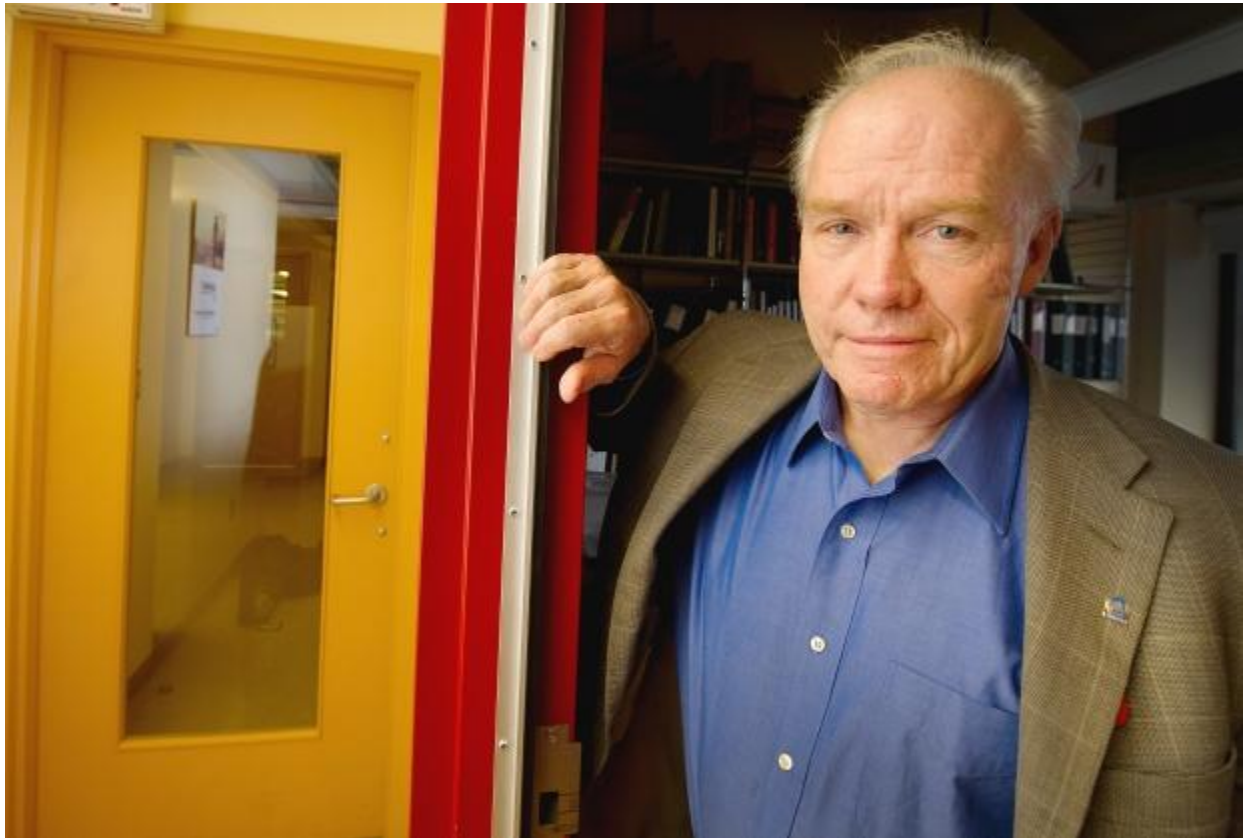


Chill of ministerial comments erodes independence of Immigration and Refugee Board, former chair says

By Don Butler, The Ottawa Citizen November 29, 2011



University of Ottawa law professor and former Immigration and Refugee Board chair Peter Showler says the ‘IRB and some of its members have discreetly deferred to negative comments by Immigration Minister Jason Kenny, and the Federal Court has not held the minister nor the board accountable.’ Photograph by: Wayne Cuddington, Ottawa Citizen

OTTAWA — The Immigration and Refugee Board describes itself as Canada’s largest independent administrative tribunal. But according to a former IRB chair, the board’s independence appears to be eroding.

Peter Showler, who chaired the IRB from 1999 to 2002, said the quasi-judicial board’s independence is vital to safeguard the autonomy of its individual members, who rule on refugee claims made in Canada, hear immigration appeals and conduct admissibility hearings and detention reviews.

But in the past couple of years, the board “has taken some measures that indicate that they’re not fully independent,” said Showler, now director of the Refugee Forum at the University of Ottawa’s Human Rights Research and Education Centre. “That’s a very controversial thing for a former chair to say,” he acknowledged.

As evidence, Showler cited the IRB’s handling of cases involving asylum seekers from Mexico, who were publicly accused of abusing the refugee system by Immigration Minister Jason Kenney in 2009. Kenney’s implication was clear — the IRB should not often be accepting refugee claims from Mexicans.

Many IRB decisions involving Mexicans — who were by far the largest group of refugee claimants until the federal government imposed visa requirements in 2009 — turn on whether their country can protect claimants who say they’ve been targeted by drug cartels and other criminal gangs.

That issue has divided the Federal Court, which judicially reviews IRB decisions. Some judges impose a high burden on claimants to show the state couldn’t protect them. But another group of judges places a lesser burden. In other words, the jurisprudence is in conflict.

Yet Showler said the IRB has exclusively chosen negative Federal Court decisions on state protection — those compatible with Kenney’s view — when posting so-called “persuasive decisions” by the Federal Court on its website. Persuasive decisions are meant to serve as models to guide IRB members when they rule on similar claims.

That’s not something a “diamond-straight independent tribunal” would do, Showler said. “The duty of a tribunal, which is below the court, would be to reflect both lines of reasoning. In actuality, all of the persuasive decisions only reflected the negative line of reasoning.”

Kenney’s “blatant” criticism of refugee claimants from Mexico, and similar comments he made about Roma applicants from the Czech Republic, was “unprecedented in Canadian refugee law,” Showler said. “The IRB and some of its members have discreetly deferred to those negative comments, and the Federal Court has not held the minister nor the board accountable.”

Janet Dench, executive director of the Canadian Council for Refugees, said Kenney “made it very clear where he stands on those claims. That’s a cold wind that can influence people.”

If the IRB is deferring to Kenney’s views, it may be partly because the minister effectively decides who gets appointed to the board. More than 90 per cent of current IRB members — including chair Brian Goodman and his three deputy chairs — are now Harper government appointees.

Though the IRB’s appointment process is supposed to be merit-based, politics has always intruded, Showler said. In the past, it was the politics of “good old-fashioned patronage.” But a candidate’s opinion of refugees, and his or her likelihood of approving or rejecting claims, was never part of the equation, he said.

That's changed in the past couple of years, Showler said. More recent IRB appointees "are just instinctively less receptive to refugee claims being made in Canada."

IRB statistics suggest that may be having an impact. For years the IRB regularly approved between 40 and 48 per cent of the refugee claims it heard. Last year, that dipped to 38 per cent — the lowest in the board's history — and has remained at that level through the first nine months of this year.

Sean Rehaag, a professor at Osgoode Hall Law School, has examined the rate at which individual IRB members approve refugee claims. Last year, among those with 50 or more decisions, all but one of the 30 members with the lowest grant rates were Harper government appointees.

One of them, David McBean, had not approved a single refugee claim in his time on the board, a record of rejection spanning 169 cases. That was evidently no cause for concern, though; last year, Kenney reappointed McBean to a five-year term.

Toronto immigration lawyer Lorne Waldman said some clients "basically get physically sick" when they find out McBean is hearing their case, "because they realized they have virtually no chance of being accepted." It's reached the point that refugee lawyers are asking McBean to recuse himself from cases, Waldman said.

Rehaag has documented huge variations in the rate at which individual IRB members approve refugee claims. Last year, for example, seven IRB members approved fewer than 10 per cent of the asylum claims they heard. By contrast, 15 members approved 70 per cent or more of the claims they ruled on. One, Marie Chevrier, a Liberal appointee, approved 94 per cent. She is now off the board, as are two other members who had sky-high grant rates last year.

Kenney's ability to influence reappointments means members who want to keep their \$120,000-a-year jobs may feel they can't ignore his views, Showler said. While the federal cabinet nominally makes reappointments, Kenney "shepherds all the files with his own recommendation to cabinet," he said.

When the government's new Balanced Refugee Reform Act comes into force next June, current members of the RPD will be replaced by public servants, who will take over the job of determining refugee claims. Many of the political appointees who now rule on asylum claims will migrate to a new section of the IRB, the Refugee Appeal Division (RAD), which will hear appeals from failed refugee applicants.

Showler doesn't know if the changes will enhance or further undermine the IRB's independence. On one hand, merit may play a larger role in deciding who gets the jobs of determining refugee claims, he said.

"There were more than 6,000 applicants for those positions, which is extraordinary," Showler said. Because of that, the public servants chosen for the jobs may make better, more competent decisions than the present group of political appointees.

But, Showler pointed out, the role of public servants is to be deferential to government policy — something that should have no role in determining who gets accepted as a refugee. “Almost certainly there is going to be additional pressures from within the board placed on decision-makers.”

Dench believes putting public servants in charge of determining refugee claims is “a step backwards in terms of independence.” The fact that the new Refugee Appeal Division will be staffed by political appointees also raises a red flag, she said. “The RAD is going to be setting precedents for the RPD. That becomes even more alarming if there is interference with the independence there.”

There would be fewer worries if the federal government clearly respected judicial independence, Dench said. But that’s not the case. “You have an executive that does not recognize a clear line of independence for judicial and quasi-judicial bodies.”