Revue québécoise de droit international
Quebec Journal of International Law
Revista quebequense de derecho internacional

CONSOLIDATED DECISION-MAKING: THE CANADIAN EXPERIENCE

Gerry VanKessel

Volume 14, numéro 1, 2001

URI : https://id.erudit.org/iderudit/1100289ar
DOI : https://doi.org/10.7202/1100289ar

Aller au sommaire du numéro

Éditeur(s)

Société québécoise de droit international

ISSN

0828-9999 (imprimé)
2561-6994 (numérique)

Découvrir la revue

Citer cet article

VanKessel, G. (2001). CONSOLIDATED DECISION-MAKING: THE CANADIAN EXPERIENCE. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, *14*(1), 159–168. https://doi.org/10.7202/1100289ar

Résumé de l'article

Étant un pays signataire de la *Convention de 1951* et de son *Protocole de 1967*, le Canada est obligé de protéger les personnes sur son territoire craignant avec raison d'être persécutées du fait de leur nationalité, de leur appartenance à un groupe social particulier ou à cause de leurs opinions politiques. Bien que la définition du réfugié dans la Convention a été incorporée dans la Loi sur l'Immigration, de nombreux organismes incluant le Vérificateur général du Canada et le Groupe consultatif pour la révision de la loi sur l'immigration ont critiqué le processus de détermination du statut de réfugié. Le Vérificateur général du Canada a recommandé que Citoyenneté et Immigration Canada s'assure que le risque de la révision reste dans le cadre des objectifs établis pour la catégorie des demandeurs non reconnus du statut de réfugié au Canada et qu'il soit géré de manière efficace et opportune. Le Groupe consultatif pour la révision de la loi sur l'immigration a établi que le système en place actuellement était complexe et que certains engagements internationaux du Canada n'avaient pas été incorporés dans la législation interne. La Commission de l'immigration et du statut de réfugié a été chargée de déterminer une définition codifiée de protection qui engloberait tous les critères pertinents et elle deviendra donc la seule instance administrant cette définition. La présence d'un seul organe détenant tous les faits devrait promouvoir l'impartialité, l'uniformité et l'efficacité de la prise de décision.

CONSOLIDATED DECISION-MAKING: THE CANADIAN EXPERIENCE

By Gerry VanKessel

Étant un pays signataire de la *Convention de 1951* et de son *Protocole de 1967*, le Canada est obligé de protéger les personnes sur son territoire craignant avec raison d'être persécutées du fait de leur nationalité, de leur appartenance à un groupe social particulier ou à cause de leurs opinions politiques. Bien que la définition du réfugié dans la Convention a été incorporée dans la Loi sur l'Immigration, de nombreux organismes incluant le Vérificateur général du Canada et le Groupe consultatif pour la révision de la loi sur l'immigration ont critiqué le processus de détermination du statut de réfugié. Le Vérificateur général du Canada a recommandé que Citoyenneté et Immigration Canada s'assure que le risque de la révision reste dans le cadre des objectifs établis pour la catégorie des demandeurs non reconnus du statut de réfugié au Canada et qu'il soit géré de manière efficace et opportune. Le Groupe consultatif pour la révision de la loi sur l'immigration a établi que le système en place actuellement était complexe et que certains engagements internationaux du Canada n'avaient pas été incorporés dans la législation interne. La Commission de l'immigration et du statut de réfugié a été chargée de déterminer une définition codifiée de protection qui engloberait tous les critères pertinents et elle deviendra donc la seule instance administrant cette définition. La présence d'un seul organe détenant tous les faits devrait promouvoir l'impartialité, l'uniformité et l'efficacité de la prise de décision.

As part to the 1951 Convention and its 1967 Protocol, Canada is obliged to protect persons on its territory who have a well founded fear of persecution based on their nationality, membership in a social group, or political opinion. Inspite of the fact that the Convention refugee definition has been fully incorporated into the Immigration Act, the process of determining refugee status and protection needs in Canada has been criticized by various organizations including the Auditor General of Canada and the Legislative Review Advisory Group. The recommendations made by the Auditor General include that Citizenship and Immigration should ensure that the risk of return review is within the scope of the objectives set out for the Post-Determination Refugee Class and that it is carried out in an efficient and timely manner. The Legislative Review Advisory Group found that not only the current system was complex, but also that some of Canada's international commitments have not been fully incorporated into domestic legislation. It was determined that the Immigration and Refugee Board would become responsible for applying all protection criteria in a consolidated protection definition, and, hence, would be the expert body to administer this definition. A single process in which all the facts are before the same decision-maker will promote fairness, consistency and efficiency.

I. Background

As party to the 1951 Convention relating to the Status of Refugee and its 1967 Protocol, Canada is obliged to protect persons on its territory who have a well founded fear of persecution based on their nationality, membership in a social group, or political opinion. Incorporated into domestic legislation are a number of important elements that give rise to Canada's continued commitment to the protection of refugees: first, the Convention refugee definition has been fully incorporated into the *Immigration Act*; second, the process by which that that status is determined is fully described in legislation, regulations and rules; and third, Canada' s commitment to the protection of individuals who may be persecuted is reaffirmed in the current and proposed legislation. The Immigration and Refugee Board has the sole authority, according to the current legislation, to determine refugee status in Canada.

The Immigration and Refugee Board (IRB) was created in 1989 at least in part in response to a landmark decision by the Supreme Court of Canada. In the *Singh* case, the Court found that in cases of serious issues of credibility fundamental justice required that credibility be determined on the basis of a hearing. The Court determined that there was insufficient or inadequate opportunity in the existing determination process for an individual to state his/her case and know the case he/she had to meet.

Following a negative decision by the IRB, failed claimants may apply to Citizenship and Immigration (CIC) for permanent residence under the Post-Determination Refugee Claimants Class risk review (PDRCC). Persons who apply for consideration under this Class have failed to meet the Geneva Convention refugee definition but allege that they would face personal risk of harm if returned to the country of origin. PDRCC criteria, as defined by regulations, stipulate that the risk must be compelling meaning that there exists a threat to life, extreme sanctions or inhumane treatment. Also the risk must be personal rather than simply a generalized situation of risk in the country of origin. The risk assessment is carried out at CIC by Post-Claim Determination Officers (PCDOs).

Claimants may also apply to CIC for permanent residence status based on humanitarian or compassionate grounds (H&C). This too includes an evaluation of personalized risk upon return. (This application is most often made prior to a person's removal from Canada). Risk related elements of the H&C review are similar to the risks evaluated in a PDRCC review. PCDOs apply the PDRCC risk criteria and forward their opinion to the H&C officer. While H&C officers are not bound by the risk opinion made by another officer, they will take these opinions into consideration in reaching a decision.

II. The Impetus for Change

The process of determining refugee status and protection needs in Canada has been criticized by various organizations including the Auditor General of Canada

and the Legislative Review Advisory Group. The essence of the criticism focuses on the consecutive layers of decision making which result in delays and inconsistencies as well as in redundancy in assessing protection and risk related criteria at the IRB and CIC. Because of the delays inherent in a multi-step approach, persons who are not legitimately in need of protection may apply under these provisions and remain in Canada for long periods of time. The analysis and basic criticisms of each are considered below.

A. The Auditor General of Canada

In 1997, the Auditor General of Canada undertook an audit of the processing of refugee claims in Canada to determine whether management mechanisms allowed for the efficient and fair resolution of refugee claims and fostered public confidence in the fairness and integrity of the process. The audit team examined three main portions of the refugee determination system including: determination of eligibility of the claim; determination of refugee status; the settlement of cases of claimants whose claims have been denied by the IRB. The findings of the audit team were wide ranging and touched many different facets of the determination process including the recruitment of IRB members and, more importantly, the redundancy of decision making at the IRB and CIC.[1]

The Auditor General, in his report, stipulated that the risk review criteria utilized by CIC in conducting a post-claim risk review are very similar if not the same as those considered by the IRB in determining refugee status. The distinction between the criteria used by the IRB (i.e. risk of persecution) and the risk of return review criteria by PCDOs (i.e. risk of death, extreme sanctions and inhumane treatment) is nebulous. PCDOs, as pointed out by the Auditor General, use information that is similar if not identical to that considered by the IRB in determining refugee status. More specifically, PCDOs rely on the following information in assessing risk: conditions in the country of return; the personal information form completed by the claimant; reasons for decision by the IRB; and any evidence submitted by the failed claimant in support of his/her risk application. IRB members utilize the same information in assessing refugee status. CIC's PDRCC guidelines, further, are based primarily on those developed by the IRB.[2]

The Auditor General argued that there should be mechanisms in CIC to clearly identify the risks of danger it seeks to which it seeks to respond and, ultimately, to complement the assessment of the IRB. Concern was also expressed that the decisions of the IRB may be overturned by departmental officials particularly since evidence suggested that PCDOs cited factors to support an existence of risk to the claimant that had already been evaluated by the IRB.

---

1 Canada, *Report of the Auditor General of Canada to the House of Commons*, (Ottawa: Minister of Public Works and Government Services Canada, 1997) at Chapter 25: "Citizenship and Immigration and Immigration and Refugee Board - The Processing of Refugee Claims".

2 *Ibid.*

The recommendations made by the Auditor General with respect to this particular area included that CIC should ensure that the risk of return review is within the scope of the objectives set out for the Post-Determination Refugee Class in Canada and that it is carried out in an efficient and timely manner.[3] CIC agreed with these recommendations and indicated in its response that the evaluation of risk considerations prior to return are necessary to ensure compliance with obligations not covered by the Geneva Convention such as those under the Convention Against Torture.

B. The Legislative Review Advisory Group

The Legislative Review Advisory Group was commissioned in 1996 by the Minister of Citizenship and Immigration to advise on the future direction for Canadian immigration legislation in light of current challenges, emerging trends and research[4]. The advisory group, in the course of its mandate, analyzed and considered different models for Canada' s immigration system and its protection regime. It also sought and received input from many interested groups across the country. Many of the legislative review group' s recommendations were incorporated into Bill C-11 that was tabled in Parliament on February 21, 2001.

In an assessment of the refugee determination process the advisory committee came to similar conclusions as those of the Auditor General. It found that the current system was complex and rooted in many layers of decision making. It noted as well that some of Canada' s international commitments had not been fully incorporated into domestic legislation, e.g. the Convention Against Torture.

Canada' s current immigration legislation stipulates that protection may only be accorded to an individual if he/she has been successful in establishing a nexus between the persecution feared and any of the grounds enumerated in the Geneva Convention protection definition. The advisory group pointed out that the Convention is only of one of a number international agreements that seek to protect human rights of individuals in their territory and those seeking admission. The protection definition should be all-inclusive and not limited only to the Refugee Convention and the decision should be rendered by one expert decision-maker. The need for protection was the overriding and fundamental principle of any protection regime[5].

The current refugee determination system is characterized in the advisory group' s report as redundant in its decision making, inconsistent and riddled with lengthy delays that serves as a pull factor for non-bona fide claimants. Consideration of all relevant protection grounds at a single protection interview would improve the process and expeditiously determine whether an individual is in need of protection.

---

3 *Ibid.*

4 *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Minister of Public Works and Government Services Canada, 1997)

5 *Ibid.*

In its final report, *Not Just Numbers: A Canadian Framework for Future Immigration,* the advisory group recommended:

> The Protection Act should provide criteria consistent with Canada' s obligations under the 1951 Convention Relating to the Status of Refugees and other current and developing human rights and humanitarian standards, violation of which would result in the endangerment of life and security of the person. These same criteria should be used when examining protection claims both in Canada and abroad. All criteria should be examined in a single administrative procedure.[1]

CIC recognized, in its response *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation,* that each of the layers of the decision making can consume considerable time including the prospect of judicial review. The result is that the determination of a claim harms those in need of protection and undermines the integrity of the system by allowing those who abuse it to remain in Canada for several years. The Government accepted the recommendation of the advisory group primarily as a means and to reduce the overall processing times of the current determination system and limit the redundancy and inconsistencies in decision making.

III. Building a new protection definition

It was determined that the IRB would become responsible for applying all protection criteria in a single hearing through a consolidated protection definition and, hence, would be the expert body to administer that definition. As well, there would be a Refugee Appeal Division at the IRB to consider appeals on the merits of the initial IRB protection decision. At the same time a decision was made to set up a separate process in CIC based on the same consolidated definition to consider the cases of failed claimants where country conditions had changed or new information had arisen and to review the protection needs of persons excluded from or ineligible for the new centralized IRB process. As a result, a pre– removal risk assessment (PRRA) has been included in the proposed legislation.

When Canada becomes a signatory to an international instrument, the commitment is to ensure that it complies with the obligations of that instrument. In addition to the Geneva Convention, Canada has ratified numerous other international instruments that protect against violations of human rights. The human rights that stand to be violated when a person is removed from Canada to a situation of possible serious harm are broadly put the right to life and to security of the person. Due to the seriousness of the rights at stake, certain of these instruments contain either an express or implicit obligation not to return (refoule) persons to a situation where these rights may be violated. Therefore, CIC analyzed those instruments that entrench, as

---

6 Supra note 4.

a human right, a person's right to life and security of the person. The following international instruments, therefore, were considered:

- The 1951 Refugee Convention: definition of Convention refugee; articles 1 E and F; exclusion; and article 33 (prohibition against refoulement);
- The Convention Against Torture: article 1: definition of torture; and article 3: prohibition against refoulement;
- The International Covenant on Civil and Political Rights: article 7: prohibition against cruel, inhumane or degrading treatment or punishment; and article 13: prohibition against refoulement;
- The American Declaration on the Rights and Duties of Man: article 1: right to life, liberty and security.

There are other conventions and international instruments that provide protection against violation of life and security of the person such as the Convention on Slavery, the Convention on the Elimination of Discrimination against Women, the Convention on the Prevention of the Crime of Genocide, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination. The kinds of serious harm identified in the majority of these conventions fall within the scope of the Geneva Convention definition of "persecution" as developed in Canadian jurisprudence. The definition of persecution has been set out in case law and in academic writing as the "systematic violation of fundamental human rights, in a context of failure of state protection". As well, the interpretation of the definition of persecution under the Geneva Convention by the IRB (with the assistance of guidelines) and the Canadian courts is broad enough to provide protection from violations of human rights set out in the above international instruments.

The protection, however, afforded by the Geneva Convention is subject to the violation of human rights being linked to one of the five Convention grounds - race, religion, nationality, particular social group and political opinion. Agents of persecution, according to Canadian jurisprudence, include state and non-state agents. Generally, the other international instruments do not have this qualification. Furthermore, certain obligations under the international instruments to which Canada is signatory are dealt with through other aspects of the *Immigration Act*, for example, the humanitarian and compassionate review and the various programs for family reunification.

As a result, the following protection grounds were incorporated into the proposed legislation:

- Convention refugees (article 1A(2), 1E, 1F and 33 of the Geneva Convention on Refugees);
- Persons who would be in danger of being subjected to torture (article 1 of the Convention against Torture); and
- Persons subject to cruel or unusual treatment or punishment (similar to section 12 of *The Canadian Charter of Rights and Freedoms).*

Excluded from the protection definition contained in the proposed legislation is a reference to Article 3 of the Convention against Torture (CAT), i.e. the bar against refoulement, as well as Articles 7 and 13 of the International Covenant on Civil and Political Rights (ICCPR). In terms of the former, it was reasoned that incorporating Article 3 of the CAT would restrict Canada' s ability as a sovereign nation to remove individuals who could pose a threat to the safety and security of Canadians. To do otherwise would derogate from the integrity of the refugee determination system and, potentially, act as a magnet for criminals, war criminals and terrorists. Canada' s proposed approach to criminals, war criminals and terrorists will exclude them from accessing the consolidated definition applied by the IRB. As there must exist a mechanism for these individuals to claim protection, the PRRA will be that mechanism. The protection grounds for these cases will be limited to CAT and cruel and unusual treatment. In terms of the ICCPR, risk of cruel and unusual treatment as reflected in section 12 of *The Canadian Charter on Rights and Freedoms* was incorporated into the proposed legislation.

Persons found to be in need of protection by the IRB based on the consolidated definition may apply for permanent residence in Canada. Also, they will be provided protection against non-refoulement and any withdrawal of this protection will be consistent with the Geneva Convention' s cessation and vacation principles of the proposed legislation. Serious criminals, terrorists and war criminals cannot be landed as they are inadmissible so the relief that may be provided is a stay of execution of removal order via the PRRA.

During public consultations, a number of Canadian non-governmental organizations recommended an expansion of the protection definition to include the Convention against Statelessness. It was determined that statelessness need not be incorporated since the Convention refugee definition, as incorporated into domestic law (current and proposed), provides protection to these individuals should they face persecution upon return.

The Canadian Federal Court of Appeal has ruled that the Convention refugee definition takes into account the inherent difference between persons who are nationals of a state and therefore are owed protection and persons who are stateless and without recourse to state protection. If it is likely that a person would be able to return to a country of former habitual residence and be safe from persecution the person is not a refugee. Statelessness is an issue within the context of removals in that there may be instances where an individual may not be removed due to their

statelessness and should, in certain circumstances, be provided relief. Permanent residence may be provided to these individuals under the auspices of the Humanitarian and Compassionate (H&C) program if, generally, the person has been in Canada for a significant period of time due to circumstances beyond his/her control.

Also within the removal context, citizenship or nationality is not the sole determinant of the Department's ability to remove an individual from Canada. The *Immigration Act* sets out the possible places to which an individual may be removed including: the country from which that person came to Canada; the country in which the person last permanently resided; the country of birth; and the country of nationality. In those cases where it is not possible to remove an individual to a country since he/she may be stateless, the person may apply for permanent residence on H&C grounds. The Department has provided permanent residence via H&C to individuals who are stateless and cannot removed from Canada.

Many non-governmental organizations have called upon the government to eliminate the restrictions on risk to cruel and unusual treatment or punishment or risk to life. In the proposed legislation a person in need of protection must clearly demonstrate that the risk is personal in nature rather than as a result of general circumstances in the country of origin. As well individuals must demonstrate that the foreign national in every part of that country would face the risk.

In Canada it has been established that the Convention Refugee definition and the Convention against Torture (CAT) have acknowledged that the risk faced by an individual seeking protection must be personal in nature in order to qualify for international protection. The definition of persons in need of protection in Bill C-11 reflects the concept of personalized risk.

In terms of the incorporation of an internal flight alternative (IFA), the existence of an IFA is an integral part to the Convention definition. Canadian jurisprudence and international guidance on the issue of an IFA is a general question of whether the person is in fact a refugee. Specifically, if there is an area in their country in which asylum seekers would be safe from persecution, they will be expected to go there unless they can show that it is objectively unreasonable for them to do so. Protection opportunities may exist in the country of origin or internationally guaranteed safe zones where the quality of protection is acceptable for the individual. Protection should be provided in those cases where no alternative exists for the individual.

It is envisioned that the interpretation of this portion of Bill C-11 would be consistent with the current Post-Determination Refugee Claimants in Canada Class (PDRCC) practices where officers determine:

- whether the IFA is a realistic and attainable option;

- whether the IFA is accessible without great physical danger or undue hardship; and
- whether the IFA provides stable protection and an established authority to which the individual can turn to recourse.

Moving from the policy arena to the operational one gives rise to a number of operational issues that must be addressed for the successful implementation of the consolidated protection definition. Training and adequate monitoring will be required to ensure that the challenges of this new system are properly addressed. Some of these operational issues include the following:

- *Consideration of protection grounds in a particular sequence:* The proposed legislation does not require IRB members to consider protection grounds in a particular sequence. While there does not appear to be any substantive legislative difference in the rights accorded to an individual found to be a Convention refugee or in need of protection. Care will need to be exercised in ensuring consistency in approach to the determination of factually similar claims.
- *Different standards of proof:* Decision-makers may be required to apply three different standards of proof in a single protection claim. Canadian case law has set the standard of proof in a Convention refugee claim as lower than a balance of probabilities[7], while the standard that has been incorporated in the proposed legislation for a CAT claim is significantly higher, i.e. "substantial grounds" to believe. The third ground for protection, risk to life or of cruel treatment , may yet require a different standard of proof – one that is closer to a balance of probabilities and is consistent with the standard for a challenge under the Charter of Rights and Freedoms. The multiplicity of tests could add complexity to decision-making.
- *Persons without Nexus:* In addition to different standards of proof, there are other differences which will have to be applied. The Geneva Convention is based on a nexus to criteria; CAT and risk to life do not require a nexus. The Geneva Convention is applicable in the case of non-state agents whereas CAT is restricted to State agents.
- *Role of Canadian Charter of Rights and Freedoms:* Section 7 of the Charter provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 7 is engaged during the refugee determination process. The additional conventions contained in the proposed legislation include an express or

[7] The test has been set out as "a reasonable chance or serious possibility of persecution".

> implicit obligation not to remove someone whose life or security may be jeopardized by removal to a situation of serious harm which have not been incorporated into the new legislation, e.g. Article 3 of CAT. Canada's courts are currently dealing with whether removing individuals to situations of torture or cruel and unusual punishment is a breach of fundamental justice

* * *

Canada is embarking on a new initiative that will allow all protection grounds to be heard and determined at one hearing before the Refugee Protection Division. The single hearing process will allow the same set of factual circumstances to be considered by one decision-maker in determining whether a person is in need of protection. Within the current legislative framework, different decision-makers must assess these issues at different points in the process. A single process in which all the facts are before the same decision-maker will promote fairness, consistency and efficiency. There are goals which are in the interests of refugee protection and program integrity.