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Fast, Fair and Final: Reforming Canada's Refugee System

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By Peter Showler and Maytree
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Executive Summary

Canada's refugee claim system is too slow – it can take up to eight years to finalize a claim. On average, it requires 18 months for a first decision at the Immigration and Refugee Board (IRB) because of a backlog of 60,000 claims. Thousands of refused claimants remain in limbo for years, waiting for redress from their refused claim or for removal from Canada. The delays hurt legitimate refugees and can attract frivolous claims. They rob us of the credibility we need to meet our legal and moral obligations to protect individuals who are escaping violence, torture or death.

The government has stated its intention to reform the inland refugee claim system. It has not yet put forward specific proposals but it has indicated that it favours an approach similar to that of the United Kingdom, where government officials make rapid decisions based on limited information and limited procedural rights for the refugee claimant. The UK's system also employs an early fast-track process with even fewer rights for claims that are assumed to be unfounded. The fast-track claims are selected from a list of presumably safe countries of origin that has included countries that produce a significant number of refugees. Determining who is a refugee is extremely difficult; it requires close examination of the individual claim and cannot be easily and reliably decided by objective categories. In countries where this model has been implemented, there are a high number of poorly reasoned decisions that often clog up the multiple levels of appeal, contributing to overall delays in the system.

The proposal presented in this paper suggests a different approach that is based on three pillars: 1) a good first decision, 2) a reliable appeal, and 3) the prompt removal of failed claimants. It builds on the strengths of the current system, namely that it is accessible, provides a good first decision, and grants legitimate refugees permanent residence. It also addresses the system's weaknesses including that IRB members are politically appointed, there is no appropriate appeal in place, refugees often have inadequate or poor counsel, and there are an excessive number of ineffectual administrative stages before removal occurs.

This paper recommends that the government minimize the number of steps in the refugee process, by creating a strong system that would remove the need for the Pre-Removal Risk Assessment, 'back-end' Humanitarian and Compassionate applications (H&C) and their associated judicial reviews. It recommends the creation of a new Refugee Tribunal with two divisions, a Refugee Claim Division and a Refugee Appeal Division, to replace the IRB. The tribunal members would be appointed solely on merit. The Refugee Claim Division would employ informal procedures to allow refugees to tell their story, and each claimant would be represented by a lawyer. Under this proposal, refugee claims would be decided in six months, reviewed in four months and removed within three months of a negative appeal decision.

The changes proposed would make our refugee system fast, fair and final. It would reduce the claim process from several years to an average of 13 months. It would ensure accurate and fair decisions, and result in the timely removal of failed claimants.

Fast, Fair and Final: Reforming Canada's Refugee System

By Peter Showler, Director, The Refugee Forum, University of Ottawa

Introduction

Canada's inland refugee system has attracted considerable controversy over the summer. Visa restrictions on Mexico and the Czech Republic have been linked to flaws in the refugee system; the Minister of Citizenship, Immigration and Multiculturalism has called for reform and, most recently, the acceptance of a white South African refugee claimant by the Immigration and Refugee Board (IRB) has called into question the quality of IRB decisions.

While these recent developments have brought refugee policy into the spotlight, in fact, Canada's asylum system has been the subject of controversy almost since the inception of the IRB in 1989. Critics allege that the system is too generous, too accessible, that the acceptance rate is too high. Other critics say that the IRB makes too many obvious mistakes, that there is no reliable appeal of IRB decisions and that there is an over-reliance on the judicial review process which is not designed to correct the types of errors that occur at the IRB. Supporters of the program hail the fairness of IRB decisions and procedures, the IRB's strong training programs and the quality of its country information research. They note that the IRB has been consistently praised by international observers, including the United Nations High Commissioner for Refugees.

Notwithstanding the supporters of the system, most observers agree that the asylum system is in trouble and needs reform. The system is not resourced to handle the annual number of claims arriving and, as a result, the IRB is confronting a serious backlog of claims and delays in completing decisions. The Refugee Appeal Division has not been implemented despite two bills before parliament and even without an appeal, the processing time for the review and removal of rejected claims is far too long. While exact timelines are not known, reasonable estimates suggest that the adjudication and removal of a failed refugee claim takes on average four to six years which is far too long. Lengthy delays encourage frivolous claims and serve neither the interests of Canada nor genuine refugees.

The government has stated its intention to reform the inland refugee claim system. It has not yet put forward specific proposals but it has indicated that it favours an approach similar to that of the United Kingdom. In the UK system, public service officials make the first-level asylum decisions and claimants from particular countries of origin, who are deemed to have unfounded claims, are directed into a fast track procedure for a rapid decision and removal. Such an approach is understandably attractive, especially as a solution to high volume claimant countries with low acceptance rates such as Mexico or as means of discouraging frivolous claims. But is it practical? Does it accurately reflect the realities of making refugee decisions?

Variations of this model of asylum have been employed by most European countries with mixed results. Critics have alleged that quick decisions by poorly trained decision-makers have resulted in too many mistakes and legitimate refugees have been unjustly deported to persecution. They allege that public servants are not independent and make badly reasoned decisions based on policy and poor country information. In addition, these changes did not make the system more efficient overall. Most of these European asylum systems have multiple levels of appeal. Poor decisions by public servants at the front end of the system have placed heavy burdens on the appeal processes. Counter-intuitively in some cases this has resulted in a slow process with failed claimants remaining in the country for too long a period.

The proposal presented in this paper is based on a different approach which is based on three pillars: 1) a good first decision, 2) a reliable appeal, and 3) prompt removal of failed claimants. It recognizes that determining who is a refugee is incredibly difficult and, as a result, claims cannot be easily and reliably decided by objective categories even from countries with low acceptance rates. (Furthermore, frivolous claims can be made by individuals from countries with relatively high acceptance rates.) Sound decisions require a close and expert examination of the particular claimant's story and of the objective country evidence.

The proposal is organized into the following sections:

1. A description of Canada's current refugee system
2. Characteristics of a good asylum system
3. Guidelines for achieving a good asylum system
4. A proposal for a better asylum system
5. Policies and procedures related to the asylum system
6. Conclusion

The Canadian Asylum System

The starting point for a discussion about Canada's refugee system is the 1951 United Nations Convention relating to the Status of Refugees (The Convention). As a signatory to the Convention, Canada has agreed not to return anyone who arrives at their borders to their country of origin if they will be subject to persecution. Canada, like the other signatories of the convention, has considerable latitude in designing the process by which they determine who is or is not a refugee.

According to the Convention, a refugee is someone who has a well-founded fear of persecution due to their race, religion, nationality, political opinion or particular social group. However, this is a legal definition and, as a result, it is interpreted differently by courts in different countries. In Canada, the definition used by the Convention has been adopted and supplemented with the concept of "a person in need of protection." That is, someone who is in danger of torture or is at risk of death and cruel or unusual punishment. However, the core notion for both definitions is the same: someone who has

a reasonable possibility of being very seriously harmed if they are sent back to their country.

Canada has two separate refugee programs, the Overseas Sponsorship Program and the Inland refugee program. The first program selects refugees overseas, principally from refugee camps, and brings them to Canada where they are granted permanent residence upon arrival. The Inland program assesses the refugee status of anyone who seeks refugee protection within Canada or at a Canadian port-of-entry. This proposal deals solely with the Inland refugee system.

Historically, an average of 25,000 people claim refugee status every year in Canada. Last year 36,700 people made refugee claims. The IRB currently has a backlog of 60,000 claims. Of these, approximately 45% will be accepted as refugees. IRB decisions currently require 18 months on average due to the backlog. There are an estimated 10,000 to 20,000 failed claimants located somewhere in the judicial review and pre-removal stages of the process. On average, the process for failed claims from date of claim to removal can take from four to six years.

The Inland Claim Process

An individual makes a claim for refugee status at the port-of-entry or a CIC office. The officer conducts a security check, determines the claimant's eligibility to apply for refugee status and if eligible, refers the claim to the Immigration and Refugee Board (IRB). If the claimant is not eligible, removal proceedings are begun unless the claimant has legal status in Canada.

The IRB is an independent tribunal that reports to parliament through the Minister of Citizenship and Immigration. A member of the IRB decides whether the claimant is a refugee after a hearing where the claimant has the right to be represented by legal counsel. If the individual is accepted as a refugee, he or she can apply for permanent residence. Approximately 45% of claimants are accepted as refugees.

If the IRB rejects the claim, there is no appeal available to the claimant. However, the refused claimant has the right to apply to the Federal Court for leave for judicial review. If leave is granted, the court will conduct a judicial review of the IRB decision. Approximately 13% of leave applications are approved for judicial review.

If the Federal Court does overturn the IRB decision, the claim is sent back to the IRB for a new hearing. If the court denies the judicial review application, either at the leave stage or after reviewing the decision, the claimant can then be removed from Canada.

Before removal, the refused claimant is entitled to a Pre-Removal Risk Assessment (PRRA). Often there is a significant delay before the PRRA process begins, as long as one to three years. Eventually, the refused claimant receives a notice that the Canadian Border Services Agency (CBSA) is prepared to begin removal. At that point, the refused claimant can apply to CIC for a Pre-Removal Risk Assessment. This is not an appeal of

the original IRB decision. It is an assessment based on new evidence of whether the person is at risk of serious harm in their home country. Very few PRRA applications are granted, about 2%. If the PRRA is denied, then the person is removed from Canada.

Before removal, the refused claimant can apply to the Federal Court for a stay of removal and a judicial review of the PRRA decision.

At any time during the refugee claim process, a claimant can also apply for permanent residence in Canada on humanitarian and compassionate grounds (an “H&C” application). Often the application is made after a refusal of the Federal Court application. An H&C application is not formally a part of the asylum process but often removal will not occur until CIC has responded to the application. The H&C application is usually based on events that have occurred in Canada such as marriage, children born and raised in Canada or long-lasting and sustaining links with their community.

The full process for refused claimants may include the following stages:

- Eligibility decision – Canadian Border Services Agency (CBSA)
- Refugee Claim decision – Immigration and Refugee Board
- Application for Leave for Judicial Review and Judicial Review – Federal Court
- Removal Ready Notice to refused claimants – CBSA
- Pre-Removal Risk Assessment (PRRA) – CIC
- Humanitarian and Compassionate Application for Permanent Residence – CIC
- Applications for Judicial Review of PRRA or H&C decisions – Federal Court
- Applications for Stay of Removal linked to JR applications – Federal Court
- Removal of the claimant – CBSA

Strengths and Weaknesses of the System

The proposal put forward in this document would build on the existing system’s strengths while addressing its weaknesses.

Strengths

1. **The system is accessible to refugees:** Compared to other countries, Canada’s asylum system is very accessible. There is a moderate detention policy, less than 2% of applicants are denied a refugee hearing, claimants are given social assistance if needed, and claimants are allowed to work and attend school. This is consistent with our obligations as a signatory to the Convention. Countries who deny these benefits to claimants are in breach of their obligations. These same countries often have a vastly larger population of illegal residents due in part to their inhospitable refugee system.

2. **The system emphasizes the importance of the first decision:** Except for Belgium who recently changed their system, Canada is the only country to employ the principle of “First Decision, Best Decision.” Other countries have government officials make an early decision with a limited opportunity for the refugee to present their case. These systems rely on lengthy appeal procedures to review the first decision. By allowing the claimant a full opportunity to tell their story to an expert tribunal, Canada’s system helps to ensure that the first decision will be the correct one. At the IRB, time and care is taken to obtain the relevant evidence before the hearing takes place. Every decision, positive and negative, includes a set of reasons that explains why a person is or is not a refugee.
3. **The system grants refugees permanent residence:** Even when determined to be legitimate refugees, most countries only grant temporary residence in the country. Such policies prevent family reunification and often lead to the existence of poor, ethnic ghettos. Canada allows refugees to apply for permanent residence and to bring their immediate family members to Canada. (Many of whom have been trapped in refugee camps or dangerous conflict zones for several years.) By granting permanent residence, Canada allows refugees to get on with their lives and to avoid many of the social problems caused by temporary residence. Refugees from the Inland refugee system represent about 7% of Canada’s new permanent residents each year.

Weaknesses

1. **IRB members are politically appointed:** The effectiveness and reliability of the refugee claim system is dependent on the competence and expertise of IRB members, particularly since each refugee claim is decided by a single member. IRB members are appointed and re-appointed by the federal cabinet. Although there is some initial merit assessment of candidates, the process is ultimately a political and secretive one that does not yield the best candidates available. There are many very competent IRB members but the overall quality of the decisions and the productivity of the Board would be greatly improved by a non-political appointment process.
2. **There is no Refugee Appeal Division:** Refugee decisions are difficult, particularly when the claim is decided on the credibility of a traumatized and confused claimant speaking a language other than English or French. Since a single member makes the decision, mistakes are unavoidably made – and made more frequently by less competent members. An appeal to the Refugee Appeal Division (RAD) was written into law by the 2002 Immigration and Refugee Act to catch IRB errors, but an appeals process was never created. The only avenue for appeal in the existing system is the Federal Court process of judicial review. However, this process is only designed to catch legal not factual errors. Inevitably, in the current system some refugees are mistakenly sent back to persecution.

3. **Time delays which result from the Review and Removal Process:** The review and removal process is too complicated with a series of administrative stages, each subject to judicial review by the court. The result is a slow and ineffective process that changes few original IRB decisions (even if errors were made) and takes years to remove failed claimants.

4. **Time delays which result from the management of the asylum process:** As already noted, the current system is complicated and this leads to delays. However, there are delays which exist in the current system because of a weakness in execution rather than system design. There is a tendency to see the asylum system as a series of unrelated steps by different state agencies with limited responsibility rather than as a single, coherent process. As a result, there are delays *between* steps in the process.

Time Delays

Except for the Federal Court there are bottle necks, backlogs and time delays at every stage of the process beginning with eligibility screening.

- Eligibility screening by CBSA was intended to take three days. Instead, there are undisclosed delays that can take weeks and even months. These delays are related to excessively long interviews on the substantial nature of the refugee claim, an area that lies outside the legislative responsibility of eligibility decisions.
- Average time for a first decision before the IRB is 18 months. As the IRB backlog ages, that time will increase to approximately two years.
- The Federal Court decides leave applications within three months. An additional four to five months is required for full judicial review decisions but that is only 13% of the leave applications. The remaining 87% enter the removal process.
- Post-Federal Court/Pre-PRRA: There is an unrecorded time delay of one to two years after the court has denied the judicial review before CBSA initiates removal process. This is a kind of procedural dead zone where no agency takes responsibility for the claim file and the average time of delay is not measured. Many files are known to remain in this limbo situation for many years. Some claimants will make an H&C application for permanent residence at this time although in theory an H&C application does not suspend removal proceedings.
- The Pre-Removal Risk Assessment process (PRRA): A refused claimant cannot be removed before they are given the opportunity to apply for a PRRA. The PRRA process is initiated by CBSA sending the failed claimant a notice to begin removal proceedings. If the claimant applies for a PRRA, removal is suspended until the PRRA decision is made by CIC. That period includes any applications to Federal Court challenging the PRRA decision. A positive PRRA decision allows the claimant protection status to remain in Canada. Only about 2% of PRRA applications are accepted. The remainder are then removable unless the Federal Court grants a stay of removal while the claimant seeks a judicial review of a negative PRRA decision or a negative H&C decision. The average time for the entire PRRA process from removal ready notice to removal is 16 months.

Total average time for processing a failed refugee claim from date of claim to date of removal: unknown. A reasonable estimate of the average process time is **four to six years.**

Characteristics of a Good Inland Asylum System

To ensure that Canada meets its international obligations to protect refugees and to maintain confidence in the system, the inland refugee process should be: fast, fair, effective, efficient and final.

Fast

Prompt decisions benefit both the refugee claimant and Canada.

Until their claim is decided, refugees live with the uncertainty and fear of being returned to persecution. In some cases, refugees have other family members still in conflict zones, internally displaced and destitute or in refugee camps. They are often desperate to resolve their own claim in order to bring their family members to safety. Secondly, having been forced to flee their country, they are eager to get on with their lives. As refugee claimants, they are in a legal limbo which does not allow them to fully engage in career or education opportunities that would allow them to contribute more fully to Canadian society.

Lengthy delays may have the unintended consequence of encouraging fraudulent refugee claims. This is because, in the existing system, refugee claimants can work legally in Canada for many years. Prompt decisions and removal discourage fraudulent claimants seeking a long period of employment in a wealthy country. However, it is important to note that not all rejected claims are fraudulent. Many rejected refugee claimants believe themselves to be refugees even though they do not fit the definition according to Canadian law. There is no means of knowing what percentage of refused claims is actually fraudulent.

Fair

Fairness is a legal as well as a moral value. In law, it refers to the duty to act fairly and providing a claimant with a reasonable opportunity to tell his or her story. This includes procedural protections such as the right to an interpreter, legal counsel, a hearing, the reasons for the decision, etc. It also means that the decision-maker is not biased and bases the decision solely on the evidence and the law. The essence of the fairness principle is that the claimant has a reasonable chance to prove his or her claim and the decision is not based on extrinsic factors.

If the claimant is not given a fair opportunity to make his or her claim, then Canada has not truly complied with its obligations under the 1951 UN Convention. Unfair procedure or practice undermines the integrity of the asylum system and makes it difficult for governments to remove refused claimants promptly with moral authority.

Canada has often served as a model to nations that have not always complied with their obligations. Any reforms to the system should consider the impact that poor reforms

would have on the entire system of international protection as well as our reputation around the world.

Effective

While fairness requires that the decision-maker is not biased, effectiveness requires that the decision-maker is competent. Since the consequences of error are extreme – persecution, loss of life or torture – a high rate of accuracy is necessary in making negative decisions. It is also important to be accurate in making positive decisions because if too many unfounded claims are accepted, the asylum system could be brought into public disrepute, undermining the entire asylum process. In addition, a lax system could attract fraudulent claimants.

Efficient

Asylum systems must be able to respond to large and variable claim loads with limited resources like any other function of government. Therefore, in addition to being fair, fast and effective, the system must also be efficient, avoiding unnecessary steps or the waste of resources.

Final

The system should be viewed as a coherent whole from beginning of the claim to the final conclusion. Although there are interim decisions throughout the claim process, the management of the system should be such that it results in a reliable final outcome. Finality means either receiving permanent residence if it is a positive decision or being removed from Canada if the claim is ultimately denied after the appeal process.

Guidelines to Achieve a Good Inland Asylum System

In order to achieve a fast, fair, effective, efficient and final refugee system, reforms to the current system must follow the following guidelines.

1. Minimize the number of steps in the asylum process.

While a good asylum program requires an appeal process, it is important to minimize the number of steps that a claimant must go through to achieve a positive or negative decision. It requires administrative energy to move cases from one stage to another, particularly where a different administrative agency has responsibility for the file. Ensuring there are only a minimum number of steps would simplify the process.

2. Ensure the first decision is the best decision.

While there may be a preliminary screening stage to remove ineligible claims, the first decision on the merits of a claim should be made by a well-trained and competent decision-maker who has all of the necessary documentary and testimonial evidence to make an authoritative and well-reasoned decision. It should allow the claimant a full opportunity to present their case. Systems that do not allow a comprehensive decision at this first stage are often bogged down in the appeals process since a solid evidentiary foundation is not laid for the appellant body or clear lines of legal reasoning are not provided.

The logic of this principle is that a positive decision can be relied on for referral for permanent residence. For negative decisions, the appeal body will have a solid body of evidence as a basis for reconsidering the claim.

3. Ensure decision-makers are competent and independent.

Competence

Decision-makers are the point of the pencil in an effective asylum system. Most refugee decisions are difficult judicial exercises. In order to decide a large number of claims rapidly with limited procedural rights, great reliance is placed on the competence of the decision-maker.

If member competence is a key element in a renewed and effective asylum system, then the appointment and retention of decision-makers must be based solely on competence with no role for political interference in appointment or re-appointment of members.

Independence

Independence means that a decision-maker decides a claim based solely on the evidence and the law without any external interference from government. Refugee status is defined by law and interpreted by the courts, but the application of the law is undertaken solely by the decision-maker. Parliament may change the law but government policy should not be used to say who is or is not at risk of persecution.

With a few exceptions, the principle of independence has generally been respected by the Canadian government and IRB management who also has a duty to ensure consistency in its decision-making process. However, the government's recent public declarations about the invalidity of Czech and Mexican refugee claims may be an exception to that principle.

4. Meet the requirement for competent legal representation.

Refugees often do not understand the refugee claim process and have a limited ability to effectively testify or gather the necessary evidence to prove their claim. Some form of legal assistance is required to effectively and quickly present the claim.

Within both the IRB and government bureaucracies, there are two views of legal counsel. Some see legal counsel as obstructive to the claim process, as an agent that presents a one-sided version of the evidence and that delays the process by making specious arguments for judicial review at every administrative stage in the process.

The second view is that legal representatives have an important role in the claim process. By ensuring the legal rights of their client, they become added insurance that the process is fair. Because they have early and more informal access to the claimant, they can contribute to the speed and reliability of the claim process in a number of ways.

Specifically, legal counsel can:

- narrow and frame important legal issues;
- gather the relevant evidence in advance of the hearing;
- deliver all relevant information early before the hearing;
- elicit the relevant testimony at the hearing;
- make the legal arguments that the claimant cannot make; and
- improve the reliability of the decision, even a negative one, by ensuring that all factors favourable to the claimant have been considered.

There are partial truths to both views. Good legal representatives assist the claim process and poor representatives are a hindrance. Poor representation injures both the claimant and the process.

Under Canadian law, refugee claimants may be represented by lawyers or consultants. Unfortunately, too many legal representatives, both consultants and lawyers, provide inexcusably poor service to their refugee clients. The cause for this circumstance is primarily the vulnerability of the refugee client who lacks the knowledge and capacity to demand or even recognize effective representation. Inadequate regulation, lack of training, the confidentiality of the refugee process and ineffective complaint mechanisms are also factors contributing to poor legal service.

To achieve the five objectives, an asylum system must ensure that the claimant is provided with prompt and effective legal representation.

5. Let the claimant tell his or her story.

In addition to effective legal representation, claimants must have a genuine opportunity to prove their claim and tell their story. Reliable documentary information is often not available. In virtually all refugee claims, the claimant is the primary and often the sole witness. Credibility cannot be reliably assessed on written materials and lawyer's

submissions alone. In questioning claimants, officials must be informal wherever possible. Overly strict rules of procedure can inhibit the ability of the claimant to give a spontaneous account of their experiences. Adversarial methods and procedures are more likely to elicit confusion and misinformation. Informal procedures require that the decision-maker be both skilful and unbiased in hearing and assessing the testimony.

6. Be smart. Manage the case load. Stream cases for increased efficiency.

While the tribunal must always ensure that streaming procedures do not create a reasonable apprehension of bias, there are a number of ways that cases can be grouped in order to make the process more efficient. Cases can be streamed by country of origin, age (minor claimants), simplicity of issues, persons in detention or unique claimant circumstances.

The system should not become clogged with obvious decisions that can be made quickly. The IRB already has an expedited process for manifestly positive cases that may be accepted after an informal interview. With proper safeguards, it is possible to fast track cases whether the outcome is positive or negative.

7. Invest in good objective country information.

Although refugees may know their own experience, they are often unable to obtain the relevant objective information about their country. Country information, particularly from oppressive regimes and conflict zones, is often general and vague. It requires a significant investment of resources to maintain good documentary evidence. Refugee decisions can be made more reliably and more quickly with sound objective evidence.

Proposal for Better Asylum System

It is possible to design a refugee claim system that follows these guidelines, and is fair, fast, effective, efficient and final. Specifically, it would be a system that can reliably evaluate, review and remove refused claims within a thirteen-month period. It would include the following stages:

1. Security and eligibility screening
2. Refugee claim decision
3. Appeal
4. Judicial Review
5. Removal

1. Security and eligibility screening

CBSA or CIC officers receive the claim as they do now. There is a brief screening for eligibility and security factors with immediate referral to the tribunal except for ineligible claims. Normally ineligible claims are less than 2% of claims. Claimants with security concerns are detained, as they are in the existing system.

The eligibility and security screening by CBSA/CIC is very brief. It does not include a substantive consideration of the claim or extensive information gathering outside of security and identity concerns. CBSA/CIC will retain the authority to suspend or annul asylum proceedings for ineligibility where new information is obtained subsequent to the referral to the Refugee Tribunal.

The current CBSA practices of deferring some eligibility decisions for weeks or months is eliminated.

2. Refugee Claim Decision

The claim is referred within one week to a Refugee Tribunal which consists of two divisions: the Refugee Claim Division (RCD) and the Refugee Appeal Division (RAD).

The tribunal is independent. Tribunal members are experts, selected by an independent committee solely on merit and the operational needs of the tribunal. It is essential that the political aspect of the appointment process be completely removed. Political involvement not only undermines the appointment of the best candidates, it discourages superior candidates from applying for the position.

At least half of all members would be lawyers. Public servants could apply for appointment through the selection process and serve upon secondment from the public service. Members and member managers are not appointed by the federal cabinet. Appointments and re-appointments are for specific terms with a maximum of three terms. The federal cabinet appoints the Chairperson of the Refugee Tribunal.

Creation of a separate refugee tribunal will correct some of the long-standing managerial challenges of the IRB which currently has three divisions and would have four with the addition of a Refugee Appeal Division. The Immigration Division and the Immigration Appeal Division do different types of work and would form their own Immigration tribunal.

In this proposal, Refugee Claim Division procedures are as informal as possible within the basic administrative law principles of natural justice. The process remains inquisitorial rather than adversarial. The tribunal maintains objective information on refugee source countries. Claimants have a right to counsel and an interpreter. There is a federally funded duty counsel system to ensure effective legal representation and early delivery of claimant information to the tribunal. The use of clinic-based duty counsel will

allow for earlier and more reliable information being delivered to the RCD. Procedures including the Personal Information Form will be greatly simplified. The hearing of the claims will be as informal as possible. Excellent country information and member training programs will be essential.

Fast-track streaming can be done for priority cases that can be decided within a few months. Average processing time is six months. Tribunal offices are located regionally.

3. Appeal

Refused claimants and the government have a right of appeal of all RCD decisions. The appeal is made to the Refugee Appeal Division (RAD), a separate appeal division of the tribunal. The role of the RAD is to correct errors of fact, fact and law or law. New evidence can be submitted by affidavit on the appeal. Live testimony may be allowed in exceptional cases at the sole discretion of the tribunal. Written reasons are provided for every appeal decision. The RAD will have the power to confirm the RCD decision, overturn it and substitute a different decision or return the decision to the RCD for another hearing.

Appeals will be decided by a single member. To resolve issues of inconsistency between RCD decision-makers, special three-member panels of the RAD will have the authority to write decisions that are binding on the RCD.

Average processing time is four months and priority cases can be streamed more quickly. The RAD is a smaller division than the RCD. It is geographically centralized to ensure consistency between RAD members. For exceptional cases, the RAD will have the authority to hear live evidence. Where significant amounts of additional evidence are required, the claim would be returned to the RCD for rehearing.

RAD members must be lawyers, have a minimum of three years experience on the RCD and superior performance evaluations. They are appointed by the same independent committee for a minimum of seven years. The appeal division is geographically centralized.

4. Federal Court

Judicial review cannot be completely excluded from the refugee determination process, but it can be limited to issues of law. In this proposed system, the appropriate role for the court is limited to developing the refugee law jurisprudence and supervising the powers and procedures of the various players in the asylum system.

There is a two stage process – a request for leave to the judicial court, and judicial review. At the leave stage, the court makes an early assessment to determine if there is a serious issue of law to be decided. If not, the claimant is immediately removable. If there is an issue of law, the court initiates its full judicial review procedure.

Well reasoned decisions by the appeal division will allow the Federal Court to quickly triage applications to identify the few cases that raise a legitimate issue of law. The court will no longer have to be concerned with evidentiary errors as it now must do. The court's job is made easier by having both the original RCD decision and the Appeal Division's confirmation of that decision. The leave decisions can be made within 45 days of the tribunal decision. If there is an issue of law, the appeal process may take several months but a small percentage of cases (less than 5%) should not impede the overall case removal process.

5. Removal

There is no Pre-Removal Risk Assessment for refused claims if removal occurs within 90 days of the appeal decision. If removal exceeds 90 days, the claimant can request a Pre-Removal Risk Assessment based solely on new evidence.

Removals will be much more direct and effective because CBSA can rely on the integrity of the tribunal decision and the appeal. If the refused claimant has been in the country for ten months by the time of the Appeal decision, he or she is not so well established in the community. CBSA can rely on the fact that only 5% of removal stream cases will be given a full judicial review and begin removal preparations concurrently with the federal court leave process. Although removals to some countries are difficult, most removals to high volume countries such as Mexico do not present such difficulties. It is imperative that CBSA be provided with sufficient resources to remove the great majority of refused claimants within the three-month period. Voluntary removal programs are successful and should be instituted.

Other Policies and Procedures Related to the Asylum Process

The proposal focuses on the core of the refugee claim process. Several related issues such as detention policy, legal representation, humanitarian claims, the selection process for tribunal members and security cases must be addressed.

Legal Representation

As discussed above, good legal representation facilitates fast and effective decision making. The quality of legal representation before the IRB has been very poor. Some provinces provide legal aid for refugee claimants, some do not. The inadequacies of legal representation of refugee claimants, both by lawyers and consultants, is well known anecdotally but has not been seriously addressed by any institution. Refugee hearings are confidential and few people other than the hearing participants – the IRB member, the claimant, the legal representative – are aware of negligent service on the part of legal counsel.

Disciplinary proceedings by law societies are driven by client complaint mechanisms that are utterly inadequate for badly served refugee clients who are alienated, vulnerable,

deferential and inarticulate. Consultants are not effectively regulated. There is an IRB complaints procedure to inform law societies of the negligent or unethical conduct of lawyers, but it is cumbersome and rarely used. Out of concern for the appearance of bias, IRB members and the IRB are reluctant to initiate complaints. During the passage of the Immigration and Refugee Protection Act, a Code of Conduct was proposed for all legal representatives that would give the IRB the authority to discipline chronically negligent consultants or, if a lawyer, forward complaints to his or her law society. The proposal was opposed by some law societies including the Law Society of Upper Canada and the Minister of Citizenship and Immigration declined to sign the Code into law.

It is recommended that the federal government provide funding to all provinces to operate duty counsel programs that can provide fast, accessible legal service with a much higher level of expertise and reliability. Legal aid clinics specializing in refugee law are the most economical and efficient model of providing that level of expertise. Similar successful models of legal representation are currently used by Belgium and Australia. The program allows the government to stipulate that only lawyers can represent refugee claimants before the Refugee Tribunal. Although this would appear to be a significant added cost to the asylum system, the much faster processing would result in overall savings to federal and provincial governments. In this case, the dictum is to think outside the funding envelope, not the box.

Humanitarian applications

Some refugee claimants have circumstances that fall more naturally within humanitarian reasons for remaining in Canada rather than within the refugee definition. There is a difference between “front-end” humanitarian claims that are primarily based on country-of-origin circumstances (although family relations in Canada may also be a factor), and “back-end” claims that are determined on factors relating to long term residence in Canada. Prompt processing within 13 months removes the factors related to long-term residence in Canada. In the system proposed in this paper, refugee claimants would not be allowed to make humanitarian claims within Canada after the date of their refugee claim hearing (a four-to-six-month period). Such a policy may seem harsh since many refugee claimants who remain in the current asylum system for several years eventually succeed on humanitarian grounds due to long-term residence and exemplary conduct. However, if Canada’s asylum system is to succeed, we cannot continue to blur the lines between refugees and humanitarian cases based on long-term residence in Canada.

There is a potential option for RCD decision makers to decide the humanitarian application after rejection of the refugee claim. The process would be more efficient than making a separate humanitarian application to CIC and would keep the appeal and Judicial Review in the same track. But there are also negative factors to consider before recommending such a process. The complexity of the evidence is broadened, the hearing would be longer and the reasons for decision would be more complex. While the refugee decision is based solely on fact and law, humanitarian applications are based on the discretion of the Minister and, unlike refugee decisions, are subject to government policy. At this time, no recommendation is made for or against the idea. Whether the

humanitarian application is made by an RCD member or a CIC official, the decision must be completed concurrently with the refugee claim decision to avoid delays in the Federal Court or the removal process.

Detention

Canada has always maintained a moderate detention policy. Detention is extremely expensive. Aggressive detention policies have not proven to be effective deterrents to refugee flows in Australia and the United States. No significant change to current detention policy is recommended.

Removal Policies

The UNHCR has often recommended voluntary removal programs. It is an example of a less adversarial approach that can be far more effective than forced removal. Voluntary removal programs assist refused claimants to return to their country and can include the discretionary payment of transportation costs. Such programs have been successful in other countries and a pilot program that was undertaken by CIC in 2000 resulted in a high removal rate. The program hastens and facilitates removal and is money well spent. It is highly recommended.

The Role of Government in the Asylum Process

It is controversial to recommend that the federal cabinet take no role in the appointment of tribunal members although it is obvious that a more pragmatic method of appointment should be instituted. Traditionally in the Westminster model of democracy, the Governor-in-Council has maintained the right to appoint members of quasi-judicial tribunals. Thirty years ago, when tribunals were relatively new legal creations with less burdensome workloads that approach may have been justified. Not so long ago, Canada, like the United Kingdom, New Zealand and Australia, appointed members with no expertise, often on a part-time basis. The challenges relating to making refugee decisions, and high volume of claimants now require a more professional approach.

However, it is reasonable to ask what role government can and should play in the operation of the refugee tribunal. Firstly, the government should appoint the Chairperson of the tribunal who is responsible for its management and effective operation. Although the tribunal is independent in regard to its judicial role, the Chairperson submits an annual report to parliament through the Minister of Citizenship, Immigration and Multiculturalism and is accountable to the supervisory roles of the Auditor General and other federal agencies dealing with privacy, access to information, bilingualism and the Public Service Commission. The government also controls tribunal resources through annual budget allocations and Treasury Board monitoring. Lastly, there is a disciplinary procedure whereby members can be removed by the federal cabinet upon the recommendation of a Federal Court judge. All of these government structures are more than adequate to ensure an appropriate balance between government control and independent decision-making.

Resource Implications

These are preliminary proposals and a cost-analysis has yet to be undertaken. Some recommendations will require additional resources. These include the recommendation to create a clinic-based system for legal representation and the creation of an appeal division.

However, the proposal would also lead to very significant savings. The Federal Court's work load would be significantly reduced. The Federal Court, by its very nature, is an expensive institution. Approximately 65% of its case load deals with immigration and refugee applications. Pre-Removal Risk Assessments and Humanitarian applications would also be greatly reduced taking a major administrative burden off Citizenship and Immigration Canada. Prompt and final decisions will ultimately reduce the flow of frivolous claims in the future although it is not possible to estimate the level of reduction. Finally, although many refused claimants do contribute to the economy, many are marginalized due to their quasi-legal status and unavoidably become a burden on federal and provincial budgets. Removal of failed claims within 13 months will represent a major saving to both federal and provincial governments.

Two-tier systems: The use of objective criteria to fast track manifestly unfounded claims.

We cannot assume that claims from a country with a high rejection rate automatically fall into a manifestly unfounded category. Mexico is a good example with an 11% acceptance rate which means that 11% of Mexican claimants are at risk of persecution. A very great number of the other Mexican claims will appear quite similar on the facts presented. It will require the normal claim procedure to distinguish the cases in regard to credibility assessment and on technical points of law. Such cases are not amenable to an early, fast-track procedure and it would be a fundamental error to seek to force such cases into a fast-track procedure. It either results in unjust decisions and early removal of viable claims or a high number of referrals back to the general claim stream which is a waste of resources.

Conclusion

There can be no pretence that making refugee decisions is an easy task. The essential challenge for any asylum system is to make a very large number of difficult refugee claim decisions quickly when the consequences of error are serious. This paper proposes a model that meets this challenge, and meets the five policy criteria for a successful asylum system.

1. **Fair:** This proposal is designed to allow refugee claimants a fair opportunity to prove their refugee claim within the requirements of Canadian law. It is also fair to the Canadian government by creating safeguards that will ensure that the system does not attract frivolous claims.
2. **Fast:** This proposal would result in a first decision within a six-month period, final decisions within a ten-month period and removal of the majority of refused claimants within 13 months. It provides early protection for refugees and their families, it catches mistakes quickly and places a less burden on provincial and federal governments than the current system because refused claimants are not living in Canada for long periods of time.
3. **Effective:** The investment in a high quality of decision-making at both levels of the Refugee Tribunal will result in a high rate of accurate and reliable asylum decisions.
4. **Efficient:** Accurate and reliable early decisions, confirmed with an appeal process, will allow the entire asylum system to function more efficiently. It will place less demand on the Federal Court, and will reduce the number of administrative steps related to removal.
5. **Final:** Prompt removal is based on the integrity and reliability of the refugee decision rather than the speed and arbitrariness of the decision. Removal within 13 months discourages migrants or unscrupulous consultants from using the asylum system inappropriately.

Given the increasing migratory movements of people across borders and ongoing global conflicts, asylum systems will continue to come under pressure from large numbers of asylum seekers. The challenge will be to make well-reasoned and accurate decisions that ensure that refugees are given protection while sustaining the integrity of Canada's asylum process.

Figure 1 – Diagram of Existing System

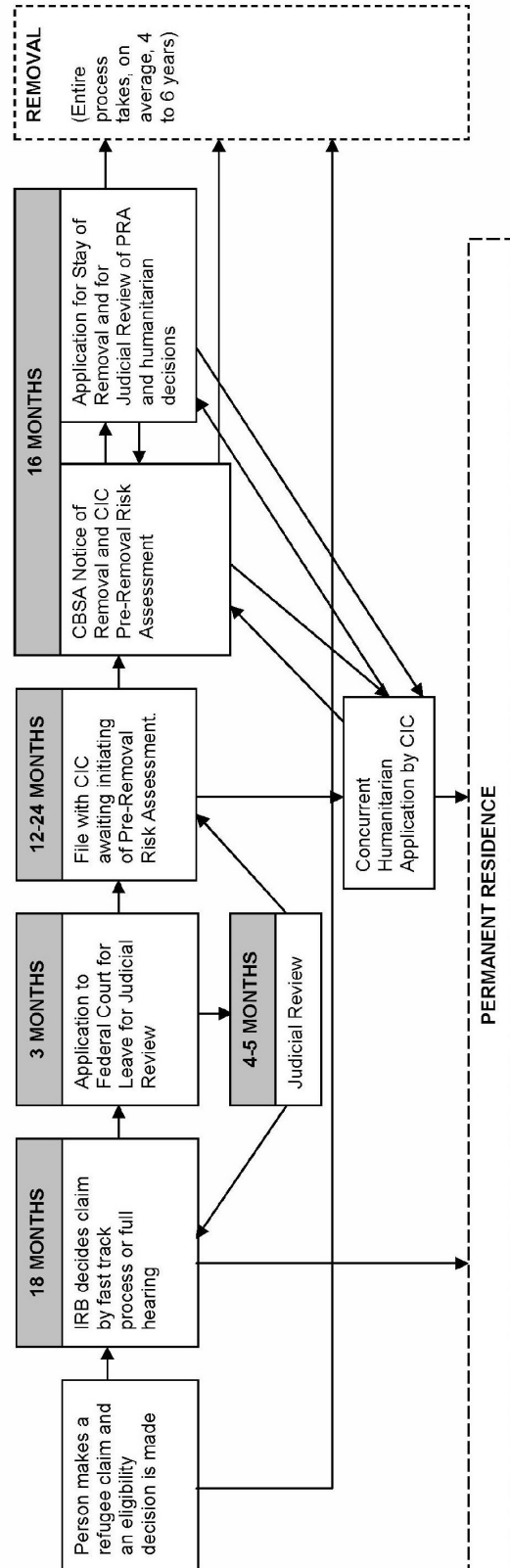
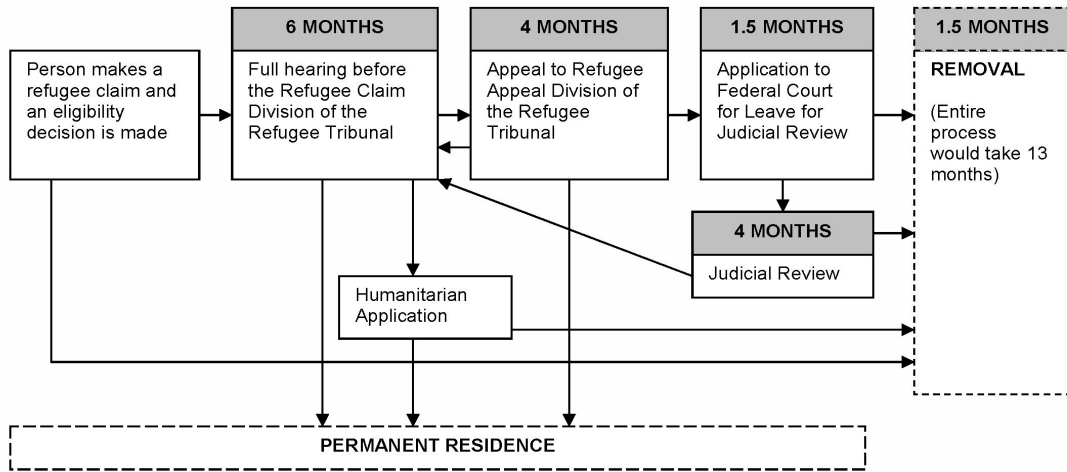


Figure 2 - Diagram of Proposed System





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