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"Qui bene interrogat bene docet" "He who questions well teaches well"

Is Our Refugee Protection System in Need of Reform?

By Tom Clark and Edward C. Corrigan

Jason Kenney, the federal Minister of Citizenship and Immigration recently announced his intention to end the "wide-scale and almost systematic abuse" of Canada's refugee determination system. This approach is misguided because it assumes that abuse is the challenge. It is not. Implementing the simple paper appeal within the Immigration and Refugee Board (the

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Foreign Credential Recognition and Assessment: An Introduction (Part Two)*

Lesleyanne Hawthorne

In terms of this economic migration, Canada selected a large number of country of origin groups that are at risk of experiencing unemployment levels three to five times the national

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* For the complete and original 2007 publication of this article, see: Lesleyanne Hawthorne, "Foreign Credential Recognition and Assessment: An Introduction" (2007) Canadian Issues 1, published in the Spring Issue by the Association for Canadian Studies.

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Please send your questions to *ImmQuest* care of Mario D. Bellissimo at mdb@obr-immigration.com. If you have any questions you would like asked of either Citizenship and Immigration Canada or the Canada Border Services Agency, send it along and we will ask on your behalf.

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Is Our Refugee Protection System In Need of Reform?

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RAD) is the real challenge, and delivering cost effective, fair and efficient service which protects refugees is the objective.

Allegations of abuse have been merely a distracting theme over the years. People legitimately claim refugee status in Canada from mixed situations, and indeed, not all may be categorized as "refugees", but this is hardly an abuse. It is Canada's obligation under international and domestic law to protect Convention refugees - the whole point of having a formal system is to facilitate making this difficult politicised judgment.

Nor can the Minister assume dysfunction in the refugee claim process because of a backlog of cases caused by the failure of the current government to appoint new members in a timely manner; the established and necessary level of Refugee Board members must be maintained.

There is nothing outrageous about the present 30,000 annual refugee claims. Around 1984, Canada shifted its role in world affairs to include a greater sharing in accepting refugees. Canada's numbers peaked around 1988 and 1989 with 40,000 per annum. Since then, annual arrivals have remained largely in the 25,000 – 30,000 range, typical of larger Western countries. There are many difficulties put in the path of a refugee before they make it to Canada.

There is a certain déjà vu in talks of reform, abuse and dysfunction. Minister Kenney's predecessors made promises of reform periodically. In practice, they made cuts to the level of justice and service. Backlogs seem to be an intended feature of immigration procedures; of course, this should not be so. But a backlog should not mean cuts in justice. As we can see, so far, cuts in justice over the past couple of decades have done nothing to reduce the backlogs. Improving justice in the system is the real challenge for a Minister, yet this Minister has the power to deliver some relatively painless improvements, and also produce a cost saving.

It is astonishing that seven years after a law was passed, the opposition parties should need to pass new legislation in order to implement a law already adopted. But legislation by Parliament to implement the Refugee Appeal Division (RAD) was needed and was under way when the last Parliament ended with the calling of the 2008 federal election. The proposed legislation is under way again in the new Parliament.

Some may see this as a threat to the Minister. We think it is an opportunity for this Minister. Mr. Kenney can simply outflank the new proposed legislation. He can easily implement the proposals which were developed by the then head of the IRB in 2002 for the RAD. After all, this is not even a full appeal. It is a simple paper internal review by a qualified individual within the existing structure of the IRB.

To any reasonable observer, this seems like a sensible proposal. Any court or tribunal, such as the IRB, where there is a single decision maker, can make mistakes. So why not add an inexpensive form of an appeal, which both the UN High Commissioner for Refugees and the Inter-American Commission on Human Rights have advised is necessary?

The additional delay and cost of the paper review can only be insignificant compared with other parts of the overall judicial process. The ever-growing backlog of cases is not connected to justice or lack of it. Indeed, the size of the panel which decides a refugee case was cut in half in 2002, allegedly to make space for RAD - which has never been implemented.

Before the *Immigration and Refugee Protection Act* 2002, hearings at the IRB were usually conducted by two members and a Refugee Protection/Hearing Officer. Today, hearings are typically conducted by one member. And although doubling the available decision makers and introducing a paper review (called an "appeal") still seems logical, the paper review set out in RAD and the *Immigration and Refugee Protection Act* have never been implemented.

A paper review would respond to the wide discrepancy in decision records by the single IRB members; some have nearly 100% rejection rates, while others have nearly 100% acceptance rates for refugee claimants coming from the same country situations. This contrast suggests a lack of consistency, or perhaps errors, within the evaluation process. Further reductions in justice, in the name of reducing a backlog, just do not make sense given the

discrepancy in members voting records, and especially given the aim of the system, to protect the refugee who really needs protection. Therefore, an impartial review of a rejected case makes excellent sense; and it would also save money.

It is true that a review can be requested by the Federal Court, but there are hurdles and huge expenses involved. The access to judicial review of a decision is amongst the most restrictive in Canadian law. The court applies a "leave" test to make sure the case qualifies. A decision has to be more than just wrong to move forward. If leave is granted, a Federal Court judge will review the decision at an adversarial hearing. Remarkably, despite the difficulties, the Federal Court finds legal errors in approximately 10% of the immigration cases submitted, and therefore must return the cases to be heard before a new decision maker.

Access to the Federal Court of Appeal depends on certification of a 'question of general importance' by the Federal Court judge. The failed refugee cannot apply directly to the Federal Court of Appeal. Only after a three-member panel of Federal Court of Appeal judges has heard the case, and if there is a split decision or leave granted by the Supreme Court, can a case be heard by the Supreme Court of Canada.

It is worth remembering that the Federal Court offers no quick, simple, cost-effective way to say an "error in law" was made, or that a "perverse error" in fact was found.

Some argue that petitions to government officials can take the place of an appeal. They cannot. The paper Pre-Removal Risk Assessment (PRRA) provides rejected claimants with an opportunity to present new evidence to immigration officials. The acceptance rate for the PRRA's is approximately 2%. Given this low success rate, those applying for a PRRA will not be able to obtain legal aid in Ontario.

True, individuals can also make an application for consideration by the Minister, or his designate, on Humanitarian and Compassionate grounds, but they must pay a substantial fee. The acceptance rate for these H & C applications is around 3%. However, neither of these procedures is intended, or suited, for correcting an error made in the hearing of a refugee claim. The fact that this administrative process can, in some cases, be so extended as to allow some rejected claimants to remain for as many as 15 years, makes it clear that these existing procedures are not an effective way of dealing with this problem.

The end result of the refugee determination and related procedures in Canada appears to be that around 80% of those seeking asylum remain – not out of line with the 60-80% range among Western States. The paper review by qualified individuals would not alter that reality.

Thus, the real problem is that there is no quick, easy, cheap way to correct a mistake in judgement or an error in law by an IRB member. Adding a paper review with the RAD would not bring a full and fair appeal, but it could catch some glaring mistakes, which would help to reduce costs in dealing with rejected claimants.

Having the RAD would offer a cost saving, reducing the need for judicial reviews submitted to the Federal Court. It is much cheaper to have a paper review by specialists already trained at the IRB rather than through the time consuming and expensive Federal Court judicial review process. The RAD would also eliminate the need to return that 10% of judicial reviews which, as mentioned earlier, are currently being sent back to the IRB for new hearings; this would prevent a significant expense.

The failed refugee claim can be resolved at the RAD, resulting in cost savings and an improvement in the efficiency of the system. Since the file would remain within a single organization, processing delays would only be lessened, so that the entire paper review might add just a few months to the process. Moreover, there would be less pressure at a later stage with regard to expensive administrative procedures.

Thus, when Minister Kenney stirs up the same old fears with the same old rationale, Canadians should not be mislead. The simplest, most sensible reform is what parliamentarians are proposing; implement the Refugee Appeal Division which is already written into the law.

An appeal is what non-governmental groups working with refugee claimants in Canada have been asking for since 1980. An appeal is what the UN High Commissioner for Refugees called for in its recommendations to Canada. An appeal is what the Inter-American Commission on Human Rights advised was necessary in 2000. The paper review in the present law would go a long way to satisfying these concerns.

Canada has a tradition of helping refugees, which in 1986 earned the people of Canada the Nansen Medal, the international humanitarian award of the UN High Commissioner for

Refugees. Now this tradition deserves to be preserved despite some Canadians who are sceptical and want to shirk our responsibility to protect refugees. This tradition is something that all Canadians should be proud of and is worth preserving.

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norm, including immigrants from China and India (respectively 18% and 12% unemployed in the first five years post-migration). Increasingly, economic immigrants have also possessed first languages other than English or French. According to Hiebert (2006), this is now the prime determinant of differential employment outcomes in a knowledge economy (see also Ferrer et al.). Compounding these problems, unprecedented numbers of new economic immigrants had secured their qualifications in radically different and often under-resourced training systems (as noted by Lemay in this volume, many of those defined as "engineers" would be deemed to be technologists in terms of the educational equivalence to Canada). Initial training differences were exacerbated by what I have previously termed "technological fit" or the degree to which immigrants' post-graduation experience was rooted in comparably advanced systems. Examples of this would be mechanical engineers with hands-on computer-aided design expertise or doctors and nurses experienced in western pharmacology and high-tech medical systems (Hawthorne 2005).

The human capital model of economic migrant selection

It is important to note that the human capital model has dominated Canada's recent selection of economic immigrants, allowing them to arrive prior to having their credentials screened, which is in marked contrast to the system now operating in Australia. As described in a recent report:

> While education level matters for Principal Applicants, field and place of qualification do not, in a context where labour market demand is seen as hard to predict and 'individuals can expect to have several careers over their working lives'. According to Hiebert (2006) the prevailing Canadian view is that 'well-trained flexible individuals... who have experience in the labour force' should be able to 'adapt to rapidly changing labour market circumstances'. In consequence 'general' rather than 'specific' competence is sought – Canadian selection criteria admitting Principal Applicants with limited host country language skills, non-recognised qualifications, and in fields of minimal labour market demand on an equal basis to those with more immediately sought after attributes (Birrell, Hawthorne and Richardson 2006, 130-131).

In Australia, by contrast, perceived "employability" has determined economic applicants' eligibility to proceed with migration since 1999. Employability is determined, in part, on the basis of a credential assessment, and principal applicants qualified in regulated fields have been required to apply for pre-migration screening by the relevant national or provincial/territorial licensing body. This is a strategy designed to avoid years of forced labour market displacement or skill discounting due to non-recognition of qualifications. Reflecting the existence of niche economies, 20 bonus points are allocated to applicants qualified in fields in demand, which is a measure associated with highly beneficial outcomes. Given the importance of host country language ability, candidates have been required to achieve "vocational"or higher level scores on the independently administered International English Language Testing System (or approved equivalent), which is administered globally by the British Council for a modest fee. Within two years of Australia's abandonment of the human capital model of selection, 81% of economic immigrants were securing work within six months of arrival (compared to 60% in Canada), a figure rising to 83% by