Guest Editorial

Refugee Determination
What's Next?

By Guy S. Goodwin-Gill

As soon as it was in place, Canada's new procedure for determining refugee status came face to face with numbers of claimants running twice as high as expected. Not queues of migrants looking for a way around immigration selection this time, but people from countries in conflict, many with a distinctly well-founded fear of persecution, or otherwise facing unacceptable degrees of risk in their homelands.

Case-by-case determination is an expensive business, no matter where you are. In Canada, besides the claimant, the law mandates interpreters, two-member panels, counsel, and case and hearings officers be present at hearings, all of whom have to be scheduled and paid for.

But what are the objectives of determination proceedings? Identifying who are the refugees in need of protection, and making sure they don't get sent back to situations of danger? Yes. Fulfilling our own *Charter* obligations? Certainly.

The U.N. General Assembly, the Office of the United Nations High Commissioner for Refugees (UNHCR) and supporting States all talk of "fair and expeditious" proceedings. "Fairness," it may be assumed, implies a reasonable measure of correctness, rather than mere procedural formality. Efficiency and expedition will serve both the refugee's interests (protection, security and stability) and those of the State (assuring itself and its people that protection goes to those who need it). Like it or not, and many don't, good management and the integrity of the processes of refugee determination also means returning those who do not meet the criteria and have no alterative claim on our protection or hospitality.

To that extent, Canada has been "fortunate," receiving the majority of its refugee claimants from countries in conflict. This has allowed the Immigration and Refugee Board (IRB) and the Canada Employment and Immigration Commission (CEIC) to implement administrative "streaming" of claims most likely to succeed. Save in a tiny minority of cases, some seven or eight percent of the total, the controversial initial hearing into eligibility and credible basis has been effectively abolished.

This sort of experience tells us we need flexibility. There's no sense locking ourselves into structured hearings, if we all know the answer is "yes" (though a minority of counsel might disagree, ever anxious to represent our interests at conception and grave, and all stages in between). The apparently sound cases should be moved rapidly through the process to solution.

But that still leaves the potentially negative claims, the borderline and the just plain hard. If our source countries changed, if conditions became just too difficult to judge with accuracy, could we cope with substantial numbers?

It's questions like these that periodically engage refugee advocates in countries now facing requests for asylum and protection. For many the answers are simple: first, keep people away with visas and airline sanctions; second, if that fails, have an official armed with broad discretion make a first decision, free from the constraints of due process, appeal or judicial review. Canada's experience over the last three years, however, suggests that a more positive response, both nationally and between States, is possible.

Frequently criticized from overseas for its "high recognition rate," Canada's procedure since 1989 is nevertheless worth a second look. First, Parliament took a decision *for* the asylum-seeker, by requiring unanimity for negative decisions. Whatever the "efficiency" of two-member panels (and they *are* institutionally rare), that choice by Parliament uniquely incorporates the benefit of the doubt. Secondly, though somewhat circumspectly and not in all cases, Parliament opted in principle for an informal and non-adversarial process. And thirdly, IRB decided to put considerable resources into making accurate, up-to-date country of origin information available to counsel and decision-makers.

Of course, this does not mean we get correct or perfect decisions all the time. Certain attitudes and inclinations remain untouched by facts, unimproved by training. But overall these elements offer a rational basis for distinguishing the Canadian approach to refugee determination from many others.

That difference is not a reason for self-satisfaction, but rather leads us to ask, what are the core elements in our process that could be enhanced? What additional improvements could be made? How, if at all, can dollars be saved, and perhaps earmarked for other critical areas of refugee assistance? Where does Canada's contribution fit into the often forgotten in-

ternational dimension of refugee protection and solutions?

A Non-Adversarial Process Works Best

Though suspected criminal or national security cases may require a different process, refugee determination is best dealt with in a procedure that is informal and essentially non-adversarial. This approach, which does not mean abandoning inquiry in the face of inconsistency, is relatively new in Canadian decision-making. Its potential is gradually being worked out, particularly between refugee hearings officers and counsel. What it offers in a hearing, is that element of flexibility which is most conductive to case presentation and eliciting a narrative.

Two-Member Panels Work Well

Some argue that decisions could be taken by a single decision-maker, more cheaply and more accountably, but that is not the only issue. What is important is that key responsibilities, namely, the assessment of the claimant's credibility and the risk which he or she may face, if returned, are *shared* in a process which allows the benefit of the doubt. This is not a soft option; it reflects the very real problems in weighing the evidence and the narrative. Do away with two-member panels, and an in-depth review of the first decision is inescapable.

Country of Origin Information is Essential

Good decisions depend on good information. Canada's system for gathering and disseminating information is recognized, nationally and abroad, as a model for what can and should be done. Accurate information has a way of influencing outcomes; but it has to be used, and decision-makers are equally responsible for its appropriate use and dissemination.

Judicial Review is Not the Answer

Refugee cases are fact-specific. Ninety-five percent turn on the assessment of risk and the assessment of credibility. The Federal Court, far removed from the claimant (and incidentally no respecter of confidentiality or risk), is ill-suited to review such issues, though it will often wrestle its way into the transcript to point up faulty reasoning or inappropriate inferences. Its most usual province is in reviewing administrative legality, often the least concern of the rejected claimant, and it is not designed or resourced to act as a full court of appeal. Better therefore to concentrate on improving the first decision, and on institutionalizing a transparent process that generates confidence in its capacity to do justice.

Any Appeal?

A continuing concern of refugee advocates in Canada is the absence from the present process of any "appeal on merits." No international rule mandates such an appeal, though in 1977 the UNHCR Executive Committee recommended that rejected applicants be accorded an administrative or judicial opportunity "to appeal for a formal reconsideration of the decision." In this regard, what can be achieved in light of the objectives described above? A full re-hearing is impractical from time and management perspectives, and wasteful of resources. But it may be essential if the first decision-maker sits alone to rule on credibility and risk. Maintain a two-member panel, operating in a non-adversarial context with doubt formally resolved in favour of the claimant, and a re-hearing is arguable unnecessary. Optically, taking a second look at negative decisions does make sense, however, and may well avoid committing the system to removals in cases which should not have slipped through. The art is to design such a second look in a way that maximizes effectiveness, while not bottlenecking proceedings, perhaps by structuring the process around a new sense of the record of the hearing or making use of tapes, for example, rather than transcripts.

Not Home Alone

The international system of refugee protection is not just the sum of its individual component parts. Canada's contribution is essential to the resolution of the human side of coerced migration, but lasting answers will not be found without increased cooperation.

Back in 1951, and even in the time of the League of Nations, States accepted that the refugee problem was international in scope, and not to be borne by any one State alone. The processes of cooperation are still being developed, but progress is coming. National perceptions, however, often lag behind.

The bureaucrat who sees his or her country as the only desirable destination for every refugee, asylum-seeker or migrant has a replicate in the advocate who thinks that this is as it should be, and that only in his or her country can the refugee, asylum-seeker or migrant find justice (or at least a better deal than anywhere else). The irony is that though the bureaucrat and the advocate rarely speak to one another (they may shout, but that's another matter), they are joined by the same common chauvinism — a petty nationalism still unable to embrace, let alone imagine, an international cooperative approach to refugee issues, or a response other than one circumscribed by the narrow rules of recognition and denial.

States participating in the international regime of refugee protection

have obligations and responsibilities. These include not only the specific duties accepted on ratification of conventions and covenants, but also general responsibilities towards the system as a whole: ensuring that the criteria of protection are applied, generously and appropriately; ensuring that no other State bears a disproportionate share of the charge upon the international community as a whole; engaging with other States in undertakings and arrangements designed to improve the overall performance of the system and enhance the refugee's chance of a lasting solution to their plight.

The so-called "Safe Third Country" provisions of Bill C-55 have never been brought into force, for obvious political and humanitarian reasons. They represented a unilateral basis for disposing of those deemed to be some other country's responsibility. The lack of agreement among States on this issue has long been a major problem for refugees unable to find a country of refuge. From the perspective of the international protection of refugees, there can therefore be no objection to arrangements between States to this effect, provided, that is, they conform to prevailing standards. If States are to agree on their shared responsibility in the determination of claims, this presupposes conformity with basic procedural and interpretative guarantees, as well as agreement on the quality of the solution to be offered.

Such objectives will not be achieved without some form of international supervision and monitoring, or without international involvement in implementation. If those conditions can be met, the formal approach to State responsibilities may become a substantive path to improved standards of national protection.

The standards which Canada sets and maintains in protection and the refugee status determination will have their impact on the whole system. Already, we are better able to understand the individual side to flight. We should not lose that resource or jettison the means for tapping in. We should work effectively with others to resolve and avert the problems to come.

Invitational Workshops*

These two workshops, originally scheduled for November 1991, have been rescheduled for the week of 3 - 7 February 1992.

Humanitarian Intervention

The emergence of a novel international practice for securing the safety of persons within a particular state or region (eg., the case of the Kurds) has motivated the need for a new framework of analysis, where state self-interests are not the ultimate rationale.

Partners: **CRS and YCISS**
Place: **York University**
Date: **4 February 1992**
Contact: **Farhana Mather (416) 736-5663**

Phase II:
Towards a Practical Early Warning System: Refugees and Displaced Persons

The ability to anticipate refugee flows and develop practical implementation plans for early warning systems is the subject of this workshop, now in its second phase of discussions.

Place: **King City, Ontario**
Date: **3,4,5,6, 7 February 1992**
Contact: **Farhana Mather (416) 736-5663**

* Attendance at the above workshops is by invitation only.