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Immigration Law Reports (Articles)  
3rd Series

The U.K. Asylum Determination System: Is there a need for it in Canada?[FN\*]

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### Introduction

In March 2003, I participated in an externship in Advance Refugee Law that took me on a transatlantic trip to the United Kingdom or Great Britain. My stay in the U.K. involved visits to NGOs, Courts and Tribunals and meetings with Lawyers that provided an excellent opportunity to observe the U.K. refugee determination system and compare it with that of our refugee determination system in Canada.

It was during my time in the U.K. that an article appeared in the Toronto Star stating that the Minister is proposing overhauling Canada's independent refugee determination system.[FN1] At the end of 2002, the Immigration and Refugee Board ("IRB") had a backlog of nearly 53,000 cases. The report indicates that government officials, who will have the power to accept or reject a claim, will conduct informal interviews with refugee claimants. The word travelled very fast and refugee advocates in the U.K. were concerned that "the Canadian IRB is in trouble." They wanted to know whether "the government is serious about dismantling it and setting up a new (more UK-like) determination system?" That the Minister is looking into review, revamping and overhauling the refugee determination system is without any doubt. However, the proposal of the Minister has not been made public to date. This paper simply attempts to compare the two systems of refugee determination from the perspective of a student in the Intensive Program in Immigration and Refugee Law who also happens to be a Refugee Protection Officer.

### *The United Kingdom Refugee Determination System in a Nutshell*

In the U.K., the initial refugee determination of a claim is made by an official from Immigration and Nationality Directorate of the Home Office. This is the department that is responsible for all decisions relating to claims for asylum. In the event that determination is negative,[FN2] the failed asylum seeker can then appeal the refusal of asylum under s. 69(5) of the *Immigration and Asylum Act 1999*. That appeal is heard before an adjudicator from the Immigration Appellate Authority. The Home Office may appear at the appeal, however, even if they do not, the adjudicator is empowered and indeed required to determine the matter in the respondent's absence by virtue of Rule 41(2) & (3) of the *Immigration and Asylum Appeals (Procedure) Rules 2000*. If the appellant loses the appeal at that stage, he or she can then appeal to the Immigration Appeal Tribunal, panels of which are comprised of three members (two lay and one legal). Both the IAA and the IAT are independent tribunals. The decision of the IAT is subject to judicial review. The granting, cessation or denial of access to asylum in the U.K. is governed by the Geneva Convention of 1951 and New York Protocol of 1967; *Dublin II*,[FN3] the Nationality, Citizenship and Asylum Act, 2002, The European Convention on Human Rights and Article 3 of the UN Convention against Torture.

### *The Canadian Refugee Determination System in a Nutshell*

In Canada, refugee protection is granted when a single member panel of the Refugee Protection Division of the Immigration and Refugee Board[FN4] determines that the claimant is a Convention refugee or "a person in need of protection." [FN5] A person in need of protection is an individual whose removal to his or her home country would subject them personally to a danger of torture or to a risk to their life or a risk of cruel and unusual treatment or punishment.[FN6] As with Convention refugees, persons in need of protection must face the risk throughout the country in question and the exclusion clauses of the 1951 Convention apply. Decisions of the RPD can be judicially reviewed at the Trial Division of the Federal Court of

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Canada, if leave from a judge of the Trial Division is obtained.

The advocates and NGOs that I encountered in the U.K. were interested in the Canadian refugee determination system and were especially interested in my explanations of the Canadian system. They really were very impressed with the independent and impartial refugee determination process in Canada and very much wish for that to be a model for a future European Union Refugee Board or reform of the U.K. refugee determination system. Professor Guy Goodwin-Gill is also a strong supporter of a Canadian like model of refugee determination.

### ***General comments about the two systems***

At the tribunal level in the U.K. accredited interpreters are provided, similar to our system in Canada. However, the IAA and IAT do not have their own officials to assist them in the process. In the U.K. these tribunals depend on Home Office Presenting Officers (HOPO), who are adversarial, unlike our process where the Refugee Protection Officer is neutral and has no interest in the outcome of the proceedings. Comparing the IAB to the RPD both tribunals focus a lot on credibility -- whether or not they believe the claimant's story. At the IAA (both at Taylor House and the Magistrates Court in Croydon) the interpreter and the claimant were not sworn or affirmed by the panel -- even though there were the various religious books on the table. There was no recording of the hearing. There was no exhibit list read out or given to counsel. In fact what was apparent in one of the cases I observed was the panel member had information that the claimant's counsel did not have in his possession.

### ***Is the U.K. System Really What We Need in Canada?***

As already observed, there is a lot of discussion in the U.K. on the Canadian model of refugee determination and its usefulness as a best practice model to be adopted in the U.K. and the European Union. However, according to the Toronto Star, "under Coderre's proposal, instead of formal hearings before the independent tribunal, refugee claimants would be granted an informal interview with a government employee called a refugee protection officer. Those civil servants would be allowed to grant refugee status, or reject a claim."[\[FN7\]](#) I should observe that under the previous *Immigration Act* and in section 16 of the current *Refugee Protection Division Rules*,[\[FN8\]](#) Refugee Protection Officers ("RPO") were given decision-making responsibilities under what is called an Expedited Interview. This process is used when the claim appears on its face to be manifestly well-founded. An RPO interviews the claimant, normally for less than an hour. If the RPO makes a favourable recommendation to expedite the claim, a written report and the file are sent to a Member to determine if the claim should be accepted without a hearing. If it is, the Member adopts the RPO report as their reasons. If the RPO does not make a favourable recommendation or the Member finds the case cannot be decided without a hearing, the case moves on to a full hearing before a single member panel. It is important to note the following: these informal interviews are "on the record", the RPO presides over the interview and determines the order of proceedings, whether witnesses should be heard, whether a person should be excluded from the hearing room, whether an interpreter is required and if yes, whether the interpreter is able to properly interpret the proceedings. In this regard, one could argue that this move is another step in the evolution of the role of the RPO.

On the other hand, various members of the Refuge Bar, academics and the NGO Community in the U.K. and Europe looks to the Canadian model of refugee determination as a best practice model to which they should push their governments to adopt. Professor Guy-Goodwin Gill, for example, has had much to say on the U.K. refugee determination process and the degree to which this process is influenced, and even controlled by power politics "The present process of getting from a claim for protection to a decision is inappropriate, inflexible, wasteful of resources, too prone to error, open to political manipulation, and not worth defending."[\[FN9\]](#) He advocates for the U.K. refugee determination process single-member panels of a Refugee Board similar to that of Canada for making the initial determination of refugee claims. [\[FN10\]](#)

### **Conclusion**

It will be quite interesting to see what developments occur in Canada and in Europe in the next decade with respect to the procedures used to determine asylum and refugee claims. Regardless of what system is used the independence and impartiality of the decision-makers will be reflected through the quality and unbiased nature of their judgments. A good refugee determination system is one that demonstrates a willingness to protect victims of severe individual or systematic human rights abuses as provided for in the Geneva Convention and also people in need of protection as provided for in the *ECHR*, the *Immigration and Refugee Protection Act* and the various other international treaties and conventions that concern themselves with the protection of human dignity and fundamental human rights.

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The importance of protection from return to a country where fundamental issues of life, liberty and security of the person may be in jeopardy requires an open, fair, independent, impartial and generous decision making process.

**FN\***. Paper prepared for the Intensive Program in Immigration and Refugee Law (Osgoode Hall Law School, York University, March 29, 2003).

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**FN1**. Allan Thompson "Refugee-claims backlog cost fuelling change" Toronto Star (March 21, 2003), p. A19.

**FN2**. The claim is generally rejected under the *Immigration Rules* (HC395) as amended or a finding is made that there is no violation of the claimant's rights under the *European Convention on Human Rights* (ECHR).

**FN3**. Commission Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third- country national: Official Journal L 050, 25/02/2003 p. 0001-0010 [hereinafter *Dublin II*].

**FN4**. This is an independent and impartial quasi-judicial tribunal that reports to Parliament through the Minister of Citizenship and Immigration. The members are Governor-in-Council appointees appointed for fix-terms that are renewable. As Richard Stainsby, Director-General, Professional Development Branch, Immigration and Refugee Board explained in his paper entitled "The Refugee Protection Process in Canada" November 2002, p. 8, "The IRB is an independent tribunal -- there are two aspects to this independence -- institutional independence and independence of individual decision-makers. The Board reports to Parliament through the Minister of CIC but remains independent from the Department and the Minister. Individual decision-makers have complete liberty to hear and decide cases without any extraneous interference. They must, of course, be impartial and decide each case on the evidence and the applicable law. The Board is responsible for safeguarding the independence of the decision-making process, including the independence of individual decision- makers."

**FN5**. See section 95 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

**FN6**. See section 97 of the *IRPA*.

**FN7**. Allan Thompson "Refugee-claims backlog cost fuelling change".

**FN8**. Rule 16 (c) provides the RPO with the authority to "hold interviews, prepare reports and make recommendations."

**FN9**. Guy S. Goodwin-Gill "How to End the Asylum Lunacy" Guardian Unlimited Observer (August 19, 2001, online) <<http://www.observer.co.uk/asylum/story/0,1084,538950,00.html>> (date accessed: March 25, 2003). See also, Guy Goodwin-Gill, An Independent Refugee Board for the United Kingdom (Refugee Legal Centre, Annual Review 2001-2002), pp. 12-16, online: <[http://www.refugee-legal-centre.org.uk/AnnualReport\\_01-02.pdf](http://www.refugee-legal-centre.org.uk/AnnualReport_01-02.pdf)> (date accessed: March 25, 2003); Raekha Prasad "The Asylum Lottery" The Guardian (January 25, 2002), online: <<http://www.guardian.co.uk/analysis/story/0,3604,639021,00.html>> (date accessed: March 25, 2003).

**FN10**. Goodwin-Gill, *An Independent Refugee Board for the United Kingdom*, *supra*, p. 14.

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