implementation of the New Asylum Model, since the data set represents a fairly even split between pre- and post-NAM decisions.

The sample RFRLs were taken from five of the countries most frequently represented in IAS cases, all of which fall within the Home Office "top twenty" asylum-producing countries. Regularly updated full Home Office COIS Reports are available to Home Office caseworkers for all these countries. These reports are themselves under the scrutiny of the APCI. The selected countries are as follows: Afghanistan,

© Jo Pettitt, Laurel Townhead and Stephanie Huber, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Democratic Republic of Congo (DRC), Iran, Somalia, and Zimbabwe.

A small subset of RFRLs were also examined from countries outside the Home Office "top 20," for which Home Office COIS Reports are not available. For those countries that still fall within the "top 50" asylum-producing countries, Home Office COI Bulletins are available to caseworkers. For those that fall outside this group, it is assumed that COI material is only available through the Home Office COIS case specific research service. This service can only be accessed with the approval of a Senior Caseworker. The selected countries in these categories are as follows: Cote d'Ivoire (Home Office COI Key Documents), Guinea (Home Office COI Key Documents), and the Occupied Palestinian Territories (Israel) (no Home Office COI product available).

The RFRLs study enabled us to reach the following conclusions:

The Use of COI in RFRLs

Of the total number of eighty-three RFRLs considered in the sample, fourteen made no reference to COI at all. Of the seventy-two RFRLs relating to countries for which there are Home Office COIS Reports available (Afghanistan, DRC, Iran, Somalia, and Zimbabwe), twelve made no reference to COI.[43]

The absence of any reference to COI in all these cases suggests either that there is a level of complacency about the caseworker's knowledge of the situation in the country of origin or that COI sources were consulted but that it was not considered important to cite or properly reference them. It might be further concluded that the failure to make use of COI indicates a complete disregard for its importance in the RSD process.

The Extent of Use of COI in RFRLs

As an indication of the extent of use of COI, where reference was made to COI in the RFRLs, on average it was referred to in four of the numbered paragraphs.[44] However, across all the RFRLs and the various countries, the number of paragraphs in which COI was used ranged from one to eighteen, reflecting the relatively wide variation in the extent to which COI was made use of across the sample.

Home Office COI Products: Reference to COI Sources in RFRLs

Of the data sample selected for this study, five countries have Home Office COIS Reports (Afghanistan, DRC, Iran, Somalia, and Zimbabwe), two countries have Home Office COIS Key Documents (Cote d'Ivoire and Guinea), and one has no country information provision (Occupied Palestinian Territories). There are Home Office COIS Bulletins available for Afghanistan (dated December 2005); Zimbabwe (dated April, June, and November 2005) and Cote d'Ivoire (dated November 2004).

It was assumed that use of country information resources as specified above would be indicated by citation in the RFRL. On this basis it was found that of the seventy-two RFRLs for countries with Home Office COIS Reports, only forty-four made direct references to these reports; twenty-eight therefore did not. As stated above, twelve RFRLs made no reference to COI, leaving sixteen, which made some reference to COI, although the sources were not specified, and not cited to COI products. Home Office COIS case specific research service was cited on seven occasions.[45]

Operational Guidance Notes as a Source of COI

As mentioned previously, data from the present study indicates that some caseworkers/case owners are still using OGNs as a source of COI and, in some instances, as the only source of COI. Of the data sample of eighty-three RFRLs, the OGN was used as a source of COI in seventeen cases. In seven of these cases, the OGN was the only source of COI that was made reference to in the RFRL and in all of these cases the COI was insufficient to address the specific issues of the case, the common pattern being that the case was refused on credibility grounds, in some cases on the basis of speculative argument. The use of OGNs as a source of policy guidance in decision making was not made explicit in any of the RFRLs where OGNs were cited.

Referencing of COI

Across the entire sample of sixty-nine RFRLs which made any reference to COI,[46] only twenty RFRLs had at least one source correctly referenced. In this case "correctly referenced" is taken to mean the inclusion of the source author, the name of the report and the date of publication. For ease of access to COI material cited, report section and paragraph numbers should also be stated. While these are generally stated when direct reference is made to Home Office COIS Reports (the Home Office COIS Report paragraph is stated, not the relevant paragraph in the original source), they are not stated in any other instances.

When Home Office COIS Reports are cited as COI source material in RFRLs, the original source document and author is often not stated (twenty-three instances). Similarly, the date of the original source[47] is not stated in many cases (nineteen instances) which is particularly relevant given that the Home Office COIS Reports are compilations of sources including material spanning many years.

On the other hand, in a significant number of instances COI sources are cited in the RFRL, but it is not stated

© Jo Pettitt, Laurel Townhead and Stephanie Huber, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

whether they have been extracted from the relevant Home Office COIS Report or have been independently sourced (11 instances). In other words, in some cases objective material is referenced to the Home Office COIS Report with no acknowledgement of the original source, while in others the material is cited to its original source but the Home Office COIS Report is not referenced. This demonstrates a lack of consistency and coherence in the approach of caseworkers/case owners to referencing COI and undermines the ability of the asylum applicant and the applicant's representative to verify the objective evidence, and if necessary, contest the conclusions drawn.

Beyond the citing of COI from the Home Office COIS Reports, in a significant number of instances, no source at all was given for country information referred to in the RFRL. In a total of twelve instances across all the RFRLs where COI was used (sixty-nine), the source origin was either not stated at all or the information given was incomplete (did not contain either the source author or the name of the report). In a further four instances, while the source name and author was stated, the date of the source was not given. This is in clear contradiction of the Home Office Asylum Process Manual.[48]

The data set in this study, however, revealed that caseworkers/case owners used no standardized form of referencing of COI. Referencing of sources appears to be carried out on an *ad hoc* basis. Moreover, in a significant number of instances, sources of COI were not referenced at all, or not in any meaningful way.

Relevance, Sufficiency and Accuracy of Use of COI

It was noted in the First Report of the QI Project in February 2005 that COI used by Home Office case workers is frequently both out of date and inadequate for refugee status determination and that it was a matter of some concern to UNHCR that some decisions (both grants and refusals) do not make any reference to COI.[49]

There continues to be a consistent pattern of under-use of COI by initial decision makers to address both contextual issues and case specific questions that arise in individual asylum claims, as evidenced by the citation of COI in RFRLs. For example, in Afghan cases refusal decisions consistently state that there is an internal flight alternative to Kabul, although this is not supported by current and sufficient COI, which is related to the individual profile of a claimant.

Moreover, there is a tendency to use standard paragraph excerpts from Home Office COIS Reports to address particular issues, which do not always support the conclusions drawn or address the specifics of the case.

Due to the overall inadequacy of referencing, it is difficult to assess the temporal relevance of much of the COI material cited in RFRLs. However, many instances were recorded where COI material cited was outdated despite the fact that newer material is clearly available in the public domain. For example, a 2005 report was used in one instance as a source of COI on the Taliban in Afghanistan for a RFRL dated June 2007. Where COI is sourced to Home Office COIS Reports, the date of the Home Office COIS Report is given (usually the most recent), but this does not accurately reflect the currency of the original source material, which may be considerably older.

Additionally, COI is used inaccurately on a significant number of occasions to support unfounded conclusions about the credibility of a claimant or the nature of the risk they may face. For example, in an Iranian case it is stated that because there is COI evidence that security services have killed many people, they would not be likely to give medical treatment to those detained, and, since the claimant stated that he was in detention and received medical treatment, he could not have been detained. In a Guinean case it was stated that the UN Committee on the Elimination of Discrimination Against Women (CEDAW), whose comments on the country's periodic report were cited as a source of COI, would be able to provide protection and redress for the individual claimant, who feared being forced to undergo female genital mutilation (FGM) if returned to Guinea.

Use of Speculative Argument and Credibility Findings Not Substantiated by COI

The use by initial decision makers of speculative argument was highlighted by the UNHCR QI team in their second report to the Home Office Minister in February 2006. In particular, initial decision makers were criticized for "attempting to guess the thought process of a third party" and for making findings of "implausibility" based on little or no evidence. UNHCR further comments that caseworkers tend to apply a "narrow UK-perspective when assessing events alleged to have taken place in significantly different cultural, political and social contexts."[50]

Unfortunately, evidence from this study suggests that this tendency persists. Speculative argument of the type described by UNHCR was found to have been employed in twenty-eight of the eighty-three RFRLs in the sample, and on occasions a claimant's entire account is dismissed as incredible on the basis of cumulative speculative argument.

The following is an example of a DRC case:

> […] It should be noted that by your own admission, you have stated that between April/May 2004 and April/May 2006 there were no physical attacks on you or your family. It is considered that if you were being persecuted to the degree that you describe by Mai Mai militia because of your imputed Nationality then a

© Jo Pettitt, Laurel Townhead and Stephanie Huber, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

> far more consistent pattern of persecution would have occurred. It is not considered credible that after going to the trouble of attacking your family in 2004, the militia would have then allowed you and the rest of your family to reside in peace for two years until they perpetrated the next attack.

To summarize, the conclusions from this particular study have raised the following key areas of concern with regards to the use of COI in RFRLs:

1. COI appears not to have been used at all in a significant number of initial decisions on asylum claims represented in this sample.
2. Where COI is used there is a huge discrepancy between different caseworkers'/case owners' use of COI in terms of the extent of its use, whether it is used to provide context or answer case specific points of fact or to establish credibility, etc.
3. OGNs continue to be used as a source of COI in initial decision-making, against the Home Office's own guidance.
4. There is no consistent pattern of referencing of COI sources used in the initial decision-making process. Some sources are not referenced at all while many others have incomplete reference, which lack either a date or a source author for example. In particular, sources which cite the Home Office COIS Reports in most cases do not state the original source author or date, which makes it difficult to assess the temporal relevance of the material and the weight of the source.
5. There is a consistent pattern of under-use of COI by initial decision makers to address both contextual issues and case specific questions that arise in individual asylum claims, as evidenced by the citation of COI in RFRLs. Furthermore, there is a tendency to use standard paragraph excerpts from Home Office COIS Reports to address particular issues, which do not always support the conclusions drawn or address the specifics of the case.
6. There is persistent use of outdated and undated COI material, as evidenced by sources cited in RFRLs, where newer material is clearly available in the public domain. Where COI is sourced to Home Office COIS Reports, the date of the Home Office COIS Report is given (usually the most recent), but this does not accurately reflect the currency of the original source material, which may be considerably older.
7. COI is used inaccurately on a significant number of occasions to support unfounded conclusions about the credibility of a claimant or the nature of the risk they may face.
8. Initial decision makers regularly make use of speculative argument, without reference to COI, to dismiss aspects of a claimant's account and credibility or the claim in its entirety.

From this it follows that in order to improve the use of COI in RFRLs, initial decision makers should make full use of COI in the consideration of all asylum claims. Where sufficient, relevant, and current COI is not available from existing Home Office COIS Reports and Home Office COIS Bulletins to address case specific questions, full use should be made of the case specific research service offered by the Home Office COI country officers. Secondly, sources cited in the RFRL or consulted in the course of making the initial decision in an asylum claim should always be referenced in full. This includes sources that are cited from Home Office COIS Reports. The original source should be stated, including author, title of the report, and date, as well as relevant section or paragraph numbers. Thirdly, OGNs should never be used as a source of COI in the initial decision-making process. Fourthly, COI should be used where necessary to address contextual issues as well as for the assessment of case specific questions in relation to the credibility of a claimant's account as well as the assessment of future risk, should the claimant be returned to his or her country of origin. Lastly, the use of speculative argument, as opposed to reasoned argument based on objective factors, should not be tolerated under any circumstances in the initial decision-making process.

The Appeal Determination Study

A further strand of the project concerns the use of COI by immigration judges in first instance asylum appeal determinations. Asylum applicants can appeal to the Asylum and Immigration Tribunal if their application is refused by the Home Office. The study focuses on the use of COI in unreported cases, which form the bulk of asylum determinations. A later task will be to examine Country Guidance cases to see if the treatment of COI in such cases is substantially different to that in unreported determinations.[51]

The study's sample is drawn from the same countries as the sample in the Reason for Refusal Letter study described above. This includes five countries for which Home Office COIS Reports are produced, two for which Home Office COIS Key Documents are listed, and one for which no COI product has been produced: Afghanistan, DRC, Iran, Somalia, Zimbabwe, Cote d'Ivoire (Home Office COIS Key Documents), Guinea (Home Office COIS Key Documents), and the Occupied Palestinian Territories (Israel) (no Home Office COI product available).

© Jo Pettitt, Laurel Townhead and Stephanie Huber, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

The sample includes determinations promulgated over the last five years and draws on a range of hearing centres. At the time of writing only a quarter of the sample has been processed; therefore the findings are limited to preliminary observations.

Use of COI
Either COI as a broad category of evidence or specific COI reports have been referred to by the immigration judge in all of the determinations examined thus far. The extent to which such information is used varies greatly, from a cursory reference in respect to one of several issues at stake to a detailed consideration of a variety of sources.

Purpose
In the majority of determinations considered, immigration judges are using COI for context in order to better assess the credibility of the applicant's story and to judge their future risk. In a smaller number of cases COI is used to make decisions on case specific issues of fact, such as the level of authority of named individuals.

Sources and Assessment of COI Material
Thus far only one determination has made no mention of a Home Office COI product, either the Home Office's COIS Report, or in older cases, the Country Information and Policy Unit (CIPU) Report.[52] All other determinations rely heavily, if not exclusively, on Home Office-produced COI.

In two cases where it is known that IAS's Research and Information Unit produced bundles with over thirty sources, only the Home Office COIS Report was explicitly referred to. In neither determination was any indication given as to why this one source had been relied on where others had not.

There is little or no consideration of the relative merits of various sources recorded in the determinations. It is, therefore, difficult to know if the reliance on COI produced by the Home Office instead of other sources is due to a thorough reflection on the evidential value of the sources submitted or because of some other reason such as familiarity.

Use of Home Office Operational Guidance Note as COI
Of particular concern is the use in one of the determinations of an OGN as a source of COI. The immigration judge quoted from the OGN and wrongly attributed the information to the "COIS Bulletin 2005." However, there is no Home Office COIS Bulletin for 2005 and the language appears in the OGN exactly as quoted in the determination. This suggests a lack of understanding on the part of the immigration judge as to the different purposes of OGNs and Home Office COIS Bulletins.

Transparency
In most determinations the extent of the COI before the immigration judge and which party submitted what material is unclear. Many of the determinations contain statements of fact/situation with no reference to the evidence on which the statement is based; it is therefore unclear how the immigration judges came to such conclusions.

Moreover, in most determinations where sources are referred to, the references are not clear. For example, a reference may simply be "in the Country Assessment" with no indication of publisher, date, or paragraph number, making it difficult or impossible to assess whether the information has been accurately summarized and used as a basis for decisions.

This lack of transparency with respect to the country evidence that has been considered, makes it difficult to gain a clear understanding of the process by which immigration judges choose to accept the reports of one organization over those of another. Without this information it is difficult for applicants or their legal representatives to know which COI sources (*e.g.* US State Department Reports or Amnesty International Reports) or which types of COI (*e.g.* news articles, UN agency assessments, NGO reports) an immigration judge is likely to respond favourably to and which are likely to be given little weight.

Lack of Information as a Basis to Make a Decision
In some cases the immigration judge states that there is a lack of evidence in regard to an aspect of the case and makes a finding based upon that lack of information. For example, in one determination the immigration judge states, "There is no objective evidence before me to satisfy me that [MA] is a man of power and influence in Kabul or elsewhere," and thus finds that the applicant is not at risk from this individual.

It may be that in some instances a lack of evidence is evidence in itself but these circumstances will be limited and will require thorough research to have taken place which has found no relevant information. It cannot be assumed that COI will provide evidence of all individual persecutors, even where they are stated to be in positions of power.

The following recommendations are based on the preliminary findings outlined above and will be expanded upon in the final report on the project once this strand has been completed:

1. A full list of COI sources submitted should be annexed to the determination as has happened in some Country Guidance cases.
2. The basis of findings relating to country situation should be clearer, *i.e.* the source material that leads to that particular conclusion should be referenced.

© Jo Pettitt, Laurel Townhead and Stephanie Huber, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

3. Referencing should be full and clear (title, publisher, date, and section or page number where appropriate).
4. Any assessment of sources that considers some to be of greater reliability than others should be made explicit.

Conclusion

From the outset of this study three assumptions were made: firstly, that there are currently problems with, or there is room for improvement in, decision making in the UK RSD process; secondly, that COI is in some sense under-used or that the (mis-)use of COI is a contributing factor in the current problems in decision making; and lastly, that using COI differently would result in improved decision making.

The preliminary findings from the three individual studies have so far demonstrated that these initial concerns were well-founded and have highlighted serious shortcomings in the use of COI in the RSD process in the UK.

It has been clearly established that COI plays a crucial role in RSD, in providing information which enables decision makers to assess whether an asylum seeker's subjective fear is based on objective circumstances. However, it has also been demonstrated, through empirical study, that a coherent and consistent approach has yet to emerge among decision makers in the UK regarding the transparent and accountable use of COI in individual cases.

The OGN study has highlighted the widespread misunderstanding of the policy function of OGNs and hence the danger of using, out of context, the COI contained in them. The RFRL study, on the other hand, has highlighted serious concerns about the adequacy and accuracy of the use of COI in initial decision making, while both the RFRL and the Appeal Determination study illustrate the lack of transparency in the use of COI and in particular the inadequate and inconsistent referencing of materials relied upon.

While the findings of the project outlined here have raised a number of issues and concerns and have painted a fairly negative picture of the use of COI in the UK RSD context, it is intended that the forthcoming final report will form the backbone of a new project, starting summer 2008, which will address these concerns in a positive way. This new project aims to bring together different country information users from within the UK RSD context, in order to contribute to a nationwide policy debate on the (better) use of COI by advisors, government officials, experts, and the judiciary.[53]

Notes

1. The Immigration Advisory Service (IAS) is the UK's largest charity providing representation and advice in immigration and asylum law. The Research and Information Unit (RIU) provides a country of origin information research service for all IAS caseworkers.
2. This article is based on a paper presented on 30 May 2008 at the conference Best Practices for Refugee Status Determination: Principles and Standards for State Responsibility, at Monash University Prato Centre, Italy. As such it represents the preliminary findings of the key studies of our project, which will be presented in full in our forthcoming publication.
3. Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), ACCORD COI Network & Training. Researching Country of Origin Information: A Training Manual, September 2004, 20–23, <http://www.unhcr.org/refworld/docid/42ad40184.html> (accessed June 20, 2008).
4. *Convention relating to the Status of Refugees,* 28 July 1951, 189 U.N.T.S. (entered into force 22 April 1954).
5. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* 1 January 1992, paragraph 42, <http://www.unhcr.org/refworld/docid/3ae6b3314.html> (accessed June 20, 2008).
6. UNHCR, Country of Origin Information: Towards Enhanced International Cooperation, February 2004, Section II. Scope and purpose of country of origin information, A. Objectives of country of origin information, <http://www.unhcr.org/refworld/docid/403b2522a.html> (accessed June 20, 2008).
7. The new Rules, based on the EU Qualification Directive, were implemented in UK domestic law by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2525/2006).
8. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
9. The paper was prepared by the COI-CG Working Party of the IARLJ, whose rapporteur was Hugo Storey, Senior Immigration Judge at the UK Asylum and Immigration Tribunal (AIT).
10. International Association of Refugee Law Judges, Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist, Paper for 7th Biennial IARLJ World Conference, Mexico City, 6–9 November 2006, <http://www.iarlj.nl/cms/images/stories/forms/WPPapers/Hugo%20StoreyCountryofOriginInformationAndCountryGuidanceWP.pdf> (accessed June 20, 2008).
11. This project refers to "The use of Country of Origin Information in the Refugee Status Determination process in the

© Jo Pettitt, Laurel Townhead and Stephanie Huber, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

United Kingdom," which the Research and Information Unit of the IAS is in the process of finalizing.

12. Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), ACCORD COI Network & Training. Researching Country of Origin Information: A Training Manual, September 2004, 4, <http://www.unhcr.org/refworld/docid/42ad40184.html> (accessed June 20, 2008).
13. This issue has been examined in relation to the treatment of expert evidence in asylum and human rights appeals by Anthony Good; see Anthony Good, "Expert Evidence in Asylum and Human Rights Appeals: An Expert's View," *International Journal of Refugee Law* 16 (3): 29–32.
14. Moreover, the notion of objectivity and therefore the possibility of the existence of objective facts is itself contested by the social sciences.
15. UNHCR (1992), para. 196. See also M. Symes and P. Jorro, "The Standard of Proof," chap. 2.1 in *Asylum Law and Practice* (Surrey: Butterworths LexisNexis, 2003); and Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), ACCORD COI Network & Training. Researching Country of Origin Information: A Training Manual, September 2004, 20, <http://www.unhcr.org/refworld/docid/42ad40184.html> (accessed June 20, 2008).
16. See, for example, ACCORD and International Association of Refugee Law Judges.
17. UK Border Agency, Policy and Law: Guidance and Instructions, <http://www.ind.homeoffice.gov.uk/policyandlaw/guidance/> (accessed: April 23, 2008).
18. UK Border Agency, Policy and Law: Guidance and Instructions: Country Specific Asylum Policy, <http://www.ind.homeoffice.gov.uk/policyandlaw/guidance/csap/> (accessed: April 23, 2008).
19. *Ibid.*
20. Advisory Panel on Country Information, Eighth Meeting, 06 March 2007: APCI.8.3 Operational Guidance Notes, March 6, 2007, <http://www.apci.org.uk/PDF/APCI.8.3%20OGNs.pdf> (accessed: June 20, 2008).
21. The note was written as a response to a suggestion made by the Chair of the APCI that COI material could be extracted from OGNs to enable the APCI to review this.
22. *Ibid.*, Conclusion & Home Office response.
23. *Ibid.*
24. Home Office Research Study 271, Country of origin information: a user and content evaluation, September 2003, <http://www.homeoffice.gov.uk/rds/pdfs2/hors271.pdf>(accessed June 20, 2008).
25. The APCI is a statutory body whose function is to review and provide advice about the COI material produced by the Home Office. For access to minutes of their meetings please visit: <http://www.apci.org.uk/>.
26. The Home Office produces COI Reports (from now on Home Office COIS Reports) on the twenty countries which generate the most asylum applications in the UK; these reports have been published twice yearly since 1997, but will be updated on a more frequent basis from October 2006. The COI reports are "detailed summaries compiled from material produced by a wide range of external information sources […] Each report focuses on the main asylum and human rights issues in the country, but also provides background information on geography, economy and history." For more information and to access all COI Reports, see <http://www.homeoffice.gov.uk/rds/country_reports.html> (accessed: April 23, 2008).

    COI Bulletins (from now on Home Office COIS Bulletins) are produced on an *ad hoc* basis in response to emerging events or in relation to a country for which a COI Report is not produced. For more information and to access the COI Bulletins, see <http://www.homeoffice.gov.uk/rds/country_reports.html> (accessed: April 23, 2008).

    COI Key Documents (from now on Home Office COIS Key Documents) are produced for countries that generate fewer asylum applications and bring together all the main source documents that would be provided with a COI Report, but with a brief country profile and index rather than an actual report. For more information and to access the COI Key Documents, see <http://www.homeoffice.gov.uk/rds/country_reports.html> (accessed: April 23, 2008).
27. In September 2003 the IAS released an analysis of the Home Office Country Assessments (HOCA) produced by the then Country Information and Policy Unit (CIPU), in April 2003. Until 1 June 2005 the country information and policy functions were carried out by one department within the Home Office, the CIPU. In December 2004 these two functions were internally separated until, in June 2005, the country information function was transferred to the Research, Development, and Statistics Directorate (RDS). See Advisory Panel on Country Information (APCI), Home Office Organisation Changes, September 2005, <http://www.apci.org.uk/PDF/apci51.pdf> (accessed June 20, 2008). The IAS report, Home Office Country Assessments: An Analysis (IAS analysis), concluded that the HOCA contained numerous inaccuracies and are therefore frequently misleading. In addition to this, IAS established that the country information referred to in the HOCA had in places been used very selectively to paint a more positive picture of country conditions than the original sources suggested. IAS, Home Office Country Assessments: An Analysis, September 2003 and its December 2003 Addendum, <http://www.iasuk.org/C2B/document_tree/ViewADocument.asp?ID=259&CatID=60> (accessed June 20, 2008).
28. See for example ACCORD.
29. Advisory Panel on Country Information, Eighth Meeting, 06 March 2007: APCI.8.3 Operational Guidance Notes, March 6, 2007, Conclusion & Home Office response, <http://www.apci.org.uk/PDF/APCI.8.3%20OGNs.pdf> (accessed: June 20, 2008).
30. *Ibid.*, Home Office response. To date (16 May 2008) two out of the existing OGNs do not have any corresponding COI

© Jo Pettitt, Laurel Townhead and Stephanie Huber, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

product. Any discussion surrounding the validity of having Home Office COI Key Documents falls unfortunately outside of the realm of this article.

31. The appeal determinations study is not completed yet.
32. Colleagues from the Irish Refugee Documentation Centre and solicitors from Canada informed researchers from the Research and Information Unit of the IAS during informal discussions in March and May 2008, respectively, that in several instances they witnessed immigration judges referring to the country information contained in OGNs to substantiate their determinations.
33. ECtHR, *Salah Sheekh v. The Netherlands*, no. 1948/04, 11/01/2007.
34. ECtHR, *Salah Sheekh v. The Netherlands*, no. 1948/04, 11/01/2007, s. 110, 111, 142, 147.
35. Immigration and Refugee Board of Canada, Responses to Information Requests (RIRs)—Angola, AGO102410.E, March 22, 2007, <http://www.cisr-irb.gc.ca/en/research/rir/?action=record.viewrec&gotorec=451055> (accessed June 20, 2008).
36. Immigration and Refugee Board of Canada, Responses to Information Requests (RIRs)—Albania, ALB101493.E, September 8, 2006, <http://www.irb-cisr.gc.ca/en/research/rir/?action=record.viewrec&gotorec=450467> (accessed June 20, 2008).
37. A discrete piece of research would be needed to investigate further the extend of which the use of country information contained in OGNs is used in RIRs produced by the IRBC.
38. UK Home Office, Asylum Policy Instructions, Assessing the Asylum Claim, October 2006, <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/assessingtheclaim.pdf?view=Binary> (accessed June 20, 2008).
39. Grants of asylum at the initial stage are not made with an equivalent letter. Therefore the Research and Information Unit of the IAS does not have a direct means of assessing the use of COI in successful applications.
40. The Medical Foundation study examined RFRLs " … as evidence of full and reasoned decisions on asylum claims," reporting on, among other issues, the relationship between the content of the RFRL in cases from Cameroon and the various sources of country of origin information available to the Home Office at the time of the decision, including the Home Office's own Country Assessments on Cameroon; Medical Foundation for the Care of Victims of Torture, "Right First Time? Home Office Asylum Interviewing and Reasons for Refusal Letters," February 2004, <http://www.torturecare.org.uk/publications/reports/283> (accessed June 20, 2008).
41. The QI Project is a joint IND/UNHCR initiative which monitors the quality of asylum decisions at first instance. UNHCR staff members have been based in Lunar House since August 2004 and are involved in the assessment of asylum decisions and interviews. For more information, see <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/unhcr.pdf?view=Binary> (accessed June 20, 2008).
42. From 5 March 2007, all new asylum applicants will come within the NAM. Any case not formally within the NAM by 5 March 2007 will be dealt with by the separate Legacy Directorate; Refugee Council Briefing, The New Asylum Model, March 2007, <http://www.refugeecouncil.org.uk/policy/briefings/2007/nam.htm> (accessed June 20, 2008).
43. RFRLs relating to Zimbabwe stand out in this particular sample; out of a total of twenty-four, seven RFRLs made no reference to COI. Leaving aside more case and profile specific issues, five of these seven cases concerned risk to and therefore treatment of family members of MDC supporters in Zimbabwe; two concerned sexual violence related to political violence, and one had the additional issue of risk to those involved in writing dissident articles for the foreign press. Cross-cutting issues of relevance to all these cases, but for which there was no reference to COI, were the levels of political violence in the country and the situation on return for failed asylum seekers.

    Similarly the three cases from Iran which made no use of COI were concerned with, among other issues, those who are imputed to have anti-regime political opinions, the treatment of those involved in the distribution of dissident materials, and the availability of a fair trial; while those from DRC and Somalia concerned treatment of people from a particular ethnic group by non-government agents and protection available.
44. RFRLs vary in length but on average they consist of from twenty to forty paragraphs.
45. It should be noted that direct reference to COIS Reports was recorded in forty-four separate RFRLS; in the case of reference to the Home Office COIS case specific research service and "Other sources," incidence of use was recorded, which includes reference to more than one type of source in the same RFRL.
46. Eighty-three RFRLs in total minus fourteen RFRLs which made no reference to COI.
47. As opposed to the date of the Home Office COIS Report, which is not the same thing.
48. Home Office, Asylum Process Manual, Chapter 3: Implementing decisions, para.14.4.2 Disclosure in the credibility section, <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/implementingandservingdecision/> (accessed June 20, 2008).
49. UNHCR, (QI) Quality Initiative Project, First Report to the Minister; A UNHCR review of the UK Home Office Refugee Status Determination Procedures, February 2005, <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports/qualityinitiative/unhcrreport1.pdf?view=Binary> (accessed June 20, 2008).
50. UNHCR, (QI) Quality Initiative Project, Second Report to the Minister, February 2006, para.2.2.9, <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/abou-

© Jo Pettitt, Laurel Townhead and Stephanie Huber, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

tus/reports/unhcrreports/qualityinitiative/unhcrreport2.pdf?view=Binary> (accessed June 20, 2008).

51. For a thorough exploration of the issues raised by the introduction of Country Guidance cases see: Colin Yeo, ed., *Country Guideline Cases: Benign and Practical?* (London: Immigration Advisory Service, 2005).
52. The Country Information and Policy Unit (CIPU) comprised the two units which became the COI Service and the Country Specific Asylum Policy Team in December 2004, and was part of the Asylum Policy and Appeals Directorate. For more information see: <http://www.homeoffice.gov.uk/about-us/freedom-of-information/released-information/foi-archive-immigration/6494-COIS-CIPU?view=Html>.
53. If you would like to find out more about this upcoming project please contact the Research and Information Unit of the IAS at <research@iasuk.org>.

Jo Pettitt, Laurel Townhead and Stephanie Huber are all Research and Information Officers at the Research and Information Unit (RIU) of the Immigration Advisory Service (IAS) in London, UK. The IAS is the UK's largest charity providing representation and advice in immigration and asylum law, whilst the RIU provides a country of origin information research service for all IAS caseworkers.

Special thanks to Amanda Shah for her contribution to the project and Elizabeth Williams for her helpful comments on earlier drafts.

© Jo Pettitt, Laurel Townhead and Stephanie Huber, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Life after Refusal to Enter: Reflections of an Immigration Judge

Geoffrey Care

Abstract

This article is a personal account of an immigration judge in the UK.

The history of attitudes towards immigrants in the UK since the Edict of Nantes is briefly sketched along with the sporadic emergence of review systems of executive decisions concerning immigrants, both political and non-political, from the beginning of the twentieth century up to the current one introduced first in 1969.

The article then looks at the sort of judges recruited at first and the subject matter of most of the appeals until 1993—visitors, students, overstayers, and those seeking settlement for work, for their families to join them, and for marriage.

The article deals briefly with the development of the immigration law in this period through these sorts of cases and the issues and questions facing the judge at the time. It considers where we got our information from with its challenges and shortcomings: particularly the misunderstandings which arise in cross-cultural dialogue.

The paper deals with the differences between a tribunal system in this particular jurisdiction, which adopts an adversarial approach, and the regular courts; and with the profound impact on a judge of having to adapt to decision making in such a milieu. It also tackles how these differences affect a judge's approach, especially given the constraints imposed on his judicial independence.

It also deals with the apparent changes over the years in the attitudes of judges in the tribunal, leaving a question mark over how far they are influenced by events and public opinion.

Some of the perceived shortcomings of the tribunal system to decide immigration matters are set out in the context of what Stephen Sedley described as a "fear of public abuse or political displeasure, unwittingly favouring individuals who fit stereotypes with which I felt an affinity; affection (sympathy) or prejudice which may skew my judgment."

The demons which lurk in all systems of adjudication, asylum prominent among them, are called out by name in the judicial oath and the hope is expressed that lessons have been learned both as a judge and a person in the course of some twenty-two years in this jurisdiction.

Résumé

Cet article est le compte rendu personnel d'un juge d'immigration au Royaume Uni.

L'article retrace les attitudes envers les immigrants au Royaume Uni depuis l'Édit de Nantes. Brièvement esquissé, l'article mentionne l'apparition sporadique de systèmes de revue de décisions exécutives concernant les immigrants, politiques et non-politiques, depuis le début du 20e siècle jusqu'au système actuel, introduit en 1969.

L'article examine ensuite les types de juges recrutés au début et l'objet de la plupart des appels jusqu'en 1993 : visiteurs, étudiants, ceux avec un séjour prolongé sans autorisation, et ceux avec des demandes d'établissement pour travailler, pour réunion familiale et pour cause de mariage.

L'article s'adresse sommairement au développement de la loi sur l'immigration pendant cette période à la faveur de ces cas, et des questions et problèmes confrontant le juge à cette époque. D'où provenait notre information, y compris les lacunes et les défis qu'elle posait; tout particulièrement les malentendus nés de dialogues interculturels.

L'article examine ensuite les différences qui existent entre un système axé sur le processus d'un tribunal, qui existe dans cette juridiction particulière — avec sa procédure contradictoire — et les Cours régulières, et l'impact considérable sur un juge qui doit s'habituer à prendre des décisions dans

© Geoffrey Care, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

un tel environnement. Il touche aussi sur la façon dont ces différences influent sur l'approche d'un juge, spécialement en présence des contraintes imposées sur son indépendance.

Il aborde aussi le sujet de l'évolution apparente de l'attitude des juges dans les tribunaux, et pose la question de savoir jusqu'à quel point ils sont influencés par les événements et l'opinion publique.

Puis, l'article place quelques unes des faiblesses perçues de ce système (p. ex. le questionnement de sa capacité à pouvoir statuer sur des questions d'immigration) dans le contexte de ce qu'a dit Stephen Sedley, « la peur de l'opprobre publique ou du déplaisir politique, favorisant inconsciemment les individus qui cadrent avec les stéréotypes avec lesquels j'avais une affinité, de l'affection ou des préjugés qui peuvent infléchir mon jugement ».

Les démons qui sont à l'affût dans tout système décisionnel, le droit d'asile apparaissant en bonne place, sont appelés par leurs noms dans le serment judiciaire et le souhait est exprimé que des leçons ont été apprises, tant comme juge que comme simple citoyen, au cours des 22 années passées dans la juridiction.

> After 5 years trial the Aliens Act [1905] stands before the bar of public opinion anathemised almost by all, understood by few. [It is] suggested that the powers of Board be transferred to [a] court of summary jurisdiction—a Stipendiary Magistrate plus 2 assessors. A Memorial from the Jewish Board of Deputies states *[inter alia]* that there be an appeal to Kings Bench Division … and better interpretation. Though Winston Churchill agreed with the former he said it would have little utility—and nothing was done.[1]

There is no shortage of writings on immigration in general or judges in particular and as such this paper is not in competition with any of them but is simply a personal account of the experiences of one immigration judge.

Coming as I did from regular practice at the normal common law bar and bench I had had no conscious experience of immigration law. Nor had I ever given thought to the case of the migrant, whether voluntary or enforced, even though I myself migrated to Zambia where I practiced for over twenty years.[2]

The issues may be familiar to most readers but perhaps some of the angles may be new. However it is not just an account of the type of issues we all had to deal with, which I see to be the most important, it is how operating amidst those issues can, hopefully, have a character-building effect on the decision maker.

I begin with a little history, by way of setting the scene for the chosen method for reviewing decisions on immigration-related matters by the executive.

The drive to be on the move for one reason or another, compulsory or voluntary, seems a part of man's makeup. Whether it be to find better pasture, to flee from an enemy or be taken captive, it has only become what we see as such a "problem" today with nation-states; and nation-states which are richer and nation-states which are poorer.

Generally England appears to have had no comprehensive policy of restriction on immigrants until 1905, though there had been an on-off sort of approach since the revocation of the Edict of Nantes in 1685.

At first the general feeling was one of compassion for refugees and modern asylum really began there. There was a panic reaction with the French Revolution and thereafter, with the slide into insecurity all over again in 1870, with an "Act to authorize the Removal of Aliens from the Realm," public reaction encouraged by the press has railed against "rising tides," "floods," and even "masses" of immigrants intent on harming our cosy (perhaps rosy) perception of the good life.

The rhetoric down the ages seems to portray a fear for national security, or for the integrity of one's national boundaries, although one cannot help thinking that it is much more a reluctance to share the good life; but it generates increasing restrictions which rebound on everyone, friend and foe alike. It seems there is an inbuilt potential for hostility toward an alien, arising more often than not out of ignorance—or fear—ignorance that all too frequently is fed by lack of informed facts and self-serving malign encouragement.

The introduction of any review whatsoever of decisions whether to admit or remove the foreigner was something of a revolution when first introduced, in a rather basic way, in 1905 to a tribunal,[3] called the London Immigration Board, which generally sat in secret as a panel of three selected from a group appointed by the Home Secretary and who had magisterial, business, or administrative experience.[4]

The Board's comprehension of asylum was worse than dangerous. There was no further review even by the courts.[5]

In 1906 there were 935 people excluded and 796 appeals heard, of which 442 succeeded, and in 1910 there were 1,066 excluded and 432 appeals, of which 144 succeeded.

The Sydney Street Siege in January 1910 led to an attack on the right of refuge and Stephen Phillips wrote, "The right to asylum is being shamefully violated."[6]

The right of review was removed by the Aliens Restriction Act 1914[7] and there was no appeal against any immigration decision until a return of a system whereby the executive decision concerning the immigrant could be reviewed[8] by a tribunal structure with the Immigration Appeals Act 1969.[9] For better or for worse, the question what is the best-suited body

© Geoffrey Care, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

to deal with individual claims for recognition as a refugee has been answered in this country by establishing a judicial tribunal.

This was modified in 1971 and has remained, with some changes since 2002, as the avenue for the review of almost all executive decisions of an immigration nature ever since.

It was not until 1979 when I became a part-time adjudicator—the lowest step in the judicial hierarchy for immigration appeals—that I had my first conscious encounter with immigration appeals. I say "conscious" because as a judge in Zambia I realized later that, as in India, judges can and do pay regard to the different issues which sometimes arise in the case of non-nationals.

Coming to the system without any previous experience I, along with others like myself at the time, probably with past service abroad, learned "on the job," the only training being attached for a few hearings to another adjudicator.

In the UK immigration appeals do not concern only refugees.[10] Indeed until the early 1990s they hardly ever did. Not only was there no appeal as such from a decision to refuse refugee status but there were few applications and fewer refusals. The way in which an asylum issue arose before us was either on an appeal against a decision to deport the person or an in-country refusal of permission to extend a stay.

Most cases we had to deal with at the time involved visitor and student appeals, applications to set aside a deportation order, and long-term applications for settlement. Rarely, if ever, was the appellant present and yet it was his or her intentions which primarily were in issue. Only the visa or entry clearance officer in the mission abroad had the chance to see and hear the applicant and it was therefore only that view which was before us. The oral evidence was from the sponsor and, however truthful he may have been, he was not the one whose purpose in wanting to come was the question. When, as was the case at times, we allowed up to 25 per cent of the appeals, this caused much dissatisfaction in the missions and we heard all about it when we went on tour.

On one occasion my colleague hinted that he thought the adjudicator must have allowed an appeal because she was pretty and showed too much leg! There could be no other good ground for appeal, let alone success, he asserted. We all knew but no one said that adjudicator was me.

Other appeals were from refusals of an extension of permission to stay for one reason or another.

There were the "tax fraud" cases and the "Primary Purpose" appeals. The appellants in these types of case usually came from the Indian subcontinent. There were other issues which came up in appeals originating in the Caribbean or Africa.

Tax fraud arose when the sponsor, usually a man, had, on arrival, claimed either to be single and to have had no, or some particular number of, children. He would then later claim tax allowances for different family members and, when he was well settled, years later, he would apply to bring in a wife and children he could never have had if his original story had been true.

There was no data link between immigration and tax so it would not be picked up until the immigration application was made.

Years of deception did not necessarily mean he was not married or even that the children were his. They were often those of a sibling. It tested our skills at deciding credibility, often with less than adequate examination skills by representatives and—being a judicial tribunal—limited rights for the adjudicator to act as *examining magistrate*. As DNA was later to show, in all probability we had been getting decisions wrong as to who was and who was not related to the resident spouse.

The latter cases of Primary Purpose arose out of claims to join a new or would-be spouse. The applicant had to prove a negative: that it was *not* the primary purpose of the application to gain residence in the UK. Endless appeals to the courts arose and it took us years to get what we thought to be the right approach—even if the outcomes may have been questionable with tools of doubtful value. The misery caused when we were wrong hardly bears thinking about.

When the immigration appeals started in 1969 it was thought that the immigration judges needed exposure to some of the cultures and countries of the peoples whose appeals would come before them, even though many at the time had served abroad as judges, magistrates, or law officers. Thus, every two years or so, two adjudicators would be sent off for a few weeks to different regions of the world to learn what went on.

In 1988 along with Lady Elizabeth Anson we spent a month in the Middle East, Bangladesh, Thailand, and the Indian subcontinent, right up to Landikotl in the northwest frontier and the Afghani border, through what was then a place where you could buy anything from a Parker pen to a washing machine—or an AK47, probably taken from the Russians who were at that very moment departing to the north. We were fortunate to be able to see and talk to the people, more of them than had many of our colleagues before, since we had been there before and knew many people. But we still missed many of the warning signals of troubles to come.

We also, along with others, failed to take on board fully the difficulties of learning things upon which we either could not rely in hearings or would have difficulties if we did.

We all learned something of the customs of people whose countries we visited, from Sylheti in Bangladesh or Sikhs from the Punjab, but it was all too brief to assimilate any deep understanding. There was always much we did not know (and

© Geoffrey Care, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

worse still did not realize we did not know) which made the formulation of opinions about the truth of a witness or the plausibility of a story always difficult and invariably suspect.

The extent of cross-cultural misunderstandings was not grasped and even now it taints the decisions of immigration judges on perceptions of risk in asylum appeals and the real conditions prevailing in mother countries. Unfortunately the judge tends to be suspicious of the value of the anthropologist's expert opinion which can educate him or her out of the distortion caused by their own cultural perceptions. Even the cultural relativity of telling lies is not well understood.

The use of one's own knowledge in an adversarial straightjacket has been the subject of debate for years, especially knowledge arising out of the tours abroad; but even with interpreters I have found, when seconded to assist in the backlog of appeals in South Africa, where that constraint was absent their knowledge was invaluable in deciding whether the appellant came from one side of a political boundary or the other.[11]

The need to have an encyclopedic knowledge of cultures and country backgrounds, and even more importantly an open mind as to how the latter can impact in individual cases and the former can give a consciousness of the inherent elusiveness of any certainty, is another major difference. This is so especially in the extent to which one may be required to be more proactive than in a normal court.

Where the adversarial type of tribunal failed miserably was to enable us to protect the reluctant (almost invariably vulnerable female) spouse who was forced to agree to marry someone she did not want to marry. We tried to persuade the Indian community in Baroda and the High Commissioner in London as long ago as 1988 to take up the matter—but nothing was done and it is still as much an issue today as it was then.[12] I know of one case at least where we got it wrong and the girl was murdered.

The caseloads of asylum—and later human rights related—appeals overtook those of the non-asylum appeals increasingly from 1993. These started to hit the immigration appeals system a year or two before when just two of us dealt with the majority of appeals which had an asylum content. Recently numbers of asylum appeals as such have decreased but appeals under the European Convention on Human Rights have increased. But it was in 1993 that a separate right of appeal was created.

I was then appointed as Deputy Chief Adjudicator. I had the responsibility for organizing the disposal of asylum appeals. The logistical task was made more complex than it should have been by the inability of the Home Office to predict numbers or to be willing to release appeals in some sort of orderly fashion. Added to this was the refusal to trust the appellate authorities to organize the most efficient way of filtering unmeritorious appeals swiftly and economically—managing without the vast increases in resources which are now in place.[13]

The adversarial system applied in this jurisdiction—more than, say, in the social welfare appeals, on which tribunal I also sat for nearly ten years—grew for two reasons. Firstly the people who were appointed at the time were lawyers and familiar with an adversarial system and secondly the tribunal system, although it occupies a place of its own in the UK administrative system, is still placed in a judicial hierarchy, as it were, and decisions are reviewed by the courts. This became increasingly the case when a specific right of appeal was added from the appellate part of the immigration appeals system to the Court of Appeal.

We have seen how important such a review is, but at the same time it reinforces the judicialization of the tribunal and has limited all attempts to loosen the straightjacket.

I have said that decision making in immigration appeals is different from decision making in the ordinary course of head-to-head litigation—either civil or criminal in the regular courts—and even, but to a lesser extent, in other tribunals.[14] I will deal with some of the factors which have a profound influence on decisions a judge can, or should be able to, live with.

These factors fall broadly into two groups. Matters of law fall into the first group. But it is not only the laws themselves which concern me. The first contention to be overcome was what immigration law comprises. Some judges would have excluded European Community Law as well as any other domestic law which was not designedly immigration. There was protracted debate on who has to prove what, and when and to what extent, and it had to be settled whether the same rule applied to asylum cases and any other case, and at what date the facts themselves were to be looked at. Was it to be when the original decision was made by the state or was it each time there was a hearing of the appeal?

When it came to interpretation of the law, particularly the immigration rules themselves, the tendency in earlier days was to adopt a facilitative or generous interpretation of the immigration rules, and rarely was the literal wording decisive. The rules were looked at as rules by which to decide how someone may be admitted to a country rather than how they can be kept out. The latter was the Home Office approach, sometimes with markedly different results.

Partly to do with this, and partly due to a lack of understanding of local cultures, it was to the despair of local Caribbean society, who gave voice to what they perceived to be incomprehensible unfairness in the rules in the way we decided whether a parent had had the "sole responsibility" for the upbringing of a child who had been left behind until the parent had settled in the UK and was in the position to offer

© Geoffrey Care, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

them a home with them. In such cases the social and legal position of illegitimate children in the rules caused monstrous injustice, it was said. Even the local social workers were baffled why children should be admitted to the UK only if the parent had had sole responsibility for them: "It is as illogical as admitting the child on the size of his feet!" they said.

How the law is interpreted is especially important with human rights related appeals. We regarded the Refugee Convention as a living instrument that was set in place for the purpose of affording a substitute for the protection which the claimant's own country should have given but did not. This approach, when brought together with the extent of the "burden of proof" resting on the refugee claimant, did not admit of a literalist approach. As an example there were many cases in which it was accepted that economics could be a basis of persecution.[15]

Unlike today.

The extent of the family affected by removal under Article 8 of the European Convention on Human Rights has been restrictively interpreted by the Asylum and Immigration Tribunal (AIT) and it had to be the House of Lords which corrected this.[16] I along with others in the UK and France had accepted that the threat of FGM (female genital mutilation) could amount to persecution but both the AIT and the Court of Appeal departed from this and again it was left to the House of Lords, in uncompromising language, to restore that approach.[17]

Again when it came to the exclusion from refugee status, decisions by the AIT have adopted a literalist interpretation to Article 4F of the Refugee Convention 1951 in a manner leading it to conclude that there is no room for evidence that someone who has ever committed acts which could lead to exclusion has reformed. No proof of a change of heart can prevail.[18]

Yet again I certainly accepted that no one who was ordered to carry out an action which amounted to crimes against humanity was obliged to carry out such an order. In that case it was as I recall carpet bombing in civilian (Kurdish) areas by the Turkish army. However the AIT has more recently held otherwise. It was put right by the Court of Appeal.[19]

To the second group belong everything relating to fact finding. One of the major points of difference between the regular courts, at least in serious matters of crime and some civil actions, is that the judge does not sit alone. Either there are other judges with him or her, or there is a jury, or in some cases assessors. Adjudicators and immigration judges, however, sit entirely on their own.

The judge is faced with any of one or more dilemmas: how best to make a judgment on the plausibility of a story and credibility itself; evaluating expert, documentary, and other evidence; knowing when and how to use his or her own knowledge and experience; and knowing how and when he should intervene, usually when there is no or no adequate representation.

In general terms, various authors have proposed some sort of guidelines to help with credibility, such as cultural and language filters; contamination of memory theories; vulnerability; consistency; verifiable country backgrounds; and—questionably—demeanour.

But two matters, perhaps more than anything else, have contributed to a real risk of a wrong decision, or the lack of transparency in many. The first is that most decisions by a single immigration judge turn on fact, and fact-finding is his or her weak point. It is also one on which any or any adequate training is not given. The second is the requirement that an appeal can be made based on an error of law only—and this is strictly interpreted.

Experienced judges are unanimous that picking out the liar is difficult. Whether or not it is a skill which can be learned must be open to much doubt but what is clear is that it is a quicksand to be wary of, which is a good reason for adopting the Canadian approach—if the story hangs together the appellant should not readily be branded a liar.

Relegating credibility to second place makes it less likely for a decision maker to adopt the view that an adverse credibility finding leads inevitably to the appeal being rejected. A test of "apparent reasonableness" or even common sense takes one no further since the question remains of "apparent to whom?", "common to whose sense?"

To say that credible statements must be coherent and plausible and not run counter to generally known facts[20] arguably begs the questions of how to assess plausibility and which facts are generally known facts.[21]

Geertz suggests it is a cultural system resting on a conviction of its validity.[22] But how well qualified is that person to assess what is reasonable in the circumstances? Lee J. in the Federal Court of Canada[23] asks, "how are we to separate systemic injustices from individual prejudices?"

Credibility is neither an aim itself nor some sort of points system of analysis.[24] As Regina Graycar puts it, "Credibility is not itself a valid end to the function of an adjudicator." Courts all over the English-speaking world have struggled to find a formula to guide the over- or under-credulous, and to counsel caution in being too ready to reject a story.[25]

The approach to accepting the scenario presented has its own special problems, not the least being that it is usually presented through an interpreter. Given that there are no strict rules for guidance, the judge is thrown back on his own resources, which may be biased, often unknowingly. Or he may rely on information which has been gained by experience and absorbed as the truth,[26] for example that documentary evidence from some countries is inherently unreliable,

© Geoffrey Care, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

or the configuration of an airport in some remoter part of the world.

Again, with expert evidence one is often lacking any reliable yardstick and ends up overemphasizing the role of ultimate control over the decision-making process, falling back on civil or criminal rules and guidelines.[27]

For myself, adapting to the hybrid nature of an appellate system, although itself founded in an adversarial climate with adversarially trained lawyers, was a little easier having sat as a judge in a country which had no jury system and in which the quality of representation was not always good and one was nearly always working through at least one interpreter.

But for those used to this, and with the increasing supervision from superior courts, the degree of acceptable intervention and the way of introducing one's own knowledge was much less easy.

In sum, in my view, for these reasons alone a legalistic tribunal is unsuited to the sort of inquiry called for particularly in refugee appeals. Unfortunately the confrontational nature of this type of enquiry starts with the Home Office and has contributed greatly to the perception of racist and discriminatory decision making by it.

Very marked inroads into judicial independence are much more easily made to a tribunal created by statute. This has been done both by the rules and procedures themselves and by pressures brought about partly by the high profile nature of the subject matter and partly internally by production line techniques and pressures to reach a decision quickly. Bound up with the last factor of the high profile nature of immigration is the constant exposure to stories of human rights abuses which can have psychological consequences for the judge, and can lead to forms of judicial burnout—something one does not always see in oneself or those around you—until one steps outside.

In Poland at least decisions are overseen by the Supreme Administrative Court which is not open to the sort of interference by the executive which is found constantly in the UK.

A start can be made on the attitudes and prejudices of the judge with what Lord Justice Sedley told an international conference of immigration judges:

> Every one of these nouns is set in high relief by the asylum judge's functions. The fear of public abuse or political displeasure, even if neither can result in dismissal; the risk of unwittingly favouring individuals who fit stereotypes with which the judge feels an affinity; the risk that affection—sympathy—will skew judgment; the risk that ill will—prejudice—may do the same; the judicial oath calls out by name these demons which lurk in all systems of adjudication, asylum prominent among them. I do not suggest that there is any nostrum against these things, though by being aware that they exist is an important start.[28]

One asks, can experience and training make a " … good road builder"? The answer is, perhaps; but under certain conditions.

The judge must listen to the evidence, make findings of fact, and apply the law. Straightforward enough, it would seem, at least to someone brought up in the common law traditions before adversarial courts. In the immigration hearings however the issues involved and the way resolution question before the tribunal is to be resolved are different: the absence of strict rules of evidence; the opportunity to hear what the party has to say first hand; the lack of cultural understanding of many and varied appellants; not to mention the unlikelihood of having been exposed to immigration at first hand, let alone to have been a refugee, categorized as a terrorist, or tortured. Perhaps Judge Albie Sachs from South Africa is one of the very few who has experienced the lot.

There is often little to guide the judge but his experience—in another sphere. Especially in asylum appeals his duty is to reach the truth—not merely on the evidence; and yet he is not an examining magistrate and does not have the facilities to call evidence even if he knew how to do so.

If he intervenes too obviously or relies on his own knowledge he is likely to be overturned on appeal. But time and again it is obvious that investigation is incomplete at best.

Some supporting evidence, such as expert evidence, may call for its own separate evaluation before putting it into the credibility equation.

Judges regularly seem to perceive threats to their own role in expert evidence from psychiatrists and anthropologists; but do they need to?

The attitude of the judge verging on the arrogant is nowhere more apparent than when it comes to dealing with medical or country background, and especially with psychiatric evidence. His expertise is in most cases at best limited and yet he is quick to assert that the decision is his. So it is—but the attitude tends to be used to exclude any recognition that the opinion of such experts can be helpful and may be more reliable than his own. At the end of the day he just has to take responsibility whatever he does.

There is no such thing as the state having to prove the correctness of their case that he is *not* a refugee, beyond all reasonable doubt; it is for the would-be refugee to show it is reasonably likely that if returned he may be persecuted. But along the road the dice are loaded and no more so than that his case is before a tribunal which can be manipulated at will, from both within the system and without, if it makes too many unacceptable decisions.

I do not make decisions in court or hearing room any longer. But if I did, would I be any better at it for the experiences which I have had? We will never know.

© Geoffrey Care, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

What has been the most profound impact on me has been to realize just how dangerous a job sitting in judgment is. Dangerous to the individual whose case I get wrong and dangerous to myself if, as Stephen Sedley said, "fear of public abuse or political displeasure, unwittingly favouring individuals who fit stereotypes with which I felt an affinity; affection (sympathy) or prejudice which may skew my judgment."

The judicial oath does indeed call out by name these demons which lurk in all systems of adjudication, asylum prominent among them. I hope it has taught me to be constantly on the lookout for where I may have gone wrong and correct the error at the first opportunity.

Notes

1. M.J. Landa, *The Alien Problem and Its Remedy* (London: P.S. King & Son, 1911).
2. In those days it was Northern Rhodesia in the Federation of Rhodesia and Nyasaland, and the final court of appeal was the Federal Court of Appeal in Harare (then Salisbury), where there was a mixture of common and Roman law systems.
3. There is a long history of judicial tribunals in England, it seems [see M. Mulholland and B. Pullan, eds., *Judicial Tribunals in England and Europe, 1200–1700* (Manchester University Press, 2003)]. Vaughan Bevan recites an interesting provision which no government today would welcome: that if a prosecution failed, the defendant must be paid treble his costs! See also *R. v. SSHD ex parte Zamir [1980] QB 378,* which showed just how far-reaching was the power to treat someone as an illegal entrant.
4. Aliens Act, 1905, c. 13.
5. See Landa, chaps. 9 and 10. Russians were returned to possible execution (*Morning Leader,* March 17, 1906) and in the House of Commons on March 14 "the whole work of the Home Office was being disorganized and seriously interfered with by the administration of the Act."
6. *Westminster Gazette,* January 12, 1911.
7. Immigration Act, 1971. The seeds of conduct conducive to the public good as a reason for removal can be found as early as the legislation in Napoleonic times.
8. Immigration Appeals Act, 1969.
9. Cmnd 4296, 1969–70.
10. In most countries there is no review still from a decision by the executive relating to any immigration decision, other than one with a human rights content.
11. See W. Kälin, "Troubled Communication: Cross Cultural Misunderstandings in the Asylum Hearing" (1986) International Migration Review 230, and the references therein, especially to Anthony Goode.
12. Despite the hopeful turn with the Forced Marriage (Civil Protection) Act 2007.
13. In the 1980s there were some sixty adjudicators throughout the UK. There are now ten times that number, but nowhere near ten times the number of appeals.
14. The Court of Appeal spoke of the unusual nature of this jurisdiction in *Karanakaran* and in *Shah and Islam:* "The civil standard of proof which treats anything which probably happened as having definitely happened, is part of a pragmatic legal fiction. It has no logical bearing on the likelihood of future events or (by parity of reasoning) the quality of past ones."
15. *Baglan* UKIAT 12620 1995; Obiter in *Gashi and Niqshiqi* [1997] INLR 97; *Chiver* (1997) INLR 212. Also see K. Jastram, "Economic, Social and Culture Rights as Grounds for a Claim for Refugee Status" (paper presented at the Research Workshop on Critical Issues in International Refugee Law, York University, Toronto, May 2008).
16. Until the House of Lords in *Beoku-Betts v. Secretary of State for the Home Department* put the AIT and the Court of Appeal right; see "Whole Family Affected by Removal of Immigrant," *The Times* (London) (July 8, 2008).
17. See *El Kebir* Conseil d'Éat (unreported).
18. [2004] UKIAT 00101 and [2005] UKIAT 00104.
19. *BE(Iran) v. SSHD, The Times* (London) (June 18, 2008).
20. UNHCR *Handbook* (1992) at ¶204.
21. *MM[DRC] v. SSHD* [2005] UKIAT19; [2005] ImmAR 198.
22. Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 76.
23. w148/100.
24. *Asif* 1999 SCC; also, Regina Graycar, "*The Gender of Judgments: An Introduction*" *in* Margaret Thornton, ed., *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995), 262.
25. *Selliah,* Federal Court of Australia, repeated in Menaa IAT.
26. *Supra* note 20.
27. *Supra* note 11. The International Association of Refugee Law Judges has at its recent conference in Cape Town agreed to propose a set of guidelines to assist judges in all jurisdictions in their approach to and reception of medically related evidence.
28. "Stemming the Tide or Keeping the Balance—The Role of the Judiciary" (5th Conference, International Association of Refugee Law Judges, New Zealand, October 2002) at 325.

Richard Geoffrey Care, LL.M. (London), is the former Deputy and acting Chief Adjudicator for the Immigration Appellate Authority and a Chairman, Immigration Appeal Tribunal in the UK. Among numerous other appointments, he has served as Solicitor England and Wales; President of the Law Society of Northern Rhodesia and Law Association of Zambia; President, Patents Appeal Tribunal Zambia; and Justice of the High Court of Zambia, as well as Head of the Department of Law at the University of Jos Nigeria and part-time Lecturer with SOAS University of London. Richard Geoffrey Care is the founding President of the International Association of Refugee Law Judges.

© Geoffrey Care, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Research Workshop on Critical Issues in International Refugee Law

May 1 and 2, 2008, York University

James C. Simeon

Abstract

This paper provides a brief outline and summary of the key academic papers and review commentators' remarks that were presented at the Research Workshop on Critical Issues in International Refugee Law that was held at York University, Toronto, Canada, May 1 and 2, 2008. One of the principal objectives of this Research Workshop was to bring together some of the world's leading senior superior and high court judges and legal scholars to examine a limited number of key issues in international refugee law from a number of perspectives, including the jurist/practitioner and theorist/academic viewpoints, with the aim of trying to find the most promising ways forward and/or avenues for further research. Four substantive academic papers were presented by Professors Guy Goodwin-Gill, Oxford University; Jane McAdam, University of New South Wales; Geoff Gilbert, University of Essex; and Kate Jastram, University of California at Berkeley. The Research Workshop keynote address was delivered by the Honourable Justice Albie Sachs, Constitutional Court of South Africa. The Research Workshop also launched a number of wider international collaborative research projects in international refugee law that will be pursued over the next few years.

Résumé

Cet article propose un bref apercu et un sommaire des principales présentations savantes et des remarques faites par les commentateurs, présentées à l'Atelier de recherche sur les questions urgentes en droit international des refugiés (« Research Workshop on Critical Issues in International Refugee Law ») qui s'est tenu à l'Université York, Toronto, Canada, les 1er et 2 mai 2008. Un des principaux objectifs de l'Atelier de recherche était de rassembler quelques uns des principaux juges doyens de Haute Cour et de Cour Suprême ainsi que des juristes chefs de file, pour qu'ils se penchent sur un nombre restreint de questions clé dans le domaine du droit des réfugiés à partir d'un certain nombre de perspectives, y compris les points de vue du juriste/praticien et du théoricien/chercheur universitaire respectivement, et cela dans le but de trouver les voies les plus prometteuses pour aller de l'avant/ou pour des recherches additionnelles. Quatre présentations de fond furent présentées par les professeurs Guy Goodwin-Gill, de l'université d'Oxford, Jane McAdam de l'université de New South Wales, Geoff Gilbert, de l'université d'Essex et Kate Jastram de l'université de California à Berkeley. Le discours principal de l'Atelier de recherche a été prononcé par l'honorable Juge Albie Sachs de la Cour constitutionnelle de l'Afrique du Sud. L'Atelier de recherche a aussi lancé un certain nombre de projets de recherche collaboratifs élargis sur le plan international sur le droit international des réfugiés, dont on va faire le suivi dans les quelques années à venir.

Introduction

The Research Workshop on Critical Issues in International Refugee Law brought together leading academics and superior and high court judges from around the world to analyze, discuss, and debate some of the most problematic issues in international refugee law in an effort to try to find the most promising solutions or to at least map out the most promising paths for future research that could lead to a pos-

© James C. Simeon, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

sible resolution of these legal issues and concerns. In essence, the Research Workshop strove to combine the perspectives of both the theorist and researcher with those of the jurist and practitioner to an examination of a number of key issues facing international refugee law today.

The Research Workshop was premised on the notion that as the number of persons affected by forced displacement and migration continues to increase globally, an essential component of the international refugee protection regime, the determination of Convention refugee status, will continue to be confronted with ever more complex and sensitive legal issues and concerns.[1] Refugee law adjudicators, whether in government departments, administrative tribunals, or within the UNHCR, and judges, in the courts and, in particular, the appeal courts, irrespective of their jurisdiction, are now faced with dealing with an ever-growing number of critical issues in international refugee law.

Four specific legal issues and concerns were selected for examination at the Research Workshop: (1) national courts, refugee law, and the interpretation of treaties; (2) the standard of proof in complementary protection; (3) refugees, the UNHCR, and the purposive approach to treaty interpretation since 9/11; and (4) economic harm as a basis for refugee status. The Research Workshop also featured a keynote address by the Honourable Justice Albie Sachs, Constitutional Court of the Republic of South Africa, entitled "Once a Refugee, Now a Judge, Hears a Case about the Rights of Refugees."

The Research Workshop was organized around four sessions over two days. Each session began with an academic paper that was followed by a judicial commentary or commentaries, a roundtable discussion, and then an academic review commentator's observations and remarks on the session. The academic review commentators were asked to focus their remarks on identifying the areas of convergence and/or divergence on the legal issues under consideration, and to try to point out any obvious gaps in knowledge on the topic under examination and the most promising areas for future research that might lead to an eventual resolution of these problematic legal issues and concerns in international refugee law.

The Research Workshop was organized under Chatham House Rules with a limited number of invited academic and judicial participants. There were nine judicial participants and thirteen academic participants, two senior Canadian governmental officials, one NGO senior representative, and four graduate and four undergraduate student participants.[2] A number of senior academic administrative officials from York University also participated, in an official capacity, at the Research Workshop.

The Research Workshop was chaired by Justice Tony North, Federal Court of Australia, and the current President of the International Association of Refugee Law Judges (IARLJ).[3] Justice North called on Chief Justice Allan Lutfy, Federal Court (Canada), and Justice Professor Harald Dörig, Vice-President, Federal Administrative Court of Germany, to chair a session during the Research Workshop. Participants were actively engaged throughout the duration of the Research Workshop. The roundtable discussions, in particular, generated lively and interesting debate and discussion on the legal issues under examination.

The Research Workshop proceedings were not recorded electronically. Rather, four student rapporteurs were retained and assigned to work with the academic review commentators to take notes of each of the sessions. Following the Research Workshop the student rapporteurs' notes were distributed to each of the review commentators and the other session participants for their review and any amendments or corrections. The notes for each of the Research Workshop sessions, along with the academic papers and judicial commentaries, as presented at the Research Workshop, were then posted on the "password-protected" portion of the Research Workshop website. This material will eventually be made available on the "public" portion of the website as well.

An edited collection of articles based on the Research Workshop will be published soon. The articles in this edited volume will include the substantially revised academic papers as well as new articles and material that will not be available on the Research Workshop website.

The Research Workshop Sessions

Day 1: Treaty Interpretation and the Standard of Proof in Complementary Protection

The opening address was delivered by Professor Guy S. Goodwin-Gill, Senior Research Fellow, All Souls College, Oxford University. The title of his paper was "The One, True Way: National Courts, Refugee Law and the Interpretation of Treaties." Professor Goodwin-Gill stated that there is but one "critical issue" in international refugee law and that is "progressive development."[4] He further pointed out that the challenge for the national courts in the application and interpretation of international refugee law and, specifically, the *Refugee Convention* is to find "the one, true way."

Professor Goodwin-Gill noted that, with 147 States now party to the *Refugee Convention* and *1967 Protocol,* there are enormous challenges and opportunities for interpretation, but little scope for building consensus or authority.[5] He mapped out the international legal context for the application and interpretation of the *Refugee Convention* by citing the Articles that are relevant for the good-faith implementation of treaty obligations in the *1969 Vienna Convention on*

© James C. Simeon, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

the Law of Treaties. For example, Article 26 of the *Vienna Convention* states, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[6] Article 27 confirms the general rule of international law that a State party "may not invoke the provisions of the internal law as justification for its failure to perform a treaty."[7] Article 31 sets out the basic rules of treaty interpretation, and emphasizes the "ordinary meaning, context, and object and purpose."[8]

Professor Goodwin-Gill pointed out that refugee status determination is as much about questions of fact as it is about law. Consequently, he argued that the principal divergences between States in the application of the *Refugee Convention* are as much about fact as they are about law. Hence, he noted, "Promoting consistency of refugee decision-making, therefore, is as much about accurate and up-to-date information, as about consensus on the meaning of terms."[9]

Professor Goodwin-Gill further remarked that "State [refugee law] practice" is embodied in both its legislation and its judicial decisions. The comparative study of jurisprudence to discern consensual interpretations of the *Refugee Convention* is, of course, a common research practice and prevalent in the academic literature. In Professor Goodwin-Gill's opinion, international refugee law is most responsive and adaptable at the national level. He argued that the "national judge will often play a crucially important role in advancing the protection of human rights."[10]

Professor Goodwin-Gill further pointed out that "interpretation requires account to be taken of any relevant rules of international law, whether treaty or customary."[11] Auto-interpretation, or the role and responsibilities of national courts in interpreting and applying the *Refugee Convention,* can be viewed from two perspectives: (1) auto-interpretation as non-opposability; and (2) auto-interpretation as creative discourse.[12] In the first instance, auto-interpretation as non-opposability stands for the proposition that all States parties to a multilateral treaty are free to adopt, in good faith, the interpretation that they consider to be the "autonomous meaning." In the second instance, auto-interpretation as creative discourse implies that the national judge must interpret the Convention "in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose."[13] Professor Goodwin-Gill notes that when individual rights, rather than State sovereignty, are at issue, then a good-faith interpretation of the Convention may require a more nuanced approach or even a "reasonable interpretation."[14]

Professor Goodwin-Gill closed his presentation by stating that "the lack of uniformity is simply the price we pay for progressive development, and *that* is the one, true way."[15]

The review commentator for this session, Professor Obiora Okafor, Osgoode Hall Law School, York University, observed that the opening session displayed several points of tension. One was assuring the independence of the refugee law adjudicator, especially those of the non-judicial kind, while avoiding "maverick" as opposed to "independent" adjudicators. Another was the tension between seeking uniformity of the global refugee regime, on the one hand, and on the other, fragmentation. The international refugee regime, Professor Okafor stated, as Professor Goodwin-Gill so ably points out, does not produce international refugee law interpretation that is binding on national refugee law judges. Professor Okafor further noted that there is no desire to have a system that is isolated State by State and that produces judgments that are overly contextualized. The key is to find the balance between creativity and uniformity in the application and interpretation of the *Refugee Convention.*

Professor Okafor went on to say that this session would have profited more from taking into consideration the non-legal factors that influence and come into play in the interpretation of the *Refugee Convention.* He noted that there is an intimate linkage between international refugee law and other areas of international law, such as international criminal law. He suggested that these linkages would become increasingly more important in the future.

Professor Jane McAdam, Faculty of Law, University of New South Wales, Australia, presented her comparative paper on the standard of proof in complementary protection cases.[16] Professor McAdam began by observing that the "standard of proof has become a central distinguishing feature in the Canadian context between attaining protection as a 'refugee' or as a 'person in need of protection.'"[17] This distinction, she points out, has been absent in the European Union (EU).

Professor McAdam's paper focuses more, rather, on the legal impediments to obtaining subsidiary protection in the EU under the Qualification Directive,[18] one of a number of instruments that sought to harmonize and to streamline legal standards relating to asylum within EU Member States.

Professor McAdam noted that the Qualification Directive was supposed to be transposed by EU Member States into their national laws by October 10, 2006, but sixteen out of the twenty-six EU Member States who are bound by the Qualification Directive had not transposed it, either in full or in part, as of August 2007.[19] Furthermore, there are striking inconsistencies in the way key provisions of the Directive are being interpreted across EU Member States.

One of the most problematic of these is the application and interpretation of Article 15(c) of the EU Qualification Directive, which states that "serious harm" consists of a:

© James C. Simeon, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

> "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."[20]

Professor McAdam stated that this provision is "poorly understood, inconsistently applied across Member States, and in some jurisdictions is the only subsidiary protection category given full consideration when a Convention claim fails."[21] She argues that EU Member States' independent analysis of the meaning of Article 15(c),

> apparently without regard to the interpretations being adopted in other Member States, the jurisprudential trends in the European Court of Human Rights, or the guidance of UNHCR, has led to vastly different recognition rates across the EU of people fleeing violence in Iraq, Chechnya and Somalia, and has created legal uncertainty about the meaning of a provision that is supposed to give rise to a uniform approach.[22]

Part of the problem is that Article 15(c) has not been transposed in a consistent manner into national law by EU Member States. Belgian and Lithuanian law contains wording that is different from Article 15(c). French law includes a requirement that the threat to the civilian's life be "direct." In Sweden and the Slovak Republic, Article 15(c) is not limited to "civilians." German law does not transpose the reference to "indiscriminate violence."[23] In addition to this clearly inconsistent transposition of Article 15(c) into national laws by EU Member States, higher evidentiary burdens are being placed on claimants under this provision, making it more difficult for claimants "to establish the requisite elements of article 15(c)."[24] Professor McAdam argued that although, in theory, the standard of proof in the EU is the same as for Convention refugee claims,[25] the *practical* effect of the EU's evidentary requirements means that a higher burden is placed on applicants. This resonates with the legal approach in Canada, where the standard of proof for subsidiary or complementary protection is the lower civil standard, "the balance of probabilities" or "more likely than not," as opposed to the "reasonable chance" or "serious possibility" standard of proof for Convention refugee status.

Professor Elspeth Guild, Radboud University, Nijmegen, the Netherlands, was the academic review commentator at the conclusion of Professor McAdam's session. Professor Guild observed that the academic-judicial exchange and roundtable discussion during this session highlighted three "big picture" points: (1) international obligations versus national sovereignty; (2) the individual versus the collective; and (3) the rolling power of the administration versus the judiciary. With respect to "international obligations versus national sovereignty" a number of questions come to the fore, such as, "Is there some kind of higher authority, within the *Refugee Convention,* that gives rise to rights that individuals can access, notwithstanding the antagonisms of the state?" When one goes from the simple picture of the *Refugee Convention,* Professor Guild noted, into a world that is ever more complicated, such as the situation in the EU, with its various asylum directives, the situation becomes ever more complex. As one moves through different levels of analysis, one observes human rights being divided differently.

With respect to the "individual versus the collective," Professor Guild remarked that "the law likes the individual, not the collective. It wants a plaintiff." It prefers to deal with individual rights. Professor Guild noted that in her experience with EU law, the legal system becomes quite nervous when dealing with collective rights and how to package these so that representative action and class actions can be asserted. She further noted that Professor Goodwin-Gill stated that Article 1 of the *Refugee Convention* appears to be a collective right; nonetheless, it is treated as if an individual determination is attached to every case.

Professor Guild also raised the following questions: "What is the role of the judiciary in the interpretation of the law?" and "What is the right of the administration to exercise discretion?" Important questions are raised when the power of the administration and the judiciary are considered. Professor Guild remarked that administrative sovereignty is a particular concern, especially, when it is employed as a mechanism of avoiding judicial oversight in a particular field. She argued that if the judiciary escapes national law through the interpretation of international or supranational law, administrative sovereignty is weakened.

Professor Guild concluded her remarks by making the point that these three sets of tensions are inherent in the world we live in and that the role of the law, whether national, supranational, or international, is played out on those who are seeking asylum and/or international protection.

Day 2: A Purposive Approach to the Interpretation of the Refugee Convention, the Honourable Justice Albie Sachs' Keynote Address, and Economic Harm as a Basis to Convention Refugee Status

The second day of the Research Workshop began with a presentation from Professor Geoff Gilbert, Department of Law, University of Essex, entitled "Running Scared since 9/11: Refugees, UNHCR and the Purposive Approach to Treaty Interpretation." Professor Gilbert asserted that the events of September 11, 2001, had a profound effect on those seeking Convention refugee status in the Global North.[26] The reaction of States following the events of 9/11 made it increasingly more difficult for those seeking asylum in the United States, Canada, the United Kingdom, Australia, New

© James C. Simeon, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Zealand, and other refugee receiving countries in the Global North. Professor Gilbert focused, in particular, on Articles 1F and 33(2). These two Articles of the *Refugee Convention* are the "two different grounds on which someone who fled persecution might lose the protection of the state that would otherwise offer it."[27] Article 1F is the "exclusion clause" in the *Refugee Convention* that excludes a person from refugee status if there are "serious reasons for considering" that the person has committed a crime against peace, a war crime, or a crime against humanity, a serious non-political crime outside the country of refuge, and/or is guilty of acts contrary to the purposes and principles of the United Nations.[28] Article 33(2) applies to persons who have refugee status in the State of refuge, but whose guarantee of *non-refoulement* is withdrawn.[29] Professor Gilbert notes that "It places a heavier burden on the state now wishing to be rid of the refugee."[30] The important distinction between Article 1F and Article 33(2) is,

> Article 1F prevents a person qualifying as a refugee, they do not obtain that status. Article 33.2 does not challenge refugee status, just its principal benefit. The *travaux preparatoires* to the 1951 Convention make clear that Article 1F was drafted to ensure that only the deserving were deemed to be refugees, paragraph 7d of the 1950 Statute had a similar purpose with respect to international protection by UNHCR.[31]

Following 9/11, Professor Gilbert pointed out, a number of States amended their refugee status laws. The United Kingdom, for example, amended its *Nationality, Immigration and Asylum Act* to remove the "double balancing from the Article 1F determination process and the 2002 Act held that a crime punished by two years imprisonment was particularly serious for the purposes of Article 33.2."[32] The United States passed the *USA Patriot Act* (*Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*). Professor Gilbert stated that this act had a far-reaching impact on refugees, "particularly with respect to removal and detention."[33] The United States also "expanded the meaning of terrorist activities, so increasing the scope of Article 1F."[34]

Professor Gilbert also asserted that since 9/11 there has been an increased tendency to exclude refugee applicants under Article 1F.[35] In a review of the case law across a number of jurisdictions since 2001, Professor Gilbert finds a tendency for the courts to take an expansive view of Article 1F. In Canada, the Federal Court of Appeal in *Zrig* ruled that the applicant was excluded under Article 1F(b) by virtue of his complicity by association in a movement that was responsible for serious non-political crimes.[36] In the United Kingdom, the cases of *KK (Article 1F(c)) Turkey) v. Secretary of State for the Home Department* and *Secretary of State for the Home Department v. AA (Exclusion Clause) Palestine,* Professor Gilbert noted, dealt in part with the interpretation of Article 1F(c) and expiation. He pointed out that the Immigration Appeal Tribunal (IAT)

> adopted a broad approach to Article 1F (c), not limiting it, as one might have hoped, to acts by senior figures in a state, given that the applicant for refugee status has to be 'guilty of acts contrary to the purposes and principles of the United Nations' and those are set out in the Charter that is binding on states parties.[37]

Professor Gilbert also stated that "*AA* citing *KK* also rejects expiation as a defence to exclusion under Article 1F."[38]

A review of the case law since 9/11 leads Professor Gilbert to conclude that the courts and tribunals have "placed a great emphasis on the literal language of the 1951 Convention, as if the judges and adjudicators were simply applying an automatic rule with no room for discretion."[39]

Professor Audrey Macklin, Faculty of Law, University of Toronto, provided the review commentator's remarks for Professor Gilbert's session at the Research Workshop. Professor Macklin observed that the discussion for this session of the Research Workshop could be broken down between the judicial and legislative and the judicial and executive branches of government and the direct experience of decision makers, whether they are refugee adjudicators or judges sitting on judicial review. She further noted that terrorism in the post-9/11 era is the subject of at least three domains of law: migration law, the law of war, and criminal law. While there is a migration dimension to terrorism, she pointed out, it is not necessarily true, of course, that terrorism is a problem that migration law can resolve. Professor Macklin stated that refugee law is nested within migration law, the subject of which is predicated on the citizen–non-citizen distinction. The subject of human rights law, on the other hand, addresses the situation of the person, irrespective of their citizenship status.

One of the features of terrorism, Professor Macklin remarked, as it gets defined in the criminal law in various jurisdictions, is the problem of how one distinguishes terrorism from ordinary crime. It is typically understood that one ought to try to get at terrorism at a much earlier stage, perhaps, than other crimes. This reflects an element of risk prevention.

Professor Macklin also observed that Article 1F(b) is designed to address the problems that the drafters of the *Refugee Convention* faced at the time, but may no longer be applicable in the current context.

Midway through the second day of the Research Workshop, the Honourable Justice Albie Sachs, Constitutional Court of

© James C. Simeon, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

the Republic of South Africa, presented his moving keynote address at the Research Workshop, on how he, as a former refugee, and now a justice on his country's highest court, decided a recent case on refugee rights. Justice Sachs described how he was arrested and incarcerated as a young lawyer defending people against the repressive racist statutes and security measures during the apartheid era of South Africa. He said that he was tortured while he was held under detention by his State's authorities. After his release from detention, Justice Sachs went into exile in England, where he studied and taught law for more than a decade before he returned to Africa. He said that he enjoyed his new-found freedom in London, but he resented his status as a refugee. Although he experienced feelings of gratitude towards his host country, he said that he also experienced feelings of anger.

Justice Sachs made the point that States are overwhelmingly responsible for the use of torture against their own citizens. He said that States have created more torture victims in the world than any other entities, whether the States are located in South America, Europe, Africa, or Asia. He also observed that one's own life experience cannot help but affect one's values and judgements. A judge's own personal experience necessarily influences his decisions in the cases he is asked to hear.

Justice Sachs said that he has just completed a manuscript of a book, entitled *The Strange Alchemy of Life and Law,* in which he explores at some length the subject of how judges decide cases, through their own experience as judges. He said that his own judicial position was thrust upon him by history. "Judging," he remarked, "is not a natural given function for me." The prominence of values in the final assessment cannot be underestimated. A deep reflection of life, philosophy, and the law dictates what interests us about other people and the intensity of our response.

Justice Sachs stated that he never liked being called a "refugee" because it connoted a sense of helplessness and of others having to be "nice" to you. He said that refugees' sense of dependence is heightened when they have to go to a State bureaucrat for their right *to be,* for the right to work, to live, and so on. With respect to categorizing someone as a refugee, Justice Sachs said that the decontextualized and depersonalized criteria can be good and useful for fair analysis. However, it does not feel good for a person to be categorized in such a way. He said that he preferred to be called, and considered himself to be, a "freedom fighter" or a "displaced person," but not a "refugee."

He described a number of cases that he heard as a member of the Constitutional Court of South Africa. He outlined, in some detail, his dissenting judgment in *Union of Refugee Women,* a case that was heard and decided by the Constitutional Court of South Africa several years ago.[40]

The last academic paper presented at the Research Workshop was from Professor Kate Jastram, School of Law, University of California at Berkeley, entitled "Economic Harm as a Basis for Refugee Status." Professor Jastram started by noting that "economic forms of persecution and persecution for reasons of economic status have been long recognized as falling within the Convention definition."[41] As Michelle Foster[42] has argued, Professor Jastram notes, refugee law has "largely failed to reflect the growth of a more sophisticated and complex understanding within the human rights realm of the content of economic, social and cultural rights."[43] However, not everyone accepts that the *Refugee Convention* can or, in fact, should include a wider range of economic claims. For instance, *In re T-Z-,* 24 I&N Dec. 163 (BIA 2007), the United States Board of Immigration Appeals has endorsed a higher standard of proof for claims based on economic persecution.[44]

Professor Jastram indicates that economic forms of persecution are recognized by statute in Australia and by jurisprudence in New Zealand, the United Kingdom, the United States, and Canada.[45] While economic harm must meet a higher standard in Australia and in some US federal courts of appeal and the US Board of Immigration Appeals, it is assessed against the same standard or similar standard to the general test for persecution in New Zealand, the United Kingdom, other US federal courts of appeal, and Canada.[46]

It is interesting to note that Australia's *Migration Act 1958* lists six non-exhaustive examples of serious harm that amount to persecution and that three of these are economic in nature and require, specifically, that the economic harm must "threaten the person's capacity to subsist."[47] As already noted, the US Board of Immigration Appeals (BIA) adopted a two-pronged test of "severe economic disadvantage or deprivation of liberty, food, housing, employment or other essentials to life."[48] Professor Jastram points out that this is a more restrictive approach than what the BIA applied previously. It is unclear, at this time, whether the various US Circuit Federal Courts of Appeal will adopt this new standard, but, if past experience is any indication, the thirteen US Circuit Federal Courts of Appeal will continue to be divided on the issue. However, Professor Jastram states that the most widely accepted test for economic harm in the United States is "substantial economic disadvantage."[49]

Following an analysis of the case law on economic harm, from January 2006 to February 2008, expressly, with respect to employment, education, and punitive fines, in five countries—Australia, Canada, New Zealand, the United Kingdom, and the United States—Professor Jastram concludes that the standard for economic persecution requires "severity rising to the level of a threat to life or the capacity to subsist."[50] This is, of course, contrary to the well-accepted notion that per-

© James C. Simeon, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

secution encompasses more than its most severe manifestations of threats to a person's life or liberty.

Indeed, Professor Jastram reminds us that it is well established that "human rights law is integrally related to refugee law and that it provides an appropriate frame of reference for determining refugee claims."[51] This is certainly the explicitly accepted approach in most refugee receiving countries in the Global North, with the notable exceptions of Australia and the United States.[52] However, there are severe practical limitations to the application of human rights laws to refugee status adjudication. For instance, human rights law can be either over-inclusive or under-inclusive for the purpose of refugee status determination. Human rights that are enunciated in the international instruments may not be sufficiently detailed for the requirements of refugee status adjudication. For example, Professor Jastram notes that the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant) not only has many formal abstract and undefined terms, but it also incorporates the notion of "progressive realization."[53] She notes that the proper consideration of refugee claims based on economic harm can require the assessment of concepts such as "taking steps, maximum available resources, and minimum core obligations."[54] Obviously, this complicates immensely the analysis required for refugee status determination in these types of claims. Further, given that human rights law is an evolving and expansive field, it is a challenge for international human rights experts, let alone refugee law judges, to discern the relevant human rights norms for claims based on economic harm.

Professor Jastram points out that the Economic, Social and Cultural Rights Committee of the ICESCR has adopted a "minimum core obligation" standard for assessing a State party's obligations under the Covenant. Professor Jastram states that the "minimum core obligation is an immediate obligation [for State parties], along with the duty not to discriminate and the duty to take steps toward progressive realization of the Covenant."[55] While Michelle Foster argues that "a violation of the core obligation of a right in human rights terms should be understood as persecution in refugee terms,"[56] Professor Jastram cautions that the use of "core obligations approach" to refugee status determination imposes significant interpretative challenges, which would benefit from greater engagement by judges, scholars and the UNHCR.[57] Professor Jastram concludes by indicating that there is ample scope for further study and reflection on how best to deal with refugee claims based on economic harm.

Professor Sharryn Aiken, Faculty of Law, Queen's University, Kingston, Ontario, was the review commentator for Professor Jastram's session. Professor Aiken began her review comments by quoting Professor Roger Zetter, Director, Refugee Studies Centre, at Oxford University, that there are "more labels, but less refugees." She noted that Roger Zetter addresses the restrictionist policies now adopted by States with a focus on the context. On the question of whether socio-economic harm could amount to persecution, Professor Aiken stated that it is important to include the contextual situation. She observed that socio-economic harm is by no means a new phenomenon. She made the point that the persecution in Nazi Germany began with socio-economic harm. She also stated that economic harm should not be treated as something different from political persecution.

Professor Aiken noted that we should not lose sight of the fact that in order for the refugee system to function that we need to address the issues at the periphery. People have mixed motives for leaving their country of nationality or former habitual residence. Often the motivations for their departure are complicated and complex. We should not be suggesting, she remarked, that a refugee's story is not true just because it has mixed motives.

She pointed out that when Sri Lankan refugees who were planning to travel to Canada by ship were intercepted off the west coast of Africa a number of years ago, it was the Canadian government that chartered the plane that returned the refugees to Sri Lanka. Professor Aiken said that a Canadian government immigration official who was interviewed at the time stated that these mixed migratory flows always presented difficulties for them.

At the time of the interdiction of Sri Lankan refugee claimants off the west coast of Africa, Sri Lanka was the leading source country for refugees for Canada. Professor Aiken observed that before these refugees were allowed to reach Canada, they were turned aside as economic migrants. As it happened, at least one of the Sri Lankans who was returned to Sri Lanka was tortured by the Sri Lankan authorities.

Professor Aiken also referred to the *Rome Statute of the International Criminal Court,* Article 7(2) (g), which defines persecution in a broad manner as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."[58] She noted that it is crucial to consider this definition in terms of violations of socio-economic rights. Indeed, she noted that the adoption of this definition of persecution would assist in the resolution of many of the difficulties in recognizing economic harm as a basis for refugee status.

Conclusion

The Research Workshop achieved its principal objective of bringing together a number of leading academics and superior and high court justices to examine in depth a limited number of critical issues confronting international refugee law today. The informal feedback that the organizers received from the Research Workshop participants was highly posi-

© James C. Simeon, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

tive. The participants at the Research Workshop appreciated, especially, the format of having leading academics present detailed papers on specific legal issue in international refugee law and having a superior and/or high court justice respond to the academic paper. The roundtable discussion following the academic-judicial exchange was found to be very engaging. There was sufficient time for all participants to voice their views and opinions on the issues and concerns raised in the academic-judicial exchange. The review commentators' remarks at the end of each session also provided an opportunity for the participants to consider the issue area from the point of view of a leading academic authority who was seeking to distill the essence from the presentations and discussions during the session and with the expressed intent of identifying the areas of agreement or convergence, disagreement or divergence, any obvious gaps or areas of uncertainty, and the most promising areas for further legal research on the issue under scrutiny.

The formal evaluations submitted by the participants at the end of each day of the Research Workshop revealed that the participants thought that the Research Workshop had met their expectations. The overwhelming majority of the participants also found that each of the panel sessions were not only interesting but that there was also sufficient time for discussion and comments. For instance, one of the Research Workshop participants stated that the "Format was great—very effective."[59]

These findings were further reinforced by Justice Tony North's remarks that he found the format of the Research Workshop to be quite effective and that he planned to recommend it to the International Association of Refugee Law Judges for their forthcoming World Conference, which would be held in Cape Town, South Africa, early in the New Year.

As noted previously, the academic papers, judicial commentaries, and review commentators' remarks will be made available on the Research Workshop website and a selection of the revised academic papers will be published in an edited volume sometime in 2009. The edited volume will also contain new material that was not presented at the Research Workshop or posted on our Research Workshop CIIRL (Critical Issues in International Refugee Law) website.[60] The Research Workshop will continue to make a contribution to resolving critical issues in international refugee law on an ongoing basis and through a number of other initiatives that have emerged from the Research Workshop.

At Pre- and Post-Research Workshop meetings that were held in conjunction with the Research Workshop, a number of possible research proposals were presented and discussed. At the Pre-Research Workshop meeting, which was held on April 30, the day before the Research Workshop, research proposals were presented and outlined by Justice Tony North, Professor Kate Jastram, Professor Geoff Gilbert, and Professor Nergis Canefe. There were also presentations from Sarah Whitaker, Senior Research Officer, from the Office of the Associate Vice-President, Research and Innovation, York University, and Kay Li, Research Officer, Office of the Dean, Atkinson Faculty of Liberal and Professional Studies, York University, on various funding opportunities for major international collaborative research project(s) that might emerge from the participants in attendance at the Research Workshop. At the Post-Research Workshop meeting, which was held immediately after the Research Workshop officially concluded on May 2, a number of other suggestions were also made for possible research proposals. These were presented by Professor Elspeth Guild and Justice Geoffrey Care. There was certainly no shortage of ideas for possible wider international collaborative research projects from the Research Workshop participants who were in attendance at these meetings.

Several weeks later, the draft notes from the Pre- and Post-Research Workshop meetings were circulated to all those who participated in the Research Workshop. Two major wider international collaborative research projects came to the fore shortly thereafter and are still being pursued actively by a number of the Research Workshop participants. These include Professor Kate Jastram's research proposal to consider the subject of the fragmentation of international law, specifically by undertaking a comparative study of the application of international human rights law to refugee status determination, and Justice Tony North's research proposal for examining the feasibility of establishing an International Judicial Commission for Refugees.[61] Both of these research proposals are still in the development stage. However, what they illustrate is that the Research Workshop was successful in spawning a number of possible wider international collaborative research projects to continue studying critical issues in international refugee law.

The Research Workshop on Critical Issues in International Refugee Law, most importantly, not only considered and examined a number of critical issues confronting international refugee law from a number of perspectives, including the theoretical/ researchers' and the judicial/practitioners' viewpoints, but also has made a unique contribution to the legal scholarship in the field. We hope that this effort will lead to a constructive resolution and advancement of the legal issues and concerns that were scrutinized at our Research Workshop, as well as make a contribution to the field of international refugee law as a whole. By doing so, we very much hope that this Research Workshop will have assisted, in some small way, the advance of the security and well-being of millions of refugees around the world who are struggling to achieve their

© James C. Simeon, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

most fundamental human rights, and the respect and dignity, that are their due as human beings.

Notes

1. "During 2007, a total of 647,200 individual applications for asylum or refugee status were submitted to Governments and UNHCR offices in 154 countries. This constitutes a 5 per cent increase compared to the previous year (614,300 claims) and the first rise in four years. This can primarily be attributed to the large number of Iraqis seeking international protection in Europe. An estimated 548,000 were initial asylum applications, i.e., lodged by new asylum seekers, whereas the remaining 99,200 claims were submitted on appeal or with courts." *2007 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced, and Stateless Persons* (UNHCR, June 2008), 13 <http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf> (accessed July 5, 2008.)
2. For a complete listing of the Research Workshop participants and program, see the website, "Critical Issues in International Refugee Law," <http://www.yorku.ca/ciirl/Home/index.html>. The participants came from at least nine states: Australia, Canada, Germany, Japan, Malawi, the Netherlands, the Republic of South Africa, the United Kingdom, and the United States.
3. For more information on the IARLJ, see <http://www.iarlj.nl/general/>.
4. Guy S. Goodwin-Gill, "The One, True Way: National Courts, Refugee Law and the Interpretation of Treaties" (background paper for presentation to the Research Workshop on Critical Issues in International Refugee Law, York University, Toronto, Canada, May 1, 2008) 1.
5. *Ibid.,* 2.
6. *Ibid.,* 3; *1969 Vienna Convention on the Law of Treaties:* 1155 UNTS 331.
7. *Ibid.*
8. *Ibid.*
9. *Ibid.*
10. *Ibid.,* 6.
11. *Ibid.,* 7.
12. *Ibid.,* 8.
13. Article 31(1) of the *1969 Vienna Convention on the Law of Treaties.*
14. Goodwin-Gill, 13.
15. *Ibid.,* 15 (emphasis in the original).
16. Jane McAdam, "The Standard of Proof in Complementary Protection Cases: Comparative Approaches in North America and Europe" (paper presented at the Research Workshop on Critical Issues in International Refugee Law, May 1, 2008, York University, Toronto, Canada).
17. *Ibid.,* 1.
18. Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12.
19. McAdam, 3. Denmark has opted out, pursuant to the Protocol on the Position of Denmark, annexed to the *Treaty on European Union* [2002] OJ C325/5.
20. Council Directive 2004/83/EC of 29 April 2004, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>.
21. McAdam, 1.
22. *Ibid.,* 6.
23. *Ibid.,* 6–7.
24. *Ibid.,* 7.
25. This is the interpretation in the UK: *Kacaj** [2001] INLR 354, although, McAdam notes that this does not necessarily flow from the wording of the Qualification Directive itself: 15–16.
26. Geoff Gilbert, "Running Scared since 9/11: Refugees, UNHCR and the Purposive Approach to Treaty Interpretation" (paper presented at the Research Workshop on Critical Issues in International Refugee Law, York University, Toronto, Canada, May 1 and 2, 2008), 1.
27. *Ibid.,* 3.
28. Article 1F of the *Refugee Convention* states, as follows:
    The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
    a. He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect to such crimes;
    b. He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
    c. He has been guilty of acts contrary to the purposes and principles of the United Nations.
29. Article 33.2 of the *Refugee Convention* states: "The benefit of the present provision may not, however, be claimed by a refugee when there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."
30. Gilbert, 3.
31. *Ibid.,* 4.
32. *Ibid.,* 5.
33. *Ibid.,* 6.
34. *Ibid.*
35. *Ibid.,* 7.
36. *Zrig v. Canada (Minister of Citizenship and Immigration)* (CA) [2003] FCA., para. 137.
37. Gilbert, 12.
38. *Ibid.*
39. *Ibid.,* 13.
40. *Union of Refugee Women and Others v. Director, Private Security Industry Regulatory Authority and Others*

© James C. Simeon, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

(CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC) (12 December 2006), <http://www.saflii.org/za/cases/ZACC/2006/23.html>.

41. Kate Jastram, "Economic Harm as a Basis for Refugee Status" (paper presented at the Research Workshop on Critical Issues in International Refugee Law, York University, Toronto, Canada, May 1 and 2, 2008), 1.
42. Michelle Foster, *International Refugee Law and Socio-Economic Rights* (Cambridge: Cambridge University Press, 2007).
43. Jastram, 2.
44. *Ibid.*
45. *Ibid.,* 6.
46. *Ibid.*
47. *Ibid.,* 7.
48. *Ibid.,* 7–8; *In re T-Z-,* 24 I&N Dec. 163 (BIA 2007).
49. *Ibid.,* 11.
50. *Ibid.,* 16.
51. *Ibid.,* 21.
52. *Ibid.*
53. *Ibid.,* 24–25.
54. *Ibid.,* 25.
55. *Ibid.,* 26–27.
56. *Ibid.,* 27.
57. *Ibid.,* 29.
58. *Rome Statute of the International Criminal Court,* Article 7.2(g), Crimes Against Humanity, <http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf>.
59. Helen Wong (Legal Research Assistant), "Critical Issues in International Refugee Law, Research Workshop Evaluation Results, Summary" (Research Workshop on Critical Issues in International Refugee Law, York University, Toronto, Canada, May 26, 2008).
60. See <http://www.yorku.ca/ciirl/Home/index.html>.
61. Justice Tony North, "A Proposal for the Establishment of a Judicial Commission on Refugees" (paper presented at the conference Moving On: Forced Migration and Human Rights, Parliament House, New South Wales, Australia, November 22, 2005), <http://www.law.usyd.edu.au/scigl/Documents/North.pdf>; Justice A. M. North and Joyce Chiara, "Towards Convergence in the Interpretation of the Refugees Convention—A Proposal for the Establishment of an International Refugee Court," in *The Asylum Process and the Rule of Law,* International Association of Refugee Law Judges, The Netherlands (New Delhi: Manak Publications, 2006), 72–136.

James C. Simeon, Ph.D., is Assistant Professor in the new School of Public Policy and Administration, Atkinson Faculty of Liberal and Professional Studies; a Centre for Refugee Studies (CRS) Scholar; and a Faculty Associate with the Centre for Support of Teaching (CST) at York University, Toronto, Canada. His teaching and research interests are in the fields of public management and administration, public policy and administration and international human rights law, international refugee law, and international humanitarian and criminal law.

© James C. Simeon, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Refugees, Inequality, and Human Development

Anthony H. Richmond

Abstract

This paper examines the relation between refugee movements and indicators of income, education, and life expectancy in sending and receiving countries. Countries which score low on the Human Development Index are more likely to experience conflict giving rise to internal displacement and refugee movements. Wealthier countries accept the better educated for permanent settlement, while admitting less-skilled manual workers and asylum seekers on a temporary basis.

Résumé

Cet article examine les relations entre les mouvements de réfugiés et les indicateurs de revenus, l'éducation et l'espérance de vie dans les pays de départ et les pays d'accueil. Les pays avec un score bas sur l'Indice du développement humain ont le plus de probabilité de connaître des conflits provoquant des déplacements internes et des mouvements de réfugiés. Les pays plus riches acceptent les mieux éduqués pour l'établissement permanent, tout en admettant les travailleurs manuels moins éduqués ainsi que les demandeurs d'asile sur une base temporaire.

The huge disparities in living standards between the developed and less developed regions of the world account for much international migration, including refugee movements. There were an estimated 200 million international migrants in 2005.[1] They accounted for approximately 12.9 per cent of the population of North America and 7.7 per cent in Europe, but less than 2 per cent of the population of Asia, Africa, and Latin America.[2] While states reserve the right to control movement across borders and endeavour to prevent "illegal" immigration, migration occurs with or without legal sanction. People move from less developed to developed countries and regions, to perform menial or dirty work, supply field labour for agro-business, provide domestic services, or work in the sex trade. Many are victims of unscrupulous traffickers and smugglers. An estimated 800,000 people are trafficked annually.[3] At the same time there is a "brain drain" of highly qualified professionals, including much-needed doctors and nurses.[4] The term "much-needed" applies both to the sending and receiving countries. The net gains to wealthy countries raise serious ethical questions and issues concerning appropriate compensation that have been debated since the 1960s.[5]

The inequalities, which undoubtedly exist within wealthy countries, pale in significance when compared with the inequalities between them and the rest of the world. Poverty in Canada, Britain, and other OECD countries is a relative concept. It has no similarity to the absolute levels of deprivation experienced in the Third World. The world average gross national income *per capita* in 2001 was US$5,120. The range was from $430 in low-income countries, with an average of $26,510 for the most advanced industrial countries.[6] The Human Development Index (HDI) combines indicators of income, education, and life expectancy into a single measure of the quality of life in various countries and regions of the world.[7] Table 1 summarizes the data. It indicates that Canada, with a score of .949 on the index, enjoys a very high quality of life, as do all the OECD countries, with an average score of .892. Developing countries' average score was .694. The highest score, .963, was achieved by Norway and the lowest score was that of Niger at .281. Table 1 also shows the huge differences between wealthy countries and others, measured by gross domestic product *per capita,* life expectancy, and the gross enrolment ratio for primary, secondary, and tertiary education. As the UN report notes, variation in income, health, and education exist in every country, and inequalities associated with gender, race, and ethnicity interact and are reinforcing across generations.[8]

© Anthony H. Richmond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Table 1. Human Development Index 2003

Region	Human Development Index	G.D.P. per capita: US $	Life Expectancy at Birth	Education Enrolment ratio
Canada	0.949	$30.677	80.0	94
O.E.C.D.	0.892	$25,915	77.7	89
Developing Countries	0.694	$4,359	65.0	63
High HDI	0.895	$25,665	78.0	91
Medium HDI	0.718	$ 4,474	67.2	66
Low HDI	0.486	$ 1,046	46.0	46
World	0.741	$ 8,229	67.1	67

Source: UN Human Development Report, 2005.

There is a close connection between the incidence of violent conflict and low levels of income, and/or low scores on the Human Development Index. Nine out ten countries at the bottom of the Human Development Index have experienced violent conflict since 1990.[9] Afghanistan, in particular, has experienced both external and internal conflict, including invasion by the Soviet Union and, more recently, the United States and its allies, in the "war against terrorism." It is not surprising that Afghanistan has been the source of the largest concentration of refugees, mostly located in camps in Iran and Pakistan. Other major source countries for refugees in 2004 were Sudan, Burundi, Democratic Republic of the Congo (DRC), and Somalia. To these must be added an additional 5.4 million internally displaced persons worldwide. These include people escaping conflicts in Africa, Latin America, Asia, and the former Soviet Union.

When all those of concern to the UN High Commissioner for Refugees (UNHCR) are considered (including refugees in camps, asylum seekers, the internally displaced, and returnees), Asian countries carry the heaviest burden of relief, followed closely by Africa and the Middle East. In 2004 there were an estimated 9.24 million "Convention" refugees, and many externally and internally displaced persons. The UNHCR reported more than 19.2 million persons of concern to that agency in 2004. (To these must be added another 3.8 million Palestinians under the care of the United Nations Relief and Works Agency (UNRWA). Even before the US-led war in Afghanistan that country was the largest single source of refugees in the world. In 2001 there were 3.6 million Afghan refugees mainly located in camps on the borders with Pakistan and Iran. That number declined as some were able to return. The UNHCR reported over two million Afghan refugees at the end of 2004.

With over one million refugees, mainly from Afghanistan, Iran had the largest number of persons of concern to the UNHCR in 2004 but, due to its oil revenues, it was better able to carry the burden than Pakistan, which had close to one million refugees in 2004. When the number of persons of concern to the UNHCR is considered in relation to the host-country capacity to support those in need (as measured by Gross Domestic Product *per capita*) the countries carrying the heaviest burden, between 1999 and 2003, were Pakistan, DRC, Tanzania, and Ethiopia. These and other countries that had responsibility for large numbers of persons of concern to the UNHCR are shown in Table 2. On the Human Development Index, they all scored below the average for developing countries as a whole.

In the decade 1994 to 2003, more advanced industrial countries accepted fewer than one million refugees *previously recognized* by the UNHCR. The number of asylum applications submitted in advanced industrial countries fluctuated yearly; it averaged over half a million annually in that decade. However, between 1994 and 2003, out of the over five million asylum claims made at borders, or after entry to wealthy countries, only 18 per cent received full Convention refugee status. A further 20 per cent were allowed to stay on humanitarian grounds or were given temporary protection. The acceptance rate in the European Union averaged 25 per cent. This compares with 46 per cent of those applying in Canada.[10]

The main countries of asylum for refugees in relatively wealthy countries are shown in Table 3. Relative to GDP per capita, Germany carried the heaviest burden. The United States and the Russian Federation had a large number of refugees and asylum seekers. Because of proximity to other African countries experiencing civil war and other conflicts,

© Anthony H. Richmond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Table 2. Host Country Capacity to Support Those of Concern to the UNHCR: Ten Countries Carrying Heaviest Burden
(By GDP per capita and Human Development Index)

Country of Asylum	Total Persons of Concern, 2004 *	Ratio of Refugees (1999–2003) to GDP per capita	Human Development Index
Iran	1,046,722	989	.736
Pakistan	968,774	3,936	.527
Sudan	845,867	789	.512
Tanzania	602,256	2,544	.418
Uganda	252,382	950	.508
Kenya	249,310	583	.474
D.R. Congo	213,510	2,775	.385
Zambia	173,981	703	.394
Guinea	145,571	767	.466
Ethiopia	116,027	1,984	.367

* Includes refugees, asylum seekers, internally displaced and returnees
Source: UNHCR Statistical Reports, 2004-2005, and UN Human Development Report, 2005.

Table 3. Host Country Capacity to Support Those of Concern to the UNHCR: Selected Advanced Industrial Countries
(By GDP per capita and Human Development Index)

Country of Asylum	Total Persons of Concern, 2004*	Ratio of Refugees (1999–2003) to GDP per capita	Human Development Index: 2003
Germany	973,392	39	.930
United States	684,564	14	.944
Russian Federation	664,552	12	.795
United Kingdom	298,854	8	.939
Canada	168,688	6	.949
Netherlands	155,257	6	.943
France	152,160	5	.938
South Africa	142,907	8	.658
Sweden	101,451	5	.949
Australia	68,498	3	.955

* Includes refugees and asylum seekers
Source: UNHCR Statistical Reports, 2004–2005; Human Development report, 2005.

© Anthony H. Richmond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Table 4. Global Perspectives on Inequality at the Beginning of the 21st Century
Human Development Index

	High HDI .895	Med HDI .718	Low HDI .486	Total/Av. .741
Total population 2001	903 million	2,328 million	2,823 million	6,054 million
GDP per capita US dollars	$ 25,665.00	$ 4,471.00	$ 1,046.00	$ 8,229.00
Armed conflicts in 2004	1	11	20	32
In 2004: No. of refugees from*	0	2.7 million	6.5 million	9.2 million
No. of refugees directly resettled 1994–2003	991,137			991,137
No. of asylum seekers 1994–2003	1.4 million accepted **			Five million asylum claims submitted

* Does not include Palestinians under UNRWA; or internally displaced, returnees and others under care of the UNHCR .
** Includes Convention status and other humanitarian grounds. An additional half million were given temporary protection
Sources: UN Development agency; UNHCR; UN Population Division; Project Ploughshares .

South Africa received many asylum seekers, and scored relatively low on the HDI. When these advanced industrial countries are compared with the countries listed in Table 2, it is evident that they were not carrying a serious burden when measured in terms of GDP *per capita.* Furthermore, the majority of asylum seekers in industrialized countries do not come from the poorest countries. In 2004 the largest number of new and appeal asylum claims were filed by nationals of the Russian Federation (35,200), Serbia and Montenegro (30,900), China (29,000), the DRC (29,000), and Turkey (27,000). The numbers reaching industrialized countries fell slightly after 2001, partly due to interdiction and deterrent measures adopted by Britain and some other countries. The largest number of *new* asylum claims in 2004 were received by France (58,500), the UK (40,200), Germany (35,600), South Africa (32,600), and the United States (27,900).[11]

The global situation is summarized in Table 4. It shows the relation between scores on the Human Development Index and other variables, including the response of wealthier countries to the needs of refugees and asylum seekers at the beginning of the twenty-first century. The world's population of over six billion people is heavily concentrated in the poorer regions of the world, which also experience the majority of armed conflicts and persecutions that give rise to refugee movements and asylum seekers. In 1995 there were forty-four armed conflicts in thirty-nine states. The number declined to thirty-two conflicts in twenty-six states in 2004. Two-thirds of these states scored low (less than .500) in the Human Development Index. With the exception of Israel, which scored .915, the remaining states experiencing armed conflicts on their soil ranged from .508 to .795 on the HDI. As noted by the UN Human Development Report, armed conflict itself contributes to a decline in the level of human development and welfare.

Refugees and asylum applicants in industrialized countries are likely to experience exclusion from fundamental human rights and the benefits of a welfare society. The exclusion of refugees and asylum applicants recently reached dramatic and tragic proportions in the case of Australia's treatment of "boat people" escaping from Afghanistan and other Asian countries. Several ships were prevented from reaching Australian territory. Instead they were escorted to remote Pacific islands where the UNHCR processed their refugee claims, without any commitment from the Australian government that those deemed to be victims of persecution would be accepted. Asylum applicants who do succeed in reaching Australia are placed in remote camps under conditions that have given rise to hunger strikes, suicide, and other protests. It was reported in February 2004 that the Australian government paid Papua New Guinea £300,000 per month to detain one Palestinian refugee being kept in solitary confinement on Manus Island.[12] These actions represent an exclusionist approach to refugees and asylum seekers which is at variance with the multicultural policies espoused by previous Australian governments.[13] Interdiction is practised by most industrialized countries concerned with the question of

© Anthony H. Richmond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

human trafficking and the protection of borders. The United States endeavours to prevent Haitian and Cuban migrants from reaching its shores as well as to control access via its border with Mexico.[14] In Europe, Spain and Italy intercept migrants travelling from Africa via the Mediterranean, while Britain operates its immigration rules extraterritorially to exclude Romany travellers and others.[15]

Even before the events of 11 September 2001, increased migration pressures, legal and illegal, led to a tightening of regulations in most developed countries, together with legislation designed to deter migration, interdict undocumented travellers, and reinforce border controls. New regulations penalize airlines, shipping companies, and truckers who are discovered to have carried, knowingly or unknowingly, passengers who do not have a legal right of entry. For example, Canada introduced Bill C11. This law increased the powers of immigration officers to refuse entry to Canada on grounds of criminality, security risk, or forged and inadequate identity documents. It imposed higher maximum penalties for human smuggling, and places the responsibility on airlines to identify and inform Canadian authorities regarding passengers who may be inadmissible to Canada. At the same time it left those genuinely in need of protection from persecution at greater risk When these immigration controls are combined with anti-terrorism measures there are direct threats to civil liberties.[16]

The victims of political and ethnic power struggles account for the large-scale movements of refugees that have occurred in eastern and central Europe, Africa, Asia, and Latin America. Developed countries in western Europe, North America, and Australasia are reluctant to give asylum to all those who flee persecution or seek to escape the economic and environmental disasters that occur in the wake of such conflicts. Many displaced persons, as well as so-called "economic migrants," are being denied protection, by a strict application and narrow interpretation of the Geneva Convention criteria for full refugee status. Since September 2001, even more restrictive measures have been adopted in the name of improved security.

Various practises are used by wealthier countries to manage and control population movements. They involve classifying people according to their perceived eligibility to enter, or remain in, a particular territory. This has been called a form of "global apartheid.[17] The instruments for the enforcement of global apartheid are interdiction, passports, visas, residence permits, work permits, and denial of citizenship rights, including access to education, government-funded health and welfare services, etc. The forcible repatriation of refugees to so-called "safe third countries" is now standard practise, together with the deportation of "illegal" immigrants. These forms of state control of immigration are seen as a legitimate response to the destabilizing effects of large-scale migration. They are indirectly discriminatory by "race" because the majority of refugees and asylum applicants come from, and are obliged to remain in, Third World countries. Only a few actually reach Europe and North America.

In contrast to the restrictions placed on asylum seekers and so-called "economic migrants," capital moves freely around the world and entrepreneurs with money to invest have little difficulty obtaining residence permits, official immigrant status, or even citizenship of the countries they wish to operate in. Special immigration programs for entrepreneurs, investors, and the highly qualified are examples of this. It is not so easy for those who bring only their labour, or who are deemed alien in language, culture, or religion. When not labelled "illegal" and imprisoned or deported, such workers find only low-paid employment in manual jobs, often clandestine employment below the minimum wage. Asylum seekers and so-called "economic migrants" are the new underclass, when they are not actually deported or refused entry altogether. From a global perspective there are various forms of *exclusion,* ranging from denial of entry to the country, through deportation, to *refoulement* (the expulsion of refugees who may face persecution, even ethnic cleansing, in their former country).[18]

Conclusion

Some people are fully incorporated into the advanced industrial economy of the emerging global system, while others are marginalized. Poverty is endemic in some regions of the world but the experience of deprivation is not confined to developing countries. Controls over the movement of people across national borders are designed to preserve absolute and relative advantage. While advanced industrial societies welcome immigrants who bring money or human capital, others are excluded even when there are political as well as economic reasons for their migration and humanitarian reasons for their admission.

Since 2001, and the terrorist attacks in the US, Spain, and Britain, security considerations have further limited freedom of movement between countries. When viewed from a global perspective Canada, and other advanced industrial societies, are in a privileged position. At the same time they are increasingly dependent upon immigration for demographic and economic reasons. Consequently, there is a profound ambivalence concerning the implications in relation to refugees, asylum seekers, and economic migrants. On the one hand, humanitarian concerns and obligations under UN conventions concerning refugees and human rights oblige wealthy countries to accept refugees and asylum seekers who are deemed to be genuine victims of persecution. On the other hand, so-called "economic migrants" are either exclud-

© Anthony H. Richmond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

ed altogether, or admitted on a temporary basis to perform the poorly paid heavy manual and service occupations that the indigenous population do not wish to undertake. The exceptions are immigrants with capital to invest, or human capital in the form of professional qualifications, which may or may not be recognized in the receiving country. Refugees and economic migrants alike experience discrimination in wealthy countries. However, the heaviest burden of care for the internally displaced and refugees rests on less developed countries in regions where armed conflicts have occurred.

Notes

1. Global Commission on International Migration (GCIM), *Migration in an Interconnected World: New Directions for Action* (Geneva: GCIM, 2005).
2. *Ibid.*, 83.
3. *Ibid.,* 85.
4. D. Kapur and J. McHale, *Give Us Your Best and Brightest: The Global Hunt for Talent and Its Impact on the Developing World* (Washington, D.C.: Center for Global Development, 2005).
5. G. Beijer, "Selective Migration for and 'Brain Drain' from Latin America," *International Migration* 4, no. 1 (1966): 28-40.
6. World Bank, *Breaking the Conflict Trap: Civil War and Development Policy* (Washington, D.C.: World Bank, 2003); World Bank, *World Development Indicators* (Washington, D.C.: World Bank, 2003).
7. UN Human Development Program, "International Cooperation at the Crossroads," in *UN Human Development Report 2005* (New York: U. Human Development Program, 2005).
8. *Ibid.*
9. *Ibid.*
10. UNHCR, "Basic Facts," in *Global Refugee Trends 2004* (Geneva: UNHCR, 2005).
11. UNHCR, *Global Refugee Trends 2004* (Geneva: UNHCR, 2005).
12. D. Fickling, "Australia pays £1.8 million to hold a single refugee," *The Guardian,* February 12, 2004.
13. J. Howard, "Australia and the Interdiction of Asylum Seekers," *Refuge* 21, no.4 (2003): 35–50.
14. J. Morris, J., "American and Australian Interdiction Policies," *Refuge* 21, no. 4 (2003): 51–62.
15. A. Sianni, "Interception Practices in Europe and Their Implications," *Refuge* 21, no. 4 (2003): 25–34.
16. A. Macklin, "Borderline Security," in *Essays on Canada's Anti-Terrorism Bill,* ed. R.J. Daniels, P. Macklem, and K. Roach (Toronto: University of Toronto Press, 2001),
17. A.H. Richmond, *Global Apartheid: Refugees, Racism and the New World Order* (Don Mills, ON: Oxford University Press, 1994); A.H. Richmond, "Social Exclusion: Belonging and Not Belonging in the World System," *Refuge* 21, no. 1 (2002): 40–48.
18. A.H. Richmond, "Socio-Demographic Aspects of Globalization: Canadian Perspectives on Migration," *Canadian Studies in Population* 29, no. 1 (2002): 123–149.

Anthony H. Richmond is Emeritus Professor of Sociology and Senior Scholar, Centre for Refugee Studies, York University, Toronto.

© Anthony H. Richmond, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

"Building a Better Refugee Status Determination System"

Introduction

Martin Jones and France Houle

The numbers that provide a context for this issue on refugee status determination (RSD), though stark and well-known, bear repeating. In excess of two hundred million people live outside of their country of nationality.[1] Sixty-seven million people have been forcibly displaced from their homes.[2] Twelve million individuals have no country of nationality.[3] Of these overlapping populations, only about eleven million[4] fall under the definition of "refugee" within the meaning of the term set out in the mandate of the United Nations High Commissioner for Refugees[5] and as defined in the *Convention Relating to the Status of Refugees* of 1951.[6] In these statistics lie the challenges of refugee status determination (RSD): determining who is a "refugee" and, conversely, who is not. As to how this task should be accomplished, neither the treaty nor the statute is of much direct assistance: there are 46 articles in the *Refugee Convention* and 22 paragraphs in the *Statute of UNHCR,* none of which address the issue of RSD.

And yet every year, over half a million individuals approach state or UNHCR officials and seek a determination that they are refugees. In Canada alone, over 25,000 individuals seek recognition of their status as refugees every year.[7] Decisions are made by states and UNHCR in a similar number of claims and there is a slowly shrinking backlog of 750,000 individuals who continue to await a determination of their status. Decisions are issued by a variety of officials and institutions: administrative officers of a state, quasi-judicial tribunals, courts, members of the political executive of states, and by agencies of the United Nations.[8]

Amongst policy makers the problematic of RSD—of sorting out the eleven million refugees from a larger group of migrants and displaced persons—has become known as "the asylum-migration nexus"[9] or, more recently and more prosaically, the problem of "refugee protection and durable solutions in the context of international migration."[10] The articles in this issue of *Refuge* directly and indirectly engage with this problematic but collectively see the problem less as ensuring migrants do not access refugee protection and more as ensuring that refugee protection is in fact offered and legal protections guaranteed to refugees.

As Care points out in his article in this issue, RSD has been with us in one form or another for more than a century. However, it has only been within the past few decades that RSD processes became widely entrenched in most Northern countries. As a guide to the more recent development of RSD, it is now almost three decades since the UNHCR's seminal global survey of RSD processes and the publication of its handbook on how RSD decisions should be made. Before these publications, there was almost nothing by way of common standards and guidelines that extended beyond the parochial study of the system presently in place in any given country.

In the 30 years since these publications, a vast scholarship has emerged on the criteria that should be applied by decision-makers in RSD or, in short, the definition of a refugee. The cornerstones of the refugee law scholarship addressed in this issue were laid by Grahl-Madsen[11], Goodwin-Gill[12] and Hathaway.[13] Their work has enduring worth but precious little to say about RSD. Perhaps the neglect of RSD is simply a reflection of a relative inattention in the scholarship and in practice to the processes of law as opposed to its substance. Nonetheless, the debate over RSD has increased in recent years. European states and civil society turned their attention to the issue in the drafting of the European Union's minimum

© Martin Jones and France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

standards on RSD.[14] NGOs from the Global South have campaigned for UNHCR to reform its RSD.[15] Throughout the late 1990's numerous countries, including Canada, the United Kingdom, and Australia, immersed themselves in debates over the reform of their RSD processes. In this context, it is no surprise that RSD scholarship has raised its profile in the academic community and with those in charge of developing public policy. More recently, new groups in civil society have entered the discussion of RSD[16] and conferences have been organized on the topic which, in turn, has generated a large body of literature on the subject· · Notably, the conference organized by Susan Kneebone and France Houle in Prato, Italy on "Best Practices in Refugee Status Determinations" in 2008 resulted in some of the articles in this issue.[17]

This new scholarship builds upon an existing and vibrant literature: Barsky's early work on the discourses at place in refugee status determination proceedings,[18] Crépeau and Nakache's examination of the critical spaces in the Canadian RSD[19] and Houle's analysis of the use of different types of evidence by the Canadian Immigration and Refugee Board (IRB)[20] are only a few examples. There are numerous comparative studies of the RSD process[21] and research on both the micro and macro variables at play in status determination.[22] This issue adds to this literature with both general and specific articles on the RSD theme. Authors seek to advance the literature in important ways. It contributes to the body of knowledge by further developing the study of legal frameworks pertaining to RSD processes. It advances our understanding on practices and norms establishing RSD processes and decision making processes. It also expands the study of RSD to include the RSD processes of the Global South, including UNHCR RSD. Finally, it actively engages with the literature outside of refugee law—both in the broader field of law as well as other fields of study and practice.

Legal Framework

As noted previously, the *Refugee Convention* (and subsequent refugee treaties[23]) does not specify the process by which RSD should be accomplished.[24] In the words of the UNHCR's *Handbook on Procedures and Criteria* "the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status."[25] Nor does it in fact require individualized RSD; a state may choose to give all asylum seekers *prima facie* refugee status as is frequently done in the case of mass influx situations. Indeed, there is a diversity of state practice with respect to RSD which must be acknowledged. New models of RSD are continually emerging, including the Brazilian model which involves civil society described by Jubilut and Menicucci in this Issue. Existing models continue to evolve as any practitioner of refugee law will confirm.

While silent on the precise process to be followed, Article 9 of the *Refugee Convention* authorizes the use of provisional measures (such as detention) against a refugee only "pending a determination by the Contracting State" of refugee status. Similarly, Articles 32 and 33 specify formal legal processes that must occur before, respectively, expulsion and *refoulement* are permitted. The former article goes so far as to normally require the right to present evidence and the right to representation.[26]

The silence of the *Refugee Convention* as to process has been filled to a large extent by other international treaties and domestic procedural standards. Articles 13 and 14 of the *International Covenant on Civil and Political Rights* provide procedural guarantees in various proceedings.[27] Articles 19 and 22 of the more recent *International Convention on the Rights of Migrant Workers and Members of their Families* provide procedural guarantees.[28] Regional conventions, including the *Banjul Charter,*[29] the *American Convention on Human Rights*[30], the *European Convention on Human Rights*[31], also provide procedural guarantees. Although there is some debate as to the extent to which each of these provisions apply to RSD *per se,* collectively they provide guidance in establishing minimum standards for RSD. Heckman and Jones's articles further elaborate on the applicability of the procedural protections granted in international treaties to procedural rights in RSD.

Furthermore, if there is a single lesson to be drawn from the domestic refugee law jurisprudence which has proliferated over the past two decades it is that domestic law is not silent about the rights to be accorded refugee claimants during RSD. In many countries, particularly in the Global North, domestic constitutional provisions, statutory protections and the bedrock notion of the rule of law have all guided the judicial understanding of the minimum standards for RSD. Where the *Refugee Convention* is silent and international human rights law contested, domestic courts have provided guidance. Here in Canada, RSD as it exists in its present form bears the markers of past judicial decisions: *Singh*[32]*; Deghani*[33]*; Say*[34]*; Thamotharem;*[35]*Benitez*[36]; and *Canadian Council for Refugees et al.*[37] to name but a few.

Less noticed however, has been the absence of equivalent guidance by the judiciary in the countries of the Global South. In many countries, appeals concerning the procedures by which refugees are protected are heard in courts sorely unprepared and ill-equipped to adjudicate the debate.[38] The courts in these countries have been poorly served by their legislative counterparts; most countries in the Global South do not have specific legislation dealing with the manner in which claims for refugee protection are to be determined.[39] The gaps extend to the legal profession. The well-developed refugee bar of the Global North is absent in most countries

© Martin Jones and France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

of the Global South. As noted by Harrell-Bond in this Issue, it is rare to find training on refugee law in even the leading legal institutions of countries home to large populations of refugees.

In many of these countries in which domestic law is silent about RSD, the gap is filled by UNHCR. UNHCR is now the largest single determiner of status in the world, rendering individual RSD decisions to 51,000 refugee claimants per year in over 52 countries.[40] Countries in which UNHCR performs RSD most frequently automatically accept the decisions of UNHCR with respect to refugee status. The problem this presents is that UNHCR RSD frequently fails to provide the minimum procedural guarantees mandated by international law.[41] Furthermore, as an international organization, UNHCR is exempt from abiding by domestic constitutional and statutory procedural protections. The tragic irony of UNHCR RSD is that its operational determination of status often fails to meet the standards recommended in its advocacy to states.[42]

RSD Processes

Even in states with legislated RSD processes and close judicial supervision of RSD, recent years have seen a troubling narrowing of access to the RSD process. Safe third country rules in Europe[43] and North America[44] have restricted the ability of an "onward traveler" to even enter the RSD process; in addition Australia, the UK and elsewhere such rules are also used no less insidiously to curtail the ability of refugees to gain protection once within RSD processes.[45] Foster's analysis of these provisions in her article in this isue is bleak: "safe third country schemes are unworkable and undermine refugee protection." Limitation periods also prevent refugee claimants from undergoing RSD if they have delayed beyond a certain period of time. In some countries, the limitation periods arbitrarily limit those who can seek asylum.[46] In other countries, UNHCR deliberately limits the number of refugee claimants who are allowed to register in order to assuage concerns of the host country and control the intra-regional movements of forced migrants.[47] In too many countries the threat of detention act as a deterrent to seeking asylum.[48]

Any complete study of RSD must analyse not only the processes by which status is determined but also the rules, processes and practices which exclude individuals and groups from status determination. Foster, along with Durieux, Jones, and Vigneswaran in this issue, take up this point. Durieux discusses the situation of individuals who never receive individual status determination but rather benefit from group determinations. Jones analyses how the Canadian procedure on the abandonment of refugee claims significantly reduces the chances of adequate protection for refugee claimants. Vigneswaran's analysis suggests that our assessment of the exclusionary rules of an RSD process must include an assessment of how individuals and institutions actually behave towards refugee claimants rather than simply the text of the law. Vigneswaran paints a particularly troubling portrait of access to RSD in South Africa, which at its inception was often cited as a successful model for RSD in the Global South.

Notwithstanding earlier antecedents, RSD as it is practiced today is a relatively recent development. The decisions that are produced in RSD processes have been described as engaging in a "transnational" legal discussion.[49] A similar description can be applied to the development of RSD: it has occurred as a result of and is the product of a transnational examination of the practice of RSD. At times this has occurred as a result of regional deliberations, but more often the developments in RSD can be better explained as stopgap measures designed to respond to specific parochial requests for reform, whether from the judiciary or the public.

A consensus has emerged concerning the constituent elements and requirements of RSD. It should occur after an in-person interview or hearing with a decision maker sensitive to the situation of the refugee claimant. The process should allow for, but not require nor necessarily automatically provide, legal representation; interpretation should be provided as required. A decision should be taken only after the refugee claimant has had an opportunity to present supportive evidence and after the decision maker has undertaken an inquiry into the existence of such evidence. There should be an opportunity for an independent review of the decision and, in normal circumstances, the removal of the refugee claimant should be suspended pending the outcome of such a review. These elements are not controversial and are found in the vast majority of RSD processes in both the Global North and Global South. UNHCR's own practice in RSD is consistent with this consensus. All of the authors herein take issue in their analysis with the adequacy of the RSD processes under study as compared against this consensus and against the prevailing binding norms.

At the core of the debate is the extent to which each of these foregoing elements of consensus is required as a matter of law and how each of them should be interpreted. As Schreier notes in her article, South Africas's use of the OAU Convention in its decision-making shows variation during the RSD process in interpretation of the law by different decision-making bodies. These variations raise the problem of the competence and abilities of decision-makers, but also the degree of their independence in relation to government of the day, whether recognized by law or not. Heckman takes up this question in his article by examining to which extent international and domestic law requires refugee decisions (including appeals) to be made by "independent" decision

© Martin Jones and France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

makers. To this end, he pays particular attention to existing international safeguards on independence.

The issue of independence is central when the time comes to design a RSD process. As can be witnessed, decision makers in state RSD processes range from specially trained immigration officers to quasi-judicial officers to judges. The legal situation of UNHCR imposes unique problems: who can provide an "independent" appellate review of first-instance RSD decisions? Equally, debate continues concerning the degree of access to appellate review—and the appropriate extent of that review. Again, practice is quite parochial with there being no agreed upon model for appellate review. Although some of the processes of RSD are heterogeneous, this is not to suggest that comparisons cannot be made, minimum standards set nor minimum standards and best practices proposed.

The question of providing refugee claimants with legal assistance is of particular importance. Despite RSD often being formally "non-adversarial" and the dominance of an investigative model (often wrongly labeled inquisitorial) of proceedings, the increasing complexity of the definition of "refugee" and the procedures used to determine status has led to the necessity of claimants having access to legal assistance. Absent the provision of such legal aid, refugee claimants have a demonstrably lower probability of success in the pursuit of their claims.[50] These statistics are doubly troubling: both because of the implication that unrepresented genuine refugees are being refused status and because most refugees are unrepresented. While NGOs in the Global South, including members of the SRLAN, are now providing legal aid to some refugees, they are unable to meet the demand.[51] In the Global North, legal aid to refugees is in crisis.[52]

Reinforcing their already mentioned procedural disadvantages, refugees undergoing RSD for resettlement have even less access to legal assistance.[53] Indeed, a growing number of countries conduct RSD for refugees applying for resettlement. These applications are dealt with by relatively junior and inadequately trained staff, are often disposed of without an interview and are rarely subject to judicial scrutiny. Although there may be no enforceable international obligation to grant refugee protection to applicants overseas[54], it is inconsistent not to provide them with some of the procedural protections provided to inland applicants. Most of the refugee claimants applying for resettlement from overseas are in a situation as precarious as an applicant applying for refugee protection from within a country; many such applicants are in danger of imminent *refoulement* or severe human rights violations in their country of temporary refuge.[55] This raises the equally important question as to who must pay for the legal representation and provision of interpretation services to a refugee claimant? Harrell-Bond suggests that the cost must be borne both by the world both collectively, including the more affluent countries of the Global North who indirectly benefit from the Global South's refugee burden, and individually through committed personal action on behalf of refugees.

These debates are joined by national and international policy makers, academics, and, increasingly, the individuals within the process itself. Decision makers, lawyers, interpreters and refugees themselves are beginning to organize and to advocate on procedural issues. The International Association of Refugee Law Judges (IARLJ), of which Case is past president, recently celebrated the tenth anniversary of its founding. Organizations and individuals providing legal representation to refugee claimants during RSD are increasingly members of national and international networks. The new Southern Refugee Legal Aid Network discussed by Harrell-Bond in her article (and with which she was involved in founding) is one such network and there are currently discussions underway about organizing a global refugee bar association. Interpreters, the literal voice of the process to most claimants, have also spoken out about unfair procedures used in refugee and immigration proceedings.[56] Refugees have themselves organized themselves locally and along communal lines in mass protest over deficiencies in RSD processes (or its absence)—sometimes with tragic results.[57]

RSD Decision Making

To put it plainly: RSD is not easy. By definition, it involves determining the status of individuals from foreign countries, describing events elsewhere about which little is known, often speaking foreign languages and with a range of different cultural beliefs and behaviors. Most refugees have suffered significant trauma, if not before flight then as a result of flight. It is a process of determination that requires perpetual sensitivity to the unique predicament of the refugee. Oddly the "uniqueness" of a refugee claimant's predicament is often used as a cudgel rather than a salve by decision makers. As Cleveland points out in her article, the use of prescribed special procedures for "vulnerable" claimants has been hampered by the view of the decision makers that the situation of the particular claimants was not sufficiently different from the generic situation of all refugees:

Few refugee decision makers can understand refugee claimants.[58] Metaphorically, the experiences of the former and the latter are vastly different. But additionally, refugee claimants frequently cannot speak the official language of their country of asylum. Interpreters and translators are omnipresent in RSD. And yet mistakes of language are made and are costly. To avoid mistakes and misunderstanding as much as possible, the right to an interview or hearing (with interpretation) before the decision-maker has become

© Martin Jones and France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

established practice in RSD. However, this right can be severely limited in practice. For example, in order to expedite refugee determinations, the Immigration and Refugee Board of Canada has resorted to a paralegal instrument—a guideline—to ensure that the inquiry into claims will focus only on the issues decision-makers have predetermined to be central, as Houle has discussed in her article. The disclosure of extrinsic evidence relevant to the claim or the country of origin that will be considered by the decision maker has also become common practice.[59]

Language and access to information are not the only barriers facing a refugee claimant. Differing social and cultural mores between a refugee claimant, his or her country of origin and his or her country of asylum can produce obstacles to inquiry and misunderstanding. With so much of RSD hinging on the credibility of the refugee claimant, obsessive attention is often paid to the precise wording of his or her written and oral testimonies. As a result, nonsensical judicial doctrines persist, such as the requirement that a claimant identify problems in interpretation as soon as they occur. A potential solution to the quagmire of micro-analysis of testimony given in another language and behavior produced by a differing socio-cultural point of view is the greater use of country of origin information. However, the article written by Pettitt, Townhead and Huber is a report on a research project of the Research and Information Unit of the Immigration Advisory Service examining the use of country of origin information in the UK RSD cautions that such information is not always as objective a source of information as often stated in refugee decisions and that its use by decision makers is plagued by a significant selection bias.

There is such variation between jurisdictions and within jurisdictions that RSD has been described as a "lottery." Refugee claimants from Iraq provide a good example of the variation in outcome. Within the European Union, the member states of which have accepted common minimum standards with respect to both criteria and process for RSD, acceptance ranged from 63% in Germany to 0% in Greece.[60] Within jurisdictions, there was an 1820% variation in asylum acceptance rate between the best and the worst immigration judge in the same courthouse.[61] In Canada, 9 in 10 refugee claimants get accepted by one member of the Refugee Protection Division of the Immigration and Refugee Board while a similar proportion of the same claimants get refused by another member.[62] Mascini adds to this newer literature in this issue with his case study of the variation in and variables affecting RSD outcome in the Netherlands. Although efforts have been made by various tribunals to standardize processes and outcomes, such efforts are more often than not motivated by concerns around efficiency than the fairness of the proceedings and run the risk of arbitrarily fettering the discretion of decision makers.

Conclusion

RSD is a means not an end. It is the process by which states and UNHCR identify who are entitled to the benefits of refugee protection and thereby facilitate the fulfillment of their obligations to the beneficiaries of the international refugee regime. It is a truism of refugee law that RSD does not confer status on a refugee but merely confirms it.[63]

The statistics quoted at the outset of this editorial belie the reality of refugee protection: as Durieux points out in his article "[t]he majority of the world's refugees have secured a legal status without resort to an individual examination of their claims". The use of group, temporary and *prima facie* recognition[64], and the application on an inter-generational basis of the doctrine of family unity all mean that most refugees are granted or denied status without ever undergoing anything other than the briefest of biographical examinations.

Nor could the international refugee protection regime function otherwise. RSD consumes significant resources and is unsustainable on a universal basis. Although exact figures are difficult to determine, it is likely that the combined cost of RSD performed by states and UNHCR approaches or exceeds the total cost of direct humanitarian assistance provided to refugees by UNHCR.[65] Hathaway has estimated that the Global North alone spends $10 billion on RSD, a number which is a scale of magnitude larger than UNHCR's budget and exceeds even total UN expenditures.[66]

But if RSD is the means—and often an expensive one—then the end is the protection of refugees. The questionable and unspoken premise of this proposition is that those individuals who are not refugees are not protected. While by definition such individuals do not have the *same* need for protection as refugees, this is not to say that they are not in need.[67] The equally questionable premise is that, once recognized, refugees gain protection. In many parts of the world this proposition is demonstrably false.[68]

This is not to say that the project of studying and improving RSD is without merit but simply to remind us that it must be linked to the larger questions of the provision and apportionment of asylum and ultimately how we react to the strangers amongst us. The broader milieu of RSD is indeed the 200 million individuals outside of their country of nationality. In assessing RSD we must look at not only how we treat refugees but also how we treat strangers in our midst.

© Martin Jones and France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Notes

1. Global Commission on International Migration *Migration in an Interconnected World: New Directions for Action* (Geneva: Global Commission on Interational Migration, October 2005) at 83.
2. United Nations High Commissioner for Refugees [UNHCR], *2007 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons* (Geneva: UNHCR, June 2008) at 1 [*UNHCR Global Trends 2007*].
3. *Ibid.* at 20.
4. *Ibid.*
5. *Statute of the Office of the United Nations High Commissioner for Refugees,* G.A. res. 428 (V), annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950) [*Statute of UNHCR*].
6. *Convention relating to the Status of Refugees,* 189 U.N.T.S. 150 (entered into force April 22, 1954) [*Refugee Convention*].
7. Immigration and Refugee Board of Canada, *Part III: Report on Plans and Priorities, 2008–2009* (Ottawa: Department of Citizenship and Immigration, 2008) at 19.
8. In addition to UNHCR, the United Nations Relief and Works Agency (UNRWA) makes determinations of status of refugees falling under its mandate (and who are thereby excluded from the protection on UNHCR and the *Refugee Convention* by Article 1D).
9. The most prominent recent articulation of the concept (although not using the term) can be found in UNHCR's 2002 "Agenda for Protection" (which was endorsed by the Executive Committee of UNHCR in its Conclusion on International Protection No. 92 (LIII) of 2002 and by the UN General Assembly in A/RES/57/187 of 4 December 2002).
10. Jeff Crisp, "Beyond the nexus: UNHCR's evolving perspective on refugee protection and international migration" (New Issues in Refugee Research, Paper No. 155, UNHCR Policy Development and Evaluation Service, Geneva, April 2008) at 2.
11. Atle Grahl-Madsen, *The Status of Refugees in International Law* (Leyden: A.W. Sijthoff, vol. 1:1966 and vol. 2:1972).
12. Guy S. Goodwin-Gill, *The Refugee in International Law,* (Oxford: Oxford University Press, 1983); (2nd ed., 1996).
13. James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1993).
14. *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status* (13/12/2005) 326 Official Journal L at 13.
15. The RSD Watch project of Asylum Access (<http://www.rsdwatch.org>) initiated, along with Barbara Harrell-Bond, advocacy on this issue. The Southern Refugee Legal Aid Network, of which Asylum Access was a founding member, has now joined the advocacy effort.
16. The Asylum Access, the Southern Refugee Legal Aid Network, and the Asia Pacific Refugee Rights Network have all been formed in the past five years and have all adopted as one of their core advocacy projects the reform of RSD processes.
17. Simeon's article in this Issue provides a report from another conference held in 2008 at the Centre for Refugee Studies at York University.
18. Robert Barsky, "Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing" (New York: John Benjamins Publishing, 1994); Robert Barsky, "The Construction of the Other and the Destruction of the Self: The Case of the Convention Hearings" in G. B. Gabler, ed., *Encountering the Other(s)* (New York: SUNY Press, 1995) 79–100; and, more recently, Robert Barksy, *Arguing and Justifying: Assessing the Convention Refugees' Choice of Moment, Motive and Host Country* (New York: Ashgate Publishing, 2000).
19. Francois Crépeau and Delphine Nakache, "Critical Spaces in the Canadian Refugee Determination System, 1989–2002" (Paper presented at the 9th Biennial Conference of the International Association for the Study of Forced Migration, 2005) [unpublished]; and the more recent François Crépeau and Delphine Nakache, "Critical Spaces in the Canadian Refugee Determination System: 1989–2002" (2008) 20:1 *International Journal of Refugee Law* 50.
20. France Houle, "Pitfalls for Administrative Tribunals in Relying on Formal Common Law Rules of Evidence" in Robin Creyke, ed., *Tribunals in the Common Law World* (Annandale, Aus: Federation Press, 2009); "The Credibility and Authoritativeness of Documentary Information in Determining Refugee Status: The Canadian Experience" (1994) 6:1 *International Journal of Refugee Law* 6.
21. See for example Jean-Yves Carlier *et al.*, *Who Is a Refugee? A Comparative Case Law Study* (Kluwer, 1997), dealing with 15 countries of the European Union.
22. See for example Mary-Anne Kate, "The Provision of Protection to Asylum-Seekers in Destination Countries" (New Issues In Refugee Research, Working Paper No. 114, UNHCR Evaluation and Policy Analysis Unit, Geneva, May 2005).
23. Notably the *Protocol Relating to the Status of Refugees,* 606 U.N.T.S. 267, entered into force Oct. 4, 1967; *Convention Governing the Specific Aspects of Refugee Problems in Africa,* 1001 U.N.T.S. 45, entered into force June 20, 1974 [*OAU Convention*]; and, the *Cartagena Declaration on Refugees,* Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190–93 (1984–85), 17 April 1998 [*Cartegena Declaration*].
24. Durieux in his article (at note 2) in this issue refutes the notion that the *OAU Convention* deals with the issue of *prima facie* RSD for mass influxes.
25. UNHCR *Handbook on the Procedures and Criteria for Determining Refugee Status* (Geneva: UNHCR, 1979) (re-ed., 1992) at ¶ 189 [*UNHCR Handbook*].
26. Article 32(2).

© Martin Jones and France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

27. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [*ICCPR*].
28. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,* G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force 1 July 2003 [*MWC*]. Article 3(d) specifically precludes the application of the *MWC* to refugees. However, given that many refugee claimants are not in fact refugees it would be inappropriate to design an RSD process that did not meet the requirements of the *MWC.*
29. Article 7 of the *African Charter on Human and Peoples' Rights,* adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 [*Banjul Charter*].
30. Article 8 of the *American Convention on Human Rights* O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).
31. Article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms,* 213 U.N.T.S. 222, entered into force Sept. 3, 1953 (as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively) [*European Convention on Human Rights*].
32. *Singh v. Minister of Employment and Immigration,* [1985] 1 S.C.R. 177.
33. *Dehghani v. Canada (Minister of Employment and Immigration)* [1993] 1 S.C.R. 1053.
34. *Say v. Canada (Solicitor General),* [2005] FCA 422.
35. *Thamotharem v. Canada (Minister of Citizenship and Immigration)* [2008] 1 F.C. 385 (Fed. Ct. Ap.).
36. *Benitez v. Canada (Minister of Citizenship and Immigration)* [2008] 1 F.C. 155 (Fed. Ct. Ap.). (The case of *Benitez* was joined with eight other cases raising similar issues by the Court of Appeal.)
37. *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Her Majesty the Queen* [2008] FCA 229.
38. As an example, in the matter of *Subramaniyam Subakaran v. the Public Prosecutor* Criminal Review No. 43-01-2006, the High Court of Malaya (in Malaysia) proceeded in its analysis on the assumption that Malaysia was a state party to the *Refugee Convention* when in fact it is not.
39. Furthermore, in those countries which do have (or are introducing) legislation, the compatibility of the legislation with the requirements international law is doubtful. The Domestic Law Project of the Southern Refugee Legal Aid Network (co-directed by Marina Sharpe, Fatima Khan and Martin Jones) is in the process of collating evaluations of these legal frameworks—many of which are obscure even to UNHCR and legal professionals in these countries.
40. *UNHCR Global Trends 2007* at 13 *et seq.*
41. UNHCR has been criticized in particular for its failure to disclose evidence to a refugee claimant, its refusal of the right to counsel, its failure to provide adequate reasons for rejection of a claim to refugee status, and its failure to provide for an independent appeal of a refusal of claim to refugee status. Many of these criticisms are the subject of ongoing discussions between members of the SRLAN and UNHCR; some recent progress has been made on increasing UNHCR's compliance with international norms.
42. The additional irony is that UNHCR is often in the position of performing RSD due to the reluctance or inability of states to perform RSD according to international norms.
43. The *Dublin Convention* Official Journal C 254, 19.08.1997 and its associated European Union regulation—*Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national* Official Journal L 50, 25.2.2003—restrict the ability of refugee claimants to seek protection in a country other than the country of their arrival (or the country otherwise responsible for their arrival) in Europe. In essence, the *Dublin Convention* rules require most refugees to seek asylum only in the country of their arrival in Europe—generally the countries of Eastern and South Eastern Europe. The problems that can be caused by such arrangements are illustrated in the recent controversy over the return of refugee claimants to Greece under the Dublin Convention. See UNHCR, "UNHCR Position on the Return of Asylum-Seekers to Greece under the *Dublin Regulation*" (15 April 2008).
44. The Safe Third Country Agreement (STCA) between Canada and the USA—more formally the *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries of 5 December 2002,* [2004] Can. T.S. No. 2—limits the ability of refugees to transit through one of the countries and seek asylum in the other. The STCA was the subject of an unsuccessful court challenge in the above-noted matter of *Canadian Council of Refugees et al. v. Her Majesty the Queen* (see note 40 above).
45. In the United Kingdom, section 94 of the *Nationality Immigration and Asylum Act 2002* makes provision for a list of countries from which asylum or human rights claims can be certified as clearly unfounded unless the applicant is able to prove otherwise. In Australia, sections 91M to 91Q of the *Migration Act 1958* (Cmwlth.) and sections 33 and 36 of the *Border Protection Legislation Amendment Act 1999* (Cmwlth.) make provision for the refusal of protection to individuals who transit certain countries while *en route* to Australia.
46. In Japan, those who make a refugee claim more than six months after arrival are subject to detention and the com-

© Martin Jones and France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

mencement of removal proceedings under the terms of the *Immigration Control and Refugee Recognition Act.* In the US, there is a one year limitation period on seeking asylum (see 8 U.S.C. § 1158(a)(2)(B)).

47. An examples of this practice can be found in Malaysia, where the number of registered refugees is arbitrarily capped by UNHCR at about 50,000 (despite a refugee population which is by all accounts a multiple of that number) in order to both placate the host government and to decrease "primary and secondary movements" of refugees; currently UNHCR refuses to commit to the full registration of refugees in Malaysia despite its obligations under the *Statute of UNHCR* and stated policies to the contrary.
48. The threat of detention is frequently used to deter refugee claims. Detention itself can also act as a barrier to seeking asylum, especially where those in detention have no access to or ability to communicate with state or UNHCR officials responsible the RSD process. In the next issue of *Refuge,* we will publish a report on detention practices in Turkey which illustrates the insidious effect of detention on asylum.
49. Harold Koh of the Yale Law School is the most notable proponent of this analysis: "Transnational Public Law Litigation" (1990–1991) 100 Yale L.J. 2347; "The 1994 Roscoe Pound Lecture: Transnational Legal Process" (1996) 75 Neb. L. Rev. 181; and, "Bringing International Law Home" (19980199910 35 Hous. L. Rev. 623.
50. Michael Kagan, "Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt" (2006) 19 Journal of Refugee Studies 45.
51. Most Southern refugee legal aid organizations are able to provide representation to less than 5% of refugee claimants.
52. As this editorial was being written, the government-funded legal aid provider in British Columbia (the Legal Services Society of British Columbia) announced an immediate discontinuation of representation at refugee hearings except in extremely meritorious cases. Ian Mulgrew, "Economic blues herald 'perfect storm' for B.C. legal aid system" *Vancouver Sun* (18 November 2008) A1; Erik Eckholm, "Interest Rate Drop Has Dire Results for Legal Aid" *New York Times* (19 January 2009) A12.
53. Very few legal aid organizations in either the Global North or Global South provide legal aid for resettlement applications.
54. Gregor Noll, "Seeking Asylum at Embassies. A Right to Entry under International Law?" (2005) 17 International Journal of Refugee Law 542.
55. Given that resettlement as a durable solution is a limited resource, both UNHCR and countries of resettlement pursue the resettlement of only those individuals for which no other durable solution is available, including often due to the risk of violence to the individual in the country of first asylum.
56. The most famous example of this is the open letter of Erik Camayd-Freixas, a contract interpreter with the US Department of Homeland Security's Immigration and Customs Enforcement unit and also the director of the interpretation and translation program at Florida International University. His widely circulated letter critiques the immigration proceedings which occurred after what was then the largest immigration raid in US history. Erik Camayd-Freixas, "Interpreting after the Largest ICE Raid in US History: A Personal Account" (13 June 2008) (copy on file with author).
57. As this editorial was being written 300 Rohingya Burmese refugees in Kuala Lumpur publicly protested the registration policies of UNHCR described below. In 2005, refugees in Cairo protested a not dissimilar policy; their protest (a sit-in of a park outside UNHCR's office) was forcibly ended after three months with over two dozen dead.
58. There are a few refugee decision makers who have themselves been refugees, notably Justice Albie Sachs of the South African Constitutional Court (a topic on which he spoke at the recent gathering of the IARLJ in South Africa in January 2009).
59. There are of course exceptions, most notably in UNHCR's RSD which continues to bar and limit access by a refugee claimant to material considered by the first instance and appeal decision makers. This practice has been colorfully described by refugee advocates as the use of "secret evidence."
60. *UNHCR Global Trends 2007* at 17 (Table).
61. Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip G. Schrag, "Refugee Roulette: Disparities in Asylum Adjudication" (2007) 60 Stan. L. Rev. 295.
62. Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39 Ottawa Law Review 335.
63. Paragraph 28 of the *UNHCR Handbook* famously states this truth as follows: "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee."
64. These terms describe the overlapping and interrelated practices of assuming unless there is evidence to the contrary (i.e. concerning exclusion) that an individual is a refugee (*prima facie*), performing such a determination on a group basis (group), and providing protection to such refugees for a time limited period (temporary).
65. By way of example, Canada spends approximately $150 million on the determination of refugee status of about 35,000 inland and overseas refugee claimants per year—or just under $5000 per claim. This figure does not include the cost of legal aid or subsequent judicial reviews. *Citizenship and Immigration Canada: Report on Plans and Priorities, 2008–2009* (Ottawa: Treasury Board of Canada, 2008) at 14

© Martin Jones and France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

and *Immigration and Refugee Board of Canada: Part III, Report on Plans and Priorities, 2008–2009 Estimates* (Ottawa: Treasury Board of Canada, 2008) at 18 (Table 1.7).

66. James Hathaway, "Toward the Reformulation of International Refugee Law" (1996) 15:1 *Refuge;* Amitav Acharya and David B. Dewitt, "Fiscal Burden Sharing" in James Hathaway, ed., *Reconceiving International Refugee Law* (The Hague: Martinus Nijhoff Publishers, 1997) at 117.
67. The belated discussion of "complementary protection" by Macadam and others has begun to address, from a human rights perspective, other groups in need. Furthermore, as any practitioner knows (and as Cleveland's article makes clear), even the "needs" of refugees vary tremendously.
68. The annual *World Refugee Survey* published by the US Committee for Refugees and Immigrants (USCRI) makes this abundantly clear for most countries surveyed, even those that do not make the USCRI's "Bottom 10" list.

Martin Jones is a research associate at the Centre for Refugee Studies and currently a visiting researcher at the Institute for International Law and the Humanities at the University of Melbourne. Before returning to academia, Martin practiced refugee law in Vancouver, representing refugee claimants at all stages of refugee status determination proceedings in Canada. He has co-authored a textbook on refugee law and refugee status determination in Canada. Martin has taught refugee law at universities in Canada, Egypt and the United Kingdom and provided training and advice on refugee law and refugee status determination to a number of NGOs, including in Turkey, Jordan, Egypt, Malaysia and Hong Kong. He is co-founder of the Egyptian Foundation for Refugee Rights, a provider of legal aid to refugees. He is a founding member of the Southern Refugee Legal Aid Network and currently its director of research and training. He is a Managing Editor of Refuge.

France Houle has been a professor at the University of Montreal since 1999 where she teaches administrative law. She formerly worked as a legal counsel at the IRB. Houle obtained a Doctorate in Law from University of Montreal in 2000 and was received at the Québec Bar in 1989. Her areas of research are: regulatory reforms and rule-making process, administrative guidelines, evidence in front of administrative tribunals, interpretation as well as independence and impartiality of members of administrative tribunals. She is currently working with the Québec administrative judges on an empirical research concerning the working conditions of several Québec Boards. Finally, she is a member of the Research Centre on Globalisation and Work where she is developing a research program on migrant labour and public governance.

© Martin Jones and France Houle, 2008. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.