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Access to Justice For Canadian Refugees: Legal, Practical, Procedural, Societal and Global Challenges

2014 Canadian Lawyers Abroad
Student Chapter Training on Refugee Rights
University of Ottawa
October 18, 2014

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Access to Justice:

Access to Effective Representation

- Majority of refugee claimants who arrive in Canada are in a extremely vulnerable situation both ***psychologically*** and ***financially*** and they also face language and cultural barriers
- Navigating through the legal system for most Canadians, let alone newcomers to Canada is a daunting and confusing task
- “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.”
 - Michael Barutciski, *“The Impact of the Lack of Legal Representation in the Canadian Asylum Process”*, Report researched and written for UNHCR, (6 November 2012) at p6, online: http://www.unhcr.ca/resources/documents/RPT-2012-06-legal_representation-e.pdf. [hereinafter, *UNHCR Report*]

Access to Justice:

Access to Effective Representation

- Legal Aid Ontario announced interim measures for refugee law services in January 2013 as a result of the *Balanced Refugee Reform Act* resulting in closure of the Ottawa Immigration and Refugee Board (all IRB hearings are now in Montreal)
- Legal Aid Ontario provides legal aid certificates to private lawyers to represent refugee claimants. However, in many cases, the amount paid by legal aid is insufficient in respect to the amount of time needed to provide quality representation. Much work has to be done on a pro bono basis.
- This leads to less time spent on each file and could diminish the quality of representation. Access to effective representation is an important part of “access to justice”; claimants that are vulnerable and unable to communicate in English or French are often unlikely to seek redress for incompetent representation and will only realize the received ineffective representation after the fact

Access to Justice:

Access to Effective Representation

- “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 system also depends heavily on **community organizations** which often do not have sufficient resources to assist all applicants.
- The **new timelines** introduced (see chart) allow very little time to 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.”
- Appeals, judicial reviews and other legal recourses are extremely difficult to navigate without legal representation.
 - *UNHCR Report, Supra n1 at 10 & 15.*

Access to Justice: Practical Dimensions

Challenges regarding Travel, Accommodations and Childcare for Refugee Hearings

- Many claimants find it challenging to travel to another city to attend their hearing in person (e.g. claimants from Ottawa to Montreal or Windsor to Toronto).
- The **cost of travel** and accommodation for many claimants, already living on a limited budget (e.g. social assistance) becomes particularly unaffordable.
- Difficulties are further exacerbated in the case of claimants who need to arrange childcare, especially when dealing with young children or children with special needs.

Access to Justice: Practical Dimensions

Scheduling a Hearing (change of date issues)

- According to the *Claimant's Guide* of the Refugee Protection Division, the claimants must be ready to proceed on the date fixed for their hearing.
- It states that “[t]he RPD will only agree to change the date or time of your hearing if there are **exceptional circumstances**”.

Access to Justice: Practical Dimensions

Getting documents in time and adequate translation

- The new strict timelines has also made it particularly difficult for many claimants to get the necessary documents from their countries of origin in time for their hearing date, particularly in cases dealing with torture, gender-based violence and discrimination based on sexual orientation.
- Claimants have to rely on family and friends in their country of origin to send them the documents and in many cases, family members are afraid that documents sent will be intercepted by authorities in their country (e.g. document attesting to the sexual orientation of a claimant).

Access to Justice: Practical Dimensions

- Challenges associated with getting official documents in many developing countries which can be a very stressful, lengthy and even intimidating process in certain situations (e.g. getting police certificates, official transcripts, etc.).
- Limited access to the internet in some areas can cause further delays as it becomes difficult to send documents electronically.
- Claimants from a Designated Country of Origin face shorter timelines to submit their documents and are inadequately prepared (including getting evidence and documents from their country of origin) when only shortly released from detention before their Refugee Hearing.

Access to Justice: Practical Dimensions

- “Refugees in detention are particularly disadvantaged, as it is difficult to get documents ready, find a lawyer, get access to information, etc. More claimants are in detention at key moments in the refugee process (filing the Basis of Claim form, going to the hearing) because of the shorter timelines.”
- Documents need to be translated if they are not in either English or French.
- It can be very expensive to have these documents professionally translated and community services are often burdened with high volume of requests and cannot accommodate everyone in a timely manner.
 - Canadian Council for Refugees, *New refugee system – one year on* (9 December 2013) at p2 online: <http://ccrweb.ca/sites/ccrweb.ca/files/refugee-system-one-year-on.pdf> [hereinafter, *New refugee system*]

Access to Justice for Vulnerable Claimants: Sufficiently Addressed by the *Guidelines*?

- Vulnerable persons are particularly affected under the New Refugee Determination System.
- Survivors of sexual violence, war and genocide, minors, persons with physical or mental disabilities, self-represented claimants, persons experiencing gender-based persecution and LGBTI individuals are faced with the challenging task of proving to the IRB that they are in fact a vulnerable person as early as possible in the refugee determination process.

Access to Justice for Vulnerable Claimants: Sufficiently Addressed by the *Guidelines*?

- The IRB has established *Guidelines* for vulnerable claimants but in many cases there is **just not enough time** because of the new strict timelines to identify these persons
- The *Guidelines* rely heavily on medical, psychiatric, psychological and other expert reports to identify a vulnerable person.
- The IRB may suggest that an expert report be submitted **but it will not pay for it** nor will it order one (see section 8.2 of the *Guidelines*).
 - See also *New refugee system, Supra n4.*

Access to Justice for Vulnerable Claimants: Sufficiently Addressed by the *Guidelines*?

- Again, the costs associated can run high and many claimants will simply not have the necessary funds to produce an expert report to the IRB.
- Women making gender-based claims or individuals of the LBGTI community need time to build trust before they are comfortable enough to tell their stories.
- In many cases, the wounds are still fresh from their traumatic experiences; claimants are re-living their past as they recount their stories and it can be a particularly painful experience.
- This can result in a delay in making their claim and negative credibility findings by the decision-maker

Access to Justice for Vulnerable Claimants: Sufficiently Addressed by the *Guidelines*?

Procedural Accommodations

- Section 4.2 of the *Guidelines* does state that the IRB has a broad discretion to accommodate vulnerable persons by various means.
- In determining the procedural accommodation to be made, the Board must take into account the person's ***specific difficulties presenting or addressing evidence***, such as:
 - Problems with ***memory, behaviour or ability to recount relevant events***;
 - Symptoms affecting ***consistency and coherence*** of testimony;
 - ***Fear*** of persons in a position of authority;
- ***Reluctance or inability to talk*** about his/her experiences
 - Janet Cleveland, Summary of the Guidelines for Vulnerable Persons, <http://oppenheimer.mcgill.ca/IRB-Guideline-on-Vulnerable>.

Access to Justice for Vulnerable Claimants: Sufficiently Addressed by the *Guidelines*?

- Procedural accommodations may include measures such as:
 - **Priority** scheduling (or delay) (9.1)
 - Allowing a **support person** to participate in a hearing (4.2b)
 - Allowing the person’s lawyer to **proceed first** (4.2d)
 - Creating a more **informal setting** (4.2c)
 - “...**any other procedural accommodation that may be reasonable in the circumstances**” (4.2h)
- “In probing the information provided by the person, the IRB will attempt to **avoid traumatizing or re-traumatizing** the vulnerable person” – in line with the principles set out in the IRB *Training Manual on Victims of Torture* (10.1)

Access to Justice: Impact of New Timelines on Vulnerable Claimants

- The strict new timelines will greatly affect the ability of claimants to complete the Vulnerable Person application and therefore to be identified as a “vulnerable” person in their refugee determination process and seek the necessary accommodation to tell their story.
- In her paper entitled “Vulnerable Claimants and the New Refugee Determination System”, immigration and refugee lawyer, Lobat Sadrehashemi notes some concerns for vulnerable claimants in the new system:

“I fear that many vulnerable claimants will not be able to retain counsel in the short time period, making it unlikely that these sorts of accommodations will be sought. I fear that even with counsel and an attentive Member, many vulnerable claimants will fall through the cracks, deported from Canada with no one noticing that the very heart of their claim has neither been explained or understood.”
[Emphasis Added]

- See Lobat Sadrehashemi, “Vulnerable Claimants and the New Refugee Determination System” for the Refugee Lawyers Group subsection of the CBA (February 2013) http://refugeelawyers.net/2d_Sadrehashemi.pdf .

Access to Justice: Societal Dimensions

- Unfortunately, Canadian government officials, including Citizenship and Immigration Minister, Chris Alexander continue to use derogatory terms such as “bogus” to refer to refugees and refugee claimants.
- These references erode public sympathy for refugees and justify significant cuts to services previously rendered to this group of vulnerable persons (e.g. cuts to health care).
- Many Canadians do not have the real facts and statistics surrounding refugees, and are led to believe that they are mostly freeloaders coming to Canada to take advantage of our social services.
- There is definitely a real need to educate the public with the real facts in order to debunk myths about refugees. The negative perception of refugees as “bogus” does have an impact on both public and political support for services such as health care and access to legal services.
 - See Humera Jabir, *“How have refugees become Canada's new boogeyman?”* The Star Newspaper (December 2013)
http://www.thestar.com/opinion/commentary/2013/12/23/how_have_refugees_become_canadas_new_boogeyman.html#

Access to Justice: Societal Dimensions

- The *Canadian Council for Refugees* echoes these concerns and states that:

“Making a refugee claim is a legitimate way, in both Canadian and international law, for a person fleeing persecution to seek protection. It is also wrong to characterize refused claims as false or abusive. The refugee definition is restrictive and technical. Many people making claims have legitimate fears even if they do not meet the narrow refugee definition. Their search for protection is genuine. Constant negative references to refugee claimants undermine the independence of Canada’s refugee system and the support of Canadians for those who come to Canada hoping for safety and freedom, and to be treated with dignity.” [Emphasis Added]

– *New refugee system, Supra n3 at 7.*

Access to Justice: Societal Dimensions

“The Bogus Rhetoric About Bogus Refugees”, Alex Neve, Secretary General of Amnesty International Canada describes the horrific and lethal consequences of bogus rhetoric which he witnessed in western Côte d’Ivoire

“Outside Canada the consequences are often lethal. I have done a considerable amount of work in western Côte d’Ivoire recently, examining the circumstances behind a horrifying attack on a displaced persons camp that was home to about 5,000 people before it was overrun and razed to the ground by a mob of close to one thousand local villagers in July 2012. Over a dozen people were killed on the spot; others were disappeared or extrajudicially executed in the aftermath. Hundreds were injured or hurt. I have been to the area twice to look into the Nahibly Camp tragedy. It is complicated ...”

- Alex Neve, *“The Bogus Rhetoric About Bogus Refugees”* (21 March 2014), online: <http://www.slaw.ca/2014/03/21/the-bogus-rhetoric-about-bogus-refugees/>.

Access to Justice: Societal Dimensions

“But one thing is glaringly apparent – the **toxic rhetoric of *bogusness* played a very ugly role**. Fueled on by local politicians, popular sentiment was whipped up in the weeks and months before it turned to rage and violence. The *déplacés* are cheating the system; they are responsible for all of the crime; they are the source of all our illnesses. **Nahibly is a wrenching reminder of where the nasty talk of bogus refugees can lead. It may erode public sympathy. It may be used as a pretext to cut health care. It may be used to stir up emotions and garner political support. It can also be a potent spark for hate, violence and death.**” [Emphasis added]

- Alex Neve, “*The Bogus Rhetoric About Bogus Refugees*” (21 March 2014), online: <http://www.slaw.ca/2014/03/21/the-bogus-rhetoric-about-bogus-refugees/>.

Access to Justice: Global Context

- Access to Asylum

- Usually, the only requirement to accessing the asylum system is physical presence where refugee status is being sought. Some measures are being implemented to make it difficult to have access to being physically present in countries of asylum
 - **Example:** carrier sanctions being used by **Denmark, Germany** and **UK** regardless of the merit of protection concerns, whereas in **France, Italy** and **Netherlands** those fines are waived if a refugee claimant is admitted into their asylum procedure.
 - **Example:** boat interceptions, such as **Australia's** new policy under its “*Operation Sovereign Borders*” campaign, which will “intercept any vessel that is seeking to illegally enter Australia” and remove it.
- There are also now measures through bilateral agreements to remove *recognized* refugees from a given state's territory
 - **Example:** agreement signed between **Australia** and **Cambodia** to relocate refugees from Nauru to Cambodian territory, a move condemned by UNHCR as a departure from international norms. **Australia** made a similar arrangement with Papua New Guinea in 2013 and Malaysia in 2011, all of which could be adequately described as ‘outsourcing’ refugee protection.
 - <http://ecre.org/topics/areas-of-work/access-to-europe/7.html>
 - <http://www.customs.gov.au/site/Translations/english-o.asp>
 - <http://www.unhcr.org/542526db9.html>
 - http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=344:unhcr-australia-papua-new-guinea-asylum-agreement-presents-protection-challenges-&catid=35:news-a-media&Itemid=63
 - <http://www.refworld.org/docid/4e2e5e932.html>

Access to Justice: Global Context

- Access to a (competent) lawyer or representative / Fair Hearing
 - No international law obligation to provide legal advice on making refugee claims
 - What schemes existed are being reduced or eliminated:
 - **Example: Australia** used to have an Immigration Advice and Application Assistance Scheme, which would give free, professional advice to people who could not otherwise afford such advice. As of March 2014, it is now available only to foreign nationals who arrive “lawfully or on a valid visa” and are disadvantaged.
 - **Example:** in the **UK**, the Office of the Immigration Services Commissioner maintains a list of regulated legal advisors and immigration representatives that can help with asylum claims.
 - <http://www.immi.gov.au/Live/Documents/paig-g.pdf>
 - <https://www.gov.uk/legal-advice-immigration-asylum>

Access to Justice: Global Context

- **Example:** in the **Netherlands**, all refugee claimants are provided assistance by a lawyer.
- **Example:** in **Sweden**, most asylum seekers have a right to public counsel.
- **Example:** in **France**, similar to Canada, asylum seekers qualify for partial or full legal aid only when they can demonstrate need.
 - <https://ind.nl/EN/individuals/residence-wizard/asylum>
 - <http://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Adults-seeking-asylum/Considering-your-application.html>
 - file:///C:/Users/Justin%20Mohammed/Downloads/Guide_de_mandeur_asile_2013_Anglais.pdf

Access to Justice: Global Context

- Access to a Fair Process

- Countries have various procedures for processing claims, some include a meaningful process whereas others do not.

- **Example:** offshore processing centres, such as the centre established by **Australia** in Nauru and Papua New Guinea.
- **Example:** in the **Netherlands**, asylum seekers are given a 'rest period' of a minimum of 6 days to prepare their claim, during which they are provided with information about the asylum procedure and the support of a lawyer, along with a medical examination.
- By contrast, in **Canada** claimants at a port of entry are given 15 days to complete their basis of claim form, and are afforded no state assistance in doing so.
- **Example:** In **France**, an asylum seeker first has to apply for an authorization to stay in France as an asylum seeker. The claimant must then apply for asylum within 21 days. If an authorization to stay in France is not provided, the claimant has only 15 days to file.
- <https://ind.nl/EN/individuals/residence-wizard/asylum>
- file:///C:/Users/Justin%20Mohammed/Downloads/Guide_demandeur_asile_2013_Anglais.pdf

Access to Justice: Global Context

– Appeals of Refugee Status Determination

- **Example:** in the **Netherlands**, a rejected asylum seeker must appeal within 1 week. In more complex cases, an asylum seeker is given 4 weeks to appeal. There are no fees related to an appeal.
- **Example:** in the **UK**, time limits for appeal depend on the type of case. Fast tracked cases must be appealed in 2 working days. Appeals cost 80-140 Euros, but may be waived or paid by the government if the appeal is successful.
- **Example:** in **Sweden**, appeals must be launched within 3 weeks of the decision.
- **Example:** in **France**, appeals from the initial refugee determination can be appealed to the National Court of Asylum within 1 month.
- <https://ind.nl/EN/individuals/residence-wizard/asylum>
- <https://www.gov.uk/immigration-asylum-tribunal/tribunal-fees>
- <http://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Adults-seeking-asylum/If-your-application-is-refused/Refusal-of-entry-with-immediate-effect.html>
- file:///C:/Users/Justin%20Mohammed/Downloads/Guide_demandeur_asile_2013_Anglais.pdf

Access to Justice: Global Context

- There are policies in place to refuse asylum to those who might have had access to protection in transit country (ostensibly to prevent “asylum shopping”) and expedited procedures
 - **Example: Canada-US** safe third country agreement
 - **Example:** EU Member State agreement (“Dublin System”) where one state is responsible for examining the protection claim. It applies between **EU** countries, **Norway**, **Iceland** and **Switzerland**.
 - **Example:** in **Norway**, persons from certain countries deemed “safe” can have claims processed (and rejected) in 48 hours, whereas others with tenuous claims can be fast tracked in a 3 week process (claimants from Armenia, Bangladesh, Belarus, India, Nepal, Russia and Kosovo). In contrast, in **Finland**, the government positively affirms that each individual case is dealt with on its merits.
 - <http://www.cbsa-asfc.gc.ca/agency-agence/stca-etps-eng.html>
 - http://www.migri.fi/services/faq/refugees_and_asylum_seekers

Access to Justice: Global Context

- Access to social assistance (economic justice)
 - Often touted line that refugees receive “Cadillac” healthcare, as argued by Jason Kenney when attempting to justify cuts to the IFHP. In reality, there is very divergent practice across different countries.
 - **Example:** in the **UK**, persons claiming asylum are provided free housing. They receive cash support in weekly payments of 52-72 Euros (depending on the individual circumstances) while their claims are pending. Children (ages 5-17) must be enrolled in public schools free of cost, and healthcare is available from the National Health Service (including financial support to purchase medicines and glasses, and to cover dental care and eyesight tests). Even those who have had their claims refused are eligible for short-term support (35 Euros per week). Additional help is available in the form of maternal payments, including a one-off payment of 300 Euros if a baby is due in 8 weeks or less, or under 6 weeks old.
 - <http://www.theglobeandmail.com/news/politics/kenney-defends-cuts-to-extended-health-care-benefits-for-refugees/article4382382/>
 - <https://www.gov.uk/asylum-support/what-youll-get>

Access to Justice: Global Context

- **Example:** in **Sweden**, claimants are provided with free housing, even after an asylum claim is rejected. It is only revoked if a person goes into hiding. They are also provided with daily allowances, depending on age and circumstance. Standard rates are in effect for dental care and health care visits, and can often be reimbursed.
- **Example:** in **Denmark**, a flat allowance of about \$10.30 (Canadian Dollars) is provided to adult asylum seekers per day, with supplementary allowances where there are dependants under the age of 18.
- **Example:** in **France**, accommodation is provided in reception centres, where asylum seekers can also benefit from administrative support concerning the asylum process, financial aid for food, health care and schooling for children.
- <http://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Adults-seeking-asylum/Accommodation.html>
- <http://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Adults-seeking-asylum/Medical-care.html>
- https://www.nyidanmark.dk/en-us/coming_to_dk/asylum/conditions_for_asylum_applicants/cash_allowances.htm
- file:///C:/Users/Justin%20Mohammed/Downloads/Guide_demandeur_asile_2013_Anglais.pdf

Access to Justice: Real Meaning

“Many claimants come to Canada fleeing the worst imaginable circumstances — war, torture and gender-based violence. Now imagine the difficulty of trying to send home for police reports, newspaper articles and other corroborating evidence within two short months of one’s arrival, never mind the difficulty of seeing a Canadian doctor in time to get medical or psychiatric reports to prove trauma. Then add a claimant’s inability to understand French or English, to access a lawyer or translator, as well as the possibility of being held in Canadian detention, and the chance of making one’s best case grows slim.”

– Humera Jabir, “*How have refugees become Canada's new boogeyman?*” The Star Newspaper (December 2013)

<http://www.thestar.com/opinion/commentary/2013/12/23/how-have-refugees-become-canadas-new-boogeyman.html#>

Access to Justice: Real Meaning?

- Access to justice in the refugee context means:
 - Access to fair and impartial procedure
 - Access to resources and support to present their claim
 - Access to adequate legal representation
 - Sufficient time to present documentary evidence
 - Access to health care
 - Access to social assistance
 - Access to appeal process
 - Access to PRRA, H&C mechanisms