

## Restructuring Canada's Refugee Determination Process: A Look at Bills C-55 and C-84

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### Résumé de l'article

Bien que le Canada affiche depuis la Seconde Guerre mondiale une feuille de route généralement enviable en ce qui regarde l'accueil des réfugiés, l'existence d'une procédure formelle de revendication du statut de réfugié en sol canadien remonte seulement à la mise en œuvre de la *Loi sur l'immigration de 1976*, en 1978. Le nombre de personnes qui se sont prévalues de ce système a toutefois excédé grandement ce qui avait été prévu par les fonctionnaires du Ministère de l'immigration. Ces derniers, en conséquence, insistent aujourd'hui pour que la Loi soit amendée de façon à réduire drastiquement l'accès à la revendication du statut de réfugié sur le territoire.

Les amendements que proposent les projets de lois C-55 et C-84 ne sont pas sans rapport avec ce qui s'est fait récemment dans d'autres pays industrialisés, spécialement en Europe de l'ouest, où de nombreux obstacles à l'entrée des réfugiés ont été dressés. Mais quand on sait que les réfugiés sont au Canada protégés par la *Charte canadienne des droits et libertés*, il ne fait pas de doute que les nombreuses dispositions des projets de lois C-55 et C-84 qui semblent porter atteinte à des droits de la Charte vont faire l'objet de contestations judiciaires qui, il faut l'espérer, auront pour vertu de définir les obligations internationales du Canada à l'égard des réfugiés.

## **Restructuring Canada's Refugee Determination Process : A Look at Bills C-55 and C-84**

Brahm SEGAL \*

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\* Étudiant, Faculté de droit, Université Laval. Ce texte a valu à son auteur la première place lors du concours annuel (1987-88) organisé par la Commission internationale des juristes, la Faculté de droit de l'Université Laval et la Fondation Maurice-Pollack. Il remercie la professeure Nicole Duplé qui l'a dirigé dans son travail.

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## Introduction

Should Bills C-55 and C-84<sup>1</sup> become law they will radically alter the way we adjudicate refugee claims in Canada<sup>2</sup>. Bill C-55, though premised on the principles of simplifying and improving Canada's refugee determination process, provides for a screening mechanism which effectively bars universal access, includes Immigration Department officials in that initial screening

1. Second Session, Thirty-third Parliament, 35-36 Elizabeth II, 1986-87.

2. A matter falling under the paramount jurisdiction of the federal government under s. 91(25), 95 of the *Constitution Act*, 1867.

and strictly limits review. Bill C-84, apart from empowering the Minister of Employment and Immigration to interdict or turn back ships thought to be transporting refugee claimants to our shores, criminalizes the act of assisting refugees, stiffens detention provisions, and broadens the basis for excluding security risks from the process. Yet paradoxically, the Minister<sup>2a</sup> has touted the Bills as being in full compliance with Canada's international legal obligations<sup>3</sup>, the *Canadian Charter of Rights and Freedoms*<sup>4</sup>, and this country's humanitarian tradition<sup>5</sup>.

Detractors on the other hand find the Bills to be in violation of the Charter, the Convention and at variance with all the major submissions put forward by the blue ribbon committees and individuals who have studied the refugee determination process in Canada of late<sup>6</sup>.

The fair, humane and expeditious treatment of inland refugee claims is both an admirable and long overdue goal. Numerous applicants under the existing system spend years awaiting a final determination of their claims, time which could be dedicated instead to the difficult job of rebuilding their lives. A more efficient determination process also would discourage spurious claimants who abuse the claims system simply because they are entitled to work in Canada and remain here until they have exhausted their appeal rights.

## I. An overview of the history of refugee protection in Canada

The *Immigration Act, 1976*<sup>7</sup> established refugees as a class and formalized the refugee status determination process for the first time in Canada. Previously

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2a. Former Minister of Employment and Immigration Benoît Bouchard.

3. A reference to the United Nations *Convention Relating to the Status of Refugees of 28 July 1951*, 189 UNTS 150 and to the *Protocol Relating to the Status of Refugees of 31 January 1967*, 606 UNTS 267 (hereafter cited as the Convention).

4. Part I of the *Constitution Act, 1982*, enacted by the *Canada Act, 1982*, 1982, c. 11 (U.K.).

5. A shamelessly revisionist view if one considers our less than admirable refusal to take in refugees of Nazism before and during World War II. To Canada's credit, it has maintained a more liberal attitude to refugee resettlement since then, than have most industrialized nations.

6. Including E. RATUSHNY, *A New Refugee Status Determination Process for Canada*, May, 1984; W. GUNTHER PLAUT, *Refugee Determination in Canada*, Report to Minister of Employment and Immigration, April, 1985.

7. S.C. 1976-77, c. 52. The principal legal basis for the determination of refugee status in Canada at present is this statute (hereafter cited as the Act).

the Immigration Appeal Board had been permitted to grant relief on humanitarian and compassionate grounds to *de facto* refugees who wished to remain in Canada. Under the current Act the I.A.B. no longer has the freedom to let claimants not falling under the Convention refugee definition stay on humanitarian and compassionate grounds. This power now belongs to the Minister's Special Review Committee, which Bill C-55 will dismantle.

While signatories to the Convention may establish their own criteria for refugee selection, the Convention dictates that the principle of non-refoulement be observed. In the words of Goodwin-Gill, the principle "[...] states, broadly that no refugee should be returned to any country where he or she is likely to face persecution or danger to life and freedom"<sup>8</sup>. Viewed cynically, the signatory's only obligation under the Convention is a negative one, a general prohibition against refoulement<sup>9</sup>. In this reading, the Convention does not require a country to provide protection in the form of permanent residence — asylum — to refugees, nor does it deny states parties the right to send refugees to some other country, provided the latter country does not refool them. One commentator notes that in Canada

[...] all attempts to [judicially] invoke the provisions of the Convention [...] apart from the definition [of a refugee], to provide substantive rights in domestic law, have met with failure. [...] despite the legislative policy set out in s. 3(g) of the [Act].<sup>10</sup>

This result is predictable given the primacy of municipal law over international law, although it can often be given effect as a powerful tool for interpreting ambiguous domestic laws<sup>11</sup>.

8. G. S. GOODWIN-GILL, *The Refugee in International Law*, Oxford, Clarendon Press, 1983, p. 69, 97.

9. M. SCHELEW, "Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-55", Iss. n° 6, p. 148.

10. C. J. WYDRZYNSKI, *Canadian Immigration Law and Procedure*, Auroro Canada Law Book, 1983, p. 315. Section 3(g) of the Act acknowledges "Canada's international legal obligations with respect to refugees [...]," while s. 2(1) defines "Convention Refugee".

any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

- (a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country, or
- (b) not having a country of nationality, is outside the country of his former habitual residence and is unable or, by reason of such fear, is unwilling to return to that country.

11. J. H. GREY, «Canada and Refugees: A case study», discussion paper presented at conference on Human Rights and the Protection of Refugees under International Law, Montréal, 2 Dec. 1987, p. 108.

Canada's selection abroad of refugees represents a moral engagement, while the inland determination system responds to our international legal obligation to consider claims for Convention refugee status made by individuals who reach Canadian soil.

Approximately 95 per cent of the refugees Canada accepts annually are processed by Canadian visa officers abroad<sup>12</sup>. Selection of this kind is discretionary in the sense that there is no obligation to accept an applicant, even one who meets the Convention definition and who is judged to have the potential for successful establishment in Canada<sup>13</sup>. Moreover, the selection of refugees abroad is not accompanied by the procedural protections that applicants to the inland determination process enjoy: an oral hearing; a right to counsel; to an interpreter; to reasons for a negative determination; and, an independent decision-maker<sup>14</sup>.

Given the dichotomy of "selection abroad" *versus* "inland determination", one can appreciate how the inland system, with its many time-consuming, costly steps is susceptible to break down under an onerous case load. As Dirks explains, the current system for refugee determination in Canada proved unsatisfactory soon after its genesis:

[...] the intention was to have a process available to a few individuals already in Canada who required protection from a [...] removal order which would result in their having to return to their state of origin when a valid fear of persecution existed. [...] Without doubt, most officials did not anticipate that hundreds or even thousands of claims would be made annually by desperate aliens prepared to make use of whatever channel might be available to acquire the right to permanent residence.<sup>15</sup>

More numerous than expected, the aliens who have reached Canada and applied for Convention refugee status in the 1980's have drawn attention to the many flaws in the existing decision-making and review system.

Since international law binds Convention signatories to perform their obligations in good faith<sup>16</sup> which, in part, requires the contextual interpretation of a treaty's terms in the light of the instrument's object and purpose, concern mounted about whether the system Canada had in place for refugee determination was adequate to the task. In response, governments since the early

12. E.I.C., *Refugee Perspectives 1987-1988*, Refugee Affairs Division, Policy and Program Development Branch Immigration, June 1986, p. 39.

13. D. MATAS, "Minutes of...", *supra*, note 9, Iss. n° 8, p. 78.

14. *Ibid.*

15. G. E. DIRKS, "A Policy Within a Policy: The Identification and Admission of Refugees to Canada," *Canadian Journal of Political Science* XVII: 2, June 1984, p. 279, 301.

16. A. 31, *Vienna Convention on the Law of Treaties*, UN Doc. A/Conf. 39/11/add.2, May 23, 1969, acceded to by Canada Oct. 14, 1970.

1980's have commissioned or elicited mountains of studies, submissions and concerned briefs from academics, religious groups, parliamentarians and ethnic organizations, culminating in Rabbi Plaut's exhaustive report submitted in April, 1985 to the Minister of Employment and Immigration<sup>17</sup>.

The release of the Plaut Report coincided with the Supreme Court of Canada's decision in *Singh et al v. Minister of Employment and Immigration*<sup>18</sup> which held that a refugee claimant is entitled to an oral hearing of his or her claim by virtue of section 2(e) of the *Canadian Bill of Rights*<sup>19</sup> and alternatively, section 7 of the Charter. Thousands of claimants, like the appellants in *Singh* had till that point been refused a review hearing before the I.A.B. because it was required to screen applications for redetermination and allow to proceed to a full hearing only those claims which had, on the balance of probabilities, a better than fifty percent chance of succeeding.<sup>20</sup>

The two year delay between the ruling in *Singh* and the tabling of reforms to the system<sup>21</sup> created the impression that senior officials of the Immigration Department were deliberately delaying the introduction of legislation in order to underline the inefficiency and supposed abuse in the current system, and thereby generate a backlash calling for restrictive measures<sup>22</sup>.

The celebrated arrivals by boat of Tamil and Sikh claimants raised fears that Canada was losing control of its borders. This perception — at least indirectly responsible for the alarmist tone of Bill C-84 — made it difficult for proponents of a retailored claims process that would respond to the spirit of *Singh* to get their views across. To this constituency, Bills C-55 and C-84 represent the triumph of restrictionism in Canadian refugee policy. Instead of aspiring to the highest and the best in the field of human rights, we have mimicked fellow Western nations which have flexed their sovereign will and renounced their commitments to refugee resettlement in recent years<sup>23</sup>. By doing so, Canada has helped to confirm the absence of obligatory force behind international refugee law and to expose the validity of Green's *dictum*

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17. W.G. PLAUT, *supra*, note 6.

18. [1985] 1 S.C.R. 177; (1985) 17 D.L.R. (4th) 422; (1985) 58 N.R. 1; (hereafter S.C.R. cited).

19. R.S.C. 1970, App. III.

20. *Kwiatkowsky v. M. E. I.*, [1982] 2 S.C.R. 856, upholding validity of s. 71 (1) of the Act.

21. Which were necessary because the government deemed unworkable the prospect of allowing all claims to proceed to redetermination before the I.A.B.

22. M. SCHELEW, "Refugee rights at Ottawa's mercy," *The Globe and Mail*, 9 Dec. 1986, p. A7.

23. G. S. GOODWIN-GILL, "Refugees: the functions and limits of the existing protection system", discussion paper presented at conference on Human Rights and the Protection of Refugees Under International Law, Montréal, 1 Dec. 1987, p. 4.

that "[...] there is no true institutional recognition or protection of the human rights of refugees"<sup>24</sup>.

Article 35 of the Convention obliges signatories to cooperate with the Office of the High Commission for Refugee, in the performance of its protection functions.

The Executive Committee, in which Canada has participated faithfully, facilitates such collaboration. Some consider the standards it has developed to be legitimate sources of international law because they represent "A unanimous declaration that exhibits the will of the community of nations [...]" on whatever issue they address<sup>25</sup>. Yet because the Office "has no secure place of asylum and no formal way to extend [...] protection", its effectiveness is "conditioned by the fact of the sovereignty of States"<sup>26</sup>. And the latter may brazenly disregard the Executive Committees recommendations not simply because "[...] there are no superpolicemen who enforce the rules" of international law<sup>27</sup>, but also because unambiguous domestic legislation prevails over the rules of international law in our constitutional system<sup>28</sup>. Hence where international law conflicts with the Act, "[...] the statute must be applied as it stands"<sup>28a</sup>.

A caveat is called for at this point: though states are the communities in which the right of refuge must be realised<sup>29</sup>, in Canada the Charter has been judicially interpreted to provide a check to the Executive's and Parliament's will to limit the procedural safeguards available to refugee claimants.

So stripped of its surrounding rhetoric, the conundrum regarding the international legal obligation to protect refugees resolves itself into two competing views. One is the internationalist paradigm according to which refugee character flows from lack of protection by one's state or the state of one's habitual residence<sup>30</sup>. In counterpoint is the statist paradigm which posits that a claimant is not a refugee until recognized as such by a state's determination process. Not surprisingly the language of the Convention, the Protocol and the U.N.H.C.R. adopt the internationalist paradigm while the

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24. L.C. GREEN, "Institutional Protection of Human Rights", (1987) 28 *C. de D.* 547, 568.

25. J. C. HATHAWAY, "Minutes of...", *supra*, note 9, Iss. n° 7, p. 39.

26. G.S. GOODWIN-GILL, *supra*, note 23, p. 19, 21.

27. J.C. HATHAWAY, *supra*, note 25.

28. P. HOGG, *Constitutional Law of Canada*, 2nd ed. Toronto, Carswell, 1985, p. 246.  
28a. *Ibid.*

29. G.S. GOODWIN-GILL, *supra*, note 23, p. 21.

30. Early draft (not published) of submission by Canadian Bar Association to Legislative Committee on Bill C-55, para. 45.



Act [and Bills C-55 and C-84 which will amend it] are cast in the vocabulary of the statist, though tempered by jargon borrowed directly from the Convention.

## **II. Existing procedures for refugee determination in Canada and the amendments proposed by Bill C-55: a thumbnail comparison**

The current legislation contemplates refugee claims only by individuals under inquiry for violation of the Act. The making of a refugee claim suspends the adjudicator's power to issue a removal order, until the claimant has had an opportunity to be examined under oath and have his or her claim considered. A rare, enlightened feature of Bill C-55 is to cease to distinguish between in-status and out-of-status claims; however, an adjudicator will have the power to issue a conditional removal order to a person who makes a claim at inquiry. This innovation obviates the need to reconvene an inquiry just to issue a removal order subsequent to a negative determination of a claim.

The Refugee Status Advisory Committee (R.S.A.C.) studies the transcript of the examination under oath (E.U.O.) which is conducted by a senior immigration officer (S.I.O.). On the advice of the R.S.A.C. the Minister determines whether or not a claimant is a Convention refugee. This procedure will be replaced under Bill C-55 by an eligibility and credibility screening before an adjudicator and Refugee Division member, both of whom would have to agree to *exclude* a claim. This panel will determine access to a full hearing before a two-member panel of the Refugee Division, which will decide whether the Convention definition applies to the claimant. Although the screening hearing is adversarial, the Minister will not be able to interject in the hearing before the Refugee Division unless she believes the cessation and exclusion clauses of the Convention apply. A single panelist's favorable vote results in the acceptance of the claim.

Currently, negative determinations by the Minister entitle claimants to a redetermination before the I.A.B. which renders a decision after hearing evidence and submissions from the claimant and the Minister. This constitutes the sole oral hearing under the current provisions of the Act.

The I.A.B.'s decisions are subject to judicial review under section 28 *Federal Court Act*<sup>31</sup> grounds which will continue to apply to decisions of the Refugee Division and the screening panel. Additionally, an appeal on points of law will be available to claimants rejected by the Refugee Division, but this

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31. S.C. 1970-71-72, c. 1.

procedure, like judicial review under the Act, will be subject to leave provisions.

## 1. Objective restrictions to a full hearing

### 1.1. Prior rejection

Ostensibly to discourage repeat claims, Bill C-55 provides that a person who has been excluded or rejected at any level of the claims process and who returns to Canada within ninety days of such a decision shall not be eligible to make a second claim<sup>32</sup>.

An exception to this provision will apply to persons excluded on the basis of section 48.01 (1) (b) — safe third country — who either cannot be removed to the safe country or have been refused permission to lawfully remain there. Under section 48.03 (1), these persons will be allowed to recommence their hearing before an adjudicator and Refugee Division member who shall inquire into the credible basis of their claim.

The apparent premise of the prior rejection exclusion is that abusers of the claims system will try to reenter it interminably, until they receive a favorable disposition. This is unlikely to mean being recognized as a Convention Refugee, although the possibility of being landed under an administrative backlog clearance program is never to be excluded. Precedents for such measures are numerous, the most recent being the Administrative Review Program commenced on May 21, 1986 to unburden the claims process subsequent to the *Singh* decision. But the language of Bill C-55, being objective, will catch and exclude not only abusers, but also genuine refugees, since the adjudicator and Refugee Division member will not have the discretion to consider the credible basis for fearing persecution. Critics of this provision caution that,

A person who was not persecuted before but is upon being forcibly returned to his country and who manages to leave again, would not have any legal recourse to have this considered on his second entry and would be returned again to his country.<sup>33</sup>

Clearly the only acceptable solution is for Bill C-55 to be amended to allow the adjudicator and Refugee Division member to consider the credibility of

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32. Bill C-55, s. 14 (Imm. Act, s. 48.01 (1) (c), 48.01 (6) ).

33. C.B.A., *supra*, note 30, para. 67(b).

the person's fear of persecution which may have arisen since the person was last rejected or excluded from the claims system. Guidelines for the identification of spurious repeat claims already are employed by the R.S.A.C. and could be transferred to the Act for the purpose<sup>34</sup>.

## 1.2. Late claims

Bill C-55 proposes that claims made at inquiry be barred if the person concerned fails to indicate at the outset his or her intention to request refugee status in Canada<sup>35</sup>. This technical restriction is at variance with the U.N.H.C.R. recommendation that failure to submit an asylum request within a certain time limit "[...] not lead to an asylum request being excluded from consideration"<sup>36</sup>. The rationale for this feature of the Bill is obscure. Under the current system, most refugee claims are made at the earliest point in the inquiry, before the C.P.O. is requested to prove the alleged violation of the Act by the person concerned. Nevertheless, a claim may be made at any point in the inquiry<sup>37</sup>.

It is submitted that no great inconvenience would be caused by preserving this aspect of the current claims system, since Bill C-55 will allow the Adjudicator to issue a provisional removal order to the claimant regardless of when the claim was announced<sup>38</sup>. Although proposed section 45(1) mandates the adjudicator to provide the person concerned an opportunity to indicate his or her intention to claim Convention Refugee status, the unrepresented or badly represented individual may be prejudiced by the absoluteness of the rule in section 45(2), if such a person were ultimately removed to a country of persecution.

## 1.3. Certified security risks

The Act currently permits the refoulement of certified security risks and other criminally inadmissible individuals found to be Convention Refugees<sup>39</sup>. The novelty Bill C-84 imports is to exclude such persons from gaining access

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34. R.S.A.C., *Manifestly Unfounded Claims Guidelines*. See W.G. PLAUT, *supra*, note 6, p. 199 for a summary of these guidelines.

35. Bill C-55, s. 14 (Imm. Act, s. 45 (2)).

36. U.N.H.C.R. EXCOM. Conc. N° 15 (xxx), 1979, para. 1.

37. *Immigration Act*, 1976, s. 45(1).

38. C. GROOS, "Re Bill C-55, Proposed Amendments to the Immigration Act, 1976: A Critique", an unpublished submission to Legislative Committee on Bill C-55, p. 20.

39. *Immigration Act*, 1976, s. 55.

to the Refugee Division for a full hearing of their claim<sup>40</sup>. Moreover the specialized tribunal that reviews Ministerial decisions to file a certificate will no longer be competent to perform this function in respect of non-permanent residents. Instead a designated judge of the Federal Court will assess the grounds for the filing of a certificate<sup>41</sup>.

### 1.3.1. Charter implications

The question of whether permanent residents will be deprived of equal justice under section 15 of the Charter is pertinent here. It is not clear why the legislator has divested an expert administrative tribunal of this matter. Considering the dubious provenance of the information underlying many certificates the Minister files<sup>42</sup> why should a claimant be deprived of S.I.R.C.'s<sup>42a</sup> procedural safeguards and an extra layer of review?

### 1.3.2. Exception to the non-refoulement principle

Article 33(2) of the Convention permits the refoulement of confirmed security risks, but all forms of expulsion are made subject under Article 32 to due process — fundamental justice under the Charter — and the existing certificate review system seems to favour the subject of the certificate.

## 1.4. Safe third country exclusion

### 1.4.1. Bill C-55's weakest link ?

This ground for exclusion from the refugee determination process aroused vehement criticism for its implacable objectivity, its overtly political character and its anticipated effect of sending refugees into orbit<sup>43</sup>, or worse, refouling then *via* the safe third country.

Section 115(1) (r) of Bill C-55 authorizes the Governor in Council to prescribe a list of safe countries for the purposes of the exclusionary ground

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40. Bill C-84, s. 5 (Imm. Act, s. 48.1), Bill C-55, s. 14 (Imm. Act, s. 48.01 (1) (e) ).

41. Bill C-84, s. 41 (4).

42. Toronto Refugee Affairs Council, "An Assessment of Some of the Major Provisions of Bill C-84", Sept. 30, 1987 (not published) p. 5.

42a. The Security Intelligence Review Committee, established by *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21, s. 34 (1).

43. Meaning when no state accepts responsibility for determining a claim.

set out in section 48.01 (1) (b) of the legislation. However, the plain wording of section 48.01 (1) (b) does not indicate that ineligibility to make a refugee claim will only attach to persons who have a verifiable right *to enter* the designated safe country and to have their claim *determined* there<sup>44</sup>.

Although the onus of proving a claimant has a right to return to a safe country and make a claim there lies initially with the Minister's representative, the undocumented or falsely-documented claimant will have to rebut the presumption that he or she is able to return to the country of embarkation to Canada<sup>45</sup>. The entire prospect of returning someone to a place where that person enjoys less than genuine safety compares negatively with the current Ministerial practice of allowing that person to make a claim and only removing a successful claimant if it is shown that he or she has already been accepted as a Convention Refugee in another country.

Since the adjudicator and Refugee Division member may not digress from the Cabinet's decision to designate a particular country as safe, debate at this stage of the access hearing will be limited to an examination of whether the person has come from that country, whether he can go back, and whether if he does go back, he can get a claim there<sup>46</sup>. Moreover removal under the safe country exclusion will take place within seventy-two hours of the decision denying access to the Refugee Division<sup>47</sup>. This time frame, "[...] does not even approximate a reasonable period of time within which to gain admission to another country" as advised by Article 32(2) of the Convention<sup>48</sup>.

What motivated the Department to campaign for the safe country exclusion was the practice they call "asylum shopping", whereby a claimant passes through two or more countries' determination processes, because of earlier rejection, to avoid imminent refoulement or merely out of a preference for another country despite prior recognition as a Convention Refugee<sup>49</sup>. The Department offers no precise figures on the extent of this supposed phenomenon.

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44. Though s. 48.03 provides for the eventuality of the designated safe country not allowing the claimant to re-enter its territory, or not determining his or her claim. In such instances the claimant shall be allowed to come into Canada and recommence his or her claim from the "credible basis" stage of the access hearing.

45. Bill C-55, s. 14 (Imm. Act, s. 48.01 (4) ).

46. R. GIRARD, "Minutes of...", *supra*, note 9, Iss. n° 2, p. 40.

47. Bill C-55, s. 16 (Imm. Act, s. 51 (1) (b) ).

48. C.B.A., *supra*, note 30, para. 48.

49. R. GIRARD, *supra*, note 46, p. 42.

Bill C-55 intentionally leaves open the possibility of the Governor-in-Council designating non-signatories of the Convention as safe countries. Nor will Bill C-55 ensure that only countries which can provide effective safety to the individual be included on the list<sup>50</sup>. It is thus imaginable that Afghans having lived in Pakistan since fleeing their country of origin will be returned uniformly to Pakistan, which does not adhere to the Convention and does not protect all Afghans equally<sup>51</sup>. Admirable as it is, the fact that Pakistan provides protection to most Afghans does not allow Canada to depend on Pakistan to never refool an Afghan who falls under the Convention definition of refugee, because Pakistan has not undertaken that obligation in the legal sense<sup>52</sup>.

#### 1.4.2. A workable version

Opponents of the safe country exclusion as it now stands generally admit that it could be redrafted to conform with our obligation to protect refugees from refoulement<sup>53</sup>. This result could be achieved by amending the Bill to specify that a safe country is a Convention signatory, that respects its treaty obligations and can extend to the individual concerned the right to enter its territory and have his or her claim determined there on the merits<sup>54</sup>. A minority of the Bill's critics maintain the view that the Convention and the *Universal Declaration of Human Rights*<sup>55</sup>, to which Canada is also a party, allow a claimant to choose his or her country of asylum<sup>56</sup>. This proposition is extravagant for the time being because Parliament has not incorporated into domestic law the provision that "Everyone has the right [...] to enjoy in [...] [Canada] asylum from persecution"<sup>57</sup>, and the provisions of the Convention enacted to date in Canadian legislation are the definition of refugee<sup>58</sup> and the non-refoulement principle<sup>59</sup>.

Essentially, Bill C-55 must recognize the possibility of a country being safe for the majority of individuals who can return to it, but not for everyone.

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50. *Id.*, p. 24.

51. M. SCHELEW, *supra*, note 9, p. 131.

52. *Ibid.*

53. *Immigration Act*, 1976, s. 55 ; United Nations Convention, *supra*, note 3, Art. 33.

54. M. SCHELEW, *supra*, note 9, p. 137.

55. UNITED NATIONS GENERAL ASSEMBLY, 10 Dec. 1948, UN Doc. A/810.

56. D. RACICOT, "Minutes of...", *supra*, note 9, Iss. n° 6, p. 105 ; C.B.A., *supra*, note 30, para. 38.

57. *Universal Declaration of Human Rights*, Art. 14 (1).

58. *Immigration Act*, 1976, s. 2 (1).

59. *Id.*, s. 55.

By granting the adjudicator and Refugee Division member the discretion to make the finding that the person concerned may not be able to rely on the protection of the designated safe country, the individualized element of refugee determination would be restored to the process, and the risk of indirectly refouling genuine refugees consequently diminished <sup>60</sup>. The Department's argument for not having to consider the effective protection that an individual might expect in a safe country is fraught with circularity:

In the case of a safe third country, you do not have to hear the testimony, because you are sending that person to a country that has been *determined* to be safe and is not his own. [my emphasis]. <sup>61</sup>

Another factor that could inform the cabinet's determination — aside from the country's respect for human rights — might be the desire to avoid offending a country with which Canada maintains good diplomatic relations.

#### 1.4.3. On a collision course with *Singh*

It has also been observed that direct refoulement will be possible pursuant to a safe country exclusion because technically the person concerned will not have been identified as a Convention Refugee, so the provision in section 55 of the Act forbidding refoulement will not be triggered. Moreover, the adjudicator only issues the removal order; choice of country of removal under section 54(2) of the Act is left to the Enforcement Branch of the Department and they will not be under any legal constraint to remove the person only to a safe third country <sup>62</sup>.

In the *Singh* case, Wilson J. held that a claimant was entitled «[...] to rely on this country's willingness to live up to the obligations it has undertaken as a signatory to the [...] Convention [...]» <sup>63</sup>. After determining that section 7 of the Charter applied to all persons physically present in Canada, regardless of their immigration status <sup>64</sup>, Wilson J. concluded that the principles of fundamental justice required that a claimant be given an oral hearing where a threat to that person's life, liberty or security existed <sup>65</sup>.

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60. Although proposed s. 115 (1) (r) directs the Governor-in-Council to have regard to a country's treatment of "persons of a specified class of persons", it cannot be said for certain that this clause will prevent Salvadoreans from being returned to the U.S.A. which accepts very few Salvadorean claimants compared to Canada.

61. R. GIRARD, *supra*, note 46, p. 40.

62. C.B.A., *supra*, note 30, para. 59.

63. *Supra*, note 18, p. 193.

64. *Id.*, p. 203.

65. *Id.*, p. 211.

Considering that many claimants will not get beyond the safe country exclusion in the determination process, it is fair to ask whether claimants so curtailed in presenting their case will have been accorded an oral hearing as contemplated by *Singh*. Detractors of the screening process note that though it

[...] will be in the form of an oral hearing which differs from the written screening process attacked in the *Singh* case [...] this difference is not substantive, because the adjudicator and Refugee Division member at this stage in the screening hearing must apply non-discretionary rejection criteria. They are precluded when considering eligibility to make a refugee claim, from looking at the merits of the claim.<sup>66</sup>

One has to conclude that the legislator erred in failing to confer discretion upon the decision-makers in the access hearing to hear evidence about why a designated safe country cannot provide adequate protection to the person concerned.

[Purportedly, senior immigration officers (S.I.O.'s) will vet "effective safety" separately and will have special review powers to consider landing claimants on compassionate and humanitarian grounds. How diligently enforcement officials, whose everyday concern is to remove people alleged to have violated the Act, will try to facilitate their entry on humanitarian and compassionate grounds or otherwise, remains the subject of speculation<sup>67</sup>.]

#### 1.4.4. Burden sharing

Exclusion based of safe third country goes to the heart of the issue of burden sharing. Refugee-receiving countries in Western Europe and North America, though not primarily countries of first asylum, have latterly attempted to regionalize refugee movements by keeping those in need of protection within their regions of origin :

This objective is pursued by the imposition of visa and transit visa requirements ; by sanctions against airlines which carry undocumented or otherwise inadmissible passengers ; by socio-economic measures of deterrence such as prohibiting employment or limiting social benefits [...] and by procedural devices designed to avoid decisions on the merits in favour of rapid removal to some other country deemed to be responsible or secure, or on the ground that the applicant for asylum has spent too long in transit, or could have sought protection elsewhere.<sup>68</sup>

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66. C.B.A., *supra*, note 30, para. 52.

67. B. JACKMAN, "Minutes of...", *supra*, note 9, Iss. n° 3, p. 13.

68. G.S. GOODWIN-GILL, *supra*, note 23, p. 4.



As this passage shows, many of the devices Bill C-55 adopts to deter refugees from selecting Canada as a country of asylum have been imported from other refugee-receiving countries. However, a major distinction applies to the European varieties of the "safe country" rule. By and large, exclusion on this ground amongst Western European countries is governed by multi-or bilateral agreements specifying which national jurisdiction will be responsible for determining a particular claim<sup>69</sup>. Unless Canada becomes a party to such European style agreements, the claimants we remove on the basis of safe third country will bounce from one frontier to the next seeking protection in vain, because we will be perceived by other refugee-receiving countries as fobbing off an unjust portion of our refugee burden in disrespect of international comity.

#### **1.5. A quasi-objective coda to the access hearing : the credible basis test**

The second stage of the access hearing for claimants not determined to be ineligible on the basis of prior protection, prior rejection, an existing removal order, failure to make a timely claim at inquiry, safe third country, or being the subject of a security certificate, is the credible basis examination<sup>70</sup>.

##### **1.5.1. Why have it ?**

According to the Department, the credible basis examination is "[...]simply intended to identify if there is an arguable case"<sup>71</sup>. The C.P.O., being the Minister's representative at the inquiry will move that the claim proceed to a determination before the Refugee Division once he is satisfied, upon a summary presentation of the claimant's evidence, that a supportable claim to protection is made out<sup>72</sup>. Should the claim not proceed to a full hearing by consent of the Minister<sup>73</sup>, the adjudicator and Refugee Division member must form an opinion as to whether a credible basis exists. A favorable decision by either decision-maker sends the claim on to the Refugee Division<sup>74</sup>.

To help guide the adjudicator and the Refugee Division member on this point, the legislator has provided two formal indicators in section 48.01 (6)

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69. C.B.A., *supra*, note 30, paras. 61-65.

70. Bill C-55, s. 14 (Imm. Act, s. 48.01 (6) (7) ).

71. R. GIRARD, *supra*, note 46, p. 13.

72. *Ibid.*

73. Bill C-55, s. 14 (Imm. Act, s. 48.01 (7) ).

74. *Id.*, (Imm. Act, s. 48.01 (6) ).

which must be considered : a country's human rights record and the disposition under the Act of past claims by nationals of that country.

Clearly the "credible basis" test is designed to counter abusive claims. The Department insisted on this procedural hurdle to discourage the clogging of the system by frivolous claims, such as those proffered in recent years by significant numbers of Portuguese, Brazilian and Turkish nationals<sup>75</sup>. An anti-abuse measure that truly preserved the integrity of our refugee determination process would have been a welcome improvement to the Act. Unfortunately, the legislator introduced a novel standard for achieving this screening function, in that credible basis is not a legal term of art, unlike the "manifestly unfounded claim" (M.U.C.) standard which has been developed by the U.N.H.C.R. Executive Committee and is currently employed by the R.S.A.C.<sup>76</sup>.

Stern points out that the M.U.C. standard supports the principle that,

[...] no case should be screened out where there is any evidence produced relating to torture, detention, general abuse arising from lack of protection, denial of education, employment, housing, food or so forth, provided [...] that such treatment was related to one of the five grounds stated in the Convention.<sup>77</sup>

The legislator deliberately shunned this low threshold for something "[...] a little stronger [...]"<sup>78</sup>. What is not known is whether, as the Department suggests, "a shred of evidence", with "some corroboration" will suffice to have the claim referred to the Refugee Division<sup>79</sup>, or, as detractors of the test fear, people "[...] who may have a prima facie claim to recognition as a refugee could be rejected without a full hearing" because of minor contradictions in their evidence, or a demeanour which raises even the slightest of doubts about credibility in the mind of the decision-makers<sup>80</sup>.

### 1.5.2. Is this an oral hearing?

In striking down a previous legislative credibility screen under the Act, the *Singh* case did not merely establish that section 7 Charter rights applied to all aliens physically present in Canada ; the court specified that the consequences of an erroneous negative determination in a refugee claim were so grave that

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75. R. GIRARD, *supra*, note 46, p. 13.

76. Both Plaut and Ratushny endorsed variants of the test in their reports.

77. M. FALARDEAU-RAMSAY, "Minutes of...", *supra*, note 9, Iss. n° 2, p. 55.

78. R. GIRARD, *supra*, note 46, p. 15.

79. *Ibid.*

80. C.B.A., *supra*, note 30, para. 78 (iii).

fundamental justice required an oral hearing, before the decision-maker, with right to counsel and proper consideration of the case upon the merits<sup>81</sup>.

Since the credibility screen, by the Department's own estimates, will eliminate about two-thirds of all claimants<sup>82</sup> the quality of the access hearing gives pause to critics of Bill C-55 who stress that a preliminary consideration of credibility cannot be equated with a determination of the issue on the merits in the spirit of *Singh*<sup>83</sup>.

#### 1.5.2.1. Discretion : how real ?

As first drafted, section 48.1(6) suggested that credibility screening would be based on the objectively discernible factors listed in paragraphs (a) and (b) of that subsection. To legislate such a static test would, of course, prejudice claimants from new refugee-producing situations<sup>84</sup> and favour, or at least be neutral towards asylum seekers from traditional countries of persecution. Matas observes that the test so framed would have amounted to a statutorily directed suspicion against the person from a country with a high rejection rate<sup>85</sup>. This factor, combined with the lag commonly observed between the outflow of information on contemporary persecution and its occurrence, especially in "closed countries"<sup>86</sup> would amount to a virtually irrebuttable presumption against credibility.

Revisions to Bill C-55 have since clarified that a subjective element is involved in the assessment of credibility at the screening hearing<sup>87</sup>. While at first blush this amendment invests the adjudicator and Refugee Division member with the discretion to inquire into the individualized dimension of a claimant's history, to form an opinion about his or her credibility, this discretion remains eminently unstructured. Neither the Act nor Bill C-55 directs the decision-maker to go beyond a mechanistic application of the two compulsory factors in section 48.01 (6)<sup>88</sup>.

The obvious concern here is that the adjudicator and Refugee Division member will make a fetish of relying on the statutory factors enshrined in

81. B. JACKMAN, *supra*, note 67, p. 26.

82. V. MALAREK, "Most refugees to be rejected, document says" *The Globe and Mail*, Wednesday, 3 Feb. 1988, p. A1.

83. B. JACKMAN, *supra*, note 67, p. 26.

84. C.B.A., *supra*, note 30, para. 78 (ii).

85. D. MATAS, *supra*, note 13, p. 113.

86. M. SCHELEW, *supra*, note 9, p. 131. He gives North Korea as an example.

87. Bill C-55, s. 14 (Imm. Act, s. 48.01 (6) ), addition of word "including".

88. R. GIRARD, *supra*, note 46, p. 40.

section 48.01 (6) and not address other meaningful indicators of fear of persecution. As Hathaway comments :

[...] claims can legitimately be made out in respect of persons from countries that have otherwise good human rights records

and the conclusion that any particular case lacks credibility does not flow inevitably from the failure of similar cases<sup>89</sup>. Put simply, every country has its first refugee.

Whether or not they anticipate rejection at the screening stage, responsible counsel will enter as much evidence as they have gathered in support of their client's claim, to create a record for the contingency of judicial review of the screening process<sup>90</sup>. Conceivably then, the time required for an access hearing will not be less than what it would take to hear the claim in its entirety. Thus by not having the Refugee Division step in and hear the claim in its entirety at the credible basis stage, the legislator is encouraging multiplicity of proceedings.

#### 1.5.2.2. Adjudicators : how independent ?

Conferring the matter to the Refugee Division at this point would obviate the need to have an adjudicator judge credibility in *refugee* matters.

It is a principle of fairness and natural justice that decisions be taken by independent, fair and impartial decision-makers<sup>91</sup>. Adjudicators, as officials of the Immigration Department "[...] whose duties and careers are lodged firmly in the administration of the immigration program"<sup>92</sup>, are ill-suited, institutionally, to pass judgment on the credibility of refugee claimants.

The primary ground for this assertion is that immigration concerns are irrelevant to refugee determination<sup>93</sup>. An open-minded approach to the assessment of credibility in a refugee claim will require that adjudicators detach themselves from the manner in which they assess credibility in immigration matters<sup>94</sup>. In theory, the decision to detain the person concerned, to set a high bond, or to issue a conditional removal order should not impact upon credibility in a refugee claim. However, the appearance of an official who is charged with finding out whether or not a person has violated the Act,

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89. J.C. HATHAWAY, *Media Release*, Osgoode Hall Law School, Sept. 4, 1987, p. 6.

90. B. JACKMAN, *supra*, note 67, p. 18.

91. See *Valente v. The Queen*, [1985] 2 S.C.R. 673.

92. J. STERN, *supra*, note 77, p. 56.

93. C.B.A., *supra*, note 30, para. 85(e).

94. *Ibid.*

also being given a say as to whether Canada should extend protection to the same person, is queer. One also wonders to what extent the Refugee Division member, who must be present while the adjudicator alone rules on admissibility and removability, will "[...] be adversely influenced by the immigration issues dealt with by the immigration adjudicator"<sup>95</sup>. Quite possibly, the screening mechanism devised by Bill C-55 will blur the distinction between the independent decision-makers and officials who may despite their best efforts be captive of an enforcement mentality.

Among the U.N.H.C.R. minimum standards for refugee determination is a recommendation that "a single central authority" be given "[...] responsibility for examining requests for refugee status and taking a decision in the first instance"<sup>96</sup>. This principle, if respected, would bolster the legitimacy of the refugee determination process because a single central body would likely produce consistent decisions, which could be of lasting precedent-value. The wisdom of establishing such an authority on a *review* level is all the more compelling, and is even practicable despite the geographic and demographic imperatives that would frustrate an attempt to centralize decision-making at first instance in Canada. As we know, however, the legislator opted to forego creating any kind of review body<sup>97</sup>. And while Bill C-55 laudably creates an expert tribunal — the Refugee Division of the Immigration and Refugee Board — whose panels, no doubt, will competently apply the refugee definition, the integrity of the process will be tainted by the participation of an adjudicator in the screening process.

## **2. The fine line between efficiently administering the Act and trampling on claimants' rights**

### **2.1. Summary scheduling of the process**

Other aspects of the access hearing have made the legislator the target of rebuke. On the premise that a speedy process deters abuse, it is foreseen that the access hearing will take place within seventy-two hours of arrival in port-of-entry claims<sup>98</sup>. While this delay may provide ample preparation time for a frivolous claim, it may be insufficient for many *bona fide* ones. Even the most

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95. *Ibid.*

96. UN Doc. A/AC 96/549, para. 53.6 (d) (e).

97. Despite Plaut's Report, two of whose three proposed models included such review.

98. V. MALAREK, *supra*, note 82.

experienced counsel occasionally have difficulty elucidating relevant facts from claimants who are later found to be Convention Refugees by the Minister. It is thought that the processing time envisaged by the Department will work particular hardship on Asian and Latin American women whose claims involved a sexual component<sup>99</sup>.

The Charter implications of too expeditiously convening an access hearing focus on whether it is consonant with the principle of fundamental justice to so restrict preparation time where the consequences of wrongful exclusion and removal could affect a person's life, liberty and security; and secondly, whether the provision offends section 15 by more rapidly processing refugee claimants through their hearing than is the case with claimants of other rights, similarly situated. In *Streng et al v. Township of Winchester*<sup>100</sup>, Smith J. of the Ontario Supreme Court held that the three month limitation period for suing municipalities for negligence was unreasonable because the quality of the defendant is not a valid basis for restricting the injured party's right of action. In so ruling on a section of the Ontario *Municipal Act*<sup>101</sup> the Court noted the validity of the principle in *MacKay v. The Queen*<sup>102</sup> to the effect that variations from the general principle of universal application of the law to meet special conditions and to attain a necessary and desirable social objective. Nevertheless, Smith J. concluded that despite the temptation to defer to the legislators "[...] when they choose to impose limitations on the right of access to the courts, [...]" such deference was not possible in the face of an "[...] extremely short [...] limitation period [...]"<sup>103</sup>.

By analogy, the Minister could invoke section 1 of the Charter on the ground that a summary access hearing dissuades spurious claimants from coming into Canada and burdening our claims system. However, this objective could be accomplished by less drastic means. One possible alternative would be to extend the preparation time for the access hearing but restrict employment authorizations to persons whose claims are referred to the Refugee Division.

## 2.2. Adversarial hearings

Even if one accepts the Department's position that the Minister should be represented at the access hearing because of the "[...] convergence of

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99. A. de Wolff, "Minutes of...", *supra*, note 9, Iss. n° 8, p. 88, 89.

100. 56 O.R. (2d) 649.

101. R.S.O., c. 302, s. 284 (2).

102. [1980] 2 S.C.R. 370.

103. *Supra*, note 100, p. 658.

immigration considerations and refugee protection considerations [...]”<sup>104</sup>, it is hard to justify the C.P.O.’s presence once the adjudicator and Refugee Division member move on to the credible basis assessment.

Currently, the C.P.O. is a passive actor in the claims process because his or her role is not to cross-examine the claimant or otherwise contest the claim or question demeanour at an examination — under oath. Bill C-55, however, will allow the C.P.O. to challenge a claim from the moment the person concerned indicates an intention to seek protection under the Convention right through to the adjudicator and Refugee Division member’s decision on whether to refer a claim with a credible basis to a full hearing.

This mutation will be particularly prejudicial to the claimant who proceeds with inexperienced or incompetent counsel, or alone. The Department has stated that it will not challenge well-founded claims<sup>105</sup>, yet Bill C-55 fails to formally limit the C.P.O.’s mandate to attempting to impeach only clearly unfounded claims.

### 2.3. Limiting choice of counsel

Since Bill C-55 places a premium on expeditious processing, the port-of-entry claimant will have to find counsel who is ready to proceed within seventy-two hours or accept counsel appointed by the Minister<sup>106</sup>. The scenario of someone who need not even be a lawyer, much less one experienced in refugee law, arguing in an adversarial setting against his or her employer’s representative, the C.P.O., brings into question the vigour with which a claimant’s case will be put forward.

The Charter provides a right to select one’s counsel where a person is detained<sup>107</sup> and the right may be read into section 7, as a principle of fundamental justice in access hearings, because of the serious stakes involved in refugee determination<sup>108</sup>. The reasonableness of section 30(2) in Bill C-55 would depend on the necessity of a speedy hearing and availability of alternative means to ensure such an end could be achieved. In other words, moving a case load efficiently through the access stage may be a valid concern and a desirable goal if it proves to deter frivolous claims. However this

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104. Admissibility and removability are the usual matters which the C.P.O. addresses on behalf of the Minister ; eligibility for protection under the Convention is not presently a matter on which the adjudicator is competent to rule.

105. R. GIRARD, *supra*, note 46, p. 16, and see Bill C-55, s. 14 (Imm. Act, s. 48.01 (7) ).

106. Bill C-55, s. 9 (Imm. Act, s. 30 (2) ).

107. *Id.*, s. 4 (Imm. Act, s. 10 (b) ).

108. *Singh, supra*, note 18, p. 211.

objective could be achieved satisfactorily if the adjudicator, who presides at the access hearing, were to set peremptory dates for hearings when of the opinion that requests for adjournment amounted to an abuse of process<sup>109</sup>. The setting of peremptory dates would be compatible with the exercise by claimants of the fundamental right to counsel of choice.

## 2.4. Limiting review

Bill C-55 proposes to limit appeals to the Federal Court of Appeal by leave and to points of law and jurisdictional grounds only<sup>110</sup>. Critics of the legislation had hoped for an appeal by right, to an expert body and on grounds of both law and fact<sup>111</sup>. The leave restriction applies both to appeal and review of Refugee Division decisions and to review of decisions made by the adjudicator and Refugee Division member in the access hearing<sup>112</sup>. Finally, section 85.1 of Bill C-55 removes the possibility of appealing to the Supreme Court of Canada from the decision of a judge of the Federal Court of Appeal denying leave to appeal under section 83.3.

### 2.4.1. At variance with the minimum standard

The limited review aspect of Bill C-55 abrogates the U.N.H.C.R. guideline that an applicant found not to be a Convention Refugee at first instance be given "[...] a formal reconsideration of the decision"<sup>113</sup>. And the provision to remove claimants pending review of the finding that their claims lack a credible basis may be at variance with the U.N.H.C.R. recommendation that claimants "[...] be permitted to remain in the country pending decisions on the initial request by the competent authority [...] unless [...] the request is clearly abusive"<sup>114</sup>, if the competent authority charged with taking a decision at first instance is considered to be the Refugee Division, and not the decision-maker at the screening hearing.

The Department is conscious of the divergence between the internationally developed guidelines on review and the limited character of appeals in Bill C-55. The drafters of this legislation emphasize that the U.N.H.C.R. guidelines

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109. B. JACKMAN, *supra*, note 67, p. 34.

110. Bill C-55, s. 19 (Imm. Act, s. 83.3 (1) ).

111. D. MATAS, *supra*, note 13, p. 79.

112. No appeal lies from the decision not to allow access to the Refugee Division and the person concerned has no right to remain in Canada while the application for leave for judicial review is considered.

113. *Supra*, note 96.

114. *Ibid.*



"[...] are not binding [...] they are suggestions"<sup>115</sup>. While the latter proposition may be valid, modern legislators have greatly attenuated the harshness of the common law presumption that appeals are statutory, by extending appeal rights at least partially to issues of fact in many domains, including monetarily insignificant civil actions and petty criminal offences<sup>116</sup>. This causes one to wonder whether section 15 of the Charter would support the view that refugee claimants should be given the same appeal rights as those enjoyed by similarly situated applicants in other matters. And while the legislator may fear that an appeal by right, on the merits will invite abuse of the refugee claims system afresh<sup>117</sup> Bill C-55 itself may prompt the courts to declare that the legislation is not in compliance with section 7 of the Charter. This could be the case if fundamental justice in the matter of refugee claims is interpreted to mean an appeal on the merits, before a competent body, with a reasonable opportunity to prepare one's case and the right not to be removed pending the decision<sup>118</sup>.

#### 2.4.2. The domain of fact in refugee determination

Review on the merits and not simply on the ground of legality is a *sine qua non* of even the most sophisticated determination process. As the current Chairman of the R.S.A.C. has observed on the basis of his own experience :

If there is no review or appeal on merits, there is no opportunity to reverse errors in individual cases and there will inevitably be inconsistency in decision-making.<sup>119</sup>

Although refugee determination is one of the last areas of law where issues of life and death can arise, the current determination process at times makes it difficult to see the difference between applications that have been accepted and those that have been rejected<sup>120</sup>. This will continue to be the result under Bill C-55 because refugee claims are decided primarily on the facts and on the applicant's credibility. Only now there will be no opportunity to give sober second thought to the decision-makers' appreciation of these two determinants.

Arguably, review on the merits is a necessary component of fundamental justice in a matter with such potentially grave consequences as refugee

115. R. GIRARD, *supra*, note 46, p. 17.

116. F. ROTTER, "Minutes of...", *supra*, note 9, Iss. n° 8, p. 67.

117. See Bill C-84, s. 1 (Imm. Act, s. 2.1 (b) ), and C. GROOS, *supra*, note 38, p. 41.

118. W. ANGUS, "Minutes of...", *supra*, note 9, Iss. n° 7, p. 40.

119. M. FALARDEAU-RAMSAY, *supra*, note 77, p. 56.

120. J. H. GREY, *Immigration Law in Canada*, Toronto, Butterworths, 1984, p. 122, 123.

determination, which, as the *Singh* case indicated goes to the life and liberty of the person concerned<sup>121</sup>. What critics of Bill C-55 would like to see it provide is some form of review, even by way of written submissions, before an expert body and not the Federal Court which is a body of first impression<sup>122</sup>. If the legislator is concerned that additional procedural rights will invite abuse by spurious claimants, it can remove them pending review. The Department projects that less than one in three claims will proceed to a hearing before the Refugee Division, and that a third of these will be rejected<sup>123</sup>. Based on these expectations, a relatively less significant proportion of claimants will get an appeal than is the case now with an automatic right to redetermination before the I.A.B. Hence to add a review of the merits to the grounds for appeal would not overburden the administrative resources of the new system. In any event, if an appeal on the merits were held to be a component of fundamental justice in refugee determination then administrative convenience could not be invoked to justify the restriction on an appeal to points of law alone<sup>124</sup>.

Groos suggests that if the Refugee Division's determinations are not reviewable for error of fact, that it at least be given an ongoing jurisdiction to reopen a rejected claim where relevant evidence, perhaps by the claimant's own fault, was not put before it; "or because of a significant change in the material circumstances of the claimant"<sup>125</sup>. The latter ground refers to the phenomenon of becoming a refugee *sur place*, since the claim was rejected. Any such reopening of a claim would require the applicant to demonstrate the plausibility of the ground invoked for having the Refugee Division seize itself of the matter again<sup>126</sup>.

## 2.5. Detaining the undocumented

Article 31 of the Convention forbids the imposition of penalties on refugees who promptly come forward and show cause for illegally having entered a country. Yet section 104.1 of Bill C-84 provides for a longer initial

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121. *Supra*, note 18, p. 207.

122. See J. H. GREY, *supra*, note 120, p. 162 where he states that it would not be realistic to expect the courts to become the champion of the refugee, irrespective of the Charter, as they have long viewed refugee determination to be a subset of immigration control, while immigration is perceived by the judiciary to be "[...] an area of law in which administration is to be made easy, subject to the exigencies of strict legality".

123. V. MALAREK, *supra*, note 82.

124. *Singh*, *supra*, note 18, p. 218.

125. C. GROOS, *supra*, note 38, p. 42.

126. *Ibid.*

detention period in respect of unidentified claimants than is currently permitted under the Act <sup>127</sup>. Moreover Bill C-84 criminalizes the act of providing advice to undocumented persons about “coming into Canada” to make a claim <sup>128</sup>. This provision may well have a chilling effect on humanitarian advice giving.

## 2.6. Turning back of ships

Section 91.1 of Bill C-84 permits the Minister to redirect ships away from our borders when the Minister has reason to believe the persons on board are being brought into Canada in contravention of the Act. The language of the section covers as insignificant an offense as not possessing a *visa* where one is required. Opponents of this provision point to less drastic methods to achieve the intended purpose of securing our borders <sup>129</sup>. Repugnant as this aspect of the Bill appears, its mere enactment and promulgation are not violative of the Convention <sup>130</sup>; the result of the provision however, might constitute a breach of our non-refoulement obligation <sup>131</sup> and section 7 of the Charter as interpreted in *Singh*.

Finally, this measure which prospectively strikes one as an engine of refoulement — since no one on the redirected vessel will get an opportunity to establish his other right to protection under the Convention — might succumb to the proportionality test in *R. v. Oakes* <sup>132</sup>. While the deleterious effects of the Minister’s power to redirect are not hard to imagine, the objective of regaining control of our jeopardized frontiers seems entirely overblown.

## Conclusion

The vision of refugee determination in Bills C-55 and C-84 is consistent with the view that “[...] first asylum is not our primary role [...]” in the effort to solve the global refugee problem <sup>133</sup>. The perennial discrepancy between the numbers of government selected refugees *versus* Convention Refugees landed each year attests to this policy preference <sup>134</sup>.

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127. Compare with *Immigration Act*, 1976, s. 104 (6), Forty-eight hours limit.

128. Bill C-84, s. 9 (*Imm. Act*, s. 95.1).

129. See *supra*, note 42, p. 14, 15.

130. G.S. GOODWIN-GILL, *supra*, note 8, p. 143.

131. *Ibid.*

132. [1986] 1 S.C.R. 103.

133. R. GIRARD, “Minutes of...”, *supra*, note 9, Iss. n° 3, p. 53.

134. *Supra*, note 12, p. 39.

Now Canada is taking its bias in favour of selecting refugees one step further by refusing to accord protection to claimants who are shown or deemed to have had a opportunity to seek it elsewhere.

The reluctance to give refugee applicants enforceable rights, or to invest the courts and statutory tribunals with wide jurisdiction may be symptomatic of what Grey identifies as “[...] the growing influence of bureaucrats who wish to retain as much power to grant relief in their administrative hands”, with the result that relief when granted “[...] will be a matter of grace, not right”<sup>135</sup>.

One cannot predict whether the grasping nature of the Immigration bureaucracy is even approaching its apogee. But the tenor of Bills C-55 and C-84 is certainly a far cry from the provisions of the Convention, which seems less relevant each day, premised as it is on the lawful residence or tolerated presence of the refugee, whom the host state aimed to assimilate<sup>136</sup>.

Yet for persons who make their claims in Canada, at least, their is a counterpoids to this restrictionist force, and that, of course, is the Charter. It has proven to be a powerful shield for vulnerable parties — refugee claimants and criminal accused, notably — and it undoubtedly will be invoked to restore the core principle of the international refugee protection system that effective safety requires access to the determination process.

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135. J.H. GREY, *supra*, note 11, p. 122.

136. G.S. GOODWIN-GILL, *supra*, note 23, p. 19.