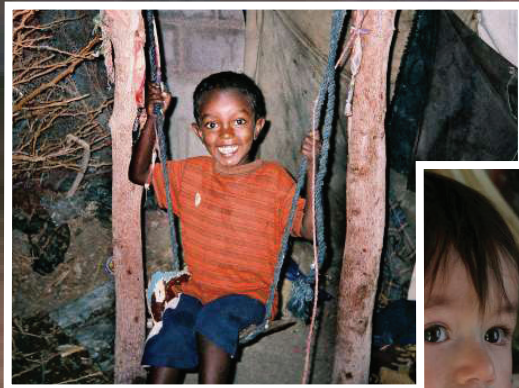


THE IMPACT OF THE LACK OF LEGAL REPRESENTATION IN THE CANADIAN ASYLUM PROCESS



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REPORT RESEARCHED AND WRITTEN FOR UNHCR*

Michael Barutciski | 6 November 2012

*The views expressed in this report are those of the author and do not necessarily reflect those of the United Nations or UNHCR.

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Executive Summary

This report identifies the changes that are needed to make sure Canada's refugee status determination system remains fair in the context of new procedures, tighter time frames and restricted access to legal aid for asylum seekers. It focuses, in particular, on decisions concerning self-represented claimants and proposes measures to enhance access to information and procedural fairness.

Refugee policy is a major governance challenge for the Canadian state. The federal government should be commended for taking refugee policy challenges seriously and for proposing substantial reform that is intended to maintain the integrity of the asylum system, a difficult objective that requires balancing fairness with efficiency. The provincial governments should be encouraged in their efforts to control public expenditure, including assistance programmes for refugee claimants. The actual decision to grant or deny refugee status is made by the Immigration and Refugee Board (IRB), a quasi-judicial body that is independent from the executive branch of government. Long held as a model for refugee adjudication, the IRB now finds itself in a major reform process and must find a way to deal with the consequences of newly-imposed shortened timelines for processing claims, as well as claimants' increasingly restricted access to legal aid. This report encourages the IRB to ensure acceptable standards of fairness in its decision-making in order to avoid the risk of lowering the quality of its adjudication and having its decisions overturned by Canada's higher courts.

Recent legislative and policy changes will likely result in many more claimants appearing before the IRB without representation. There has already been a significant increase in unrepresented claims over the last decade, and a basic concern is that the overall acceptance rate for unrepresented claimants is significantly lower than for represented claimants.

Procedural changes are necessary if the IRB is to preserve the integrity of the asylum system in the new context. This report recommends that the IRB provide unrepresented claimants with simplified, less onerous procedures, and encourages it to develop its communication tools in the spirit of fairness so that unrepresented claimants properly understand matters that will affect their claims. In complex cases where fairness requires legal representation, the report recommends that the IRB introduces a form of duty counsel to assist claimants. Questions involving the effect of lack of representation on recognition rates are also addressed and the IRB is encouraged to examine this issue, as well as the link between increased withdrawal/abandonment rates and lack of representation.

In the coming years, one of the country's main challenges in terms of refugee policy will be to maintain fair procedures for those claimants who try to navigate the complex asylum system without representation. All stakeholders need to cooperate in order to make sure that the current legislative and policy changes result in an efficient system that treats unrepresented refugee claimants fairly, and that persons in need of international protection are able to access it.

I. Context

The main objective of this report commissioned by UNHCR is to note the extent and impact of the lack of legal representation in the Canadian asylum procedures. To understand the issues associated with the lack of representation in Canada's refugee system, it is necessary to place the subject in its full context.

The country's sophisticated asylum procedures have recently been changed by a federal government that is under fiscal pressures and that believes its generous system is being abused. The resulting challenges in maintaining the system's fairness are illustrated by the reduced access to legal aid and the increasing number of unrepresented asylum seekers who will have what might be a single chance at securing protection under the new asylum system.

1. Navigating Between Humanitarian Idealism and Interdiction

In recent decades, Canada has achieved an enviable reputation in relation to refugee protection. The Nansen Medal was awarded to the "people of Canada" in 1986 and the country is an influential member of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees (UNHCR). Canada is an important donor to UNHCR and it has the second largest refugee resettlement programme in the world. Its procedures for dealing with inland refugee claims are often cited when international discussions turn to best practices or influential court cases.

This enviable reputation has arisen in part because of Canada's specific circumstances. Due to its relative geographic isolation from most refugee-producing regions, Canada has been spared the large number of mass refugee flows that affect certain UN member states in less fortunate parts of the world. Whereas Canada has received between 20,000 and 40,000 asylum seekers per year over the last decade, some other countries have been obliged to deal with hundreds of thousands of refugees. The country's situation is not only due to its geography: it is also the result of sophisticated and well known government attempts at limiting the number of asylum seekers who arrive at ports of entry without proper travel documentation.¹

In order to further understand the context, it should be acknowledged that Canada, along with many western liberal democratic states, embraces the formal universality that characterises the current international refugee system. In other words, the 1951 Convention relating to the Status of Refugees² and its 1967 Protocol relating to the Status of Refugees³ follow the general UN promotion of universal human rights in that anyone from anywhere can seek asylum in any state party.⁴ Current

¹ See e.g. Canadian Council for Refugees, *Interdicting Refugees*, May 1998, 61 p.

² Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954). Hereinafter "Refugee Convention". Canada acceded to the Refugee Convention on 4 June 1969.

³ Opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967). Canada acceded to the Protocol on 4 June 1969.

⁴ The two treaties combined provide the legally-binding treaty norms that most approximate the aspirational goals found in para. 14 of the Universal Declaration of Human Rights: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

technological advances, as well as the relative affordability and accessibility of transcontinental transportation, have implications for this idealistic concept of universality. Indeed, the flip side of this formal position embracing universality is the darker practice of interdiction that mitigates the potential burden of hosting many refugees.

2. Compromising Between Indigent Claimants and Budget Cuts

Those refugee claimants who do manage to reach Canadian territory despite interdiction⁵ generally find themselves in a vulnerable and destitute situation. Contrary to other immigrants or temporary migrants who are selected on the basis of criteria involving employment and financial capacity, refugee claimants generally arrive with limited financial resources. Most of these indigent claimants must rely on access to publically-funded legal aid if they are to be represented by legal counsel during their initial refugee status claim.

As legal aid in Canada falls within the jurisdiction of the provinces,⁶ one of the consequences is that there is a wide variety in the form of legal aid available across the country.⁷ The three provinces that receive the largest number of refugee claimants (Ontario, Quebec and British Columbia) have legal aid plans that cover refugee claims, and statistics for one of the provinces suggest that almost 5% of total legal aid expenses are devoted to “immigration/refugee” matters.⁸ Within this context of significant expenses coming from the public purse, it is important to underline that the provinces are presently experiencing a period of budgetary difficulties and cuts in government services.

As Canada’s most populous province, Ontario is where more than 60% of the country’s asylum seekers make their refugee claims⁹ and its fiscal situation must be understood in order to appreciate the

⁵ For example, a recent report by the Canada Border Services Agency addressing the significant yearly increases in refugee claims from Hungary recommends that the government “maintain enhanced interception efforts at strategic embarkation points; it should however be noted that while interdictions have yielded positive results, the [largely Roma] movement appears to be highly responsive to interdiction efforts: a number of interdicted individuals subsequently used alternate transit points ultimately making their way to Canada, thereby shifting the problem elsewhere.” CBSA Intelligence GTA Region, *Project SARA: International and Domestic Activities – Final Report*, 31 January 2012, p. 8.

⁶ Section 92 (14) of the Constitution Act 1867, 30 & 31 Victoria, c. 3 (UK).

⁷ For information on the various programmes offered in the six provinces that provide legal aid to refugee claimants, see generally Refugee Forum, *Interim Report – Legal Aid for Refugee Claimants in Canada*, University of Ottawa, 7 September 2012, pp. 3-23. See also Social Planning and Research Council of BC, *An Analysis of Immigration and Refugee Law Services in Canada*, Department of Justice Canada, 2002, 155 p.

⁸ This percentage concerns statistics for British Columbia (2010-2011) cited in Refugee Forum, *Interim Report – Legal Aid for Refugee Claimants in Canada*, University of Ottawa, 7 September 2012, p. 4. Statistics for Ontario in 2011-2012 indicate that 12.9% of all legal aid certificates are delivered for “immigration/refugee” matters. See Legal Aid Ontario, *Consultation Paper – Meeting the Challenges of Delivering Refugee Legal Aid Services*, 25 October 2012, p. 5. It was estimated a decade ago that more than 90% of legal aid expenses relating to immigration matters in Canada are devoted to refugee claimants. See John Frecker et al., *Representation for Immigrants and Refugee Claimants: Final Study Report*, Department of Justice Canada, October 2002, p. 8. This estimation is confirmed for recent years in Ontario (see Legal Aid Ontario, *Consultation Paper* cited above, p. 5).

⁹ Refugee Forum, *Interim Report – Legal Aid for Refugee Claimants in Canada*, University of Ottawa, 7 September 2012, p. 16. See also testimony by Carole Dahan of Legal Aid Ontario (Refugee Law Office): “Ontario receives 60% of all refugee claims in Canada, so we do both a merit screening as well as a financial screening.” House of Commons, 41st Parliament, 1st session, Standing Committee on Citizenship and Immigration, Meeting no. 37, 2 May 2012.

budgetary challenges. Prompted by large deficits affecting public finances, the provincial government took the historically-important step of creating the Commission on the Reform of Ontario's Public Services. The Commission recently published its report, which includes a bleak assessment of the province's fiscal situation.¹⁰ To the extent that Ontario's fiscal problems reflect economic difficulties throughout the country, there are obvious connections between Canada's refugee policy and the question of resources. As suggested in the Regulatory Impact Analysis Statement accompanying the proposed new Refugee Protection Division Rules, the country is experiencing significant problems with its asylum system because of the lack of resources.¹¹ This overall situation is undoubtedly related to recent announcements that Legal Aid Ontario is unable to cover the current costs of representing refugee claimants¹² and that it is obliged to introduce changes in order to balance its budget.¹³ The legal aid programme administered by the Quebec Bar has also found itself in a similar situation.¹⁴ Any realistic attempt to address the impact of the lack of legal representation must take into account the larger economic situation.¹⁵

¹⁰ "Ontario faces more severe economic and fiscal challenges than most Ontarians realize. We can no longer assume a resumption of Ontario's traditional strong economic growth and the continued prosperity on which the province has built its public services. Nor can we count on steady, dependable revenue growth to finance government programs. Unless policy-makers act swiftly and boldly to prevent such an outcome, Ontario faces a series of deficits that would undermine the province's economic and social future." Commission on the Reform of Ontario's Public Services, *Report – Public Services for Ontarians: A Path to Sustainability and Excellence*, 15 February 2012, Executive Summary, p. 1. See also ch. 1 entitled "The Need for Strong Fiscal Action".

¹¹ "Canada's refugee determination system is respected internationally for its high degree of fairness and the quality of its proceedings and decisions. However, the system is being undermined by long wait times and a significant backlog of cases. Individuals who have made an in-Canada refugee protection claim currently wait on average approximately 18 months for an initial decision on their claim. Canada's refugee determination system is further burdened by a backlog of cases which consisted of 39,400 claims as of the end of March 2012." Refugee Protection Division Rules, Canada Gazette Part I, 11 August 2012, p. 2306.

¹² "LAO issued 12,453 certificates to refugees in fiscal year 2010/11 and 13,612 certificates in fiscal year 2011/12 – an increase of nine per cent in the past two years alone ... LAO spends approximately \$21 million annually on refugee and immigration certificates; it receives \$7 million in funding from the federal government to help cover this expense ... Changes to LAO's refugee and immigration services are expected to reduce expenditures by approximately \$1 million or roughly 4.7 percent of LAO's overall spending for refugee and immigration services." Legal Aid Ontario website http://www.legalaid.on.ca/en/info/refugee_immigration.asp (accessed 10 August 2012). Email from LAO Vice-President David McKillop, dated 1 August 2012: "LAO continues to face financial pressures in this area of law and must balance competing priorities."

¹³ The initial changes came into effect on 6 September 2012. Further changes are anticipated. See Legal Aid Ontario, *Consultation Paper – Meeting the Challenges of Delivering Refugee Legal Aid Services*, 25 October 2012, p. 4: "LAO is facing significant and urgent financial pressures that must be addressed promptly and comprehensively." Email from LAO Vice-President David McKillop, dated 3 August 2012: "I also get the impression [refugee advocates] believe LAO is obligated to consult before it can make a decision. That is incorrect. LAO is responsible for operating the legal aid program in Ontario and will make whatever operational decisions it feels appropriate to ensure that it operates the best program possible within the funding it receives from the government. LAO is currently spending more than it receives which means choices, hard choices, have to be made ... Time was also of the essence in this matter as money we could not afford was going out the door. LAO needed to act quickly." Representatives from legal aid plans in Ontario and British Columbia had already indicated a decade ago that they were concerned about lack of funding. See Social Planning and Research Council of BC, *An Analysis of Immigration and Refugee Law Services in Canada*, Department of Justice Canada, 2002, pp. 48-49, 132.

¹⁴ See Barreau du Québec, *Déclaration – Les seuils d'admissibilité à l'aide juridique*, Autumn 2011, 2 p.

¹⁵ Most advocacy-driven research does not address in an adequate manner this problem of budgetary constraints. See, e.g., Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment", *Osgoode Hall Law Journal*, 2011, vol. 49, pp. 104-105: "[I]n light of the findings of this study and of the impending reforms to the refugee determination system, the only appropriate course of action is for the federal government to transfer adequate funds

3. UNHCR's Supervisory Role and Governmental/Advocacy Tensions

UNHCR is mandated by UN members, including Canada, to supervise the application of refugee protection treaties.¹⁶ It is worth underlining that UNHCR, as a subsidiary organ of the UN General Assembly, is supposed to collaborate with governments which represent states. The first paragraph of UNHCR's Statute specifies that it "shall assume the function of providing international protection [for refugees] ... and of seeking permanent solutions ... by assisting Governments".¹⁷ To create an effective relationship between UNHCR and host states such as Canada, the cooperation must be reciprocal in that state parties to the Refugee Convention are obliged to cooperate with UNHCR in accordance with article 35(1) of the Convention. Canada has been bound by the Convention since 1969 and it should be emphasised that its article 35(2) obliges the government to provide UNHCR with information and statistical data concerning the condition of refugees, the implementation of the Convention and national legal safeguards for refugee protection. Supervising the legal and non-legal representation available to refugee claimants, and particularly the impact of the lack of representation on access to fair determination procedures, is clearly part of UNHCR's mandate.

Another important part of the context which deserves to be mentioned is that Canada's current political situation is characterised by tensions related to the polarised views held by the principal institutional stakeholders. Refugee advocates tend to present maximalist positions on the entitlements enjoyed by asylum seekers, whereas government officials concerned about border controls tend to minimise Canada's protection obligations.

Indeed, the Minister of Citizenship and Immigration has suggested that many foreigners are abusing Canada's asylum system by presenting "false" claims for protection.¹⁸ There have been a

to provincial legal aid programs in order for them to provide legal aid for all refugee claimants who meet reasonable financial eligibility requirements." A similar problem involving advocacy for state-funded legal aid in various European countries without any discussion of difficulties relating to public finances is found throughout the analysis and recommendations in ECRE, *Survey on Legal Aid for Asylum Seekers in Europe*, October 2010, 172 p.

¹⁶ Annex to the Statute of the Office of the United Nations High Commissioner for Refugees, UNGA res. 428 (V), 1950 (hereinafter "Statute"), para. 8(1).

¹⁷ The requirement to cooperate with governments is also found explicitly and implicitly throughout para. 8 of the Statute that outlines the activities of UNHCR.

¹⁸ "[Minister] Kenney said Tuesday that he's heard stories from Canada Border Service agents who've interviewed Hungarians about why they withdrew their applications. Some were quite honest, he said, noting they came to get free dental care for their kids and planned to leave after they got it. Many Columbian claimants, he added, apply for refugee status in Canada, not after arriving from Bogota but after spending a decade in the United States with no health coverage. "It's hard for us to quantify exactly how many false asylum claimants have come because of pull factors like the Interim Federal Health Program, but we shouldn't be naive. When you're offering people free gold-plated medical services they can't get in their country of origin, it's just human nature," Kenney said." Tobi Cohen, "Bogus refugee claimants from 'safe' countries abusing Canadian health care: Kenney", Postmedia News, 31 July 2012. In explaining claimants' choices regarding the different types of representation, one recent study has reflected on various motivations: "[I]ndividuals who know that they are not likely to obtain refugee status but who wish to make claims for other reasons (such as delaying removal for several months) may be more likely to employ consultants than lawyers. This might make sense given that such claimants would not be concerned about the quality of representation and would likely want to minimize the cost of representation." Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment", *Osgoode Hall Law Journal*, 2011, vol. 49, p. 109.

number of governmental or ministerial declarations over the last few years that have criticised how undeserving foreigners are abusing the generous Canadian asylum system instead of proceeding through standard immigration channels (i.e. “queue jumping”).¹⁹ On the other end of the spectrum, there is speculation by advocates that government officials are convinced legal representation unduly prolongs refugee recognition procedures without helping to establish the genuineness of a claim (i.e. false claims get recognised by claimants who have effective lawyers).²⁰ Refugee advocates even suspect that recent governmental legislative initiatives may in fact be intended to limit legal representation.²¹ More generally, many advocates are quite outspoken in their criticisms and denunciations of the current government’s refugee policy.²² Recently-adopted legislation has the explicit objective of “Protecting Canada’s Immigration System”²³ from abuse and editorials from most national newspapers have supported the government’s position. For example, according to The Globe and Mail’s editorial board:

“The legislation rightly focuses on weeding out claimants who are not genuine, and stemming the flow of asylum seekers from countries such as Mexico and Hungary that are democracies with respect for basic rights and freedoms. Last year, the number of refugee claims from Hungary doubled to 4,900; many are Roma. The acceptance rate is only about two per cent. Following a spike in asylum claims from Mexico, Ottawa imposed a visa in 2009, which has been the source of great irritation for all Mexicans, with good reason.”²⁴

This report proposes that effective protection can only be realised if the appropriate balancing and compromising is done between the divergent ethical positions. While the public presentation of refugee policy is often used by various actors with wide-ranging political agendas, judicial bodies play a particularly important role in terms of the issues addressed in this report. With their decisions that constrain or justify refugee policies, Canadian courts have developed enough jurisprudence to allow the issues to be framed within certain parameters. It is in the interest of the various official bodies to take into account this guidance in order to achieve the best possible combination of fairness and efficiency.

To sum up, there is a basic policy dilemma that is not sufficiently addressed by commentators and analysts of refugee protection: the current universal system theoretically allows anyone from

¹⁹ “Immigration Minister Jason Kenney has singled out Hungarian [Roma] refugee applicants, accusing them of targeting Canada with bogus claims of persecution in order to collect financial support and tap into government resources intended for well-founded claims.” Will Campbell, “Federal government considers detaining Roma refugee claimants, report suggests”, *The Globe and Mail*, 18 August 2012.

²⁰ Sean Rehaag, “The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment”, *Osgoode Hall Law Journal*, 2011, vol. 49, p.110: “An alternative reading of the same phenomenon would be that some lawyers manipulate the refugee determination process and that individuals who do not meet the refugee definition are nonetheless able to obtain refugee protection when they are represented by skilled lawyers. And indeed, this view arguably informs some recent government policies that seek to minimize the role of lawyers in the refugee determination process.”

²¹ David Matas, “Balancing” (2010) 88 Imm LR (3d) 212.

²² See, e.g., Audrey Macklin and Lorne Waldman, “Ottawa’s bogus refugee bill”, *The Toronto Star*, 22 February 2012 and Sharry Aiken et al., “Tough-on-refugees policy reflects badly on Canada”, *The Ottawa Citizen*, 27 November 2009.

²³ See Protecting Canada’s Immigration System Act, S.C. 2012, c. 7. Hereinafter “PCISA”.

²⁴ Editorial, “Due process as important as efficiency in refugee reform”, *The Globe and Mail*, 17 February 2012.

anywhere to claim refugee status, but government resources are for practical purposes limited in providing support for fair procedures (counsel, interpreters, social aid, welfare, housing, etc.). Like many western liberal democracies, Canada has experienced difficulty in the required balancing act, and lack of legal representation for refugee claimants is proving to be one of the key areas of contention in a situation characterised by complex procedures with strict timelines and penalties for non-compliance. We all have an interest in ensuring that asylum procedures remain fair within this difficult context, and UNHCR's long institutional history around the world places it in a particularly good position to offer constructive comments.

II. Impacts

Access to representation is relevant to any system concerned about fair and efficient procedures for determining refugee status. A lack of representation clearly has a direct impact on refugee claimants, as well as other persons involved in the conduct of hearings or in the operation of legal aid programmes.

The key proceedings in Canada regarding refugee status determination include: eligibility interviews, filling out the Personal Information Form (to be replaced as of December 2012 by the Basis of Claim Form – BOC), refugee status determination hearings conducted by the Refugee Protection Division (RPD) at the Immigration and Refugee Board (IRB), as well as post-determination reviews available to prescribed groups of unsuccessful claimants, including judicial review before the Federal Court and the Pre-Removal Risk Assessment (PRRA) available one year after rejection. This report explores the RPD hearings, judicial review and the PRRA, while focusing on the RPD because it will likely be the critical step for the majority of refugee claimants under the new legislative changes. Although the analysis will also be relevant to the new Refugee Appeal Division (RAD) that should become operational in several months, many new claimants will probably not have access to the RAD and the importance of the RPD will be accentuated because it will represent the only chance for recognition of refugee status. It is therefore particularly important to ensure the fairness of the new RPD procedures.

The impacts examined in this section are divided into two categories: one is of a qualitative nature as it raises questions of procedural fairness and potential violations of the Canadian Charter of Rights and Freedoms,²⁵ while the other is empirically-based in that it uses statistics to indicate tendencies in recognition rates when claimants are unrepresented. The various concerns are analysed with a view to exploring possible safeguards and offering recommendations.

1. Compliance with Legal Requirements

According to the studies mentioned below, the lack of representation has a major impact on the fairness of the procedures. In the Canadian system, procedural fairness is carefully assessed in relation to legislative and Charter obligations, as well as compliance with common law principles and international law.

²⁵ Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982, 1982 c. 11 (UK). Hereinafter “Charter”.

The relevant provision of the Refugee Convention is article 16 which deals with access to courts.²⁶ Legal assistance is specifically mentioned in its second paragraph: “A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.” According to this paragraph, the Refugee Convention grants the right to legal assistance only for refugees who have established “habitual residence” in the host state.²⁷ Article 16(2) is therefore of limited usefulness in the Canadian context where national legislation is more specific and guarantees, at the very least, a right to equal treatment before the law regardless of one’s status. As will be seen below, refugee claimants in Canada receive the benefit of legal assistance on the same conditions as citizens. While it is a well-established principle that Canadian courts will interpret ambiguities in the law within the context of Canada’s international legal obligations, the above comment on the Refugee Convention suggests international law has a limited contribution to our study on the impacts of the lack of representation.

Canadian legislation provides that refugee claimants can have legal representation “at their own expense”.²⁸ The recent legislative amendments²⁹ do not change this basic situation which has existed for years. The problem, of course, is that any right to counsel becomes illusory if claimants cannot afford to pay.³⁰ Indeed, a right to counsel is different from a right to state-funded legal counsel. A key question for this report is to establish whether the latter is necessary in refugee hearings that determine whether the claimants will be granted asylum, or returned to the country where they claim to fear persecution. As these refugee claimants are generally unfamiliar with Canada and its complex legal system, the argument from advocates is that they need counsel to help them navigate through the procedures. Alternatively, it would be necessary to adapt the complex legal procedures so that unrepresented claimants have full and fair access to the protection system.

A. A Qualified Right to Counsel

According to a report commissioned a decade ago by the Department of Justice in Ottawa, refugee claimants need some form of representation during the RPD hearing. The following reasons are provided: the process is court-like and legalistic (despite attempts to make it informal), the refugee definition is complicated and it is the subject of extensive judicial interpretation, claimants can be questioned intensively by Refugee Protection Officers³¹ and can also be cross-examined by CIC lawyers, claimants are generally unfamiliar with the court-like proceedings and they are often

²⁶ For an analysis of article 16, see generally James C. Hathaway, *The Rights of Refugees Under International Law*, Cambridge, Cambridge University Press, 2005, pp. 905-912.

²⁷ Its limited protection has already been noted. *Id.*, pp. 909-910: “[E]ven the British rules establishing reduced access to legal aid and the European Union requirements to provide free legal aid only on a review or appeal set standards in excess of what Art. 16(2) requires”.

²⁸ Section 167(1) of the Immigration and Refugee Protection Act (S.C. 2001, c. 27).

²⁹ See PCISA and Balanced Refugee Reform Act, S.C. 2010, c. 8, s. 23 (hereinafter “BRRA”).

³⁰ As underlined by the service providers interviewed in John Frecker et al., *Representation for Immigrants and Refugee Claimants: Final Study Report*, Department of Justice Canada, October 2002, p. 94.

³¹ For the duties of the Refugee Protection Officer (RPO), see Refugee Protection Division Rules, (SOR/2002-228), s. 16. The newly proposed Refugee Protection Division Rules would eliminate the RPO. Canada Gazette Part I, 11 August 2012, pp. 2327-2359.

unable to function in one of the official languages.³² Opinions vary on the form of acceptable representation (e.g. lawyer, paralegal, consultants). While most of the interviewees in the Department of Justice report believe lawyers are needed for complicated cases, some believe paralegals and consultants can handle simpler or routine cases. As for judicial review before the Federal Court, the report concludes that legal counsel is “absolutely necessary”.³³ Given that success requires solid understanding of administrative law principles, along with well-crafted legal arguments which highlight the reviewable errors, the report recommends that an indigent refugee claimant should not be left alone to argue before the Federal Court.

However, these views are not fully accepted in Canadian jurisprudence. The Federal Court has clearly recognised that a right to counsel is not absolute at RPD hearings.³⁴ For example, in refusing judicial review to an unrepresented Roma claimant in *Kellesova*,³⁵ the Federal Court declared she had failed to show that the RPD’s finding on the availability of state protection was unreasonable. The lack of legal counsel apparently did not raise any problem for the presiding judge.³⁶ In another case where the Federal Court simply did not believe the refugee claimant’s affirmation about his Roma ethnicity, self-representation also did not raise any problem for the presiding judge.³⁷

The objective of the procedures as identified in Canadian jurisprudence is to allow the claimant to fully present his or her case so as to ensure a fair hearing. As an administrative tribunal, the IRB is master of its own procedures and the Courts should be reticent to intervene.³⁸ This position has been explained by Justice Sopinka of the Supreme Court:

“We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.”³⁹

However, it is in the interest of the IRB to follow carefully the specific parameters established by Canadian jurisprudence in matters of procedural fairness if it wants to avoid having to repeat certain cases before differently constituted panels. According to the Federal Court:

³² John Frecker et al., *Representation for Immigrants and Refugee Claimants: Final Study Report*, Department of Justice Canada, October 2002, pp. 33, 44.

³³ *Id.*, pp. 37, 45.

³⁴ See, e.g., *Sandy v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1468, para. 50.

³⁵ *Kellesova v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 769.

³⁶ *Id.*, para. 14.

³⁷ *Szalo v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 412, para. 12.

³⁸ *Aslani v. Minister of Citizenship and Immigration*, [2006] FC 351, para. 21.

³⁹ *Prasad v. Minister of Employment and Immigration*, [1989] 1 S.C.R. 560, para. 16.

“The right to counsel in the context of an administrative proceeding is not an absolute right. However, our Court has recognized that in certain circumstances the absence of counsel has caused harm such that it was warranted to allow the judicial review.”⁴⁰

The controversial nature of the suggestion that the right to counsel can be qualified deserves to be underlined as most refugee claimants and service providers interviewed in the report commissioned by the Department of Justice believe that lack of representation has an important impact.⁴¹ The report acknowledges that the respondents from the IRB and CIC believe the process can still be fair without representation, although it has an impact on the manner in which proceedings are conducted.⁴² Yet even though the interviewed IRB members maintain that there is no effect on the assessment of merits, they admit that competent representation can ensure all evidence is presented and all issues effectively addressed.⁴³ The question left unanswered is whether this advantage deriving from the presence of counsel leads to higher success rates. The statistical evidence presented below appears to reinforce this concern.

It is likely that these types of concerns have encouraged the Federal Court to suggest that the right to counsel has to be evaluated in terms of its impact on the fairness of the procedure.⁴⁴ Furthermore, it has already been suggested that the specific human rights-related context of RPD hearings requires special attention and a high level of procedural fairness.⁴⁵

Section 7 of the Charter of Rights and Freedoms raises the possibility that an implied right to state-funded counsel for indigent claimants may, under certain circumstances, be included within its protection guarantees, given that protection involves grave issues related to a person’s security. Specifically, the notion of “fundamental justice” in s. 7 involves both substantive and procedural fairness. As a consequence, representation is likely necessary when refugee claimants do not understand the procedures in order to ensure that the process is conducted in accordance with principles of fundamental justice. This duty of fairness related to the principles of fundamental justice was most recently highlighted by the Supreme Court in a case involving a Roma refugee that the federal government wanted to extradite to Hungary to face serious criminal charges.⁴⁶

⁴⁰ *Mervilus v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1206, para. 17.

⁴¹ John Frecker et al., *Representation for Immigrants and Refugee Claimants: Final Study Report*, Department of Justice Canada, October 2002, p. 94.

⁴² *Ibid.*

⁴³ *Id.*, p. 96.

⁴⁴ *Cervenakova v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 525, para. 35: “It is well established that the right to counsel at an RPD hearing is an issue of procedural fairness.”

⁴⁵ *Geza v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, para. 53: “The independence of the Board, its adjudicative procedure and functions, and the fact that its decisions affect the Charter rights of claimants, indicate that the content of the duty of fairness owed by the Board, including the duty of impartiality, falls at the high end of the continuum of procedural fairness.”

⁴⁶ See *Németh v. Canada (Justice)*, [2010] 3 S.C.R. 281, para. 70. See also the companion case of *Gavrila v. Canada (Justice)*, [2010] 3 S.C.R. 342.

There are precedents for asserting that in particular circumstances involving Charter rights the government is under a constitutional obligation to provide indigent persons with state-funded counsel. In *R. v. Rowbotham et al.*,⁴⁷ the Ontario Court of Appeal recognised that the denial of state-funded counsel to an indigent and unrepresented accused can lead in certain circumstances to a violation of the right to a fair trial in accordance with the principles of fundamental justice contained in s. 7 of the Charter. The Court of Appeal went on to order the complex criminal proceedings to be stayed conditionally until state-funded counsel was provided. The *Rowbotham* case has become a standard reference point for questions involving the right to state-funded counsel in criminal cases. It is particularly important to note that the notion of requiring the government to provide state-funded counsel has been taken beyond criminal law and applied to civil matters involving child custody.⁴⁸ These are clearly relevant precedents for refugee status procedures if indigent claimants risk not having fair hearings because they do not understand the complex legal proceedings.

If legal representation is a right under certain circumstances according to the duty of fairness and s. 7 of the Charter, then we need to clarify the extent of the costs to be covered by the state. The jurisprudence suggests that state-funded aid is not unlimited. Indeed, the Federal Court of Appeal has established that s. 7 of the Charter does not guarantee the right to state-provided counsel in situations where a refugee is subject to an immigration inquiry that may lead to deportation if “provincial legal aid has committed some, but not adequate, funding for the pre-hearing preparations by counsel.”⁴⁹

B. Procedures for unrepresented claimants

Canadian jurisprudence clearly stipulates that the specific procedural rights are context-dependent.⁵⁰

i. Denial of Right to Counsel?

When self-representation is not by choice and counsel would have made a difference in the refugee claimant’s hearing at the RPD, the Federal Court has shown that it is ready to intervene.⁵¹ However, in another recent case the Federal Court has also shown that it will not automatically believe assertions by refugee claimants that they have been denied the right to legal representation. Indeed, Justice Zinn in *Lukacs* established that a Roma claimant’s allegations about being denied the right to have a representative were simply false.⁵²

⁴⁷ (1988), 41 C.C.C. (3d) 1 (Ont. C.A.).

⁴⁸ “While a parent need not always be represented by counsel in order to ensure a fair custody hearing, in some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent, the government may be required to provide an indigent parent with state-funded counsel.” *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.

⁴⁹ *A.B. v. Canada (Minister of Citizenship and Immigration, Attorney General)*, Federal Court of Appeal, docket no. A-888-97, 8 January 2001.

⁵⁰ *Law v. Minister of Citizenship and Immigration*, 2007 FC 1006, para. 19: “[I]t is evident that the specific content of procedural rights afforded to unrepresented parties is context-dependent. The paramount concern is ensuring a fair hearing where the unrepresented party will have the opportunity to fully present their case.”

⁵¹ See, e.g., *Cervenakova v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 525, paras 60-61.

⁵² “There is quite simply nothing in the transcript from which it can be reasonably concluded that the applicants would have felt pressured to proceed. There was no denial of the right to a representative or counsel.” *Lukacs v. Canada (Minister*

While the jurisprudence allows for claimants to voluntarily choose to be unrepresented, it is necessary to clarify how situations in which self-representation is not by choice are to be treated. Indeed, determining whether counsel would have made a difference is a difficult task that may require more guidance for decision-makers.

The new timelines introduced by recent legislation will allow little time for refugees to access counsel, thereby making it difficult to give any meaningful substance to the right to counsel found in s. 167(1) of IRPA. Testimony from many stakeholders clearly expresses this concern,⁵³ as well as the specific difficulties that claimants will have in trying to obtain legal counsel before submitting the BOC (15 days following referral of claim to IRB)⁵⁴ and before appearing for their RPD hearing (within 30-60 days depending on claim category).⁵⁵ According to the Federal Court jurisprudence analysed above, in some cases involving complex legal questions the IRB will likely have no choice but to grant a postponement if there is not enough time to be represented by a lawyer.⁵⁶ In order to provide itself with a safeguard against this potential problem that could lead to many of its decisions being returned for a new hearing after judicial review, the IRB should allow postponements for

of Citizenship and Immigration), 2011 FC 751, para. 20.

⁵³ See e.g. House of Commons, 41st Parliament, 1st session, Standing Committee on Citizenship and Immigration, Meeting no. 40, 7 May 2012. Testimony by Sharryn Aiken: “Are we denying them the right to access counsel? Because effectively they’ll have no opportunity. Those are the concerns. It’s not the notion of expediting the claims in and of itself that we’re concerned about.” See also House of Commons, 41st Parliament, 1st session, Standing Committee on Citizenship and Immigration, Meeting no. 39, 3 May 2012. Testimony by Gina Csanyi-Robah: “Even the most educated Roma who come here and who I’ve been meeting in my life—for example, a former member of the European Parliament from 2004 to 2009—have a very difficult time getting in their applications in 30 days. If it is reduced to 15 days, it’s going to be almost impossible, literally impossible, for someone to be prepared within that time.”

⁵⁴ House of Commons, 41st Parliament, 1st session, Standing Committee on Citizenship and Immigration, Meeting no. 37, 2 May 2012. Testimony by Carole Dahan: “Fifteen days for the basis of claim is going to make it extremely difficult for legal aid to do its job in ensuring that we are distributing moneys and funding those applicants who deserve it the most, and who, as I said, warrant the expenditure of public funds. Fifteen days is going to make it extremely difficult, if not impossible, for legal aid to continue delivering the services as it presently does. And it’s 15 days not only from a legal aid perspective, but in terms of finding counsel even after legal aid has issued a certificate, which enables representation by the private bar. There are many, many hurdles that present themselves, in terms of finding a lawyer who’s going to be available at the time, finding interpreters who can assist you. So one of the recommendations is that the basis of claim form be extended to either the 28 days that claimants presently have in terms of filing their personal information forms, their PIFs, or be rounded out to 30 days ... I don’t think an additional two weeks or 15 days to get the basis of claim form to be submitted is really going to delay the process that much. But in terms of making it workable and doable for all stakeholders and for all members who are involved in the process, it will make an enormous difference.”

⁵⁵ See e.g. House of Commons, 41st Parliament, 1st session, Standing Committee on Citizenship and Immigration, Meeting no. 41, 7 May 2012. Testimony by Furio De Angelis: “It’s important that the timelines should not impact upon certain rights of the processing. That means the right to counsel and also the ability to collect and review information. What is the preparation stage for an interview? It’s the right to counsel and also gathering information. The timelines should be adequate to this process, and also, considering that Canada has a sophisticated legal process, it is necessary for a certain, particular category of vulnerable asylum seekers to find their way in the process.”

⁵⁶ See e.g. *Mervilus v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1206, para. 25: “The following principles can therefore be drawn from the case law: although the right to counsel is not absolute in an administrative proceeding, refusing an individual the possibility to retain counsel by not allowing a postponement is reviewable if the following factors are in play: the case is complex, the consequences of the decision are serious, the individual does not have the resources - whether in terms of intellect or legal knowledge - to properly represent his interests.”

these claimants who are trying to obtain a lawyer.

Recommendation 1: The IRB should introduce special procedures to allow postponements (e.g. 15 additional days) if an unrepresented refugee claimant has applied for legal aid but has not obtained a response.

ii. Heightened Duties in Self-Represented Cases

Notwithstanding the above determinations, the Federal Court’s recent jurisprudence recognises that the RPD has special obligations when refugee claimants are unrepresented. As recently stated by Justice Pinard, “[t]he authorities establish that unrepresented litigants before the Board are owed a heightened duty of fairness.”⁵⁷ This follows the reasoning of Justice O’Reilly several years earlier when he stated the following:

“the Board’s freedom to proceed in the absence of counsel obviously does not absolve it of the over-arching obligation to ensure a fair hearing. Indeed, the IRB’s obligations in situations where claimants are without legal representation may actually be more onerous because it cannot rely on counsel to protect their interests.”⁵⁸

In addressing the special obligations owed to an unrepresented claimant, the Federal Court has also suggested that the claimant is entitled to “every possible and reasonable leeway to present a case in its entirety” and that “strict and technical rules should be relaxed.”⁵⁹ Above all, the RPD should make sure that unrepresented claimants understand the procedures in order to ensure a fair hearing.⁶⁰

With the new timelines that may be too short for many claimants to effectively exercise their right to counsel, the result will be a potentially large increase in claimants who will proceed with self-represented claims. The current IRB Claimant’s Guide provides practical information and suggests that counsel is not required,⁶¹ but it does not include specific information intended to guide self-

⁵⁷ *Lee et al. v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 705, para. 12.

⁵⁸ *Nemeth v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 590, para. 13.

⁵⁹ *Soares v. Minister of Citizenship and Immigration*, 2007 FC 190, para. 22.

⁶⁰ *Nemeth v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 590, para. 10: “The Board was aware that the Nemeths had been represented up until just prior to the hearing. It was, or should have been, alive to the risk that the claimants were ill-prepared to represent themselves. Under the circumstances, it had an obligation to ensure that the Nemeths understood the proceedings, had a reasonable opportunity to tender any evidence that supported their claim and were given a chance to persuade the Board that their claims were well-founded.”

⁶¹ “You may represent yourself. You are not required to have a counsel to represent you. The IRB treats all refugee protection claimants equally, whether they have counsel or not. If you want to have someone represent you, you should try to find counsel as early as possible in the process. If your counsel is charging you a fee to represent you, then he or she must be a lawyer (a member of a provincial law society or of the *Chambre des notaires du Québec*) or a licensed immigration consultant (a member of the Immigration Consultants of Canada Regulatory Council) in which case you would need to have your counsel complete the Counsel Contact Information form (the IRB/CISR 687 form) included in your PIF

represented claimants in the complex asylum system. For example, it does not mention the various important points about procedural fairness discussed in this report despite the fact that claimants have little possibility of learning Canadian procedural nuances. This lack of detailed information needs to be rectified. In order to avoid the potential problems regarding procedural fairness that are often associated with claimants who decide to proceed unrepresented, the appropriate safeguard for the IRB would be to prepare new procedures for the expected large increase in these types of claims and to outline them in either a distinct Claimant's Guide or in a specific section of the current Guide.

Recommendation 2: The IRB should prepare for the expected increase in unrepresented claims by explaining procedural rules and principles of fairness in either a distinct Claimant's Guide intended for self-represented claimants or in a distinct section of the current Guide.

iii. Specific Protection For Unrepresented Claimants

As many new refugee claimants will probably be unrepresented when they submit their BOC, it is likely that many of these forms will be incomplete. The concern is that an incomplete BOC (like its PIF predecessor) can be used against claimants.⁶² In order to provide a safeguard that will help avoid problems with procedural fairness in the event that a BOC form submitted by an unrepresented claimant contains omissions, the new public servant decision-makers of the RPD should be instructed not to hold an incomplete BOC form against unrepresented claimants. An opportunity for clarification should be allowed either before or during the hearing.

Recommendation 3: If claimants prepare their Basis of Claim form (BOC) without the help of counsel, the RPD should be instructed not to hold any omissions in the BOC against them. The claimants should be allowed to provide clarification either before or during the hearing.

As many new refugee claimants will likely be unrepresented during their RPD hearings and will have limited time to produce corroborating evidence to support their claims, it can be anticipated that many claims will lack such corroborating evidence. The problem is that the lack of corroborating

kit. A family member, a friend or a volunteer may help you at no charge in which case you would need to complete the Notice of Representation Without a Fee form (the IRB/CISR 692 form) also included in your PIF kit. If you have counsel, that person must be available and ready to proceed on the date of your hearing ... If you decide to hire a lawyer or an immigration consultant, you are responsible for paying him or her. If you cannot afford to pay for counsel, you may contact the legal aid office in your province to find out what assistance is available. There are also local community groups and refugee rights groups that may be able to help you find counsel or prepare for your hearing." IRB, *Claimant's Guide – Refugee Protection Division: Information for Claimants*, 2009, pp. 8-9.

⁶² House of Commons, 41st Parliament, 1st session, Standing Committee on Citizenship and Immigration, Meeting no. 41, 7 May 2012. Testimony by Lorne Waldman: "The first most obvious consequence is that many of the claimants will not have counsel, either through the whole process or at least at the initial stage when they file the first form, the BOC. What are the consequences of this? There will be omissions in the BOC and, as we all know, the initial presentation is vital, and there's a great deal of jurisprudence from the Federal Court that says that a tribunal can draw adverse inferences if there are omissions from this initial form. The fact that refugees don't have counsel to prepare the form will undoubtedly lead to many circumstances where there will be vital omissions that could result in adverse inferences being drawn against genuine refugees."

evidence can be used against claimants.⁶³ In order to avoid problems with procedural fairness in the event that unrepresented claimants do not have enough time to produce corroborating evidence, the new public servant decision-makers of the RPD should be instructed not to hold the lack of corroborating evidence against the claimants. If necessary, unrepresented claimants should be provided with a postponement that would allow such evidence to be obtained. More generally, a certain amount of flexibility should be exercised with unrepresented claimants regarding the stringent evidence requirements as suggested in the *Soares* case cited above.

Recommendation 4: The RPD should exercise flexibility regarding the stringent evidence requirements when hearings involve unrepresented claimants. For example, it should be instructed that it cannot hold against unrepresented claimants the lack of corroborating evidence and that it should provide appropriate postponements if necessary to allow such evidence to be submitted.

Many stakeholders have expressed concern that unrepresented claimants will not understand fully the complex procedures and that there will be occasions when it would be unreasonable to expect that these claimants will be able to learn the detailed aspects of the procedural rules.⁶⁴ If the IRB does not check self-represented claimants' awareness of the procedures, the Federal Court has already shown that it is ready to quash a decision and return it to the RPD for reconsideration.⁶⁵ In order to prevent such problems, the appropriate safeguard would be to oblige the RPD to make sure claimants understand what they must establish to obtain refugee status. In other words, the IRB should be required to establish a mechanism to make sure that self-represented claimants understand every step of the process.

Recommendation 5: The IRB should establish a mechanism to check at various stages whether self-represented claimants understand the key aspects of the procedures.

⁶³ Ibid. Testimony by Lorne Waldman: "Another important impact will be that refugees themselves will not have time to obtain corroborating documents. One of the things we're seeing more and more in decisions by refugee board members is that they draw an adverse inference when claimants don't have corroborating documents to sustain. So if a claimant says he was arrested and tortured, the member will say, "Why don't you have a medical report?" Well, claimants often can't come with these reports, because if they're fleeing their countries they can't take the documents with them, and they need to have time to obtain the corroborating documents. This process and the speed with which it is designed to take place will make it impossible for corroborating documents to be obtained. Members will still continue to draw adverse inferences and this will result in more unfair decisions. One, we do want a fast, expeditious process, but it has to allow reasonable timeframes. It has to allow reasonable timeframes to prepare the initial statement form and it has to allow for reasonable timeframes for claimants to bring in corroboration. The other alternative is this. The way the law is now, the jurisprudence says that if a claimant doesn't bring in corroborating documents, medical reports, proof of detention, proof that he attended demonstrations, the board member can draw an adverse inference. If you want to shorten the timeframes, then put into the legislation a provision that says a member cannot draw adverse inferences from lack of documentation. Then you've created a balanced system. Right now the way it is, you're creating a situation where it would be impossible for claimants to bring in the documentation but still allowing members to draw adverse inferences from the lack of documentation. It's completely unfair."

⁶⁴ See e.g. *Cervenakova v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 525, para. 67: "If counsel had been present, the translation and lost document issue would have been dealt with much more fairly. It is not reasonable to expect an unrepresented claimant to know that she can ask for an adjournment if necessary, especially after the RPD told her the hearing had to proceed that day."

⁶⁵ *Id.*, paras 58, 60 and 67: "In the end, the Applicant did not get a fair hearing ... the RPD also told the Applicant that the hearing was peremptory and 'must go forward today.' This left her with no choice but to try and represent herself. The record shows she was nervous and did not do a very good job of it."



Recommendation 6: If a self-represented claimant does not understand the procedures or if the RPD hearing involves complex legal questions, the IRB should allow a postponement until the claimant obtains legal counsel (through legal aid or other means such as duty counsel).

The position of RPO, which is expected to be eliminated according to the proposed new RPD Rules, could be given a new specific mandate to address the problems related to the lack of representation. Such a revised RPO position could form the backbone of a newly created roster that can provide unrepresented claimants with a type of duty counsel support. The roster could be complemented with external lawyers working for legal aid or refugee law associations. In order to encourage efficiency, the support could be limited to specific aspects of the procedures requiring assistance.

Recommendation 7: The IRB should develop a roster of duty counsel to provide unrepresented claimants with support from either internal staff (such as the RPO with a new mandate) or from external lawyers working for recognised legal aid organisations and refugee law associations.

More generally, it would be useful to explain the various measures dealing with potential problems relating to unrepresented claims in a new Chairperson's Guideline that would provide guidance for decision-makers.

Recommendation 8: The IRB should introduce a new Chairperson's Guideline on Self-Represented Claimants Appearing Before the Refugee Protection Division that covers the various concerns and safeguards mentioned in this report, including rules for special short adjournments.

2. Effects on Recognition Rates

There have been several recent attempts by refugee advocates to use statistical studies in order to raise doubts about the fairness of the Canadian asylum process. These studies insinuate that the system can only be fixed by providing all claimants with legal representation.

This approach follows the strong American tradition of statistical studies in criminal and social justice cases that suggest the existence of disparate treatment based on inappropriate factors. One of the most prominent American studies to extend this approach to asylum has claimed that approximately 33% of refugee claimants were unrepresented before the Immigration Court during fiscal years 2000-2004.⁶⁶ Contrary to represented claimants, who were granted asylum at a rate of 45.6%, the unrepresented were granted asylum at a rate of 16.3%.⁶⁷ According to the authors, the complexity of the process is such that it is not surprising that lack of representation has a big impact.⁶⁸ Although the study does not explore the quality of representation, the authors also suggest that the unrepresented claimants might rely more often on their own testimony, while legal counsel might be more likely to seek corroborating evidence and to obtain experts for testimony

⁶⁶ Jaya Ramji-Nogales, Andrew I. Schoenholtz and Phillip G. Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," *Stanford Law Review*, 2007, vol. 60 (2), p. 325.

⁶⁷ *Id.*, p. 340.

⁶⁸ *Ibid.*

about country situations and about the claimant's personal situation, thereby making it easier for adjudicators to decide in favour of claimants.⁶⁹

Recent Canadian statistically-based studies attempting to explore disparities in asylum cases come from a similar advocacy tradition and they all point unequivocally to the same conclusion: decision-making in the asylum system is fundamentally biased. The first of these studies explored the newly introduced leave requirement for seeking judicial review at the Federal Court by examining all applications filed in 1990 and by finding significant variations in leave grants among individual judges.⁷⁰ The next statistical study found disparate treatment in applications for leave and judicial review by examining a sample of more than six hundred cases filed at the Federal Court in 2003.⁷¹ One of the key conclusions of this study is that legal representation results in much higher granting of leave: "At the most basic level, the quantitative results indicate that petitioners require a legal advocate—and an experienced one at that—to get inside the door of the FCC [Federal Court of Canada] to have the merits of their claims considered. These resources strongly overshadow the other explanations for the court's leave decisions."⁷² More recently, an extensive study of more than seventy thousand RPD decisions from 2005 to 2009 concluded that legal counsel is a critical factor for successful refugee claims.⁷³

The latter two of these Canadian statistical studies attempt to demonstrate that legal representation is necessary for fair procedures and that all indigent claimants must obtain state-funded lawyers in order for principles of fundamental justice to be respected. As seen above, however, Canadian jurisprudence does not back such a position because it has been established that the right to counsel is not absolute. While the Federal Court is ready to intervene in certain situations where fairness cannot be assured without legal representation, this is a more nuanced point than the one made in these studies. There may even be situations in which s. 7 of the Charter obliges the government to provide a state-funded lawyer to an indigent refugee claimant, but courts have not yet made such an explicit statement.

To the extent these studies imply that potential biases can be mitigated by legal representation, it is necessary to explore further the suggestion that Canada's asylum procedures are fundamentally biased because of the lack of legal representation. As will be seen below, the logic of recent judicial decisions suggests that the alleged biases presented in these studies are merely speculative.

⁶⁹ Id., p. 341. See also Andrew I. Schoenholtz and Jonathan Jacobs, "The State of Asylum Representation: Ideas for Change", *Georgetown Immigration Law Journal*, 2002, vol. 16 (1), p. 739 where the authors argue for increased legal representation.

⁷⁰ Ian Greene and Paul Shaffer, "Leave to Appeal and Leave to Commence Judicial Review in Canada's Refugee-Determination System: Is the Process Fair?", *International Journal of Refugee Law*, 1992, vol. 4, p. 71.

⁷¹ Jon B. Gould, Colleen Sheppard and Johannes Wheeldon, "A Refugee from Justice? Disparate Treatment in the Federal Court of Canada", *Law & Policy*, 2010, vol. 32 (4), p. 454.

⁷² Id. 475. "By contrast, once a petitioner is granted leave and appears before the court at a hearing on the merits, almost all litigants are represented by counsel and, thus, stand on a more equal playing field ... A system designed to provide due process of law ought not to be tilted in favor of those who can hire an experienced lawyer, and yet that is exactly what is happening when applicants appear before the FCC seeking leave for immigration or asylum cases ... the present results underscore concerns about the FCC's treatment of immigration and asylum cases and raise questions about the very legitimacy of Canada's immigration and refugee system. At its most basic level, a system designed to provide due process of law ought not to be tilted in favor of those who can hire an experienced lawyer." Id., pp. 475, 482.

⁷³ Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment", *Osgoode Hall Law Journal*, 2011, vol. 49, p. 71.

While fairness requires decisions to be free from reasonable apprehensions of bias by impartial decision-makers, the Federal Court has declared that “[a]llegations of bias are therefore serious and impugn the decision-making process and the decision-maker. Such allegations must be proven to be probably true. This is a high threshold.”⁷⁴ Furthermore, the Federal Court of Appeal has rejected the idea that bias is established by statistical evidence:

“Each claim stands on its own merits and the members of the Refugee Division have to assess each case based on the evidence and applicable law. Such an assertion reflects directly on the integrity of the members in question and cannot be accepted unless there is good evidence. Mere suspicion based on ‘rates’ does not meet the applicable standard of the well-informed individual considering the matter in depth in a realistic and practical way.”⁷⁵

The Federal Court has also demonstrated its reluctance to compare decisions in order to arrive at statistics that imply bias.⁷⁶ We can conclude that proving bias in the Canadian asylum system requires more than comparative statistics. The same logic presumably applies to the IRB statistics presented in the next section and the potentially misleading difference in recognition rates between represented and unrepresented claimants.

A recent judicial review case involving a PRRA decision against a Roma refugee claimant from the Czech Republic is worth emphasising because it raises several points relevant to this report.⁷⁷ In referring to his “scepticism of the relevance of statistics,”⁷⁸ Justice Crampton of the Federal Court goes on to explain that allegations of bias based on statistics are not easy to prove (the Court ultimately finds that the submitted statistics relate only to the RPD and not the PRRA, but the various points remain relevant): “Allegations of bias are serious. They impugn the impartiality of the decision-making process in question and the integrity of the person who made the decision.”⁷⁹ In dismissing the application for judicial review of the PRRA by the failed claimant, Justice Crampton emphasises that:

“The Officer must be presumed to be impartial, absent serious grounds for concluding that a reasonable and informed person, viewing the matter realistically and practically, would believe that the Officer was not impartial. It cannot simply be inferred solely from the political nature of the Minister’s comments that they give rise to a reasonable apprehension of bias. Apart from the above-noted statistics, which have little probative value, the only additional evidence submitted by the Applicant in support of her allegations of bias were the two aforementioned articles published

⁷⁴ *Jaroslav v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 634, para. 39. The same position is repeated in *Cina v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 635, para. 39.

⁷⁵ *Zrig v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1043, para. 130, aff’d 2003 FCA 178.

⁷⁶ *Gabor v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1162, para. 18: “I agree with the respondent with respect to the inappropriateness of comparing Board decisions. It is trite law that the Board’s decisions are based on the specific facts of each case and are not binding.”

⁷⁷ *Dunova v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 438.

⁷⁸ *Id.*, para. 45.

⁷⁹ *Id.*, para. 46.

by Canwest News Service and in Embassy Magazine.”⁸⁰

Particularly noteworthy is the Court’s reluctance to accept the argument that statements by the Minister of Citizenship and Immigration could somehow throw into question the independence of decision-makers in the asylum process:

“Even if a reasonably informed person, viewing the matter realistically and practically, might reasonably apprehend the Minister to be biased based on the comments that he was reported to have made, that does not provide a sufficient basis for concluding that such a person also would reasonably apprehend the Officer to be biased. The Officer is a member of the Public Service of Canada. It is well accepted that the Public Service of Canada is independent of the executive branch of government. Absent evidence to the contrary, the Officer also should be presumed to be independent and impartial. No such evidence to the contrary was presented by the Applicant [refugee claimant].”⁸¹

A similar argument about lack of independence has been made in relation to IRB members by other failed Roma claimants, and it has been rejected by the Federal Court. In considering the institutional structure, Justice Snider has underlined how the argument is merely speculative without any actual evidence of bias.⁸² Likewise, Justice Zinn of the Federal Court has rejected the argument based on analogous reasons in another recent Roma case.⁸³

To the extent that these arguments were all raised in Roma cases where the failed refugee claimants alleged that the Minister of Citizenship and Immigration had made inappropriate declarations in linking Roma claimants and abuse of the system, Justice Kelen has provided possible explanations for the sudden drop in success rates:

⁸⁰ Id., paras 61-62.

⁸¹ Id., para. 69.

⁸² *Zupko v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1319, para. 20: “I accept that the Minister influences Governor-in-Council appointments and reappointments of Board members. However, this is insufficient to found a claim of a reasonable apprehension of bias. Under IRPA, the Board is independent from Citizenship and Immigration Canada (CIC). The Board has its own chairperson. Every member of the Board is statutorily required to swear an oath of office requiring him or her to ‘faithfully, impartially and to the best of my knowledge and ability, properly carry out the duties of a (member) of the Immigration and Refugee Board’. Members of the Board are appointed for set terms and are paid remuneration that is not dependent on how they decide cases. They can only be removed from office for incapacity, misconduct, incompetence or conflict of interest ... I have no evidence, beyond bare speculation, that appointments are made on the basis of prospective members’ views of the Minister’s speeches or that the renewal of Board member appointments is made on the basis of, or influenced by, their refugee claim acceptance rates.”

⁸³ *Gabor v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1162, para. 34: “Allegations of the possibility or apprehension of bias by an independent decision-maker are serious allegations. I agree with the respondent [government] that the allegations in this case call into question the professionalism of the panel member, the functioning of the administrative tribunal and the impartiality of decision-making ... I find no substantial grounds here for the allegations raised by the applicant. His allegations are speculative and there is no evidence before the Court that the Board was or could be influenced by the Minister’s statements.”

“Many factors can explain why the Board stopped accepting as many refugee claims from the Czech Republic in the latter part of 2009 and 2010. For example, there was the fact finding mission from the Board which issued its papers in the summer of 2009. Significantly, there was also the fact that the Board had much more experience in dealing with Czech claims after the surge in 2007 and 2008.”⁸⁴

It is important to understand the Federal Court’s reasoning on this issue because the same argument about lack of independence will likely be raised in relation to the public servants who will eventually make decisions at the RPD under the new legislative changes. We can assume refugee advocates would consider the above judicial decisions as reinforcing the argument that legal representation is necessary for all refugee claimants. The point to emphasise before examining the data in the next section, however, is that judges consider the various alleged biases as speculation. Canadian courts have been quite clear that these statistically-based allegations must be supported by actual evidence in order to be accepted.

A. RPD Decisions on Merit

The figures below regarding the number of unrepresented claimants before the RPD were obtained from the IRB’s Strategic Communications and Outreach unit after authorisation was granted by the Chairperson. As the IRB does not play a role with respect to the designation of representation or the assignment of resources for representation and is obliged to recognise representatives who may be lawyers, paralegals, consultants and unpaid representatives (e.g. family member, church official), the figures do not distinguish between the various categories or whether the representatives were paid by the claimants. This is an important shortcoming because a recent study suggests that lawyers, and particularly experienced lawyers, obtain generally higher acceptance rates than the other authorised representatives.⁸⁵ The figures also do not reflect on the quality of claims or whether self-represented claimants were refused legal aid certificates from provincial legal aid plans that assess a claim’s “chance of success”. This latter point is particularly important as it suggests considerable caution should be exercised when drawing conclusions from the comparison of different rates. Likewise, these figures refer only to claims that were finalised, which in this particular case is defined by the IRB as not including abandonments or withdrawals (i.e. only the decisions made on merit).

⁸⁴ *Jaroslav v. Minister of Citizenship and Immigration*, 2011 FC 634, para. 58.

⁸⁵ Sean Rehaag, “The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment”, *Osgoode Hall Law Journal*, 2011, vol. 49, p. 92.

i. How Many Unrepresented Claims?

From July 2002 (implementation of IRPA) to March 2012 (latest available statistics), the Refugee Protection Division of the IRB finalised 130,514 principal claims with an overall acceptance rate of 53%. Of these finalised claims, 6% (7,487) were presented by claimants without representation. The acceptance rate for these unrepresented claimants is 16%.

The percentage of unrepresented claimants has generally been increasing during the period July 2002 – March 2012: from 3-4% during 2002-2003 when a total of almost 9,000 claims were finalised, to 5-6% during 2004-2010 when an average of 14,132 claims were finalised each year. A further increase was noted in 2011 when the percentage of unrepresented claimants reached 8% (out of 18,374 finalised claims) and this percentage has remained the same during the first quarter of 2012.

Several points deserve to be highlighted. The overall success rate during 2002-2012 for unrepresented claimants (16%) is the same as the claimants at the Immigration Court in the American study cited above, while the comparison with the success rate of all claimants (53%) is relatively close to the one in the American study (46%). We can conclude that unrepresented claimants are generally being recognised at a significantly lower rate, although these statistics in themselves do not provide any evidence regarding the reasons for this difference. For example, it is likely that many unrepresented claimants were refused legal aid following a “chance of success” screening and that their claims may have been relatively weak or unfounded. To the extent the lower rate may be explained by the possibility that unrepresented claimants are not able to fully or effectively present their cases, the reasons for this difference need to be examined more closely by the IRB. Some advocates also raise doubts about the legitimacy of the legal aid screening process⁸⁶ and argue that it is an unreliable mechanism which may even breach the principles of fundamental justice found in s. 7 of the Charter.⁸⁷ In any case, it is in the IRB’s interest to take steps to mitigate any issues affecting the perception of fairness in its procedures. The available statistics raise concerns *a priori* and the IRB’s short 1-page response⁸⁸ to previous statistically-based criticisms that was published in 2008 remains insufficient.

Recommendation 9: The IRB should conduct a study that examines the merits in a large sample of cases to determine why there are significantly lower success rates for unrepresented refugee claimants coming from the same country of origin.

⁸⁶ “[I]t would appear that legal aid programs may not in fact be applying true merit tests where claims that meet a certain evidentiary threshold in terms of risk of persecution obtain funding. Rather, merit screening seems to be used in many cases as a kind of quota system, whereby the standard of merit shifts depending on the level of resources that provincial legal aid programs are prepared to put into immigration and refugee matters. Indeed, the overall trend is that several provinces are adopting increasingly restrictive standards of merit in order to reduce refugee law expenditures.” Sean Rehaag, “The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment”, *Osgoode Hall Law Journal*, 2011, vol. 49, p. 103.

⁸⁷ “To the extent that the standard of merit shifts depending on the financial priorities of legal aid programs, existing merit screening processes likely breach these principles.” *Ibid.*

⁸⁸ IRB, *Members’ Decisions – Explanatory Note*, June 2008. The IRB suggests that variables affecting the trends for individual countries of origin include, for example, the claimant’s ethnicity and home region.

Given that some of the represented claimants related to the above statistics are represented by non-lawyers, we can assume that the percentages on lack of representation are higher if we consider only the number of claimants who are represented specifically by legal counsel. In other words, more than 8% of claimants whose cases were decided on the merits in the last year did not benefit from legal representation. Despite repeated requests, it is unfortunate that the IRB did not provide figures distinguishing legal from non-legal representation because the above statistics may indicate a trend in which a significant and increasing number of claimants are not represented by lawyers.

ii. Source Countries

Of all the principal claims finalised from July 2002 to March 2012, the source country with the largest number of unrepresented claimants is Mexico with 1,819 claims (representing 12% of all principal claims from the country). While the overall acceptance rate for claimants from Mexico is 20%, the percentage drops to 5% for those who are not represented. Caution should be exercised in interpreting these results: we do not know whether these unrepresented claimants had applied for legal aid and whether (and why) their applications had been refused. It is possible, for example, that legal aid would not finance their claims because the screening process had determined they were “unlikely to succeed”.

The next 3 source countries in terms of the largest numbers of unrepresented claimants are also from the general region of Latin America and the Caribbean: Costa Rica with 450 claims (representing 30% of all principal claims from the country), Honduras with 358 claims (representing 29% of all principal claims from the country) and Saint Vincent with 313 claims (representing 11% of all principal claims from the country). In all 3 cases, the recognition rate for unrepresented claimants is lower than the overall rate from the country: it drops from 6% to 2% for Costa Rica, it drops from 32% to 5% for Honduras, and it drops from 38% to 20% for Saint Vincent.

Of the 18 source countries with the largest number of unrepresented claims (each with over 100) finalised during the period July 2002 – March 2012, it is noteworthy that 14 are from Latin America and the Caribbean and each experiences a drop in recognition rates when the claimants are not represented. The remaining 4 countries (Israel, Philippines, Pakistan, USA) account for 633 of the 7,487 (8.45%) unrepresented claims during the period.

Unrepresented principal claimants at RPD (finalised July 2002 – March 2012)

Source country	Number of unrepresented claimants	Unrepresented claimants as percentage of overall claims from source country	Acceptance rate of unrepresented claimants	Acceptance rate of all claimants from source country
Mexico	1,819	12%	5%	20%
Costa Rica	450	30%	2%	6%
Honduras	358	29%	5%	32%
Saint Vincent	313	11%	20%	38%
Israel	200	14%	9%	24%
Jamaica	193	14%	16%	35%
Saint Lucia	192	13%	16%	40%
Colombia	181	2%	60%	76%
El Salvador	169	11%	9%	31%
Philippines	158	12%	8%	10%
Guyana	155	10%	13%	25%
Pakistan	138	2%	41%	51%
USA	137	11%	0%	1%
Haiti	131	2%	44%	55%
Grenada	116	19%	7%	22%
Trinidad & Tobago	110	16%	9%	22%
Cuba	105	10%	25%	78%
Brazil	104	16%	8%	13%

Source: IRB Strategic Communications and Outreach unit (email July 2012)

It is worthwhile underlining several points relating to the source countries. According to figures published by UNHCR, countries from Latin America and the Caribbean are not generally found among the top asylum-producing countries.⁸⁹ To the extent that a disproportionately high number of domestic violence-related claims seem to originate in the Caribbean,⁹⁰ it would be useful for the IRB to explore any linkages that should be made between its *Guideline 4 – Women Refugee Claimants Fearing Gender-Related Persecution*⁹¹ and the lack of representation. Also, one of the

⁸⁹ UNHCR, *A Year of Crises – Global Trends 2011*, pp. 14, 26.

⁹⁰ Constance MacIntosh, “Domestic Violence and Gender-Based Persecution: How Refugee Adjudicators Judge Women Seeking Refuge from Spousal Violence – And Why Reform is Needed”, *Refuge*, vol. 26(2), 2009, pp. 152-153.

⁹¹ Effective date: 13 November 1996.

countries regularly singled out by the government for alleged abuse and often making headlines, Mexico, has been a leader in unrepresented claimants over the last few years. The fact that the largest number of unrepresented claimants has come from Mexico does not in itself support or contradict allegations that Mexicans are abusing the asylum system. An extensive study involving examination of the merits of large sample cases would be necessary to shed light on this controversial debate.

B. Withdrawals and Abandonments Prior to Decisions on Merits

i. High withdrawal rate

According to the IRB *Claimant's Guide*, the term “withdrawal” is used to indicate a “claimant’s decision not to continue with his or her claim”.⁹² In order to withdraw a claim, “a claimant must inform the IRB” of this decision.⁹³ According to the newly proposed Refugee Protection Division Rules, “a party may withdraw the party’s claim ... by notifying the Division orally at a proceeding or in writing” as long as no substantive evidence has been accepted in the RPD hearing.⁹⁴

Given that the procedure for withdrawal explicitly depends on the consent of the claimant, there is *a priori* less concern for situations in which the claimant is not represented. After all, it is reasonable to presume that a refugee claimant’s voluntary and explicit decision to withdraw does not generally raise concerns. If there are questions as to the claimant’s decision, the new Rules also provide that a “person may apply to the Division to reinstate a claim that was made by the person and was withdrawn.”⁹⁵ The IRB must consider relevant factors such as “whether the application was made in a timely manner and the justification for any delay”⁹⁶ and it can allow the application if there was “a failure to observe a principle of natural justice or it is otherwise in the interests of justice”⁹⁷ to do so.

In order to place data on withdrawal in their larger context, it should be noted that 1.6% of all finalised claims (including those decided on merits, as well as withdrawals and abandonments) were declared withdrawn in 1989, the first year of the IRB’s operations. This number has constantly risen and it has now reached 9.9% for 2011.⁹⁸ This is a significant percentage and all stakeholders should take note that we have now reached a point where almost 1 in 10 claims is withdrawn by the claimant.

Statistics for 2010-2011 indicate that the overwhelming majority of withdrawn cases involve

⁹² IRB, *Claimant's Guide – Refugee Protection Division: Information for Claimants*, 2009, p. 3.

⁹³ *Ibid.*

⁹⁴ Para. 59(2) of the Refugee Protection Division Rules, Canada Gazette Part I, 11 August 2012, p. 2350.

⁹⁵ *Id.*, para. 60(1).

⁹⁶ *Id.*, para. 60(4).

⁹⁷ *Id.*, para. 60(3).

⁹⁸ Statistics from the undated document entitled *IRB Refugee Status Determinations (1989-2011 Calendar Years)* available on CIC website.

claimants originating from Mexico and Hungary.⁹⁹ In 2011, these two countries account for 1,438 of 1,854 (78%) withdrawn claims at the IRB. In 2010, these same countries account for 2,373 of the 2,899 (82%) withdrawn claims. Mexico has been the leading source country for withdrawals since 2003, with countries from which Roma claimants originate either leading during certain earlier years (Hungary in 1999-2002) or more recently coming in second place (Czech Republic in 2009, Hungary in 2010-2011).

In other words, it is relatively clear that Mexican and Roma claimants have been withdrawing their claims at much higher levels than any other groups. Statistics for 2011 indicate that the remaining top ten source countries for withdrawals are (in decreasing order): Colombia, China, India, Pakistan, Saint Vincent, Nigeria, Namibia and Sri Lanka. These 8 countries account for a combined 416 of the 1,854 (22.4%) withdrawals in 2011. Without further evidence, it is difficult to pinpoint the specific reasons for withdrawal (e.g. lack of representation, mental health, overly stringent rules, abuse of system).

ii. Unclear discretionary abandonment practices

Both the IRB *Claimant's Guide* and the IRB website provide blunt warnings to claimants: if the established procedures are not respected, the IRB can conclude that a claim is abandoned. The following definition of abandonment is provided in the *Claimant's Guide*:

“Failing to do all things required for the Immigration and Refugee Board (IRB) to make a decision about your claim (for example, if you fail to provide your Personal Information Form on time, fail to appear at a proceeding, or fail to communicate with the IRB when you are asked to do so).”¹⁰⁰

The consequences of failing to follow the designated steps are clearly spelled out: “Failing to do any of these things may lead the IRB to conclude that you do not wish to continue with your claim. If the IRB determines that your claim has been abandoned, you lose the right to have your claim decided.”¹⁰¹

Likewise, the IRB website explains that it “will send the claimant a letter with a date, time and place to appear and if the claimant does not appear, the IRB will assume that the claim has been abandoned, or dropped.”¹⁰² According to the new Refugee Protection Division Rules proposed by the IRB, a claimant can be informed “that the claim may be declared abandoned without further notice if the claimant fails to provide the completed Basis of Claim Form or fails to appear at the hearing.”¹⁰³ A useful safeguard is proposed with the possibility of avoiding abandonment by quickly

⁹⁹ Ibid.

¹⁰⁰ IRB, *Claimant's Guide – Refugee Protection Division: Information for Claimants*, 2009, p. 2.

¹⁰¹ Ibid.

¹⁰² IRB website accessed 11 August 2012

<http://www.irb-cisr.gc.ca/Eng/brdcom/references/procedures/proc/rpdspr/Pages/rpdp.aspx>

¹⁰³ Para. 3(4)(c)(vi).

contacting the IRB: “If it is impossible to make the scheduled time for a serious reason, such as illness, the IRB must be contacted right away. A new time may be scheduled.”¹⁰⁴

These statements are all in accordance with the legislation that establishes the possibility of abandonment. According to s. 168(1) of IRPA:

“A Division may determine that a proceeding before it has been abandoned if the Division is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so.”

Given the discretionary element included in the above provision, it is important to ensure that the actual practice followed by the IRB does not raise problems of arbitrariness or any other form of unfairness.¹⁰⁵ From this perspective, it is encouraging that the proposed new RPD Rules contain a provision that requires the IRB to consult any claimant who in fact does not want the claim to be abandoned:

“In determining whether a claim has been abandoned under subsection 168(1) of the Act, the Division must give the claimant an opportunity to explain why the claim should not be declared abandoned (a) immediately, if the claimant is present at the proceeding and the Division considers that it is fair to do so; or (b) in any other case, by way of a special hearing.”¹⁰⁶

It would be useful to clarify whether this provision provides a positive obligation for the IRB to contact a claimant in order to obtain confirmation prior to abandonment or whether it is simply a passive obligation to listen to objections if it receives them from the claimant.

Fairness in the abandonment procedure is also enhanced by allowing the possibility of reopening an abandoned case: “At any time before the Refugee Appeal Division or the Federal Court has made a final determination in respect of a claim for refugee protection that has been decided or declared abandoned, the claimant or the Minister may make an application to the Division to reopen the claim.”¹⁰⁷

From the above provisions explaining the notion of abandonment, it becomes clear that a claim can

¹⁰⁴ IRB website accessed 11 August 2012

<http://www.irb-cisr.gc.ca/Eng/brdcom/references/procedures/proc/rpdspr/Pages/rpdsp.aspx>

¹⁰⁵ A recent testimony suggests abandonment is declared automatically without due consideration of specific personal circumstances. See House of Commons, 41st Parliament, 1st session, Standing Committee on Citizenship and Immigration, Meeting no. 41, 7 May 2012. Testimony by Lorne Waldman: “If refugee claimants don’t provide the form within the time stipulated by the rules, their claims are declared abandoned. That’s one of the main reasons claims are declared abandoned. It’s not that the board doesn’t have the recourse. If the claimants don’t cooperate, they lose their right to make a claim.”

¹⁰⁶ Para. 65(1)

¹⁰⁷ Id., para. 62(1).

be abandoned involuntarily if the claimant is not diligent in respecting the procedures established by the IRB. However, the actual practice will depend largely on the IRB's strictness in applying the rules.

There is concern that the expected increase in unrepresented claimants resulting from the shortened timelines will lead to more abandonments.¹⁰⁸ To the extent that the above analysis demonstrates that the legislation and the RPD Rules allow the IRB to proceed with abandonment if claimants do not respect the various procedures, the decision to declare a case abandoned is nevertheless discretionary in the sense that the IRB is not obliged to make such determinations in all cases. Yet the exact procedure for deciding to proceed with abandonments is unclear in the IRB's publically-available information. The appropriate safeguard in relation to this problem of transparency and access to information is for the IRB to explain clearly its procedures in dealing with situations that can lead to abandonments.

Recommendation 10: In the spirit of transparency and to ensure consistency of practice, the IRB should specify in the Claimant's Guide and on its website how it proceeds with its discretionary decisions to move to abandonment of unrepresented claims.

iii. Rising Abandonment Rates

In order to place data on abandonment in their larger context, it should be noted that 0.8% of all finalised claims (including positive and negative decisions, as well as withdrawals and abandonments) were declared abandoned in 1989. This number has constantly risen and it has now reached 5.1% for 2011.¹⁰⁹

Statistics for 2010-2011 indicate that the majority of the abandoned cases involve claimants originating from Mexico and Hungary.¹¹⁰ In 2011, these two countries account for 533 of the 807 (66%) abandoned claims at the IRB. In 2010, these same countries account for 448 of the 889 (50.4%) abandoned claims, with Haiti also being a significant source country with 151 (17%) abandoned claims for that particular year. Statistics for other years indicate Haiti to be a relatively minor source country for abandonment, while Mexico has clearly been by far the leading source country with between 35% and 60% of all abandoned claims since 2007 (although Hungary was catching up in 2011). The other noteworthy country has been China with a consistent percentage

¹⁰⁸ See e.g. House of Commons, 41st Parliament, 1st session, Standing Committee on Citizenship and Immigration, Meeting no. 41, 7 May 2012. Testimony by Furio De Angelis: "Overly restrictive timeframes in the context of a sophisticated asylum process can lead to increased rates of abandonment and the rise of a number of unrepresented claimants. Asylum claimants do not ordinarily have the knowledge to navigate the legal system. Even where a client retains counsel, enough time needs to be allowed for applicants to apply for legal aid and to find a counsel. The consequence of abandonment are, in effect, a final, negative decision, as there is no right to an appeal or access to a pre-removal risk assessment for one year after the negative decision. In this respect, appropriate resources should be allocated towards creating, maintaining, and supplementing legal services for asylum seekers."

¹⁰⁹ Statistics from the undated document entitled *IRB Refugee Status Determinations (1989-2011 Calendar Years)* available on CIC website.

¹¹⁰ *Ibid.*

varying from 9.9% to 12.3% of all abandonments during 2009-2011. Statistics for 2011 indicate that the remaining top ten source countries for abandonments are (in decreasing order): Saint Vincent, Nigeria, India, Pakistan, Colombia, Sri Lanka and Namibia. These 7 countries account for a combined 194 of the 807 (24%) abandonments in 2011.

There is some controversy relating to statistics for Roma asylum seekers, but it is clear that the success rate is low for claimants from Hungary and that a high number have also abandoned (or withdrawn) their claims over the last couple of years. One may presume that implicit in the governmental view on the abandonment/withdrawal rate is that these claimants are not represented (i.e. legal counsel would presumably want to win cases they accept to represent). The government insists this is proof of abuse, and the Federal Court has suggested in a recent case involving a Roma claimant from the Czech Republic that it agrees with the government's assessment that abandoned or withdrawn claims are akin to "false" claims.¹¹¹

Advocates, on the other hand, suggest there may be various reasons why claimants abandon (or withdraw) their claims. For example, there is information circulating among Toronto-based advocacy groups that suggests some unethical lawyers have accepted payment without properly completing procedures (e.g. not filling out the PIF properly), thereby resulting in hundreds or thousands of abandonments by unwitting claimants.¹¹² Similarly, advocates have alleged that some lawyers have provided poor advice.¹¹³ If these allegations were to be proven correct, then they would

¹¹¹ *Jaroslav v. Minister of Citizenship and Immigration*, 2011 FC 634,, paras 46-47. The interpretation apparently accepted by the Federal Court reflects the government's current view that Roma from Hungary are abusing the Canadian asylum system and it coincides with the testimony provided recently to the House of Commons Standing Committee on Citizenship and Immigration by a Conservative Member of Parliament: "One of the issues we face with Hungary is that back prior to the year of 2008 when there were visa restrictions within Hungary, the applications we received for asylum seekers were in the neighbourhood of 20 to 30 people a year. In 2009 there were 2,500 and in 2010 there were 2,300. These numbers just went through the roof. When we see that 95% to 98% of those individuals come to Canada for a period of up to 10 to 12 months, and just prior to their hearings taking place at the IRB, they do not show up for those hearings—or we find they have returned to Hungary—that is an issue. I think you would agree with me that a number of those individuals didn't come here to seek refugee status. They came here for different reasons. I won't label what those reasons are but they weren't for reasons of seeking asylum ... But 95% of the applications filed are not being represented at the IRB hearing. Almost every single one of them is not participating at even the first level of having their refugee hearing." House of Commons, 41st Parliament, 1st session, Standing Committee on Citizenship and Immigration, Meeting no. 39, 3 May 2012. Statement by MP Rick Dykstra.

¹¹² See e.g. House of Commons, 41st Parliament, 1st session, Standing Committee on Citizenship and Immigration, Meeting no. 39, 3 May 2012. Exchange between MP Chungsen Leung and Roma Community Centre representative Maureen Silcoff: (Leung) There are lots of Roma claimants in Canada. Why is there proportionately higher abandonment and withdrawal, because that causes a problem for those of us who are looking at this. (Silcoff) It's very difficult for people who have low or little education to navigate a complex legal system. Until recently, there has been very little community support to assist these refugees. There has been a huge problem with a handful of unscrupulous lawyers and consultants who have actually done an injustice to this community. Numerous complaints have been filed at the law society against these lawyers. I myself am cleaning up dozens of messes from what happened. People lose hope. The lawyers don't show up. They don't answer their phones, and sometimes people just end up withdrawing their claims.

¹¹³ House of Commons, 41st Parliament, 1st session, Standing Committee on Citizenship and Immigration, Meeting no. 40, 7 May 2012. Testimony by Catherine Dauvergne: "There are a number of things that contribute to people abandoning claims. We quite often hear from refugee lawyers in Canada that claims are sometimes abandoned because people receive very poor advice from unscrupulous community members or consultants. There are conditions under which people who

represent a serious abuse of the system that should be sanctioned severely. The questions they raise, however, concern the quality of representation, as opposed to the more general issue of access to legal representation examined in this report. The potential problem of poor legal counsel is more appropriately handled in the context of professional disciplinary mechanisms.

III. Summary of Recommendations

The Canadian government should be commended for taking seriously the issue of asylum seekers and for attempting bold action to address long-standing problems. However, it should continue exploring various types of protection guarantees in order to make sure that the intended policy outcomes (i.e. a more efficient system that also preserves fairness) do in fact materialise. The consequences of attempting to implement bold new changes that have not been thoroughly thought through in terms of safeguards would not be acceptable to the Canadian public which is the proud recipient of the Nansen Medal. As an active member of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, Canada and its representatives must continue leading by example and must do everything possible to avoid a situation in which some refugee claimants might not have a fair chance to present their cases. It would be unacceptable if new procedures intended to make the asylum system more efficient resulted in self-represented claimants being forcibly sent to threatening circumstances in countries of origin.

The following is a summary of the recommendations that are presented in the preceding sections and that follow from the analysis in this report.

Recommendation 1: The IRB should introduce special procedures to allow postponements (e.g. 15 additional days) if an unrepresented refugee claimant has applied for legal aid but has not obtained a response.

Recommendation 2: The IRB should prepare for the expected increase in unrepresented claims by explaining procedural rules and principles of fairness in either a distinct Claimant's Guide intended for self-represented claimants or in a distinct section of the current Guide.

Recommendation 3: If claimants prepare their Basis of Claim form (BOC) without the help of counsel, the RPD should be instructed not to hold any omissions in the BOC against them. The claimants should be allowed to provide clarification either before or during the hearing.

Recommendation 4: The RPD should exercise flexibility regarding the stringent evidence require-

genuinely fear persecution will return to their home country. Sometimes there's a threat to children, but those are rare cases. Often people whose children or families are threatened will make difficult decisions to return while waiting out a process that at present simply takes too long." Response by MP Roxanne James: "One of the examples you gave was receiving poor advice. I'm not so sure that if I received poor advice in Canada I'd flee back to my country to face persecution, but I'll accept your answer ... To me it doesn't make sense to say they can't go to another European Union country and receive that protection when they come to Canada, accept benefits for one to two years, and then don't show up for their hearing. They abandon their claim, voluntarily leave, and go back to their country of origin. I don't think we've actually had an answer that makes sense to the people who may be listening to this committee today."



ments when hearings involve unrepresented claimants. For example, it should be instructed that it cannot hold against unrepresented claimants the lack of corroborating evidence and that it should provide appropriate postponements if necessary to allow such evidence to be submitted.

Recommendation 5: The IRB should establish a mechanism to check at various stages whether self-represented claimants understand the key aspects of the procedures.

Recommendation 6: If a self-represented claimant does not understand the procedures or if the RPD hearing involves complex legal questions, the IRB should allow a postponement until the claimant obtains legal counsel (through legal aid or other means such as duty counsel).

Recommendation 7: The IRB should develop a roster of duty counsel to provide unrepresented claimants with support from either internal staff (such as the RPO with a new mandate) or from external lawyers working for recognised legal aid organisations and refugee law associations.

Recommendation 8: The IRB should introduce a new Chairperson's Guideline on Self-Represented Claimants Appearing Before the Refugee Protection Division that covers the various concerns and safeguards mentioned in this report, including rules for special short adjournments.

Recommendation 9: The IRB should conduct a study that examines the merits in a large sample of cases to determine why there are significantly lower success rates for unrepresented refugee claimants coming from the same country of origin.

Recommendation 10: In the spirit of transparency and to ensure consistency of practice, the IRB should specify in the Claimant's Guide and on its website how it proceeds with its discretionary decisions to move to abandonment of unrepresented claims.



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