CANADIAN COUNCIL FOR REFUGEES

THE REFUGEE APPEAL: IS NO ONE LISTENING?

31 March 2005

"*It seemed liked no one was listening to us… We just wanted an appeal – like normal people in Canada have.*"
Husband of Moroccan woman recently deported despite her fears of persecution.

Background
Refugee claimants in Canada appear before a single decision-maker who determines whether they need Canada's protection. The decision is not subject to any appeal on the merits of the case. This means that a single person decides the fate of a refugee claimant, even though a wrong decision may mean that a claimant is sent back to face persecution, torture and even death.

This is not the refugee determination system that Parliament approved. In 2001, Parliament passed a new law, the *Immigration and Refugee Protection Act*, that created a Refugee Appeal Division (RAD) where refugee determinations could be reviewed. They balanced this new recourse with the reduction of the number of board members hearing the claimant from two to one. In 2002, the government, without consulting Parliament, implemented the new law without implementing the Refugee Appeal Division. On the other hand, the government went ahead with the reduction of board members hearing a claim, leaving claimants' fates in the hands of a single person.

Since then, the government has continued to fail to respect the law passed by Parliament.[1]

Why an appeal is needed
The stakes are high: Refugee determination is one of the few decision-making processes in Canada where a wrong decision can mean death for the applicant. Even though the stakes are so high, there are fewer safeguards in the system than for other decision-making processes where

[1] The government has also broken the promise made by then Minister of Citizenship and Immigration, Denis Coderre, to the Canadian Council for Refugees in May 2002. He repeated his promise in the House of Commons on 6 June 2002: "I have already made a commitment to the Canadian Council for Refugees that we will have an appeal system in place in one year's time."

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the stakes are much lower (for example, a minor criminal offence). As a result, wrong decisions go uncorrected.

Decision-making is inherently difficult: Refugee determination is extremely difficult because it involves deciding what may happen in the future in another country, about which the decision-maker may have limited knowledge, based often on testimony that must pass through an interpreter and that may be confusing because of the traumatic experiences that the claimant has lived through. Often decision-makers have little documentary evidence that can help decide the case one way or the other, and the credibility of the claimant is a decisive factor. However, credibility assessments can easily be wrong.

Not all decision-makers are equally competent: For many years, appointments to the Immigration and Refugee Board have been made in part on the basis of political connections, rather than purely on the basis of competence. As a result, while many board members are highly qualified and capable, some are not. The problem was recognized by former Minister of Citizenship and Immigration Minister Judy Sgro who announced a reform of the appointment process in spring 2004.[2] While this is a positive development and may mean future improvements, in the meantime board members appointed under the old political patronage system continue to decide on the fate of refugee claimants.

Decision-making is inconsistent: Refugee determination involves a complex process of applying a legal definition to facts about country situations that can be interpreted in different ways. Different decision-makers do not necessarily come up with the same answer, leading to serious inconsistencies. Two claimants fleeing the same situation may not get the same determination, depending on which board member they appear before. (This was the case with two Palestinian brothers who had the same basis for their refugee claim, yet one was accepted and the other refused. The refused brother was deported). An appeal level helps a system to make more consistent decisions, because precedents established at the appeal level must be followed at the lower level when the facts are the same.

Poor representation: Refugee determination is made more difficult because refugee claimants sometimes have no legal representative, or are represented by incompetent and unscrupulous lawyers and consultants. This problem is quite common because refugee claimants rarely have much money to pay for a lawyer, and legal aid is in some provinces unavailable to claimants and in others so meagre that few competent lawyers are willing to represent claimants on legal aid.

Any decision-making process will make mistakes: As human beings, we are all bound to make mistakes from time to time, however hard we try. An effective system recognizes this and provides a mechanism to correct errors. We do this in the criminal justice system, which allows anyone who feels they have been wrongly convicted to appeal the decision.[3] We try to avoid people being wrongly sent to jail here in Canada by providing appeals: why would we not similarly try to avoid refugees being wrongly removed, which could result not only in their being jailed, but tortured and even killed?

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[2] See Citizenship and Immigration Canada news release, 16 March 2004, *Minister Sgro Announces Reform of the Appointment Process for Immigration and Refugee Board Members*.

[3] For example, statistics from the Quebec Court of Appeal show that in 2004 fully 45% of appeals in criminal cases were successful. This is not generally seen as a sign that the judges of the lower court are incompetent but rather that errors are human and need to be corrected.

Non-implementation shows disrespect for the rule of law: Parliament approved a law that included a right to an appeal on the merits for refugee claimants. This right was balanced by a reduction in the number of board members hearing a case from two to one. During debate there was never any suggestion that the implementation of the appeal would be indefinitely delayed and there is no indication that Parliament would have passed the law if the government had proposed it as it is now being implemented.

> "The Canadian government is joining the ranks of Western governments which are using the political context created by 9/11 to renege on a general commitment to the rule of law. This fact is most marked in the area of immigration and refugee law. Canada is now in flagrant violation of one of the central pillars of the rule of law, the right of access to an independent court to test the legality of decisions affecting basic rights. Judicial review of such decisions is available, but only on leave, which is infrequently granted. That this is an inadequate safeguard has been recognised through a legislative promise to establish a Refugee Appeal Division, a promise which the government refuses to implement. In persisting with this refusal, the government exhibits the two faced stance which is so depressingly common these days whereby governments maintain the facade of the rule of law without delivering its substance." David Dyzenhaus, professor of Law and Philosophy, University of Toronto

International obligations

As a signatory to the 1951 Convention relating to the status of refugees, Canada has an obligation not to return a refugee directly or indirectly to persecution.[4] If a refugee's claim is wrongly rejected and Canada subsequently returns that refugee to persecution, we have violated our international legal obligation. Similarly, under the Convention against Torture, Canada must not send anyone to a country where there are substantial grounds for believing that they would be in danger of being subjected to torture.[5]

International bodies commenting on Canada's compliance with its obligations towards refugees have criticized the lack of an appeal on the merits.

In February 2000, the Inter-American Commission on Human Rights published its *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*. They stated that:

> "Where the facts of an individual's situation are in dispute, the effective procedural framework should provide for their review. Given that even the best decision-makers may err in passing judgment, and given the potential risk to life which may result from such an error, an appeal on the merits of a negative determination constitutes a necessary element of international protection." (para. 109)

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4 Convention relating to the status of refugees, article 33 (known as the principle of non-refoulement).

5 Convention against Torture, article 3.

The United Nations High Commissioner for Refugees (UNHCR) has also consistently maintained the need for an appeal on the merits. After the government's announcement that the Refugee Appeal Division would not be implemented, the UNHCR wrote to then Minister of Citizenship and Immigration Denis Coderre:

> "UNHCR considers an appeal procedure to be a fundamental, necessary part of any refugee status determination process. It allows errors to be corrected, and can also help to ensure consistency in decision-making. Canada, Italy and Portugal are the only industrialized countries which do not allow rejected asylum seekers the possibility to have first instance decisions reviewed on points of fact as well as points of law. In the past, a measure of safeguard was provided by the fact that determinations could be made by a two-member panel, with the benefit of the doubt going to the applicant in case of a split decision. With the implementation of IRPA on June 28th, this important safeguard will be lost."[6]

The UN Committee against Torture, hearing a complaint from Enrique Falcon-Rios, a rejected refugee claimant, found that the Canadian refugee determination system had been unable to correct a wrong decision in his case. The Committee found that the Immigration and Refugee Board had discounted strong evidence that Mr Falcon-Rios had been tortured and that the way the evidence had been treated represented a denial of justice. It concluded that removing him would constitute a violation of Canada's obligation under article 3 of the Convention against Torture.[7]

Current situation

In the absence of an appeal on the merits, there is no other mechanism that can ensure that errors are corrected. A refused refugee claimant can apply to the Federal Court, but only with leave (or permission) from the Court and only on technical legal matters.

Leave is rarely given and the Court does not even provide a reason when it denies leave. From 1998 to 2004, 89% of applications to the Federal Court for judicial review of refugee claim determinations were denied leave. If we compare the number of applications granted leave during this period (under 4,000), with the number of claims refused by the Immigration and Refugee Board during this period (just under 87,800), we find that only 4% of refused claimants had the opportunity to have the decision against them reviewed by the Federal Court.[8] The vast majority of negative decisions are never allowed any kind of review.[9]

Even if a claimant is granted leave by the Federal Court, mistakes will not necessarily be corrected since the Court can only intervene if there is a "reviewable error." Reviewable errors include mistakes such as the decision-maker failing to take into consideration relevant evidence

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[6] Letter dated 9 May 2002. Available at http://www.web.ca/~ccr/unhcr.html

[7] Communication No. 133/1999: Canada. 17/12/2004. Available at http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/ffb5d14bea7f5f30c1256faa0053845f?Opendocument

[8] In fact, some of the applications for judicial review are applications by the Minister for judicial review of a positive decision by the Immigration and Refugee Board. However, these are probably quite few in number. The statistics are based on data provided by the Immigration and Refugee Board.

[9] Many claimants do not even apply for judicial review because of the expense involved in hiring a lawyer. Also, because of the narrow scope of the review, in many cases lawyers will advise the claimants that there is little point in applying for judicial review, since even if the decision is wrong, it may not contain the kind of errors that can be corrected by the Federal Court.

or drawing unreasonable conclusions from the evidence. However, if the original decision-maker considered all the evidence in a reasonable way, but reached the wrong conclusion, the Court will not intervene. It is particularly difficult to get a decision overturned when the decision-maker has based the conclusions on the credibility of the claimant, since the Court will usually say that the decision-maker who heard the claimant is best placed to judge whether they were credible. From 1998 to 2004, 57% of judicial reviews of refugee determinations heard by the Federal Court were denied. This means that even after getting over the difficult hurdle of leave, claimants are still more likely to be turned down by the Court than have the negative decision against them rejected.[10]

The following quotation from a case shows how even when a judge disagrees with the Board's determination, the claimant's application can be rejected simply because there was no reviewable error.

"This is a case that gives me substantial difficulty. The Applicant's testimony was consistent throughout notwithstanding the fact that he underwent a very detailed and lengthy examination. On each of the Board's findings of implausibility, I would have been inclined to find otherwise. In particular, the Applicant's testimony as to his escape appears to me to be quite plausible.

"However, it is not for me to substitute my discretion for that of the Board. The question I must answer is whether it was open to the Board on the evidence to conclude as it did. Recognizing that if confronted with the same evidence, I would have been inclined to hold otherwise, I cannot say that the Board ignored the evidence before it or acted capriciously.

"It drew inferences which were adverse to the Applicant's claim, and the fact that I might have seen the matter differently does not allow me to intervene in the absence of an overriding error. I have been unable to find such an error. The Application is therefore dismissed."

Oduro v. Canada (Minister of Employment and Immigration) [1993] F.C.J. No. 560.

The Federal Court is the only forum in which the refugee determination made by the IRB will be reviewed and potentially overturned. Refused claimants may apply for a Pre-Removal Risk Assessment or for humanitarian and compassionate consideration, but neither of these recourses serve as a mechanism for correcting errors made by the IRB.

A refused claimant applying for a Pre-Removal Risk Assessment (PRRA) can only raise new evidence, not argue that the initial decision by the Immigration and Refugee Board was wrong. This point was recognized by the UN Committee Against Torture, in its decision on the Falcon-Rios complaint cited above. The Committee pointed out that in a PRRA application "it would only be any fresh evidence that would be taken into consideration, and otherwise the application would be rejected. In its view, therefore, this procedure would not afford the complainant an effective remedy […]"[11]

[10] If we compare grants of judicial review with the numbers of refugee claims rejected by the IRB during the period 1998 to 2004, we find that only 1.6% of negative decisions by the IRB are overturned by the Federal Court. It should be noted that there is not an exact correspondence between the IRB rejections and Federal Court decisions, since cases rejected by the IRB in one year will likely be decided by the Federal Court during the next year.

[11] Footnote 7 above, parag. 7.5.

Thus, a refugee claimant who was wrongly rejected might be protected in the PRRA process if they happened to have some new evidence. But this is rarely so and in any case very few claimants are accepted in this process. In 2003, only 2.6% of decisions at the Pre-Removal Risk Assessment were positive.

Applications for humanitarian and compassionate consideration (H&C) also fail to offer any meaningful recourse for claimants who have been wrongly rejected. The measure is a discretionary one and the applicant can be deported before a decision on H&C has been granted. The UN Committee Against Torture decision on the Falcon-Rios case made the following comment on the ineffectiveness of H&C as a recourse:

> "The Committee observes that at its twenty-fifth session, in its final observations on the report of the State party, it considered the question of requests for ministerial stays on humanitarian grounds. It expressed particular concern at the apparent lack of independence of the civil servants deciding on such appeals, and at the possibility that a person could be expelled while an application for review was under way. It concluded that those considerations could detract from effective protection of the rights covered by article 3, paragraph 1, of the Convention [i.e. return to torture]. It observed that although the right to assistance on humanitarian grounds is a remedy under the law, such assistance is granted by a minister on the basis of purely humanitarian criteria, and not on a legal basis, and is thus ex gratia in nature."

François Crépeau, Professor of International Law at Université de Montréal, and Canada Research Chair in International Migration Law, argues as follows for the implementation of the appeal[12]:

"The Refugee Appeal Division is indispensable for the smooth functioning of the Canadian refugee determination system for four reasons:

- *In the interests of efficiency*: a specialized appeal division is a much better use of scarce resources than recourse to the Federal Court, which is not at all specialized in refugee matters. It would be much better placed to correct errors of law and fact and to discipline hearing room participants for unacceptable behaviour.
- *In the interests of consistency of law*: an Appeal Division deciding on the merits of the case is the only body able to ensure consistency of jurisprudence in both the analysis of specific facts and in the interpretation of legal concepts in the largest administrative tribunal in Canada.
- *In the interests of justice*: a decision to deny refugee status is generally based on an analysis of the facts, often relies on evidence that is uncertain and leads to a risk of serious consequences (death, torture, detention, etc.). As in matters of criminal law, a right to appeal to a higher tribunal is essential for the proper administration of justice.
- *In the interests of reputation*: as a procedural safeguard, the Refugee Appeal Division will enhance the credibility of the IRB in the eyes of the general public, just as the provincial Courts of Appeal reinforce the entire justice system. The IRB's detractors – both those who call it too lax, and those who call it too strict – will have far fewer opportunities to back up their criticisms and the Canadian refugee determination system will be better able to defend its reputation for high quality."

[12] Professor Crépeau's comments are based on the research he has done on the Canadian refugee determination system. See, for example, ROUSSEAU, Cécile, CRÉPEAU, François, FOXEN, Patricia, HOULE, France "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*.

Consequences of not implementing the RAD

In the absence of an effective appeal mechanism, refugees who have been wrongly rejected face deportation from Canada to a risk of persecution, torture and even death. In order to avoid this fate, some have gone underground and are living in insecurity and deprivation. Others have been deported.

Saadia El Ouardi was deported to Morocco in January 2005. She had fled Morocco for Canada because she feared the violence that men in her family wanted to inflict on her. The Immigration and Refugee Board's single decision-maker rejected her claim. Her subsequent attempts to convince authorities that she faced risk were unsuccessful, until the last review, on humanitarian and compassionate grounds. That decision was positive, but was too late for Saadia, as she had already been deported.

Saadia's husband, Suad Hetaj, is in anguish over his wife and small son's safety. This is what he said about the need for a proper appeal for refugees:

"We tried to tell them [of the risk to Saadia in Morocco]. We sent pages, over 100 pages, to the Federal Court [application in January 2005 to stay Saadia's deportation] but it was useless. The judge made his decision in only 10 minutes – tell me how he could read all those pages in 10 minutes? It seemed liked no one was listening to us. We asked for more time, just 3 days, because we wanted to wait for the humanitarian and compassionate review, but they wouldn't wait. We just wanted an appeal – like normal people in Canada have. I wanted someone to properly read our appeal and take the time to study it."

Others have sought sanctuary in a church, offered this protection by church members who have felt morally obliged to provide the protection that the Canadian government was failing to provide. Churches have no desire to take over the government's role, nor do they pretend to have particular expertise in refugee determination. But representatives of a church have felt that they must act when they hear the compelling evidence of the human beings before them and learn that there is no opportunity to correct mistakes in the decision because the government has not respected the law and implemented the appeal.

"We have come to the conclusion that the refugee determination process is unfair. Churches who open their doors to provide sanctuary are defying this unjust policy. We believe that refugees have a right to life and liberty, that human life is sacred and must be preserved at all costs. Moral institutions cannot obey laws that are unjust and religious leaders are prepared to accept the penalty for this civil initiative that is the sanctuary movement."

Rev. Darryl Gray, Union United Church, Montreal. Union United Church offered sanctuary to the Ayele family (a mother and three children). The family spent over a year in the church before they were given temporary resident permits in December 2004.

Implications of implementing the RAD

The government has repeatedly justified its failure to respect the law by reference to management concerns such as backlogs, numbers of claimants and processing times.[13] This shows that the government considers refugee claimants primarily not as human beings whose fundamental rights may be threatened, but as a problem to be managed.[14] In taking this approach, the Canadian government not only puts people's lives in danger but also damages Canada's credibility as a country that tries to treat refugees right.

Why no RAD?

- April 2002: the Minister says there are too many claims.[15]
- January 2003: the figures for 2002 show a dramatic decrease in the number of claims.
- February 2003: the Minister says that the number of claims in 2002 (close to 34,000) "is well above figures for most of the previous decade" and that the IRB's "inventory" [i.e. claims waiting to be heard] remains "very high" (50,000).[16]
- January 2005: the figures for 2004 show 25,521 claims were made, well below the average for the previous decade. The IRB's "inventory" at the end of 2004 was 27,290 (the lowest year end figure since 1999).
- March 2005: the Minister says that implementing the RAD would be a barrier to "eliminating the inventory" at the IRB.[17]

Furthermore, it is far from clear that the government is right in its analysis of the management issues. Of course, it is difficult to know what the government's analysis actually is, since it is has not made it public, or even discussed it with representative groups such as the Canadian Council for Refugees.[18] Nor has it made public the assessment of the impact of delaying the RAD that it promised to undertake in the CIC news release of 29 April 2002.[19]

However, certain aspects are known or can be surmised:

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[13] In the news release announcing the non-implementation of the Refugee Appeal Division, 29 April 2002, then Minister Denis Coderre is quoted as follows: "The Canadian refugee determination system is facing an unprecedented increase in refugee claims. The number of claims almost doubled over the last three years, with the most dramatic increase in 2001. Because of the pressures on the system, we are delaying the creation of the Refugee Appeal Division within the IRB and focusing first on current challenges, namely, implementing other aspects of the Act while reducing the inventory and processing times." On 24 February 2005, responding to questions at the Standing Committee on Citizenship and Immigration about whether he would implement the RAD, Minister Joseph Volpe referred to issues of resources and efficiency and concluded that "At this stage of the game, quite frankly, from what I've been able to assess so far, I'm not sure establishing the RAD would accelerate that process."

[14] Many parliamentarians have rejected this approach. On 14 December 2004, the Standing Committee on Citizenship and Immigration unanimously adopted the following motion: "Whereas: The Refugee Appeal Division is included in the Immigration and Refugee Protection Act; Parliament has passed the Immigration and Refugee Protection Act and can therefore expect that it be implemented; and The House of Commons and parliamentarians have a right to expect that the Government of Canada will honour its commitments; The Standing Committee on Citizenship and Immigration requests that the Minister of Citizenship and Immigration, implement the Refugee Appeal Division or advise the Committee as to an alternative proposal without delay."

[15] CIC news release, 29 April 2002.

[16] Letter from Hon. Denis Coderre to CCR, 11 February 2003.

[17] Le Devoir, *Pas d'appel pour les demandeurs de statut de réfugié*, Clairandrée Cauchy, 22 March 2005.

[18] According to documents released to Canadian Press in early 2005, the government had prepared in August 2004 an analysis of the likely outcomes of implementing the RAD and different options for implementing it. However, the actual content of the analysis was not released.

[19] See footnote 15 above.

- The Refugee Appeal Division would cost an estimated $2 million to set up and $8 million annually to run.[20] This is a modest sum in the context of government expenses, reflecting the very modest nature of the appeal approved by Parliament, which is limited to a paper review.[21]
- The costs of implementing the RAD would be mitigated by some cost-savings for the government at the Federal Court, since fewer cases would need to be addressed at that level. Dealing with cases at the Federal Court is much more expensive because of all the formal requirements of judicial proceedings, involving expenses for the govenment not only for the Court itself but also for the Department of Justice lawyers who must prepare documents and appear before the Court.
- Implementation of the RAD will almost certainly reduce significantly the numbers of applications for judicial review to the Federal Court, as well as the numbers of cases granted leave. This can be assumed for several reasons: many of the wrong decisions will be corrected by the RAD and therefore not require a judicial review; claimants who have had one review of a negative decision are less likely to want to pursue an expensive judicial review; the Federal Court will presumably have less reason to grant leave since most cases with reviewable errors will have been dealt with by the RAD.
- Refused claimants who have had an opportunity to have their case reviewed at the RAD will not need to try to use the Pre-Removal Risk Assessment or H&C as a way to overturn the original refugee determination decision. Even though these mechanisms do not provide a recourse for a wrong refugee decision, claimants who have been denied an appeal on the merits naturally try to make these mechanisms work as a substitute for an appeal.
- Implementation of the RAD will improve efficiency and consistency at the first level hearing, by providing precedents that must be followed in similar cases. This will assist decision-makers who will be able to use the jurisprudence of the RAD to simplify decision-making.
- If the government is preoccupied by the time it takes to finalize the cases of people who don't need Canada's protection, it could most usefully address the delays for which it is responsible. Many claimants wait months before they are asked whether they want to apply for a Pre-Removal Risk Assessment and, when they do, many more months for a decision.

Studying alternatives: a delaying tactic?

➢ 5 December 2002, Minister of Citizenship and Immigration Denis Coderre, letter to the Canadian Council for Refugees:

"As Minister of Citizenship and Immigration, I am committed to developing viable options for an effective appeal process in relation to refugee claims. My officials are currently identifying and evaluating possible procedures in this regard. While it would be premature to discuss specific proposals, I would like to re-affirm that we will be consulting organizations such as the Canadian Council for Refugees, about any proposals."

➢ 22 March 2005, Minister of Citizenship and Immigration Joseph Volpe, quoted in Le Devoir:

"The Department has been given the mandate of presenting me with alternatives, if there are any." [translation]

[20] These figures were provided to the Standing Committee on Citizenship and Immigration by the Chairperson of the Immigration and Refugee Board, Jean-Guy Fleury, on 9 December 2004.

[21] *Immigration and Refugee Protection Act*, s. 110-111.

CONCLUSION

Throughout the debate over the Refugee Appeal Division the government has never once been able to put forward a logical principled reason for their failure to do what the *Immigration and Refugee Protection Act* requires. All we have been presented with are vague concerns about cost, inventories and lengths of processing times. No convincing facts or figures have ever been put forward. There are reasons to believe that the government's concerns are groundless. It is quite possible that implementation of the RAD would save money and speed up processing. In the light of the overwhelming evidence that the lack of a RAD seriously jeopardizes the safety of refugee claimants, the use of such thin grounds for their continued refusal to implement RAD makes the government appear petty and uncaring. It is high time that this shameful delaying by the government end. The Refugee Appeal Division should be implemented immediately because it is the humane, just, and right thing to do.