

Roundtable on Canada's Refugee Status Determination System

Table of Contents

- 1. Forward**
- 2. Agenda**
- 3. Summary Report**
- 4. Flow chart with end notes**
- 5. List of participants**

Roundtable on Canada's Refugee Status Determination System

Forward

This Roundtable was conceived in contemplation of anticipated changes to Canada's refugee status determination system. When the *Immigration and Refugee Protection Act* came into force on June 28, 2002, one important element of the Act was not implemented, the Refugee Appeal Division (RAD). Denis Coderre, Minister of Citizenship and Immigration at the time, promised to implement the RAD within one year. In 2003, both Minister Coderre and the subsequent minister, Judy Sgro, stated that additional delays in implementation of the RAD were necessary since the government was considering more fundamental changes to the Canada's refugee system. They gave no indication about the nature of those changes.

As co-hosts of the Roundtable, we were concerned about the direction those changes might take. Since September 11, 2001, refugee policy in many industrialized countries has been extremely volatile. Australia and virtually every European country have implemented new laws and policies to narrow access to their refugee status determination systems. Those policies are generally seen to be successful solely because the number of claimants has dropped significantly, in the past year. Little attention has been paid to the quality of the refugee decisions being made. To be fair, the Canadian government has given no definite sign that it intends to especially follow a similar path; however, governments do not create refugee policy in a vacuum. They are very conscious of the relative accessibility of other refugee systems. No country wants to be singled out as being too easily accessible.

We were also concerned that the government would develop a new refugee claim process without prior consultation with non-governmental experts. We therefore invited thirty individuals with exceptional knowledge of and practical experience with Canada's refugee system, to discuss potential improvements to that system. Our intention was not to develop a single model, but to propose practical ideas and principles that would help to achieve the twin goals of improving both

the efficiency and fairness of refugee status determination in Canada. In that regard, we want to thank all of the participants for their candour, their creativity and their willingness to share ideas in an open and co-operative manner.

We would like to thank the Human Rights Research and Education Centre (HRREC) of the University of Ottawa and the Faculty of Arts and Social Sciences at Carleton University for their financial and administrative support. We also express our appreciation to Citizenship and Immigration Canada for its financial support as well as its willingness to participate in the Roundtable.

Particular thanks go to Susan Lecorre, Alan Fleischman, Sheila McIntyre and Nicole Beauparlant of HRREC for their administrative and moral support; to the able and courageous Roundtable moderators Sharry Aiken, Buti Kale, John Scratch and Yves LeBouthellier; to Professor Jim Hathaway for services above and beyond the call; to our reliable student researcher Ania Pollock; to student recorders Danna Ingleton, Camille Vezina, Mark Ignatiev and Dan O'Brien; and finally, special thanks to Heather Neufeld and Manon Lavoie.

Judith Kumin and Peter Showler

Co-hosts

Roundtable on Canada's Refugee Status Determination System

Sponsored by the University of Ottawa and Carleton University

Ottawa, March 12-13, 2004

University of Ottawa campus

Agenda

Friday, March 12

8:30 – 9:30 **Registration and coffee**

9:30 – 10:00 **Opening remarks and review of the agenda:** Peter Showler

10:00 – 10:45 **Setting the policy context: Introduction and discussion:** Judith Kumin

10:45 – 11:00 Break

11:00 – 12:30 **Pre-hearing issues:** Moderator: Sharry Aiken

This session is not intended to consider substantive eligibility issues but rather, to focus on procedural questions which, if addressed at the pre-hearing phase, could contribute to a fair and expeditious process. A basic goal is to obtain and convey reliable claimant information to the decision-maker as early as possible as well as to inform the claimant about the law and refugee claim process.

Suggested discussion questions:

- In view of the large number of inland claims, are there ways to encourage claimants to present their applications at the earliest opportunity?
- Should counsel be involved earlier? How? Is duty counsel a useful approach?
- Would a procedural counselling mechanism be helpful? If so, how might it be conceived? Who should be responsible for it?
- Are there other pre-hearing issues which could be addressed, in order to make the process faster and fairer?
- Time standards: Is there a way to maintain time standards throughout the entire claim process? Should they be statutory or administrative? Are there realistic incentives to promote rapid processing at each stage?

12:30 – 14:00 *Lunch*

14:00 – 14:30 Pre-hearing issues: (continued)

14:30 – 15:30 First-instance decision-making: Moderator: Buti Kale

- This session is intended to encourage innovative thinking about decision-making models which would fulfill the fundamental requirements of procedural fairness and natural justice, while addressing the realities of volume and resources. Lessons learned from other jurisdictions may usefully be presented.

Suggested discussion questions:

- What is the best institutional setting for the decision-maker?
- How should the decision maker be selected?
- Full hearing vs interview model? How to ensure natural justice in an interview model? Are there other ways to simplify the decision-making process while assuring fairness?
- Can spurious claims be identified and channelled into an accelerated process?
- What are appropriate time standards?

15:30 – 15:45 *Break*

15:45 – 17:00 First-instance decision-making (continued)

19:00 **Dinner, Palais Imperial Chinese Restaurant,
313 Dalhousie St., tel. (613) 789-6888**

Saturday, March 13

9:00 – 9:30 Outstanding issues and conclusions from previous day's discussion

9:30 - 10:30 **Review phase:** Moderators: John Scratch

- In this session, participants are encouraged to consider workable review models, which would correct errors in first-instance decision-making and contribute to the development of refugee law, without generating a proliferation of review instances and the attendant concerns of an unduly prolonged process. As in the previous session, lessons learned from other jurisdictions may be a helpful reference point.

Suggested discussion questions:

- What is the most effective institutional setting for a review of the first instance decision? (Single tribunal? Specialized division of Federal Court?)
- What review model is most effective? (Appeal on the merits? Judicial Review? Paper review? Live evidence? If an appeal on the merits, how to ensure prompt decision making?)
- Are there ways to accelerate the review of spurious claims?
- How can a proliferation of reviews be contained, while assuring fairness?
- What are appropriate time standards?
- At what stage can humanitarian and compassionate considerations best be addressed?

10:30- 10:50 *Break*

10:50-12:00 Review phase (continued)

12:00-13:30 *Lunch*

13:30-15:15 **Removal phase:** Moderator: Yves LeBouthillier

- It is widely accepted that the prompt return of persons not in need of protection to their countries of origin contributes to maintaining the institution of asylum. Participants are asked to consider how the return issue can best be addressed in the Canadian context.

Suggested discussion questions:

- When is a pre-removal risk assessment needed? When would it not be needed?
- What is the most effective pre-removal risk assessment process?
- How can voluntary compliance with removal orders be promoted?
- What are appropriate time standards ?
- Are there other issues which should be addressed with regard to persons who have been found not to be in need of protection?

15:15 - 15:30 *Break*

15:30 - 16:30 **Outstanding issues and concluding remarks:** Peter Showler and Judith Kumin

Roundtable on Canada's Refugee Status Determination System

Summary Report

Introduction

On March 12, 2004, thirty experts on Canadian refugee law gathered in Ottawa for a two-day roundtable discussion on Canada's refugee status determination system, hosted by the Human Rights Research and Education Centre at the University of Ottawa and the Institute of Interdisciplinary Studies at Carleton University. The conference organizers were Judith Kumin of Carleton University and Peter Showler from the University of Ottawa. The participants, drawn from the Immigration Bar, academic and NGO communities and government, were asked to propose and explore innovative and practical ways to improve both the efficiency and the fairness of Canada's current system. The objective of the Roundtable was to use the enormous cumulative expertise and experience of the participants to produce a wide range of creative and practical ideas for improving Canada's refugee system.

This is a summary report of the Roundtable proceedings. It is divided into the four phases of the inland refugee claim procedure identified in the Roundtable agenda. As much as possible, the report reflects the various, and sometimes differing, views of Roundtable participants. It is not a verbatim report and there is no attribution of remarks to particular speakers. Participants' comments have been organized around themes that emerged during the discussion; these were not necessarily the same as the topics originally identified in the agenda. Similar positions on particular issues have been compressed in the interest of brevity and clarity. Although consensus was not an objective, indications are given where particular positions appeared to enjoy broader support.

A flow chart has been appended to the report. The chart diagrams various options proposed by the participants that would meet the twin goals of improved efficiency and fairness. The flow

chart includes detailed explanatory endnotes. The list of participants and the conference agenda are also attached to the report.

Phase 1: Pre-hearing phase: Access to the Refugee Determination Procedure

The moderator noted that this phase focussed on procedural issues. A fairer and more expeditious system would mean obtaining claimant information more quickly and conveying it more rapidly to the decision-maker as well as providing early information about the claim process to the applicant. After considerable discussion, the following topics emerged as central concerns:

1) Early Humanitarian and Compassionate application (H&C)

Varying views were presented in regard to an early humanitarian and compassionate (H &C) application process. Some stated that an early H&C process could relieve pressure on the system by clearing off cases that do not necessarily meet the refugee criteria but do have other grounds for remaining in Canada. The 1989 “backlog clearance” had a front-end H&C procedure that was very effective. Some stated that the failure of overseas missions to recognize and process legitimate humanitarian cases resulted in unnecessary pressures on the asylum system. A more effective and meaningful H&C process overseas would forestall the necessity of seeking entry to Canada through the asylum system. Embassies should be more proactive with regard to such cases. Humanitarian programs are not effective without political will.

Other speakers preferred an expedited process within the asylum system rather than a preliminary screening. H&C decisions are based on government policy factors, very different from a refugee decision based on rights arising from domestic and international law. They are different types of decisions by different types of decision maker. If an early H&C process is intended to relieve pressure on the refugee system, the claimant should be required to select either the H&C or refugee protection stream. Such a selection decision could not be made without adequate

information and informed advice. There was a difference of opinion whether legal counsel was necessary at this stage. Others felt that the H&C and asylum processes should be consecutive rather than mutually exclusive. An unsuccessful H&C applicant should be able to return to the refugee stream.

Another speaker stated that Australia had attempted an early humanitarian program to relieve the asylum backlog. That program generated an even bigger backlog and was eventually abolished.

2) Manifestly Unfounded Claims

There was significant discussion about the purpose and process of identifying manifestly unfounded claims. One speaker asked whether there could be early, instantaneous decisions for some claimants. Another suggested there might be objective categories for manifestly unfounded claims based on country of origin. There was some acknowledgement that manifestly unfounded claims should be identified and removed from the pool early in the process, but most speakers did not favour any attempt to make merit-based decisions at the beginning of the process. There was support for the accelerated processing of manifestly unfounded claims through the regular determination process. There was a consensus view that the accelerated processing of manifestly *founded* claims (the “expedited program” at the IRB) was effective and should continue. It moves obvious refugees through the system quickly, leaving the decision makers to concentrate on the more problematic cases.

Comments included:

A “credible basis” screening process was attempted in 1989 and was unsuccessful. Manifestly unfounded decisions involving credibility are more complicated and difficult than they seem. There would be a need to engage legal aid very early, since such claims still require legal counsel and due process. Instantaneous decisions have been attempted in other jurisdictions at ports-of-

entry, detention centres and in international zones. Generally, those decisions have lacked supervision, adequate control, legal counsel, media scrutiny and adequate judicial review. Many such practices have been struck down by courts on rule of law principles. There are no silver bullets.

Early screening does not work. It is better to get a manifestly unfounded claimant before a decision maker as soon as possible to secure a merit-based decision. The IRB is already starting to do this. Designating claims as manifestly unfounded based on country of origin will not work. It is rare to see a PIF that does not appear to conform to the requirements of the refugee definition. It is more common to see a sequence of claims from a particular country that look and sound the same. Such claims could be grouped and heard by a designated panel of decision-makers. The IRB is already doing this but it would be better to make the process more transparent with legislation. One speaker noted that prioritizing manifestly unfounded claims through the regular claim process proved to be an effective strategy in Australia.

A few speakers felt that any form of manifestly unfounded screening, including streaming, was not appropriate work for the IRB as an independent decision maker and it might lead to bias against those placed in the manifestly unfounded stream.

3) Early case processing and legal advice

The majority favoured engaging the decision maker in the process as quickly as possible. A few people dissented, pointing out that there are sometimes legitimate reasons for not proceeding immediately. There was a general view that early referral to the decision-maker required fast legal aid referral as well. The merit-based process could not proceed prior to competent legal advice. One speaker suggested a duty counsel system to complete essential claimant information and to inform the claimant about the process. This should be co-ordinated with early referral to the IRB.

Some speakers recommended trained counsellors to provide early advice to claimants about the nature of the process. This issue overlapped with the possibility of a front-end H&C assessment. There were differences of opinion on whether legal counsel were required immediately or whether trained counsellors would be as effective and more available to advise claimants. Most agreed that counsellors could provide effective advice if there were an early choice between H&C or asylum streams. A few speakers felt that advice from a lawyer was required before the claimant could make such a decision. Some speakers noted that “friendly immigration officers” have provided effective advice in the past.

In regard to early legal advice, there appeared to be a consensus that lawyers can facilitate a fair claim process, but there are fundamental problems with the Canadian legal aid system, which is inconsistent due to the variance in provincial legal aid funding. Some legal aid systems are slow to approve legal aid retainers, some provide inadequate compensation, others provide no legal aid support for refugee claimants. Some speakers felt that trained counsellors could provide preliminary advice until legal aid counsel could be retained. One speaker noted that refugee counsel in Australia did not need to be lawyers, but they did require government licensing approval. During the opening session on the second day, some speakers recommended an early triage by trained counsellors, informing claimants of their rights and obligations before directing them to concurrent H&C and refugee determination processes.

4) Time standards

None of the participants favoured statutory time standards. One speaker said that these restricted operational flexibility and they were ineffective since there are avoidance strategies. For example, the Federal Court does not finalize positive leave decisions until it can schedule a hearing date as a means of complying with the 90 day time limit for judicial review decisions. Some speakers were open to administrative time standards as a means of measuring and encouraging a faster process. Others felt that if there were an efficient and fair process that was adequately resourced, then timely decision-making would follow automatically. The basic guideline should be: the simpler the

process, the faster the process. A complex process would cause delays.

Other comments included:

The 28 day deadline for completing the personal information form (PIF) is too short to deliver all of the information required. Given the overall length of the process, it is better to allow more time to get more reliable information. It is unfair to require claimants to fulfil various obligations in very short time periods while there are such lengthy delays in the hearing process. Another speaker said it takes too long for claims to reach the IRB.

Part 2. First-instance decision-making phase

The moderator urged the group to recall the goal of the first-instance process: to reach a *correct* decision. The fact that processes are constantly under review in various countries suggests that other refugee systems are not perceived to be functioning properly – whether from the perspective of time, cost and/or quality of decisions. Participants were asked to consider best practices for first instance decision-making, mindful of the need to build public confidence in the process.

1) Institutional setting for the first-instance decision

There was strong support for an independent, quasi-judicial process with full due process safeguards in view of the sensitive nature of refugee status determination and the high stakes involved. It was important to reach the highest possible quality of first-instance decisions in order to avoid having to replicate the process at other levels. Several participants pointed out that it is difficult to recommend a first instance model without considering the whole process.

While there was broad agreement on the importance of “getting it right” at first instance, not all participants were convinced that a *quasi-judicial* process was required. Some felt that given the “hard, fast and technical” nature of the process, the first instance decision would best be made by

properly trained government officials, with the possibility of appeal to an independent body. Others cautioned that the refugee determination process is not amenable to “hard, fast and technical” decisions; it is a difficult process requiring careful weighing of evidence. If the first instance is an administrative procedure, it will be harder to garner stakeholder confidence.

Many participants felt that the bottom line was a two-step adjudicative process, involving one full, independent hearing and one review. If the procedure consists only of two levels, it would be inappropriate to have a government official be responsible for the first instance decision. That decision-maker should be independent. At the same time, independence should not become a crutch for decision-makers who are not qualified. Several speakers felt the Refugee Protection Officer (RPO) did not play a useful role, and this position could be eliminated.

2) Interview vs. hearing models

With regard to whether an interview or hearing model is more appropriate, participants were divided. Some felt the interview model was costly and inefficient; others recommended a first instance interview (rather than a hearing), as long as all negative decisions were subject to an adequate appeal process. Some noted that the hearing model provides additional safeguards for applicants who are often unsophisticated, traumatized, and easily “trapped” by contradictions about dates, for instance. Others noted that due process is not necessarily synonymous with formality; the important value was accuracy of decision-making.

Either approach, it was agreed, can yield both good and bad decisions. The key is to ensure independent decision-making when such core rights are at stake. Some speakers noted that independence does not preclude appropriate measures, such as the use of jurisprudential guides, to encourage consistent decisions.

3) Selection of decision-makers

There was consensus that the selection of decision-makers should be entirely merit-based. It was felt that independent decisions and a process which is fair to vulnerable persons can only be achieved if the selection of decision-makers is 100% merit-based. But what qualities and skills are imperative? The answer to this question would differ, depending on whether one was looking for persons able to make difficult decisions based on evidence, to apply lead cases, or to craft oral decisions. Several speakers pointed out that the core of the process does not involve legal analysis but credibility assessment, requiring skills and capacities for ascertaining the truth.

With respect to the qualities needed in decision-makers, reference was made to earlier studies, e.g. the 1998 Trempe-Davis-Kunin report. It was suggested that decision makers need to have prior relevant experience, including legal knowledge and knowledge of the political and cultural backgrounds of claimants; the psychological capacity to work with issues of exile, suffering, trauma, and death; the human qualities needed to conduct interviews; and relevant training, whether in law, psychology, sociology, anthropology or another related field, or acquired in various settings. Respect and compassion for asylum-seekers were considered non-negotiable qualities. Decision-makers should be chosen by a committee on which various stakeholders would be represented. A seven-year non-renewable term was suggested; some felt the current ten-year IRB term to be too long. Others said that there are limits to the effectiveness of selection methods for such a wide range of competencies required for good refugee decisions. A decision-maker could be more effectively evaluated after a relatively brief first appointment. Although a delicate task, it is feasible to evaluate decision-makers without impinging on their independence.

4) Processing of clearly ill-founded claims

In general, the group did not support establishing a separate process for manifestly unfounded claims. Past experience with the “no credible basis” process showed that it was neither efficient nor effective. Some felt that manifestly unfounded claims could be identified up-front and decided on a last-in, first-out basis, while still being entitled to the same procedure as other claimants. The preference, however, was for qualified decision-makers capable of making quick, accurate decisions, rather than an accelerated process.

5) *Time Standards*

On time standards: timing was considered largely dependent on which process one chooses. If process and resources make sense, timing will take care of itself. Another speaker suggested the need for a flexible funding formula to adjust adjudicative resources according to claimant volume.

6) A broader view

Several speakers suggested the group was not being sufficiently imaginative, since it appeared still to have the IRB model in mind. It was noted there seemed to be two ideas on the table. The first was a refinement of the existing model – a tribunal-based first instance, with an appeal process. The second was a ‘radical new approach’ which remained unidentified. Participants noted that radical reform requires multilateral cooperation between nations; it cannot be achieved unilaterally. Meanwhile asylum-seekers will continue to arrive in Canada and unless the government wants to invoke the Charter’s “notwithstanding clause”, a process will be needed to deal with them.

The existing model, some said, had met the test of time although it has two flaws – the way decision-makers are appointed and the lack of an appeal mechanism. Others noted that it is this very process which has generated backlogs and delays. It was essential to make gains, whether by an accelerated process, or more selection overseas, or a radical shift of benchmarks. It was suggested that it would be useful to identify which aspects of that process were the cause of delays. One participant noted that the process is slow because it doesn’t respond to the *patterns* of claims which are received, and because lawyers don’t see the slowness of the process as their problem. As a result, each claim is treated as if it were *sui generis*.

One participant urged preserving what is working well in the Canadian system, suggesting that the “front and back ends need more work than the middle. ” A further suggestion, supported by several participants, was for a pre-hearing triage, staffed by non-lawyers, to establish identity and

facts, make social service referrals, flag trauma or H&C issues, as well as manifestly well-founded and ill-founded claims.

It was emphasized that at the government level, there is a genuine appetite for far-reaching changes. Objectives and principles must be kept in mind when deciding on appropriate models, and refugee protection needs to remain the central focus. Still, there might be other ways of meeting refugees' protection needs. Might this consist of group determinations? Port-of-entry-decisions? Should money be spent here or overseas? One participant urged weighing Canada's inland vs. overseas activities, and noted that the cost of protecting 15,000 persons in Canada would fund 30-40% of UNHCR's annual budget. It was suggested that participants should ask themselves what would be the bare minimum required of an inland process, in terms of Canada's Charter and international obligations, and then build options. Another questioned whether this debate was really fuelled by concern for refugees, and whether any savings made in the inland process would in fact result in more support for overseas programs?

3. Review of First Instance Decisions

There was a general consensus that some form of review of first-instance decisions was necessary, since even competent decision makers make mistakes and there are other contributing factors to decision errors including incompetent counsel, unrepresented claimants and the claimant's failure to present all of the evidence for a variety of reasons. The current system of a single member decision with only a leave provision for judicial review by the Federal Court is not sufficient. Most speakers agreed that a simple two-step process (a sound, first decision followed by some form of review) was acceptable and more efficient than multiple layers of review. There was no general agreement on the preferable form of review that was fast, fair, efficient and politically attainable.

The following models were suggested with comments from proponents and critics.

1) Refugee Appeal Division (RAD)

An appeal to a RAD as currently framed in the legislation is an acceptable compromise. It is a more efficient means of identifying first-instance errors, particularly those related to credibility. The RAD should also have the authority to develop precedential jurisprudence for first level decision makers, possibly using three-member panels. RAD members should be lawyers with experience in refugee law.

Other suggestions included:

- Access to judicial review could be controlled by a certification mechanism similar to that now used by the Federal Court,
- The RAD should be a separate tribunal for greater independence,
- The RAD could take on wider powers, including an authority to grant H&C relief
- Claimants without lawyers should be granted a longer notice period to appeal

Criticisms included:

- A paper review at the RAD will not be able to effectively correct credibility findings,
- Privative clauses are undesirable. There is no means to limit judicial review to the Federal Court so the RAD becomes an extra step,
- A RAD is not politically attainable. We are better off putting our resources into good, two member decisions.

2) Review by the Federal Court

Some speakers suggested an appeal directly to a Refugee Division of the Federal Court. Refugee cases represent 60% of the Federal Court caseload; this would justify a specialized division that could overcome some of the disadvantages of a generalized court. It would have more country expertise and understanding of the refugee claim process. A specialized judge could make the leave decision and hear the case if so required, eliminating the arbitrary aspect of the present leave process. An appeal on the merits by an expert division could allow for a final decision rather than a referral back to the IRB if there were errors of fact or law. It could also permit the prompt removal of unsuccessful claimants and the development of an authoritative jurisprudence.

Criticisms of this proposal included:

- Courts are too slow, formal and expensive to be efficient. It is not a practical option,
- Courts will judicialize the entire claim process imposing unnecessary formality on the hearing process,
- Any leave provision will still reduce access to justice for those who cannot afford a lawyer.

3) A reconsideration mechanism within the Refugee Protection Division

Some speakers acknowledged that an appeal was desirable but not politically practical under the current circumstances. They recommended an expanded form of the reconsideration power that is already available to the IRB. Such a power would permit the Board to maintain an internal quality control of its decisions through an informal process. This would be far less expensive than any formal appeal model. There would be no requirement for written reasons which account for much of an appeal's expense and time delay.

Comments included:

- Other tribunals, including the Ontario Social Assistance Review Board, have successfully used

reconsideration as a review mechanism; they should be consulted,

- The savings in expenses could justify returning to a two-member panel and an expanded leave provision to Federal Court that would not be based on the patently unreasonable test,
- Informality of the process makes it more flexible and can identify mistaken credibility findings better than a RAD or a court,
- The same mechanism could be used to review repeat claims rather than a pre-removal risk assessment (PRRA).

Criticisms included;

- Internal review mechanisms are acceptable to correct simple mistakes, but institutions are inevitably self-supporting and defensive. Greater independence is required.
- Informal decisions without reasons lack accountability.

Part IV: Removals Phase

The moderator opened the discussion related to the removal phase of the refugee determination process noting that the other phases of the process make sense only if removal of persons not in need of protection is also addressed. He invited participants to consider a number of questions about the pre-removal risk assessment process, and would then move on to a discussion about promoting voluntary compliance with removal decisions.

Some general comments were made about removals. One speaker asked about the government's capacity to effect removals. To what extent is a program viable, if removal capacity is insufficient? The absence of reliable removal data was identified as a problem. A participant reported that there were 10,500 removals from Canada in 2003, of which 9000 were rejected claimants. But voluntary compliance with orders to leave the country is difficult to assess, in the absence of exit controls.

Australia's efficiency with regard to removals was cited as an example; several participants pointed out however the differences between Australia and Canada: Australia had far lower numbers of claimants, a regime of mandatory detention, and no Charter of Rights and Freedoms.

1. The pre-removal risk-assessment (PRRA)

The moderator asked: When is a PRRA needed? Not needed? What time limits should be imposed? Who should perform it? Could it be merged with the examination of humanitarian and compassionate claims?

A number of speakers said that the PRRA was not currently an effective mechanism, noting that a protection mechanism is not effective if people cannot avail themselves of it; this was the case with unrepresented claimants seeking a PRRA. Legal aid is not granted for the PRRA, yet applicants need to prepare a persuasive written submission. In the absence of officially provided interpreters, there are also serious communications issues. It was also suggested that the PRRA should not be restricted to new evidence, but that any evidence related to risk should be allowed.

Several speakers affirmed that if removal follows immediately upon the final rejection of a claim, a PRRA is not needed. Most participants felt that in the absence of a PRRA, new evidence or changed circumstances could be addressed by re-opening a case at the IRB. Others favored retaining a PRRA in all circumstances and felt that the timing of the PRRA – linked to removal readiness – was appropriate.

Some participants stressed that the pre-removal risk assessment should not be done by the same agency that handles removals. It appeared that the Government is still considering the allocation of responsibilities between CIC and CBSA, but CIC will remain responsible for policy issues with regard to the PRRA and removals.

A number of speakers urged that the PRRA be done by the IRB. Advantages were that the IRB already holds the file, is qualified to assess risk, and is independent. Objections were raised to this approach, however. One participant stressed that the PRRA was intended as a quick, administrative decision, not a judicialized one. Another felt the IRB would be too inflexible to deal with the PRRA, since Members' schedules are fixed well in advance. Still others pointed out that the PRRA is not only for failed claimants, but the IRB would not be competent in other cases. One speaker felt that in security cases, it should not be the role of the IRB to balance protection and security concerns. If the PRRA were placed at the Board, the link with removal would be severed and the process would look like a reconsideration.

The government was urged to reconsider how the PRRA process operates for repeat claimants

who are not allowed to file a new refugee claim. The PRRA of such individuals is dealt with at the port where they re-enter Canada, which is inconvenient and expensive for the applicant who is living inland. There were also complaints about individuals having to appear for two separate appointments, one to receive the application and one to receive the decision.

The moderator summed up the discussion on the PRRA by noting that it is not perceived as efficient or effective; rather, as cumbersome and not fair. The majority was in favor of allowing the IRB to reopen cases when there is new evidence, but there would still need to be a risk-assessment mechanism for claims not handled by the Board. Finally, there was a strong sense of the group in favor of having humanitarian and compassionate considerations dealt with at the same time as a risk review. At the removals stage, H & C applications should not be a separate process that could further delay removal.

2. Promoting voluntary compliance with removal orders

The moderator then invited participants to turn to ways of promoting the voluntary compliance of rejected claimants with the order to leave Canada. It was noted by many that the refugee system will continue be under attack unless persons not in need of protection leave the country. One participant questioned this premise, however, asking what was the government's main aim with removals. Many rejected claimants make important contributions to Canada. Was their removal necessary merely because Canada hadn't selected them? Or to vindicate Canada's sovereignty? It was felt that public perceptions about rejected claimants and removals were quite confused.

The importance of facilitating returns with dignity was emphasized by several speakers; some were troubled by the manner in which rejected claimants are removed. One participant noted that removals are time-consuming and expensive, as well as often difficult and humiliating for the affected individual. Promoting voluntary compliance with removal orders, in safety and dignity, is

in everyone's interest. This had been the subject of a government-NGO discussion two years ago in Calgary, which had unfortunately not been followed by any specific action. The speaker suggested there was a need for a neutral agency, not involved in the asylum process, with a presence across Canada and in countries of origin, to be mandated to provide counselling about return, and for the government actively to support return by paying travel costs and providing other incentives, as appropriate, to persons who comply voluntarily with the order to leave.

Several speakers urged the government to make it easier for rejected claimants to leave. NGOs were often frustrated, when rejected claimants or persons wishing to withdraw their refugee claims approached them, asking for help to return home. There should be a designated agency to which such persons can be directed, with the resources to counsel and help them. Many rejected claimants are confused about their options. Several speakers felt that financial incentives should be provided. It was suggested that the current 30-day period for voluntary compliance after the departure order becomes enforceable is too short for persons who have been in Canada for a long time to settle their affairs.

One participant urged that return counseling be provided when individuals receive their PRRA decision. Another noted that voluntary compliance can only be realistically promoted *after* claimants have received a negative PRRA decision. However, a regulatory change would be needed to ensure that there is a window of opportunity for this counseling before the departure order turns into a deportation order. The primary incentive for voluntary departure is to avoid a permanent ban on return to Canada. This incentive no longer exists once the departure order has become a deportation order.

Several speakers felt that there should be specific programs to allow rejected claimants who have successfully established themselves in Canada and who comply with departure orders, to apply from abroad to return to Canada. Others felt that it would be difficult to justify giving such cases priority in view of the large number of other overseas applicants for permanent residence.

The moderator concluded the discussion on the promotion of voluntary compliance with removal orders, noting that there was a need for more and better data on departures, for more action to help people to leave and possibly, under certain circumstances, to be able to return. A pilot project would be helpful.

Concluding discussion

In a final session, participants were invited to raise any issues which had not been adequately covered during the proceedings.

A number of specific issues were highlighted, namely the crisis in legal aid for refugee claimants; the impact of delays in obtaining and renewing work authorizations; the ongoing problem of security clearances for landing; the suggestion that protected persons be landed automatically upon recognition. The practical implementation of the US-Canada safe third country agreement and reform of the IRB appointment process were also raised.

The focus of the discussion, however, was the “bigger picture”. One participant urged recognition that the refugee determination system cannot solve all the problems. There needed to be a coherent strategy, also involving CIC and the CBSA. It was felt that this coherence was lacking. For instance, CIC affirms that refugee protection is at the center of its concerns, yet interdiction is the core of its strategy, and interdiction measures do not integrate any refugee protection safeguards. CIC's interventions before the IRB also do not seem consistent with a protection-centered strategy, since CIC seeks to intervene with regard to groups for whom it perceives the recognition rate as too high. With regard to removals, no particular strategy is discernible. The speaker questioned the value of prioritizing the processing of certain claims before the IRB if they are not also prioritized for removals. Finally, it would be important to analyze how and why the refugee system is used by persons who do not have protection concerns, and to try to address the needs of such persons in different ways.

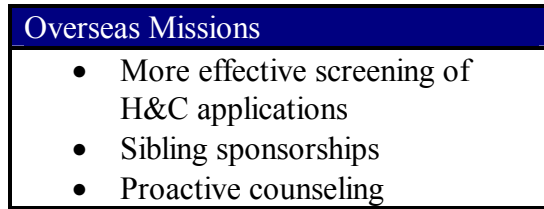
There were several comments on the role of a more efficient determination system within a broader view of Canadian refugee policy. Proposals that could reduce pressures on the asylum system and could contribute to a faster, fairer system were not just a matter of “tinkering around the edges” of the existing system. One participant noted that refugee status determination should not be considered a “small” idea, since providing protection was an important value in Canadian society. It is difficult to make a useful contribution to the larger policy discussion without knowing what the government has in mind. Reading from current discussions at the international level, there was apprehension on the part of some that the government may be thinking of a much harsher regime, for instance involving quick decision-making by a government body, mandatory detention, and compulsory removals. Others suggested that such a scenario was not in the cards, but there is indeed a need for better information on who is accessing the refugee system, on what motivates them, as well as on the entire refugee claim continuum. Canada’s policy needs to be seen in the broader context of global migration, of Canada’s “ place in the world” and Canada’s role in international migration. This debate needs to be de-politicized and factual and should not be limited to the specialized immigration and refugee community but should involve civil society more broadly. It was troubling that the Prime Minister’s December 12, 2003 announcement had not been preceded by any discussion or consultation with stakeholders. The government was encouraged to make use of the tremendous expertise which is available in Canada on these issues and to engage with stakeholders in a transparent way. The need to involve refugee and immigrant communities in the debate was also highlighted. Finally, it was pointed out that even with extensive and continuous consultation, there would always remain an underlying tension between individual human rights and state sovereignty.

The co-chairman concluded by thanking all participants for their contributions. He noted that the Roundtable had focused on just one aspect of a much broader system, but felt it important that Canada maintain a refugee determination system that can continue to serve as a model for the world. He hoped the report of this session had provided workable solutions to correct the identified flaws in the current system and would provide inspiration for continuing the broader discussion on Canada’s refugee policy.

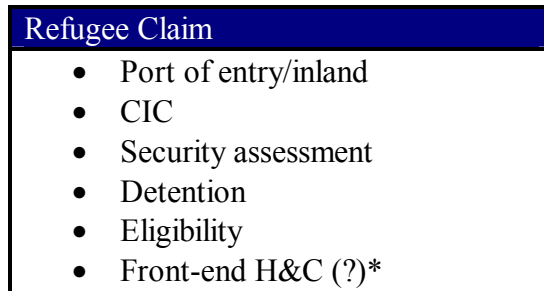
POTENTIAL REFUGEE STATUS DETERMINATION SYSTEMS

1. Pre-claim extra-recommendations

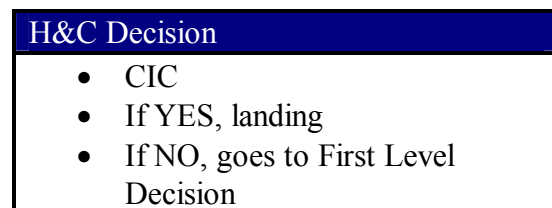
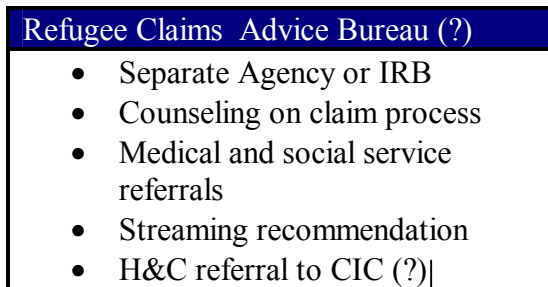
territorial



2. Pre-hearing Process



3.



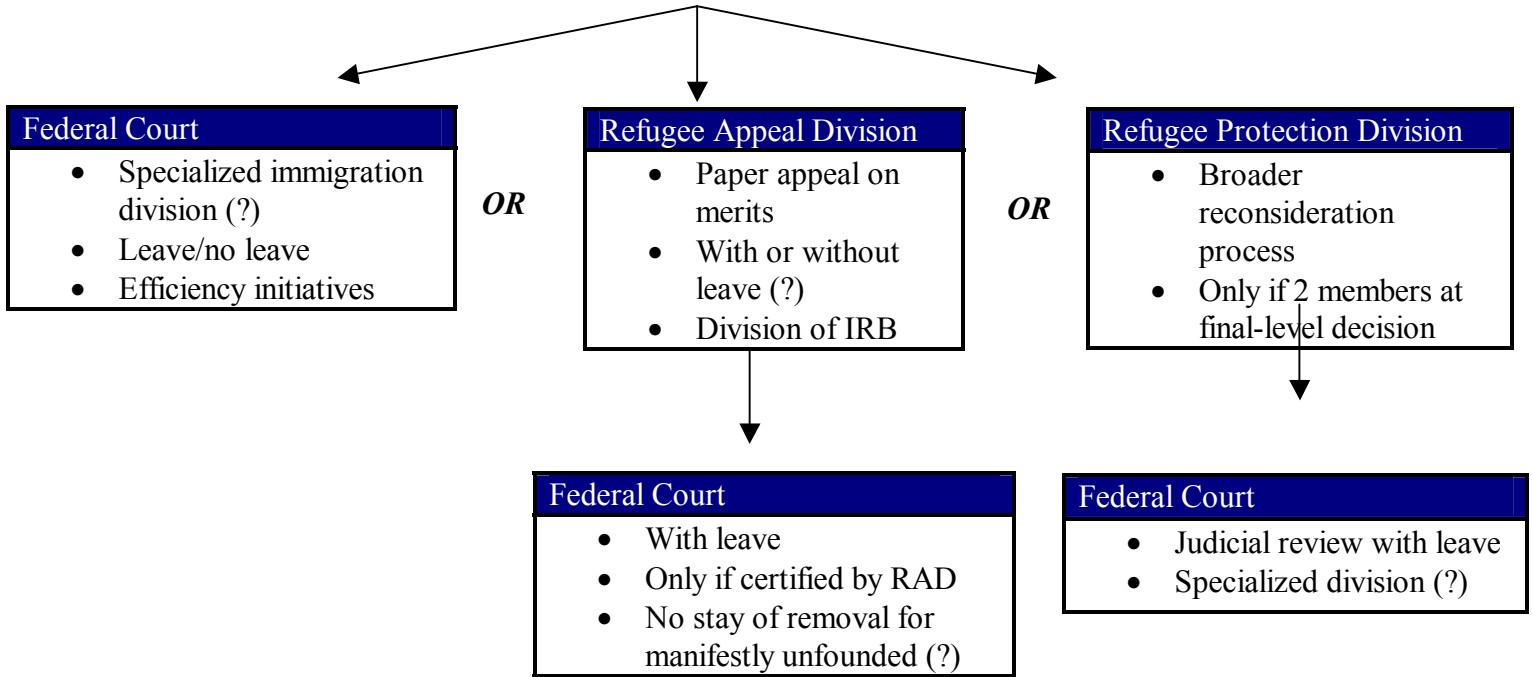
4. First-Level decision

Refugee Protection Division
<ul style="list-style-type: none"> • Hearing/interview • 2 members/1 member • No RPO • Independent tribunal

OR

Administrative Decision
<ul style="list-style-type: none"> • Interview • Independent public servant • Natural justice protections • Right of appeal

5. Appeal/Judicial Review



6. Removal

CIC / CBSA
<ul style="list-style-type: none"> • Paper only (?) • Interview for exceptional circumstances (?)

OR

IRB
<ul style="list-style-type: none"> • Paper only (?) • Interview for exceptional circumstances?

- *Pre-removal review strictly limited to change of circumstances (country conditions or personal)*
- *H&C available any time in claim process*
- *Statutory bar against stay of removal for post-appeal H&C applications*

Endnotes

1. Pre-claim extra-territorial recommendations

Several speakers suggested that unnecessary pressures could be removed from the asylum system with more efficient and pro-active processing of overseas H&C applications. Foreign citizens with Canadian family relations use the asylum system as the only feasible access to Canada when H&C overseas processing is more appropriate.

2. Pre-hearing phase

It was generally agreed that the port-of-entry and inland application processes should be the same. Most agreed that CIC should have initial responsibility for security assessment, detention and claimant eligibility decisions. Eligibility factors were not part of the Roundtable agenda although some participants stated that a full review of the asylum system should include a discussion about appropriate eligibility screens, including the safe third country provision. Some suggested that CIC could make an early H&C decision to divert obvious H&C cases from the asylum system. It was noted that a similar CIC authority in the past, resulted in few decisions and could lead to processing delays in the bulk of the cases. Some stated that it was imperative to refer the claimant to the first-level decision-maker as soon as possible whether by way of deemed referral or some other means.

3. Refugee Claims Advice Bureau (RCAB)

Several functions were identified in the pre-hearing process that could be bundled

together including counselling claimants about the asylum process (and an H&C alternative), early medical examination referral and confirmation, social service referrals, potential referral to CIC for an H&C decision and finally, streaming recommendations (manifestly founded, manifestly unfounded, regular stream). The RCAB could be a separate agency or could be a preliminary phase of the claim process at the IRB. Some noted that a separate agency would mean an extra administrative step and time delays. There are issues to clarify about the role of legal counsel in this phase of the process.

The purpose of an H&C referral at this stage would be to remove appropriate cases from the full claim process. Some suggested that the claimant be given a choice of alternative but mutually exclusive processes. Others suggested that the referral be sequential, permitting a refused H&C applicant to return to the refugee stream.

4. First-level Decision

There was unanimous agreement that the decision-maker had to be independent and appointed solely on merit criteria. The majority preferred an independent tribunal although a few speakers felt that an independent administrative decision-maker could operate within a public service structure as CIC adjudicators did in the past. Some said that the administrative decision may be quicker but concerns were raised about the quality of the decision-making and the overall efficiency of such a model if it entailed a large number of overturned decisions as in the United Kingdom.

There were differing views of the tribunal process. It could be either a formal hearing or less formal interview model. Both processes would of course retain basic natural justice protections. Some recommended one decision-maker, some recommended two decision-makers with a more modest appeal mechanism (see below). Most said that the Refugee Protection Officer (RPO) was not required in the hearing, especially if there were two members.

5. Appeal/Judicial Review

There was general agreement that some form of appeal was necessary given the uncertainty of refugee decision-making and the expectations of international standards. Most participants stated that a single first-level decision- maker raised the importance of an effective appeal/review model. It was generally acknowledged that

privative clauses were not desirable and therefore, any form of non-court appeal would also entail an additional judicial review to the Federal Court. Most of the suggestions can be divided into one of three models.

1) Federal Court: This could be either an appeal on the merits or judicial review, with or without leave. Direct referral to the Federal Court avoids a two-step review process. It was noted that a court is normally slower and more expensive than a tribunal model. A specialized immigration division of the court would be more efficient and could introduce other efficiency measures such as one judge considering both the leave application and full decision where leave is granted.

2) Refugee Appeal Division (RAD): Many recommended the current RAD model contained in the Immigration and Refugee Protection Act (IRPA) as a reasonable compromise following a single-member decision. This means an appeal on the merits but limited to a paper process (no live hearing). Some suggested a leave provision to deal more quickly with obviously non-meritorious appeals. Most agreed that a subsequent judicial review by the Federal Court was unavoidable. There were some suggestions to limit judicial review by a leave provision, to issues of law or by a certification process similar to that now employed in the Federal Court.

3) Reconsideration within the Refugee Protection Division (RPD): Some suggested that if resources were devoted to a two-member panel within an independent tribunal, then a review of those decisions could be done by way of a broader application of the Reconsideration authority now available to the RPD. This would be an administrative process by way of application but without the formality of written reasons. Judicial review to the Federal Court would still be available, with leave, and still, potentially, to a specialized division of the court.

6. Removal

There was general agreement that any pre-removal risk review be strictly limited to a change in country conditions or personal circumstances. Some approved of time limits whereby no review would be required if there were prompt removal (eg. 3 months) after a fair and sound two-decision process. Others felt that a change of circumstances must always be considered. Some said that CIC or the Canadian Border Services Agency would be the most efficient decision-maker. Others suggested that the RPD should make the risk analysis since they had greater country expertise. There was a brief discussion about process, whether it be limited to a paper application or allow for an interview for exceptional circumstances.

There was some discussion about concurrent and consecutive H&C applications. It was suggested that, since H&C is available to claimants at any time in the process, a late H&C application, after the appeal or judicial review decision, should not be a means for the claimant to delay removal proceedings. It was suggested that no stay of removal be available for late H&C applications. On the other hand, a stay should be available for early H&C applications that have not received a response.

ROUNDTABLE ON CANADA'S REFUGEE SYSTEM

TABLE RONDE SUR LE SYSTÈME CANADIEN DE DÉTERMINATION DU STATUT DE RÉFUGIÉ

List of Participants - Liste des participants

**Professor Sharryn J. Aiken
Queen's University**

**Paul Aterman
A/Senior General Legal Counsel
Immigration and Refugee Board**

**Jenny Bedlington
Principal
JennGen Consulting, Australia**

**Michael Bossin
Barrister & Solicitor
Community Legal Services, Ottawa**

**Professor François Crépeau
University of Montreal**

**Krista Daley
Senior General Legal Counsel
Immigration and Refugee Board**

**Professor Catherine Dauvergne
Canada Research Chair in Migration Law
University of British Columbia**

**Janet Dench
Executive Director
Canadian Council for Refugees**

**Professor Stephen Gallagher
Bishops University**

**Professor Donald Galloway
University of Victoria**

**Mitchell J. Goldberg
Barrister & Solicitor**

**Professor James C. Hathaway
University of Michigan Law School**

**Barbara L. Jackman
Barrister & Solicitor**

**Buti Kale, LL.D.
Senior Legal/Protection Officer
United Nations High Commission for Refugees (UNHCR), Canada**

**Professor Nicole LaViolette
University of Ottawa**

**Professor Yves LeBouthillier
University of Ottawa**

**Professor Audrey Macklin
University of Toronto**

**David Matas
Barrister & Solicitor**

**Alex Neve
Secretary General
Amnesty International Canada**

**Robert Orr
Director General
Refugee Directorate
Citizenship and Immigration Canada**

**William F. (Bill) Pentney
Assistant Deputy Attorney General
Citizenship and Immigration Canada**

Francisco Rico-Martinez
Co-Director
FCJ Hamilton House Refugee Project

Bruce Scoffield
Director
Policy Development and International Protection
Citizenship and Immigration Canada

John Scratch
Former Assistant Deputy Attorney General
Department of Justice
Immigration Law Portfolio

Nick Summers
Barrister & Solicitor and President
Canadian Council for Refugees

Chantal Tie
Barrister & Solicitor and Executive Director
South Ottawa Community Legal Services

Lorne Waldman
Barrister & Solicitor

Pia Zambelli
Barrister & Solicitor

CO-HOSTS

Judith Kumin
Visiting Professor
Carleton University

Peter Showler
Gordon F. Henderson Chair in Human Rights
Human Rights Research and Education Centre
University of Ottawa