Canadian Association for Refugee and Forced Migration Studies
Association Canadienne des Études sur les Réfugiés et la Migration Forcée

WORKING PAPER SERIES/DOCUMENTS DE TRAVAIL

The Role of the Federal Court in the Canadian Refugee Determination Process

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October 2015

CARFMS/ACERMF Working Paper No: 2015/1

CARFMS/ACERMF

THE ROLE OF THE FEDERAL COURT IN THE CANADIAN REFUGEE DETERMINATION PROCESS

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Editor's Note

The following text is an edited version of the speaking notes only of the keynote address delivered on May 15, 2015, at the 8th Annual Conference of the Canadian Association for Refugee and Forced Migration Studies (CARFMS) at Ryerson University, Toronto.

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INTRODUCTION

It is a great privilege to have been asked to address this extraordinary gathering of those involved in the refugee process in one way or another. It is truly a remarkable feat on the part of the organizers to have been able to bring together such a large group of distinguished and diverse participants from around the world to discuss so many issues of pressing concern.

Having reviewed the program that you have followed over the last few days, it's clear that you have already had the chance to discuss many of the issues that are confronting those of us who are working directly with refugees, or who are involved in the refugee determination process in some capacity.

Indeed, I think that it is fair to say that we live in interesting times.

Your speakers have come from a variety of countries and backgrounds and have undoubtedly brought a range of perspectives to the discussion. I bring yet another perspective to the conversation. As a judge of the Federal Court, it is my job to sit in review of dozens of refugee decisions every year.

For those of you in the audience who are Canadian refugee lawyers, bear with me, as I explain the role that the Federal Court plays in the Canadian refugee determination process. While it is something that you already know all about, it may be less familiar to those non-legally trained individuals among us who work with refugees, and to those who are here from outside Canada.

I have heard different statistics quoted as to the percentage of the work of the Federal Court that is taken up by immigration cases, including refugee cases. These range from 40% to 80% of our work. I suspect that the variation in the numbers depends on whether you measure the percentage by looking at the number of court files opened, the number of hearing days taken up by various types of cases, or by some other measure.

I can tell you that we opened 8,403 immigration files last year, of which 3,655 involved applications to judicially review refugee decisions or decisions in other kinds of risk-based cases such as Pre-Removal Risk Assessments.

Any way you look at it, immigration cases have been - and continue to be - a big and very important part of the work we do at the Federal Court.

As you know, a decision to accord refugee protection to individuals can be made inside or outside Canada.

Insofar as individuals who are physically located outside of Canada are concerned, a permanent resident visa may be issued by a Canadian visa post to a foreign national who satisfies the requirements of the Convention Refugee Abroad Class or the Country of Asylum Class, such that they are outside their country of nationality and habitual residence and they have been and continue to be seriously and personally affected by civil war, armed conflict or massive violation of human rights their country.

If an individual who is outside of Canada has his or her application for protection is turned down, they have the right to seek judicial review of that decision in our Court. I haven't done a statistical analysis, but my sense is that we don't get many such applications - either because most of the applications for refugee protection that are made from abroad are granted, or perhaps it is because the logistical barriers to bringing an application for judicial review in a Canadian Court are simply insurmountable when:

- you're not legally trained,
- you don't speak either English or French,
- you're flat broke and
- you're living in a refugee camp overseas.

What we see far more frequently are applications to judicially review decisions of the Immigration and Refugee Board – either its Refugee Protection Division or, more recently, decisions of the Refugee Appeal Division.

The vast majority of these applications are brought by unsuccessful refugee claimants, although we do, from time to time, see applications to review positive refugee decisions being brought by the Minister of Citizenship and Immigration. In the last couple of years, Minister's applications were most frequently brought in relation to claims made by Sri Lankan refugee claimants who came to Canada on board either the *MV Ocean*

Lady or the *MV Sun Sea*. Some of these applications succeeded and others did not, and I will discuss the reasons for this apparent inconsistency in the results later in my talk.

But first let me talk about the leave process.

THE LEAVE PROCESS

As you may know, refugee claimants whose claims are rejected by the Immigration and Refugee Board do not have an automatic right to a full hearing in our Court – they must first obtain leave of the Court to have their cases heard. The test that Federal Court judges are to apply in deciding whether or not leave should be granted is whether the claimant has shown that he or she has a fairly arguable case.

In 2014, our court granted leave in 24.9% of cases involving risk-based claims, whether they be applications for judicial review of refugee decisions or Pre-removal Risk Assessments. Other kinds of immigration cases had a lower leave-grant rate in the same period. Leave was granted in 18.3% of non-refugee immigration cases in 2014, for an overall immigration leave-grant rate of 21.2%.

It is no secret that there are statistical variances in the leave-grant rates of various Federal Court judges, and that some judges grant leave more often than do others. We have been working within the Court to try to develop a more consistent approach to leave applications, but the reality is that there is only so much that we can do in this regard. Judges are, and should be, independent, and perfect consistency is simply never going to happen.

What you also need to understand is that these types of variances are not unique to the Federal Court or to the refugee sphere.

Back in the day when the dinosaurs roamed the earth, I practiced some family law in Ottawa. This was in the era before we had child support guidelines, and it was well known amongst lawyers that some judges were more generous than others when it came to child or spousal support. I suspect that this is still the case, even with the child support guidelines in place.

Similarly, sentencing principles are have been clearly spelled out in the area of criminal law, and the Supreme Court of Canada and provincial Courts of Appeal have established guidelines with respect to the

appropriate sentences for different types of offences. Even so, there are still going to be some judges who are tougher than others when imposing sentence – some will focus more on general or specific deterrence, and others will give more weight to rehabilitation when deciding on the appropriate sentence for an offender.

While if would be wonderful if we could achieve perfect consistency in the legal process, it is never going to happen.

- There will always be variances.
- Judging is a human endeavor that involves the exercise of discretion; and
- It is an art, not a science.

It may also be helpful for you to understand the context in which leave applications are decided, especially if you are involved in preparing applications for leave in our Court.

Several times each year, a Federal Court judge will be assigned to "immigration duty" for a week at a time. There are usually several judges assigned to immigration duty in any given week – at least two in Ottawa and one in Toronto.

When you are on immigration duty, you are expected to deal with leave applications, urgent stay motions and motions that have been brought in writing in immigration cases.

Being on immigration duty at the Federal Court is known colloquially amongst us as "Doing Boxes", and there is a reason for that. When you are on immigration duty, you are expected to deal with 20 leave applications a day, Monday to Thursday. The files literally arrive in your office by the boxful. For those of you who are not quick enough with your fingers and toes – that's 80 cases a week that you have to review, consider and decide whether the case will get leave or not.

During that same week, the duty judge will also have to prepare for, hear and decide any number of motions to stay the removal of failed claimants from Canada, and they may also have to dispose of a number of motions in writing, some of which can be quite tricky. And if, like me, you are a judge that has been designated to do National Security work, you may also have cases to deal with in that area during your immigration duty weeks.

As you will appreciate, doing 80 leave applications in a week along with everything else that they throw at you requires an incredible amount of reading and concentration on the part of the duty judge. They are long weeks indeed.

And so for those of you who represent refugee claimants in the Federal Court - this is why it is so important that your leave applications are clear, concise and sharply focused.

STAYS

Before I talk about applications for judicial review, I want to spend a few minutes talking about stay motions.

While failed refugee claimants can seek judicial review of the Board's negative decision in the Federal Court, in some cases, the Government of Canada will not have to wait until the application is heard before taking steps to remove the individual from Canada. In such cases, a claimant facing imminent removal can come to the Federal Court seeking a stay of their removal pending the determination of their application for judicial review.

Federal Court judges are available on a 24/7 basis to hear last minute motions brought by refugee claimants who are seeking to stay their removal from Canada. You can always reach the Court by phone. The emergency numbers are listed on the Court's web site.

To the lawyers here – I do want stress the need to bring your stay motion at the very earliest opportunity. All too often we see cases where the refugee claimant has been aware of his or her removal date for several weeks, but waits to bring their motion for a stay until a day or two before the date set for removal. It is far better to make the motion returnable at a regular motions day, on proper notice to the Crown, so that the motion can be dealt with in an orderly manner.

Bringing a stay motion at the last minute is also very unfair to the Crown, who won't have a reasonable opportunity to prepare a response. It is also risky, as there are some judges who will simply refuse to hear a last-minute motion, particularly where the motion materials do not, on their face, raise an arguable case for a stay, and no reason is offered as to why the motion is being brought at the last minute.

So bring your motion early, and if for some reason you cannot do that, be sure to explain why you are coming to Court at the last minute in your motion materials. That said, if your motion materials reveal a fairly arguable case, and you have a reasonable explanation for bringing the motion at the last minute, you will be heard.

Stay motions are challenging for everyone involved. As I already noted, they are often brought at the eleventh hour. This may be because the individual is only told about the date of their removal at the last minute, or it may be because the claimant didn't retain a lawyer until shortly before they were scheduled to be removed. Whatever the reason – a stay motion is often a bit of a scramble for all concerned.

Because the motions can originate in any part of the country, we frequently conduct the hearing by teleconference.

Unlike applications for judicial review where we are reviewing decisions that have already been made by someone else against a specified standard of review, stays are the one area of immigration law where we, as Federal Court judges, actually make a decision that has immediate consequences for the individual concerned. Based on what we decide to do on the motion, the claimant will either get to stay in Canada until their application for judicial review is heard, or they will have to get on a plane in a just few hours or days and go home.

I personally find stay motions to be some of the most difficult work that I have do as a Federal Court judge. Whatever the merits of the individual case may be, I am always acutely aware of the fact that, with a stroke of my pen, I could be tearing somebody's life apart. While the person in front of me may not have been able to meet the refugee definition, I am always well aware of the fact that their future is going to be very different - and probably much harder - if I deny a stay of removal.

That said, there is a three-part legal test that I have to apply in deciding whether or not a stay of removal should be granted, and I cannot just let failed a refugee claimant stay in Canada just because I think that he or she is a good person who wants to make a better life for themselves and their children here in Canada. If I do that, the system will simply break down.

Knowing this doesn't make it any easier, though, and it is often the decisions that I have had to make in stay cases that stay with me the longest after the hearing is over.

I may have been completely satisfied that an applicant has not satisfied the legal test that would entitle them to a stay of their removal and that the stay had to be denied, but I do often wonder what happens to some of the people that I see after they return home, and there are some cases that haunt me still.

While I know that it must be that much harder for those of you who work with refugee claimants on a daily basis, and who develop personal relationships with individual claimants, let me assure you that we judges are not immune to the consequences that our decisions have for people's lives, and it is frankly not easy being a Federal Court judge.

I'm going to turn now and spend a few minutes talking about the role of the Federal Court in the judicial review process.

JUDICIAL REVIEW APPLICATIONS

Once a Federal Court judge decides that an application discloses a fairly arguable case, and the case gets leave, a date is then set for the hearing. Two hours are usually allocated for the hearing of an application for judicial review of an immigration decision, although additional time can be set aside for the hearing in an exceptional case.

On the weeks that judges are scheduled to hear immigration applications, we typically hear seven cases in a week. These could involve anything from a spousal sponsorship that was denied on the basis that the marriage in question was found not to be genuine, to a failed application for a study visa, to a negative refugee decision.

An application for judicial review of an immigration decision such as a refugee decision is a paper exercise: we do not see the claimant or receive testimony. That is the job of the Refugee Protection Division of the Immigration and Refugee Board – the expert decision-maker that Parliament has entrusted with the job of making refugee determinations.

Our job on the Federal Court is instead to conduct a review of the process that was followed by the Refugee Protection Division or the Refugee Appeal Division of the Immigration and Refugee Board in order to ensure that the process that was followed by the Board was fair, that the correct legal tests were applied, and that the decision that was reached by the Board was reasonable in light of the evidence that was before it.

An application for judicial review of an immigration decision is not an appeal. Federal Court judges do not get to take a second look at the RPD or RAD's decision and decide whether or not we agree with it.The role of Federal Court judges is more restricted: unless the fairness of the hearing process is in issue, we generally have to look at the decision in the context of the evidentiary record that was before the RPD or RAD and decide – not whether we would have come to the same decision as did the Board - but whether the Board's decision was reasonable.

Reasonableness is a deferential standard, which means that we have to show respect for the decisions made by the RPD or RAD. This deferential standard limits the extent to which we can intervene in refugee cases.

Judges are always going to be reluctant to intervene if the reason that the claim was refused was because the Board just didn't believe the story that was told by a refugee claimant. This is because the Board was in a position to observe the claimant telling his or her story, whereas all we have at the Federal Court level is a paper transcript of the claimant's testimony. As a result, the Board is usually in a better position than we are to decide whether or not someone is telling the truth.

That said, if the Board mis-stated the claimant's testimony on a key fact or failed to consider the explanation offered by the claimant for an apparent contradiction in their evidence on an important matter, the Court can, and will intervene.

Our Court cannot intervene however simply because we might have weighed the evidence differently than did the Board. This is a limitation that can lead to some apparent anomalies in the process.

I remember talking to a very senior member of the Immigration and Refugee Board a few years ago, and he expressed some real frustration with what he saw as the failure of our Court to provide guidance with respect to certain issues that were regularly confronting the Board. The example that he gave related to

claims from the Caribbean islands of St. Vincent and the Grenadines. We did – and still do - see a lot of refugee claims filed by women from St. Vincent, whose claims are frequently based on domestic violence. Some of these claims succeeded before the Board, but others did not.

Unsuccessful claimants would then bring their applications for judicial review to our Court. Some of these applications would be granted on the basis that the Board erred in its assessment of the adequacy of the state protection that was available for victims of domestic violence in St. Vincent. At the same time, other applications would be refused on the basis that the Board's conclusion that the victim could receive adequate state protection in St. Vincent was reasonable.

"Why can't you just tell us" - the Board member asked me – <u>is there</u> adequate state protection for victims of domestic violence in St. Vincent or not?"

Well, first of all, as you well know, the availability of state protection for a refugee claimant will depend on the profile of the individual claimant. The wife of the Chief of Police will be in a very different position when trying to access the assistance of the police than an ordinary citizen will be when she seeks police protection from her abusive domestic partner.

But more fundamentally - the question revealed a lack of understanding of the role played by the Federal Court in the judicial review process. As Federal Court judges, we do not get to make blanket pronouncements such as "adequate state protection is not available for victims of domestic violence in St. Lucia". Rather, our task is to look at the facts of the specific case that was before the Board and decide whether the Board's assessment of the adequacy of the state protection available to

- an individual claimant
- with a particular profile
- at a specific time
- based upon the evidence that was in the record
- was reasonable.

It is this limitation on our role that explains what may, at first blush, appear to inconsistent results in cases involving similar facts.

To illustrate what I am saying, let me go back to the example of the *Ocean Lady* and *Sun Sea* cases that I mentioned earlier. In most of these cases, the question arose as to whether the claimants had a valid *sur place* refugee claim.

That is, the argument was that even if the refugee claimant was not at risk at the time that he or she left Sri Lanka, because of the publicity surrounding the arrival of the two ships in Canada, they would now be perceived by the Sri Lankan authorities as having ties to the Tamil Tigers, and would thus now be at risk if they were to return home.

This argument succeeded before some Board members and failed before others. Some applications for judicial review brought by failed claimants succeeded on the *sur place* issue, and others did not. Similarly, some applications for judicial review brought by the Minister from positive Board decisions succeeded, and others did not.

"What's going on?" you might ask. Is it truly the luck of the draw whether a refugee claimant gets protection or not?

Not at all.

As you well know, country condition information is rarely uniform, and there will often be evidence before the Board that will lead to one result, and other evidence that might lead to a different result. It is the Board's job to weigh that competing evidence in the context of the individual case, and to come to a conclusion as to the well-foundedness of the claim.

As a result, a Board member could carefully consider the conflicting evidence that is out there relating to *sur place* claims for *Ocean Lady* and *Sun Sea* claims and explain why the member had concluded that claimant "X" would likely be perceived by the Sri Lankan authorities as having ties to the LTTE. If the explanation provided by the member is logical and coherent and accords with the evidence, that positive decision would likely be found to be reasonable and would thus be upheld on judicial review.

However, a different Board member could then look at the same evidence, weigh it differently and provide an equally compelling analysis as to why that member was not persuaded that claimant "Y" would be perceived by the Sri Lankan authorities as having ties to the LTTE. Once again, if the analysis is logical and coherent and had evidence to support it, that negative decision would also likely be found to be reasonable on judicial review.

So the deference that the Federal Court owes to decisions of the Refugee Protection Division or the Refugee Appeal Division means that reasonable decisions must be upheld, even if they lead to different results in similar cases.

That said – both the Refugee Protection Division and the Refugee Appeal Division are required to apply the law correctly. Very specific legal tests have been established in the case law for determining whether, for example, there is a viable internal flight alternative for a refugee claimant in his or her country of origin or whether the state protection that is available to a claimant in their country is indeed adequate. Our Court will not hesitate to intervene where the Board has applied the wrong legal test in assessing a refugee claim.

We can also intervene if the process that was followed by the Board was unfair in some respect. Examples of procedural unfairness can include inadequate interpretation at the hearing such that a claimant cannot properly make his or her case. Another example of procedural unfairness would be reliance by the Board on evidence or specialized knowledge that has not been disclosed to the claimant, the effect of which would be to deny the claimant a fair chance to challenge the information that is weighing against them.

As I said earlier, the Immigration and Refugee Board is the expert decision-making body that Parliament has entrusted with the job of making refugee determinations. The Federal Court is not an expert in refugee determination, but exercises supervisory jurisdiction over the Board to ensure that it gets its job right.

As a consequence, if we decide that a refugee claimant has been treated unfairly by the Board, or that the Board has erred in its assessment of the evidence that was before it, we do not get to substitute our

judgment for that of the Board and we cannot grant refugee protection to the claimant. Instead, we have to send the case back to the Board for a fresh hearing. We can, however, and do sometimes provide directions to the Board governing the re-hearing process, where it is appropriate to do so.

Now - what I have been talking about to this point are challenges that are brought by claimants (or the Minister) to specific decisions made with respect to individual refugee claims. That is what we usually do at the Federal Court – review individual immigration and refugee decisions. There is, however, another type of case that we see from time to time in the Federal Court that I want to discuss. These are the systemic challenges that involve questions that apply across a range of cases, including challenges to the legislative scheme itself.

SYSTEMIC CHALLENGES

Let me be clear: Judges in Canada do not get to make laws, nor do they set policy. That is the job of the executive and legislative branches of the Canadian government.

Judges do, however, have both the jurisdiction and the responsibility to ensure that governments act within the law, and that the laws that they pass or the policies that they enact conform to the *Canadian Charter of Rights and Freedoms*.

And every time that the immigration and refugee system gets changed, new legal questions arise that have broad implications for those involved in the system.

I was appointed to the Federal Court in 2003 - shortly after the enactment of the *Immigration and Refugee Protection Act*, and in the years immediately following my appointment, the Court was faced with a number of novel legal questions, as new provisions of Canada's immigration law were tested and interpreted.

Some of these cases ultimately ended up in the Supreme Court of Canada, and in one of these cases - a case called *Medovarski*[1] - the Supreme Court observed that Governments are entitled to assign or re-define priorities when it is enacting immigration legislation. And with the enactment of *IRPA* - which, of course,

[1] *Medovarski v. Canada (Minister of Citizenship and Immigration)*; *Esteban v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539.

happened not long after the 2001 attacks on New York and Washington - the Government of Canada had clearly intended to recalibrate the balance that was to be struck between competing objectives of Canada's immigration legislation, including the protection of refugees and Canada's national security.

As you are all well aware, there has been a further re-calibration of Government priorities over last couple of years. This is reflected in the extensive changes that have been made to the immigration and refugee process, with their increasing focus on efficiency and national security.

This has led to numerous challenges being brought to different aspects of the new regime. What I want to do now is just touch briefly on a few of these cases, to illustrate how these challenges to government action can play themselves out in the Federal Court.

ISHAQ

The first such case that I want to talk about is called *Ishaq*[2].

As I said earlier, it is not the role of the Federal Court to decide whether a government policy is a good one or a bad one, or whether a better policy could be created. We may, however, have to decide whether a policy conforms to the law under which it was enacted. The *Ishaq* case is an example of a situation where a government policy that was found not to accord with the law.

Ishaq is the case that has been known in the media as the "Niqab case". It involved a challenge to the government policy that required female candidates for Canadian citizenship to unveil before they could take their citizenship oath.

Ms. Ishaq challenged the policy on constitutional grounds, arguing that it interfered with her constitutionally-protected freedom of religion. The judge did not, however, need to go to the constitutional arguments. This was because the *Citizenship Regulations* require citizenship judges to "administer the oath of citizenship with dignity and solemnity, allowing the greatest possible freedom in the religious solemnization or the solemn affirmation thereof".

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[2] *Ishaq v. Canada (Minister of Citizenship and Immigration)*, [2015] F.C.J. No. 158.

My colleague, Justice Boswell found that Citizenship Judges could not afford would-be citizens the "greatest possible freedom" in the taking of their oaths if they had to require candidates to violate or renounce a basic tenet of their religion before they could take the oath. Because the unveiling policy was inconsistent with the duty imposed on Citizenship Judges by the Regulations to accord religious freedom in the taking of the oath, the policy was declared to be invalid.

Justice Boswell's decision is currently under appeal, and it will be interesting to see what the Federal Court of Appeal has to say on the subject.

Government policy decisions can also be challenged on constitutional grounds, under the *Canadian Charter of Rights and Freedoms*, as all government action taken in Canada has to conform to the norms established by our *Charter*. An example of a successful *Charter* challenge to a government policy is the challenge that was brought to the changes made in 2012 to the program that had historically provided funding for health care for refugee claimants, amongst others[3].

I want to be careful about what I say about this case, as I am the judge who wrote the decision, but what I can say is that I found that the cuts that were made to the health care policy constituted cruel and unusual treatment of those vulnerable individuals who were seeking the protection of Canada, and were thus of no force and effect. My decision in the refugee health care case is also under appeal and it will be interesting to see what happens to it down the road.

The creation of the Refugee Appeal Division has led to a debate as to the standard that the RAD should apply in reviewing decisions of the Refugee Protection Division – a question that affects hundreds of claimants, and which will be decided by the Federal Court of Appeal in due course.

Challenges have also been brought with respect to the new provisions in IRPA limiting access to Pre-removal Risk Assessments, and to the legislative provisions creating different refugee determination processes for claimants coming from Designated Countries of Origin and those from non-DCO countries.

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[3] *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, [2015] 2 F.C.R. 267.

As you no doubt know, the Supreme Court has also just recently heard a case involving Canada's new human smuggling legislation, where it was argued that the legislation was over-broad and the sanctions imposed by it were disproportionately severe. A decision in that case will likely be forthcoming in the next few months, and it remains to be seen whether the legislation will be upheld.

Each of these cases will be decided under Canadian law, and as you no doubt know, there is already a substantial body of Canadian jurisprudence in refugee law area. But Canada is not alone in trying to resolve these competing imperatives. As a consequence, in cases that raise novel issues, Canadian Courts regularly have regard to Canada's international obligations under international agreements such as the *Refugee Convention.* Consideration can also be given to international instruments such as the *Refugee Handbook* and *UNHCR Guidelines*, and to the jurisprudence that has developed in foreign national courts and in international courts in deciding where the balance should be struck.

CONCLUSION

As I said at the outset of my talk, we live in interesting times. The world is changing, conflicts regularly transcend national boundaries, and concerns with respect to national security are top of mind for many.

At the same time, hundreds of thousands of people are forced to flee their homelands every year in search of protection, and as a signatory to the *Refugee Convention*, Canada has recognized its obligations to the displaced and the dispossessed.

Reconciling these competing imperatives is a monumental task, and there will never be unanimity as to where the balance should be struck. The Federal Court will, however, be at the heart of the struggle and let me assure you that my colleagues and I are acutely aware of the magnitude and the gravity of the responsibilities that we bear.

Thank you so much for your attention.