IRB Review

CCR submissions

28 August 2017

In June 2017, the Minister of Immigration, Refugees and Citizenship announced an independent review of the Immigration and Refugee Board (IRB) of Canada to determine the possibilities for efficiencies and higher productivity. This document provides the key submissions of the Canadian Council for Refugees (CCR).

A. Overview

The Canadian Council for Refugees believes that fairness and efficiency are best achieved by:

- Giving everyone who requests it access to the refugee determination system so that their need for protection can be evaluated quickly and fairly.
- Having the same rules for everyone, while providing flexibility to respond to individual needs.
- Assessing each case on its individual merits.
- Investing in high quality initial decisions.
- Keeping it non-political: have an independent body make all decisions.
- Putting the necessary resources in place: avoid backlogs.
- Scrupulously adhering to human rights standards (international instruments and the Canadian Charter of Rights and Freedoms).

Priority to fairness: In the view of the CCR, the refugee system must be designed first and foremost to work for people who need Canada's protection. If fairness and efficiency are pulling in different ways, the system must opt for fairness. The decision to be made is one of the most serious ever taken by a Canadian decision-maker: the consequences may literally be a matter of life and death for the claimant. Only by ensuring that the refugee determination system makes the right decisions can Canada be confident it is complying with its obligations under the Refugee Convention, the Convention against Torture and International Covenant on Civil and Political Rights.

A fair system can (and should) be efficient: For the most part, fairness and efficiency are in fact pulling in the same direction. A system that gives people a fair chance to be heard is more likely to make the right decision, reducing the need for appeals. Giving people enough time to prepare themselves for a hearing means also that there is time to schedule appropriately, reducing the risk of hearings not proceeding. Long delays and big backlogs are unfair as well as inefficient.

Ensuring system resources match claimant numbers: Over recent decades, Canada's refugee determination system has repeatedly found itself in difficulties, leaving thousands of claimants in long-term limbo, because of the failure to name decision-makers or provide sufficient resources. Refugee claim numbers are not consistent, predictable or controlled by the government. No matter how perfectly the system is designed, if it is not able to quickly increase capacity when numbers increase, backlogs will inevitably emerge. Similarly, when the authority to name decision-makers or provide resources lies at the political level, important delays regularly occur, compromising the efficiency of the system.

Understanding the whole process: For refugees who make a successful claim, the process does not end when they are granted Protected Person status: they need to become permanent residents and, in many cases, to be reunited with their family. These processes should be considered **essential parts** of the refugee claim process.

B. Strengths of Canada's refugee determination system

It is important to safeguard and build on the strengths of the current system in any efforts to seek greater efficiencies and higher productivity. These strengths include:

- **An expert, independent quasi-judicial tribunal, the IRB**

The IRB has earned a reputation around the world as a model for refugee determination. A quasi-judicial tribunal is the minimum level of institutional structure appropriate to hear refugee claimants, given the gravity of the rights issues at stake. Because of its focus on refugee determination, the IRB has been able to develop significant expertise that is essential for good quality refugee determination, including through Chairperson's Guidelines, research and documentation using methods that respect risks inherent to the refugee reality, and jurisprudence. Because it is independent, refugee determination is appropriately isolated from other arms of the government, whose political, diplomatic or institutional priorities might taint the credibility of refugee determination.

- **A high-quality first-level decision**

Since 1989 when the IRB took over refugee determination, Canada has invested in a serious and thorough initial decision. Investing in skilled and independent decision-makers and a full and fair opportunity for claimants to be heard pays off. By working to get it right as often as possible the first time, there is less need for expensive appeals, and more confidence in the system overall.

Good quality first-level decision-making does not negate the need for an appeal process: any administrative process needs a robust appeal mechanism to mitigate the possibility for human error. However, a system with generally good first decisions, where fewer decisions need to be overturned on appeal, has more integrity.

In contrast, some other countries have opted for a low quality first level: it may be cheaper in the short term, but this advantage is offset by a high rate of decisions overturned at appeal.

For example in the UK, 41% of decisions are overturned by the courts (Home Office Feb 2017 data).

C. RPD hearings

Current issues

- As an independent tribunal, the Refugee Protection Division (RPD) has in theory significant latitude to organize the management of the caseload, adapting to changing profiles and numbers of claimants. However, they are currently constrained by the rules in the Act and Regulations, which severely limit their ability to manage cases in an efficient manner.
- The current timelines (15 days for Basis of Claim form (BOC), 60 days for hearings) are not long enough for claimants to present their case adequately and prepare for a hearing (including obtaining necessary evidence).
- The system lacks flexibility for claimants who need more time (including claimants with significant mental health issues related to the persecution they have suffered).
- Cases not subject to legislated timelines end up in long-term limbo, as the RPD is forced to give priority to new claims. Older claims (e.g. returns from Refugee Appeal Division (RAD), Federal Court, "legacy" claims) are low priority, and in theory may never be heard, depending on the number of new claims subject to legislated timelines. (Given the unfairness of this problem, the RPD recently began to devote some of its resources to the older claims.)
- There is a major issue of cases not being able to proceed because the Front End Security Screening is not complete.
- There are other reasons causing may hearings to be postponed or adjourned.
- The RPD is not able to triage cases appropriately. With more adequate timelines, the RPD could better identify cases that could be expedited (currently they are only able to expedite based on country of origin), schedule a later hearing date for cases needing more preparation time, identify and address specific issues in cases that don't need to be addressed in a hearing (e.g. through case conferences, or through requests for further documentation), and determine how much hearing time a case is likely to need.
- Refugee claimants currently experience enormous stress because of the scheduling realities. New arrived claimants have inadequate time to prepare themselves for the originally scheduled hearing. In approximately 50% of the cases, the hearing does not proceed, but the claimant only learns that a few days before, or even on the day of the hearing. Once the hearing does not proceed, the claimant may well have no idea when a hearing will go ahead. In other words, hearings are either too soon or postponed to an indefinite future.

CCR recommendations on scheduling

- Provide longer timelines for the hearing and more flexibility when a claimant requests a postponement.

- Give the RPD the power to do the scheduling.

- RPD should triage the cases first and then schedule a hearing date, taking into account the specifics of the case.

- In scheduling, consideration must be paid to the perspective of the claimants, so as to minimize stress and to take into consideration the needs of claimant. Refugee claimants should receive notice of an effective hearing date soon after referral. Requests for more time because of the needs of the claimant should be handled flexibly (without, for example, requiring expert evidence of PTSD).

- Claimants should be given reasonable advance notice (e.g. 10-14 days) of cancellation of a hearing (e.g. because Security Screening is not done, shortage of Board members or non-availability of interpreters). Last minute cancellations should be limited to emergencies such as a Board member being sick. When a hearing is cancelled, an alternative date should be provided soon after to the claimant, particularly when the cancellation is due to double-booking.

- RPD should have a mechanism through which claimants /counsel can see hearing slots that come available at short notice and can submit their availability to proceed at one of the available times. When a case has to be postponed close to the date of the hearing, it is unfair to ask a claimant to go forward with only a few days notice, but some claimants are ready to go, so it is a matter of matching available slots with the claimants.

Specific hearing management strategies

- **Expedited**: IRB is currently expediting claims from a limited number of countries. In the past, expedited hearings were not limited by country. Also, the expedited processing included a very short hearing, which allowed the member to resolve simple issues that would otherwise lead to the case not being approved in expedited. Having a short hearing is also an important guarantee of the system (including as a protection against criticism of the system).

  Recommendation: Claimants from all countries should be eligible for expediting, based on clear guidelines. Cases suitable for expediting should be identified by the RPD; counsel should also be able to submit cases that meet the guidelines. Members deciding cases in the expedited process should hold a very short hearing with the claimant, at which they can resolve simple issues. Board members assigned to process expedited claims must have the right skills and mindset.

- **Short hearings:** It is possible to have short and effective hearings, but Board members need to know how to do a short hearing: i.e. to avoid getting into aspects that are not relevant to the decision. However, it is not efficient to focus only on a single issue which is used to refuse the claim. If the claim is overturned on appeal on that issue, the claim will have to be reheard as none of the other issues will have been reviewed. Also having a single issue focus encourages Board members to think in terms of issues on which to refuse claimants, rather than approaching the claim with an open mind.

  Recommendation: Train board members to identify and address the key issues relevant to determining a refugee claim, with a view to quickly identifying claimants who should be recognized as refugees. Assign to short hearings only Board Members who can successfully do this.

- **Specialized panels/teams** – while there may be efficiencies to having specific teams working on a particular country, region or type of claim, caution must be used because of the danger of fatigue and cynicism developing among decision-makers after hearing many similar stories. In addition, a team can become close-minded in its analysis, and teams may be unduly influenced in their analysis by decision-makers with strong opinions and perhaps seniority in the team.

D. Mass arrival/backlog measures

Unfortunately, decade after decade the Canadian refugee determination system has become mired in backlogs. In recent weeks, Canada is faced with the challenge of scaling up its refugee determination process in response to significant increases in refugee claims. Backlogs cause enormous hardship to people living for years in uncertainty and unable to get on with their lives, often separated from family members left behind in situations of danger. In addition, backlogs undermine public confidence in the refugee determination system, and weaken communities because of the vulnerability of people with precarious status and the disruption caused when people are deported after many years in Canada.

Recommendations:

- Implement a mechanism to ensure the IRB quickly receives additional resources when claim numbers go up and/or a backlog emerges.

- Institute a backlog regularization program for people who have been waiting for a refugee determination for years. A long delay in refugee determination is inherently unfair in that memories are faded, making it more difficult to testify, and circumstances in the home country may have changed. In the meantime, people forced to wait years for a refugee determination become well-established residents in Canada and it is unfair to them and disruptive to communities to deport them years later. The CCR has recommended that a regularization program be implemented for legacy claimants (those who applied before

December 15, 2012)[1]: these principles should be extended to others forced to wait years. Regularization of backlog claimants reduces pressures on the refugee determination system, which can instead focus resources on more recently arrived claimants.

- Re-open the possibility of filing simultaneous humanitarian and compassionate applications while going through the refugee determination process. Some claimants have compelling humanitarian factors which merit permanent residence. Again, pressures on the refugee claim process are reduced if some claimants are able to withdraw their claim because they have an alternative route to permanent residence.

E. Governance issues for IRB

Currently the IRB reports to the Minister of Immigration, Refugees and Citizenship. There is no governance structure that can effectively hold the IRB to account, given that the Minister does not have the resources nor necessarily the expertise to effectively monitor whether the IRB is acting fairly and efficiently. At the same time, the IRB could no doubt benefit from an expert and independent body that reviews and challenges its functioning.

We note that this is an issue not just for the IRB but for various tribunals and agencies across government.

Recommendation: Create an "accountability secretariat for independent agencies", with expertise in fairness and efficiency, that would review and report on agencies' functioning (somewhat parallel to the role of the Auditor General).

F. Issues for IRCC and CBSA

- **Ministerial interventions**: Both Immigration, Refugees and Citizenship Canada (IRCC) and the Canada Border Services Agency (CBSA) make interventions before the RPD. Some interventions add little or nothing to the process; many lead to inefficiencies because the intervention is made late, the Minister's representative is not available or asks for a postponement, or the intervention means that the hearing is unnecessarily long.

  Recommendation: IRCC and CBSA should review their processes in order to focus their interventions on cases where they have something meaningful to add to the process. When they intervene they should rigorously respect the timelines.

- **Cessation:** Stripping permanent residents of status simply because they are no longer refugees serves no policy objective; on the contrary it undermines the integration of refugees. In addition to causing enormous human suffering, cessation applications are contributing to the RPD backlog and wasting significant government resources, for absolutely no purpose.

[1] http://ccrweb.ca/en/legacy-cases-recommendation-regularization

Recommendation: Stop making unnecessary cessation applications and withdraw current applications. Amend the law regarding cessation to reverse the 2012 changes.

G. Designated Countries of Origin (DCOs)

Concerns

- Treating claimants differently based on country of origin or membership in a class is discriminatory.
- The Federal Court has confirmed that denying DCOs access to the RAD is a violation of section 15 of the Charter. By the same logic, the shorter timelines may well also be found to be unconstitutional, if litigated (which is likely to happen if DCO provisions are not eliminated).
- The government's evaluation reveals that in practice processing times for DCOs are not significantly faster.[2]
- Having different categories of claimants subject to different rules is inefficient and causes significant scheduling problems for the IRB.
- Acceptance rates for nationals of several DCOs demonstrate that these countries are not in fact safe for some of their citizens (in 2016, for example, Hungary: 61%, Slovakia: 51%).

Recommendation: Abolish the DCO regime entirely.

H. Designated Foreign Nationals (DFNs)

Concerns

- The provisions clearly violate the Charter.
- Although they are not currently being implemented, these provisions are offensive and should not be on the books.

Recommendation: Eliminate DFN provisions

I. Making a claim

Inland claimants currently don't get access to services until they file all forms (including BOC). This causes enormous stress and difficulty, as people are torn between making their claim with poorly prepared forms or struggling to survive in absolute poverty while preparing the forms more rigorously. In some cases there is an irresolvable conflict: without access to

[2] IRCC, Evaluation of the In-Canada Asylum System Reforms, Finding #8

healthcare the person is not well enough to complete the forms, but without completing the forms the person cannot get access to healthcare.[3]

- The situation for inland claimants who make a claim on arrest is impossible: the law requires them to produce the BOC the same day (or within 3 days).
- The new system has led to significant downloading to NGOs of responsibility to help fill in forms, get documents translated, etc. This is not sustainable.[4]
- There are many mistakes in forms completed in rushed and constrained circumstances (e.g. in detention).

Recommendation: Amend process for making a claim, particularly to resolve issues for inland claimants, to ensure:

- Those wanting to make a claim have access immediately to services (including IFH, social services)
- Claimants have time to fill out forms accurately
- Prompt processing by IRCC/CBSA when claimants are ready for eligibility determination

In particular we propose:

- Having the same process wherever you make your claim (inland or POE), based on the POE process, i.e. the BOC does not need to be filed on making the claim.
- Issuing immediate acknowledgement of claim document that can be used to access services (this was done in the past).
- Providing more time for claimants to fill out forms required by CBSA/IRCC. However, there needs to be a requirement that eligibility is done promptly once the forms are ready (e.g. eligibility must be determined max 3 days after forms submitted) to avoid claimants being put into limbo at this point.

We note that it is also good from an enforcement perspective to have people present themselves as soon as possible rather than waiting months to get all the forms completed. It is in no one's interest to have a system that encourages and even to some extent requires people to remain off the radar for weeks or months.

Recommendation: Issue work permits to all adult eligible refugee claimants automatically.

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[3] See CCR, The Experience of Refugee Claimants at Refugee Hearings in the New System, 2014, http://ccrweb.ca/en/refugee-hearing-report-2014

[4] See CCR, Keeping the door open: NGOs and the new refugee claim process, 2014, http://ccrweb.ca/en/keeping-door-open-report

The current system of requiring individual applications for work permits is very inefficient, forces people to rely for months on provincial social assistance when they could be working and wastes IRCC resources on processing applications. Refugee claimants used to receive work permits which excluded work in specified areas (e.g. involving food preparation) until they had passed their medical. This provision could be reinstated.

J. Legal aid

Most refugee claimants lack the money to pay for their own lawyer and thus rely on legal aid for representation. Unfortunately legal representation is not available to refugee claimants in all regions of Canada, and even when it is available it is in some cases inadequate or under threat. Refugee claimants are entitled to legal aid under the Canadian Charter of Rights and Freedoms: the Supreme Court has ruled that legal representation is required when the right to life, liberty and security of the person is at stake, as it is in the case of refugees.

An efficient refugee determination system depends on claimants being well-represented. When claimants are unrepresented or poorly represented, hearings are more likely to be postponed and to take longer, and first level decisions are more likely to be successfully appealed.

Recommendation: Federal government must work with provincial and territorial governments to ensure there is increased and sustainable legal aid funding to represent refugees and vulnerable migrants in refugee and immigration proceedings.[5]

K. Basis of Claim form

Concerns

- 15 days is not enough time for claimants to complete the BOC.
- Inland claim on arrest: in this circumstance people have to produce BOC same day (or within 3 days) which is completely unrealistic.

Recommendations:

- Eliminate the same day BOC filing for inland claims.
- Provide longer timelines for BOC for all claimants.

[5] http://ccrweb.ca/en/media/legal-aid-essential-for-refugees

L. "No credible basis" and "manifestly unfounded"

Concerns

- Experience shows that bad decisions are made invoking "no credible basis" or "manifestly unfounded". These decisions are very difficult to correct because claimants are denied access to the Refugee Appeal Division.

- It is fundamentally unfair that decision makers should be able to insulate their decision from appeal, simply by designating the claim "without credible basis" or "manifestly unfounded".

Recommendation: Eliminate provisions relating to "no credible basis" and "manifestly unfounded" claims.

M. Refugee Appeal Division (RAD)

Concerns

- Several categories of claimants are barred access to RAD (STCA claimants, manifestly unfounded/ no credible basis – who also have no stay of removal at JR)
- Timelines for RAD are too short.
- The process is very complex and not accessible for someone who is not represented by a lawyer.
- The rules regarding new evidence are very restrictive and lead to the exclusion of evidence that may show that the person needs protection. The system should be designed to ensure that we protect those who are at risk, and not reject appeals on purely technical grounds.
- The RAD rules are unfairly biased in favour of the Minister. Any bias should be in favour of the claimant, whose life may be at risk.
- Returns to the RPD are inefficient. Many claimants are waiting years for a new RPD hearing after being sent back from the RAD.

Recommendations:

- Remove all bars on access to RAD.

- Provide longer timelines for RAD.

- Amend the wording regarding new evidence to say that the claimant may provide additional evidence that is relevant to the claim.

- Give the Minister no more rights before the RAD than the claimant, at least when the Minister has participated in the first instance hearing.

N. Post-claim

Concerns

- Refused claimants are subject to a one year bar on Pre-Removal Risk Assessment (PRRA) (3 years for DCOs). This results in a serious protection gap when there is new evidence that the person is at risk.

- Claimants cannot make an H&C application simultaneously or for one year after the claim is decided.

Recommendations

- Replace the PRRA with a re-opening provision at the IRB (Eliminate the separate PRRA altogether and transfer all of the decision-making currently assigned to PRRA to the IRB, so that all refugee and other risk determinations (s. 96 and s. 97) are made by the IRB. In the case of claimants who have had a previous hearing at the IRB, provide for an application to re-open based on new evidence).

  Having a re-opening provision with leave at the IRB would be a fairer and efficient way of dealing with issues arising immediately prior to removal. Rather than having a CBSA removals officer (who is not qualified in matters of risk) handle a deferral request, the function could be dealt with by the IRB, which could decide whether there was sufficient evidence to grant leave for a re-opening. Such a provision would also relieve the Federal Court (which is a much more expensive venue) of some of the many emergency stay requests filed to prevent removal.

- Eliminate the IRPA provision that bars an application for re-opening under any circumstance if judicial review has been pursued.
- Eliminate the bar on H&C for claimants.

O. Automatic permanent residence for protected persons

Concerns

- Accepted refugees spend long periods waiting for permanent residence, delaying family reunification and integration.

- Where immediate family is outside Canada, family reunification for refugees is intolerably long. (34 months for DR2s, for the year ending March 2016, and significantly longer in some regions).

- There are few legal bars to permanent residence for Protected Persons, and CBSA /IRCC have had the opportunity to look into those issues (criminality, security) in advance of the refugee hearing.

- If people can lose PR automatically through loss of PP status – cessation – why not gain PR automatically?

- Processing of permanent residence applications uses up IRCC resources. Given that the vast majority of Protected Persons become permanent residents, this is not a good use of resources.

- Minor Protected Persons cannot include family members on their application and have no entitlement to family reunification, which violates Canada's obligations under the Convention on the Rights of the Child.

Recommendations:

- Provide in IRPA for automatic permanent residence for persons found to be a Protected Person, as well as for their family members and dependants, whether inside or outside of Canada. (If necessary, the law could provide that this does not apply where CBSA /IRCC has raised an issue of potential inadmissibility.)

- Amend the regulations so that "family member" of a "protected person" includes the parent and siblings of a "protected person" who is a minor.

NB we note that IRCC's background paper addresses removal of rejected claimants, but not access to permanent residence for those who are accepted. This suggests a lack of balance. We underline that the purpose of the refugee determination process is to offer protection to those who need it. The highest priority should be those for whom the system is designed, not those who may not need Canada's protection.