



The challenge of fair and effective refugee determination

Minister of Citizenship and Immigration Jason Kenney has recently stated that he plans to introduce changes to the refugee determination system and that he is looking to the UK system for models.¹

The following points respond to the Minister's proposals, as well as to public commentary on them and in the wake of the imposition of the visa requirement on Mexico and Czech Republic.

1. Refugee protection is a matter of human rights

A refugee determination system must first and foremost ensure respect for the human rights of those who claim our protection.

Canada has international human rights obligations, notably under the Convention relating to the Status of Refugees and the Convention against Torture: we must not send any refugees back to face persecution or anyone to a risk of torture.

The Canadian Charter of Rights and Freedoms entrenches our human rights obligations in our constitution. In adopting the Charter, Canada committed itself to the principle that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." As the Supreme Court of Canada ruled in the 1985 Singh case², "everyone" includes refugee claimants.

Respecting human rights is not always easy or convenient. Nor is it an optional gesture, for which we can claim we are being "generous".

2. Discussion of refugee issues needs to be respectful and well-informed

There have been numerous serious inaccuracies in recent public comment on the Canadian refugee system, often apparently motivated by hostility to refugee claimants. This does not support reasoned discussion about the important policy issues.

Refugees are among the most vulnerable people in society and are easy targets for attack, as non-citizens in a foreign country.

Not all claimants are refugees – but even those who are not refugees often have compelling reasons for having left their countries. Many factors contribute to existing problems in the system: we shouldn't blame the individuals caught up in it. The fault may lie right outside the refugee system: for example, people may be drawn into making claims because of the failure in our immigration system to provide avenues for workers whose labour we want.

¹Globe and Mail, "Minister calls for overhaul of Canada's refugee system", 15 July 2009, <http://www.theglobeandmail.com/news/politics/minister-calls-for-overhaul-of-canadas-refugee-system/article1218020/>

²Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177, <http://csc.lexum.umontreal.ca/en/1985/1985rcs1-177/1985rcs1-177.html>

3. Is a bogus crisis in the refugee system being generated as a political ploy?

Other countries have seen governing parties whip up anti-refugee sentiments in order to win votes. On the eve of Australian elections in 2001, finding themselves down in the polls, John Howard's Liberals created a panic over the arrival of asylum seekers, and won the elections on the strength of the public backlash.³

In the current context of a minority government in Ottawa, controversial legislative change of the sort proposed by the Minister presumably has little chance of being passed, especially if an election is called. Then why is it being proposed? Is the goal to exploit a backlash against refugees for partisan political gain?

4. Refugee determination is an individual determination

Refugee determination involves applying a complex legal definition to the facts of an individual case. It is inappropriate and unhelpful for people to make generalizations about whether certain groups of people are or are not refugees, without all the facts of the case.

Similarly, it is wrong to create a two-tier system, where some claimants are disadvantaged based on a factor such as their nationality.⁴

An effective refugee system requires determination of individual claims, based on all the facts and the law, by an expert, independent body.

5. The UK refugee system should not be copied

The UK refugee system, which has been modified numerous times in recent years, is neither just nor efficient. Minister Kenney's proposal to model Canadian reforms on the UK system is ill-advised.

Professor Colin Harvey,⁵ an expert on the UK system, has commented:

“There are serious and ongoing human rights concerns with the approach adopted in the UK to asylum law and policy over the last decade. It is not a model to be recommended for Canada. The UK's model of deterrence and restriction has fed a general climate and culture of disbelief, with negative implications for all refugees, asylum seekers and migrants. Fairness has been compromised in the UK's overarching desire to reduce the numbers of asylum applications. The strategy has not worked even in its own terms, and the Canadian government would be best advised to have the self-confidence to continue to develop a Canadian model of refugee protection anchored in humanitarian principles of fairness, effectiveness and respect for the human rights of all. This is the type of model that stands the best chance of securing efficiency and effectiveness in the longer term. I hope Canada will have the good sense not to follow the UK's lead in this area of law and policy.”

³ For a brief account of this ignoble episode, visit <http://www.safecom.org.au>. Most of the asylum seekers in question were eventually recognized as refugees, although they spent years in detention on the island of Nauru first.

⁴ The Canadian refugee determination system already takes into account that state protection will normally be available in countries that are fully developed democracies, and requires claimants from such countries to demonstrate why the state can't or won't protect them.

⁵ Head of the Law School at Queen's University Belfast, a Human Rights Commissioner for Northern Ireland and author of 'Seeking Asylum in the UK: Problems and Prospects'.

Many changes in the UK asylum system have been introduced in the context of sensational media reporting, widespread misinformation and a marked politicization of the issue. This is the worst possible context for making well-considered policy changes, so it is not surprising that the UK system is not working well.

We can see that the UK has been struggling to create a functioning system by the frequent legislative changes:

1999: Immigration and Asylum Act
2002: Nationality, Immigration and Asylum Act
2004: Immigration and Asylum (Treatment of Claimants, etc.) Act
2006: Immigration, Asylum and Nationality Act 2006
2007: UK Borders Act
2008: Criminal Justice and Immigration Act
2009: Borders, Citizenship and Immigration Act

In addition, there have been numerous policy and practice changes, including the introduction in 2007 of the New Asylum Model.

“[P]oliticians in the UK have responded to a media and public outcry by producing ever more restrictive legislation on asylum. Far from helping improve the asylum system this legislation has made it harder to determine genuine need, leading to a lack of confidence in the process.” Centre for Social Justice⁶

Widely reported problems in UK system include claimants being unfairly screened into a fast-track process, where they are unable to present their cases properly, detained claimants unable to present their cases properly, inadequate legal aid and poor quality first-instance decision-making. Many critics charge that concerns about controlling numbers have taken precedence over deciding who needs protection, and have led to institutional bias against claimants.⁷

“The British Refugee Council is concerned by reports that Canada may be looking to replace independent decision making with decisions by immigration officers, replicating some of the most restrictive elements of the UK asylum system. While there are elements of the UK system that work well, fast-tracking and prejudging asylum claims, detaining refugees who have committed no crime, returning people to countries where they are not safe, and restricting refugees’ ability to have a fair hearing of their asylum claim are not among them. Canada should not seek to introduce UK policies and practices that have been condemned by international bodies including the United Nations High Commissioner for Refugees, and that make it incredibly difficult for refugees to have their claims heard fairly.” Gemma Juma, British Refugee Council

⁶ Centre for Social Justice, *Asylum Matters*, December 2008, p. 33,

http://www.centreforsocialjustice.org.uk/client/images/FINAL%20Asylum%20Matters%20_Web_.pdf

⁷ The slogan used by the Home Office in announcing their New Asylum Model was “Swifter Decisions - Faster Removals” – a slogan that suggests that fairness and refugee protection may well be sacrificed. Press release, 18 January 2006, <http://press.homeoffice.gov.uk/press-releases/new-asylum-model-swifter-decisio>

Widespread destitution of failed refugee claimants has become a major issue in the UK. Many cannot leave the UK because it is not safe for them to return to their home country, but they are without government support or the right to work. A year ago the British Red Cross estimated that there were at least 26,000 destitute failed asylum seekers, living on Red Cross food parcels.⁸ There is significant public support for these individuals in part because of lack of confidence in the system.

“Over the past few years there has been a growing resistance to the government’s attempts to deport failed asylum seekers. From Manchester, from Sheffield, from Belfast, from Bristol, the Home Office is being bombarded with requests from British people all over the country asking for asylum seekers to be given another chance.” Rachel Stevenson and Harriet Grant⁹

The problem of destitution of refugee claimants attracted the attention of the Parliamentary Joint Committee on Human Rights. In its 2007 report, the Committee concluded that “by refusing permission for most asylum seekers to work and operating a system of support which results in widespread destitution, the Government’s treatment of asylum seekers in a number of cases reaches the article 3 [European Convention on Human Rights] threshold of inhuman and degrading treatment [...] We have been persuaded by the evidence that the Government has indeed been practising a deliberate policy of destitution of this vulnerable population.”¹⁰

“... the treatment of asylum seekers falls seriously below the standards to be expected of a humane and civilised society.” Independent Asylum Commission¹¹

6. A high quality first decision is the best way to achieve fair and efficient refugee determination

Many countries around the world have experimented with what Minister Kenney proposes: a quick first decision by an immigration officer, followed by an appeal to a tribunal. What that often means is poor first decisions, many of which have to be overturned at appeal.

Canada has been taking another approach: investing in high quality first level decisions, by an independent tribunal, supported by good documentation.

Working to get the first decision right is the better way to make refugee determination fair and efficient.

The UK experience illustrates this well: of first instance decisions, made by officials of the UK Border Agency, a high percentage are overturned on appeal. This adds to expenses, as well as undermining confidence in the system. In 2007 and 2008, 23% of rejections appealed by failed asylum seekers were overturned, rising to 26% in the first quarter of 2009. For some countries,

⁸ The Guardian, “Land of no return”, Rachel Stevenson and Harriet Grant, 13 June 2008, <http://www.guardian.co.uk/uk/2008/jun/13/immigration.immigrationpolicy>

⁹ Ibid.

¹⁰ House of Lords and House of Commons, Joint Committee on Human Rights, *The Treatment of Asylum Seekers*, Tenth report of Session 2006-2007, 30 March 2007, <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/81i.pdf>

¹¹ Independent Asylum Commission, *Interim Findings - Fit for Purpose Yet?*, March 2008, p. 2, <http://www.independentasylumcommission.org.uk/files/Fit%20for%20Purpose%20Yet.pdf>

the successful appeal rate is much higher: 56% for Zimbabweans and 40% for Somalis in the first quarter of 2009.¹²

Problems with the quality of first instance decision making has attracted the concern of the UNHCR, which has been running a Quality Initiative Project, in an attempt to address the shortcomings. The UNHCR has repeatedly identified “very serious and significant concerns with the approach to credibility assessment.”¹³ In 2008, they found particular problems with decisions in the detained fast track: an incorrect approach to credibility assessment, a high prevalence of speculative arguments, a lack of focus on material elements of the claim, and some decision-makers demonstrating “a limited understanding of refugee law concepts.”¹⁴ A year later, the concerns persisted.¹⁵

Assigning refugee determination to immigration officers, rather than a tribunal like the Immigration and Refugee Board, is fundamentally problematic for a number of reasons, including:

- Immigration officers don’t have the necessary institutional independence. As departmental employees, they are likely to be influenced by departmental objectives such as reducing the number of claimants. Furthermore, since they ultimately report to the Minister, they may be biased by political considerations.
- In practice, immigration officers assigned to this level of decision-making are much more junior than those appointed to the Immigration and Refugee Board.¹⁶
- Immigration officers don’t have available to them the same level of training, legal services support and research and documentation, as provided to members of the Immigration and Refugee Board.¹⁷

¹² Home Office, Control of Immigration: Quarterly Statistical Summary, United Kingdom - First Quarter 2009, <http://www.homeoffice.gov.uk/rds/pdfs09/immqi109.pdf> and Supplementary excel tables, <http://www.homeoffice.gov.uk/rds/pdfs09/immqi109supp.xls>. Australia also has a first instance decision made by a civil servant, followed by an appeal to a tribunal. In 2007-08, the set-aside rate of appeals at the Refugee Review Tribunal was 18%, down from 30% in 2005-06, but rates for certain countries were much higher (e.g. 31% for Sri Lanka and 47% for Nepal). Migration Review Tribunal and Refugee Review Tribunal, Annual Report, 2007-2008, Table 4.8, <http://www.mrt-rrt.gov.au/annrpts/mrt-rrt/ar0708/MRTRRTAR0708.pdf>

¹³ UNHCR, Quality Initiative Project, Fifth report, June 2008, for period February 2007 – March 2008, par. 2.4, <http://www.unhcr.org/uk/what-we-do/documents/FifthReportkeyobservationsrecommendationsversionFINAL.pdf>

¹⁴ Ibid., par. 2.3.

¹⁵ UNHCR, Quality Initiative Project, Sixth report, April 2009, for period April 2008 – March 2009, chapter 3, Conclusions, <http://www.unhcr.org/uk/what-we-do/SixthReportKeyObservationsandRecommendations.pdf.pdf>. This report focuses on child claimants and finds inadequate attention is paid to child-specific factors in assessing claims made by children. The National Audit Office also pointed to problems in the quality of first instance decision-making, finding that “whilst audits may show the need for improvements in some areas of decision making, the Agency does not follow up these findings to identify and reverse incorrect decisions.” National Audit Office, *Management of Asylum Applications by the UK Border Agency*, January 2009, par. 6 (g), http://www.nao.org.uk/publications/0809/management_of_asylum_appl.aspx

¹⁶ This is certainly the case with Citizenship and Immigration Canada officers who currently make Pre-Removal Risk Assessments, which requires making refugee determinations.

¹⁷ For concerns about training of Pre-Removal Risk Officers, see Report of the House of Commons Standing Committee on Citizenship and Immigration, *Safeguarding Asylum - Sustaining Canada's Commitments to Refugees*, May 2007, <http://tinyurl.com/ljn24x>.

“[R]efugees must be able to have their claim for protection heard by a decision-making body that is independent from political pressures and public hostility towards asylum seekers and refugees. The Canadian model of independent decision-making is one that is well respected internationally and recognised as a model of good practice.” Gemma Juma, British Refugee Council

Ironically, while Minister Kenney is looking to the UK for inspiration for the Canadian system, some in the UK are recommending that the UK overhaul its system on the model of the Canadian. The Social Justice Centre recently reported that it was “very impressed with the Canadian asylum system where asylum decisions are made by independent highly trained ‘members.’”¹⁸ In making their proposal for a Canadian-inspired system, they argued that “greater investment and time at the beginning would ensure that a better quality of decision was being made, with fewer appeals, which will cost no more in the long term.”¹⁹

The Canadian refugee system has also been frequently praised by the UN High Commissioner for Refugees, and promoted as a model internationally.

7. Fast-tracking some claims: often unfair and ineffective

The idea of fast-tracking claims that seem unfounded is an attractive one. However, there are a number of problems:

- It is difficult to identify at the outset which claims are without merit. Some claims that seem superficially unfounded turn out on investigation to be serious claims. In the UK, claimants wrongly screened into the fast track have included survivors of torture, rape and other gender violence.²⁰ The Canadian system used to have a screening process designed to eliminate claims with “no credible basis” but it failed and was abandoned in 1993.
- Screening by country of origin is not useful because there are very few claimants from countries which one could confidently label safe. The countries currently preoccupying us, the Czech Republic and Mexico, have both experienced significant and well-documented human rights abuses and there are serious questions about whether the state is able or willing to protect its citizens. This is confirmed by the acceptance rates of those heard by the Immigration and Refugee Board. Over the last year and a half over 80% of Czechs and 15% of Mexicans heard were found to be refugees. While the acceptance rate of Mexicans certainly indicates that many claimants do not need Canada’s protection, it also makes it impossible to argue credibly that we can presume a Mexican claim is not well-founded. In addition, the acceptance rate may be unfairly low: many of those refused are denied protection on the grounds that the Mexican state should be able to protect them. But, in the context of rising violence in Mexico, the state often does not offer protection, either because

¹⁸ *Asylum Matters*, par. 7.2.3, supra at footnote 6.

¹⁹ Ibid.

²⁰ Bail for Immigration Detainees, *Refusal factory: Women’s experiences of the Detained Fast Track asylum process at Yarl’s Wood Immigration Removal Centre*, September 2007, http://www.biduk.org/pdf/Fast%20track/BID_RefusalFactory_07.pdf. The National Audit Office found that some applicants are detained although their case is too complex for the fast-track, due to a failure to conduct a full screening interview, *Management of Asylum Applications by the UK Border Agency*, par. 10, supra at footnote 15.

it is powerless or because it is complicit in the abuse. A study by the Pentagon has concluded that Mexico is at risk of becoming a failed state.²¹

- Putting claimants in a fast-track on the basis that they are deemed unfounded usually works out to be a self-fulfilling prophecy. The claimants don't have sufficient time or opportunity to prepare and present their case properly, and decision-makers risk being biased against them because they have been labelled unfounded. Fast-tracking particularly penalizes survivors of rape and sexual violence, since it is well-documented that these survivors often need time before they are ready to disclose their experiences to decision-makers. In fast-track systems, they will be out of the country before they have had a chance to explain to anyone what has happened to them.

“Fast track is just a system to refuse people. There is no time to listen to you. Even the judge didn't listen.” N., claimant in the UK detained for 11 months.²²

Most commentators fixate on getting fast refugee determinations for unfounded claims, but in fact delays very often occur after a claimant has been rejected. Removals operations rarely seem to be coordinated with the rest of the system.

The UK is experiencing a similar problem. Their National Audit Office recently reported that the introduction of the New Asylum Model has not resulted in an increase of the removal of failed asylum applicants.²³

In fact, recent statistics show that backlogs in the UK asylum system are increasing.²⁴ Worse, significant numbers of claimants at the end of the asylum process find themselves destitute.²⁵

Conclusion

Canadians are rightly proud of our international reputation as a leader in refugee protection. Our refugee system is far from perfect, but in considering changes, we would do well to safeguard the core elements that contribute to its success, and that are envied in other parts of the world. Among those core elements is a commitment to treating claimants with dignity and to providing a fair process to determine whether they need protection.

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²¹ Wall Street Journal, “Mexico’s Instability Is a Real Problem. Don’t discount the possibility of a failed state next door”, Joel Kurtzman, 16 January 2009, <http://online.wsj.com/article/SB123206674721488169.html>. The Federal Court of Canada has repeatedly struck down decisions of the Immigration and Refugee Board where claimants were rejected on the basis that the Mexican state could protect them or that they could find safety elsewhere within Mexico. For references, see <http://www.ccrweb.ca/livesinthebalance4.htm#FN2>.

²² *Refusal Factory*, supra at footnote 20.

²³ *Management of Asylum Applications by the UK Border Agency*, January 2009, para. 6(h). supra at footnote 15.

²⁴ The National Audit Office, supra at footnote 15, found a growing backlog of cases awaiting an initial decision (par. 2.14) and a rising backlog of refused claimants awaiting removal (par. 2.23), in addition to a “legacy backlog” of 335,000 cases from 2006, of which nearly 90,000 were concluded by My 2008 (par. 5.1 – 5.4). See also House of Commons Public Accounts Committee, 28th report, *Management of Asylum Applications*, 16 June 2009, <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpubacc/325/325.pdf>

²⁵ Kate Smart, *The Second Destitution Tally: an indication of the extent and causes of asylum seekers, people at the end of the asylum process and refugees in the UK*, May 2009, <http://www.refugeecouncil.org.uk/policy/responses/2009/destitution.htm>