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Asylum Determination Process: A Comparative Study of the United States and Canada

PRABSIMRAN SINGH[1], DILRAJ SINGH[2], MEENAKSHI SINGH[3] AND JAIDEEP SINGH MAAN[4]

ABSTRACT

Canada and the United States, two of the largest countries on earth that proudly welcome immigrants, have long been major actors in the international refugee protection system. Canada has a long history of providing humanitarian aid and, in particular, defending refugees. However, both countries have recently backtracked on their previous protection obligations by placing a higher priority on law enforcement and reducing their commitments to civil liberties and refugee protection as a result. These trends have accelerated since September 11, 2001. This article will provide an overview of and comparison of the asylum decision processes in Canada and the United States, paying special emphasis to the non-entrée measures used by both nations to prevent or even forbid potential asylum seekers from submitting claims on their territory. It will highlight regretful alterations to the agendas of both countries. The article shall further contrast the measures that the two nations have implemented on a few particular asylum difficulties at the same, stressing their various detention practices and their growing readiness to cooperate on a regional level.

The asylum procedure in Canada will be discussed first, with a focus on the new procedural limitations. Following that, we will repeat the process for the US and highlight some of the parallels and discrepancies between both systems. Finally, we will look at some of the more significant Canada-United States joint ventures, including the most recent "safe third country" arrangement between the two countries.

I. INTRODUCTION

Playing two of the most affluent nations on earth as neighbours and proud countries of immigration, Canada and the United States have long been key players in the global refugee protection system. Canada has a historical reputation for humanitarianism in general and for protecting refugees in particular. However, both nations have recently backed away from their historical protection responsibilities by prioritising law enforcement more and lowering their pledges to civil freedoms and refugee protection in response. Since September 11, 2001, these

[1] Author is a Student at Symbiosis Law School, Noida, India.
[2] Author is a Student at Symbiosis Law School, Noida, India.
[3] Author is a Student at Symbiosis Law School, Noida, India.
[4] Author is a Student at Symbiosis Law School Pune, India.

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II. THE REFUGEE PROCESS IN CANADA

Canada has consistently accepted refugees. They were welcomed as settlers for a very long period, much as other immigrants. Canada was very active in admitting new immigrants during the Cold War, including Hungarians in 1956, Czechs in 1968, and Indo-Chinese after 1979. After the coup in 1973, relatively few Chileans were allowed to enter, but throughout the 1980s and 1990s, Canada was considerably more welcoming to Guatemalans and El Salvadoreans.

Supreme Court's Role:

The Canadian Supreme Court, which was tasked with interpreting the Canadian Charter of Rights and Freedoms, which has been part of the Canadian Constitution since 1982, has had a role in shaping Canada's modern refugee policy. According to section 7 of the charter, which safeguards "the right to life, liberty, and the individual's safety and the right not to be devoid thereof except in adherence to the principles of fundamental justice, it was recognised in *Singh v. Minister of Employment and Immigration* that refugees are entitled to a full oral hearing.[5]

More recently, on June 28, 2002, the revised Immigration and Refugee Protection Act (IRPA) went into force. The 1978 Immigration Act was superseded by IL, which was seen to be too complicated, difficult to comprehend, and inflexible to allow for effective action. The 1978 Immigration Act had undergone two overhauls and more than thirty amendments. The IRPA has expanded the restrictions on who can access the Immigration and Refugee Board in light of

[5] Singh v. Minister of Employment and Immigration [1985] 1 SCR 177

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the "new problems" that are thought to be brought on by the perceived rise in security risks.[6] The legislation's approach to limiting access to Canada's refugee assessment system contrasts with the Supreme Court's recent decisions in and Ahani v. Canada (Minister of Citizenship and Immigration)[7] & Suresh v. Canada (Minister of Citizenship and Immigration)[8] which make an effort to reconcile the objectives of national security with the liberties guaranteed by the Canadian Charter of Rights and Freedoms. Even yet, the court has also demonstrated a growing reliance on the notion of deference to the administration in the use of its discretionary powers. However, the government's and the court's approaches fall short in addressing the fundamental political morality concerns that forced migration brings to light.

In 1986, 155 Tamils were saved off the coastline of Newfoundland; in 1987, a boatload of Sikhs showed up in Nova Scotia; and in the summer of 1999, four boats landed in British Columbia carrying a total of 599 Chinese, 134 of who were children, all arriving from Fujian Province, where they had arranged with locals to receive asylum seekers. It is interesting to note that major changes to immigration policies were prompted by these arrivals. In each instance, the possibility for tighter border restrictions was created by the public uproar over what was seen as a danger to law enforcement.

Canada’s Asylum Determination Process: A General View

Canada publishes its immigration and refugee objectives each year. They include both individuals who are recognised after applying for asylum in Canada as well as those sponsored to come to the country.

While in Canada, anyone may ask for refugee protection. Citizenship and Immigration Canada (CIC) determines whether a person is qualified to submit a request for refugee status as part of the In-Canada Refugee Program. To assess if a person is a protected person, the Refugee Protection Division of the Immigration and Refugee Board (IRB) conducts hearings. An administrative court that is separate from CIC is the IRB. CIC occasionally speaks out at refugee proceedings before the IRB.

Anyone may apply for refugee protection in Canada or at a point of entry. Those who seek refugee protection must go before an immigration officer for inspection. They are required to fill out an application form, get their photo taken, and have their fingerprints taken. Removal orders are given to anyone requesting refugee protection; however, they do not become effective

[6] Bill C-11, 2001; Galloway: Chapter 5 2003
[7] Ahani v. Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 72
[8] Suresh v. Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817

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until their request is rejected.

The new statute consolidates refugee protection judgement at the MB and adds additional bases for refugee protection. The 1951 Convention on the Status of Refugees served as the perception and evaluation of a refugee under the previous legislation. It was up to the IRB members to decide if the claimant had a legitimate fear of being persecuted in her home country due to her race, religion, nationality, belonging to a specific social group, or political beliefs. Since the passage of the new legislation, IRB decision-makers must determine whether a person faces a risk of torture, a risk to their life, a risk of cruel and unusual treatment, or a risk of punishment if sent back to her country in addition to taking into account these grounds and Canada's commitments under the 1984 UN Convention against Torture. According to the ruling in the matter of Suresh, the court can only reconsider an IRB decision in this respect if it is "patently irrational."

The IRB hears claims for refugee protection. A representation, such as a lawyer, may help claimants. The IRB conducts non-adversarial hearings. The minister of citizenship and immigration, however, may intervene on behalf of immigration hearing officers to challenge a decision for security or severe criminality concerns.

The new Act lowered a refugee hearing's decision-makers from two to one. The new law limits the ability to appeal immigration decisions. According to IRPA's s.64, which is constitutional, this includes the power to review disposal orders against anyone who is barred from entering the country for reasons related to security, serious criminal activity, or organised crime.[9] As a result, the destiny of a refugee claiming refugee in Canada might now be decided by one person without a hearing on the merit, even when there is a significant possibility that they would be tortured or subjected to other harsh or unusual punishments if they are deported.

One of the greatest refugee determination systems in the world is found in Canada; ministers like to refer to it as the Cadillac of refugee decision systems. Each refugee applicant has the right to be heard with full interpretation and the right to counsel under this quasi-judicial system, which is founded on the Canadian Charter of Rights and Freedoms. Although the refugee basic functional is under federal jurisdiction, legal assistance in such matters has already been left to provincial legal aid schemes, without any attempt to ensure some equivalence. As a result, it has never been considered important to provide enough legal aid to aid the refugee to prepare his case. The typical legal aid expense in Ontario for a refugee assessment case is still more

[9] Adil Charkaoui v. Minister of Citizenship and Immigration and Solicitor General of Canada, SC 2004: 760-87

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than CAD 1,500[10]. Asylum seekers in British Columbia lost full access to legal assistance in June 2003, but subsequent discussions allowed for a scaled-back service to begin in March 2004.[11]

In decreasing order, India, Colombia, Mexico, Pakistan, Costa Rica, Sri Lanka, Pakistan, Peru, Turkey, and the United States were the top 10 countries of origin for asylum applicants in 2002, accounting for slightly over half of all applications. This range of source nations suggests that the arrival of refugees in Canada is likely influenced by both push and pull factors, such as local conflicts and tensions, as well as the accessibility of legal and illegal entry points. In this way, the three seas and the American continent may be used to quantify how much Canada is "shielded" from the developing globe.

Arbitrary fines for smuggling migrants

The Convention against the Smuggling of Migrants either by Sea, Land, or Air was one of two companion protocols that the United Nations General Assembly approved in December 2000 together with the Convention against Organized Crime. Canada was one of the first countries to adopt the agreement and its associated protocols in May 2002. The Immigration and Refugee Protection Act of 2002, therefore, increased the maximum penalties for planning an illegal entry into Canada and significantly increased the penalties for the brand-new crime of human trafficking, but it did not make a distinction between those who are inspired by humanitarian concerns and others.[12] A refugee application hearing may be denied or a permanent residency may be revoked without the right to appeal for someone who assists a family member in fleeing persecution. Helping 10 or more people cross the border illegally without posing harm to people or property is now punishable by a life sentence. This punishment is greater than that for rape committed under duress, which carries a maximum sentence of 14 years in jail and qualifies as a crime against humanity. Notably, the IRPA does not make a distinction between those who work in the industry of supporting migrants and people who work in the industry of assisting people fleeing persecution.

III. THE REFUGEE PROCESS: UNITED STATES

Like Canada, the United States has long been one of the most dependable safe havens for that fleeing persecution. However, just like in Canada, policymakers' perceptions of mounting backlogs, protracted delays in case resolution, and a hit-and-miss trend of removing deportable

[10] Legal Aid Ontario 2002
[11] Legal Service Society of BC 2003, 2004
[12] Jimenez and Crépeau 2002

applicants whose asylum claims were ultimately denied have increasingly shaped American refugee procedures. Government officials have also had the perception—rightly or incorrectly—that many claims are frivolous from a legal standpoint. Since September 11, 2001, the changes have been noticeable.[13]

This section will discuss some of the non-entrée methods by which the U.S. intentionally restricted or discouraged entrance to the asylum decision system after describing the overall refugee processing infrastructure in the country. The discussion will next turn to various detention practices and related regulations that reflect the perceived necessity for national security following September 11th. Along the process, pertinent parallels to Canadian practice will be provided.[14]

United States Refugee Process: A General View

U.S. refugee policy is implemented in two essentially distinct arenas, similar to Canada. Offshore refugees—those accepted under a yearly numerical cap declared by the president are individuals who are actually outside of U.S. territory. The president divides the overall cap into regional sub-caps and gives the secretary of national security permission to accept as many refugees as are consistent with those boundaries After then, U.S. officials abroad set priorities to decide which refugees must be admitted first, in what order, and in how many. The U.S. quotas are binding legal caps, in contrary to Canada, where the numerical predictions are just that: forecasts.

For "onshore refugees," or refugee applicants who manage to arrive at American beaches without assistance from the U.S. government, more complicated procedures are in place. Others have already attempted admission, whether legitimately or illegally, while some reach the processing platform at ports of entry. Some of those who have already entered seek relief during removal proceedings, while others voluntarily submit to the Department of Homeland Security, before the initiation of any removal procedures. Onshore refugees may seek a variety of measures of safety. According to US law, "asylum" refers to the right to remain in the nation indefinitely or at least temporarily. It may be granted, at the administrative office's discretion, to anybody who satisfies the statutory description of a refugee and does not come under any of the exclusions. The more restricted non-discretionary remedy of non-refoulment, which precludes transfer to the nation of persecutors but not certainly to other countries, is referred to

[13] Galloway D. 2003. 'Criminality and State Protection: Structural Tensions in Canadian Refugee Law', S. Kneebone, The Refugees Convention 50 Years On: Globalisation and International Law, England: Ashgate.
[14] Jimenez, E. and F. Crépeau. 2002. 'The Immigration and Refitgee Protection Act', Horizons, Bulletin of Canadien Policy Research Initiative, 5(2).

as "withholding of removal."[15] In the case that a request for asylum is refused, every application is immediately considered a request for a stay of deportation. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides redress (CAT). When appropriate, one often applies all three types of protection at once because the application processes for all three treatments are essentially identical.

Nevertheless, depending on the applicant's location and other factors, the processes change. The immigration court overseeing removal proceedings receives a request for protection from a person who is already the subject of removal proceedings; the immigration judge then conducts a quasi-formal evidentiary hearing during which the applicant and DHS may be assisted by counsel. The hearings conducted by U.S. immigration courts are adversarial, in contrast to the Canadian IRB procedure; the opposite sides are the non- and DHS. When relief is denied, decisions made by immigration judges are subject to scrutiny in court and are appealable by citizen applicants as of rights to the Board of Immigration Appeals.[16]

Non-Entrée Policy: United States

Asylum seekers have faced some difficult obstacles in the United States throughout the years. Similar to Europe, these barriers come in a variety of shapes; a detailed explanation is provided elsewhere. One example is the previously mentioned accelerated removal process, which is intended to stop potential asylum seekers before they start the standard process.

Except for new circumstances that fundamentally alter eligibility or "exceptional" circumstances that justify the filing delay, Congress instituted a one-year filing limit for petitions for asylum beginning in 1996.[17] Applications for deferring removal are exempt from the deadline.

Additionally, the executive branch must enter into re-admission arrangements with other nations for the United States to implement a limited "safe third country" requirement. [18]Until 2004, when Canada–United States re-admission agreement took effect, this clause was dormant. From the perspective of the person, safe third country regulations create important issues regarding the level of liberty asylum seekers should have when choosing the nations in which they would seek shelter. From the perspective of the global community, they pose further concerns about how the eventual host nations and third countries should fairly and effectively divide up the burden of caring for refugees. UNHCR is currently quite concerned about the

[15] (8 CFR s.208.3(b)(2004))
[16] (8 CFR s.3.1(b)(3)
[17] (8 USC s.1158(a)(2)(B))
[18] (8 SCR s.1158(a)(2)(A)).

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situation.

Another tactic used by the United States to keep possible asylum seekers (mostly from Haiti, but also from Cuba, the Dominican Republic, and China) from reaching American shores is the blockade of ships on the high seas. Sale v. Haitien Centers Council[19] was a case in which the U.S. Supreme Court upheld the legality of even an interceptor policy that does not attempt to identify refugees amongst some of the passengers, interpreting both the statute and the Refugees Convention as being inapplicable to actions taken on the high seas. The decision was criticized by both UNHCR and the Inter-American Commission.[20]

Additionally, by using detention more frequently and by prohibiting job permission during the initial 180 days of the asylum procedure[21], the United States has attempted to discourage asylum seekers. The combination of preventing employment and banning asylum seekers from receiving government help presents an evident problem that is typically only resolved by relying on family or friends or turning to irregular work. In a similar spirit, U.S. law declares anybody who, after receiving adequate notice, "has intentionally lodged a frivolous claim for asylum" permanently ineligible for any future immigration benefits. The most concerning development are that U.S. federal officials have recently prosecuted asylum seekers for entering the country using forged credentials.

Other restrictions are a result of the inspection procedure itself. Only from U.S. territory, including the border, may one submit an asylum claim.[22] However, reaching American soil is not simple. Travellers often need entrance permits, and Congress has established fines and other consequences for commercial carriers who bring passengers to the United States without the necessary documentation.[23] This is similar to the laws in Canada and other countries. Additionally, U.S. immigration officials have used "pre-inspection" techniques at international airports more frequently, just like their Canadian counterparts.

IV. U.S. & CANADA'S COOPERATION ON THE BORDER CONTROL ISSUE

The surveillance at the Canada-U.S. border has rapidly increased since the terrorist events on September 11, 2001. Since 70% of all Canadian exports pass via this border, companies in Canada learned during the hours after the attack how dependent they were on a policy of open borders with the United States. From that point on, Canada's principal goal was to prove to the

[19] Sale v. Haitien Centers Council, 509 U.S. 155 (1993)
[20] UNHCR 1993: 1215; Henkin et 1999: 426
[21] (8 USC s.1158(d)(2))
[22] (8 USC s.1158(a)(1))
[23] (8 USC ss.1182(a)(7)(A)(i)(1), 1323)

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American administration that Canada cared about American security and that its policies were secure.

Some Americans have, quite unfairly, viewed Canadian security measures as lax. Canadians were quick to emphasize that none of the terrorists from the September 11 attacks entered the country through their country and that possibly some American security measures could be reviewed, but this did not alter the perception. After Ahmed Ressarn, an Algerian-born terrorist failed in a prior effort to carry out a terrorist attack in 1998, one American lawmaker even went so far as to call Canada a "Club Med for terrorists".[24] The Canadian Security Intelligence Service (CSIS) head, Ward Elcock, admitted during the discussion around that event that "numbers of terrorist groups have begun utilizing Canada as a sanctuary, a source of money and material support, and even a base of operations." According to him, " more foreign terrorist organizations are functioning in Canada than any other country, maybe with the only exception being the United States"

The United States and Canada's current joint programmes are probably inadequate to alter public opinion, and the development of a single security perimeter around the two nations will need the standardisation of policy in several sectors.

Asylum Seekers' Temporary Repatriation to the U.S.

In addition, Canada has intensified its policy of sending American asylum claimants back to the U.S. temporarily while their cases are being heard. In the past, Canadian officials would request assurances from the American Immigration and Naturalization Service (INS) that these individuals wouldn't be detained and would be permitted to appear at the border on the scheduled day. The Canadian Council for Refugees has noticed a substantial decline in the number of people who actually show up at the border for their hearings since January 2003, and many of them have since been detained or, worse, deported by U.S. officials.

Hundreds of immigrants who were seeking to seek shelter in Canada have been forcibly sent back to the United States by Canadian officials since the end of January 2003. They are offered appointments to go to Canada to further their objectives, but many of them are prevented from doing so by American detention, which Canadian officials are well aware of. Others attempt to avoid being sent back by scheduling appointments ahead of time, but the immigration administration has permitted a systemic delay of several weeks, amid which many families are unable to provide for their needs.[25]

[24] US House of Representatives, Opening Statement of Chairman Smith, 2000
[25] Canadian Council for Refugees 2003c; Canadian Council for Refugees 2004c

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The National Security Advisory Council is the new advisory organisation that the government is creating to assist it in monitoring the programme. The first is in charge of overseeing the application of the new security initiatives. The second will serve as a platform for larger concerns about how the initiatives may be harming Canada's multicultural society and will be made up of representatives of ethnic and religious groupings.

V. CONCLUSION

These changes, including the replication of the US Department of Homeland Security, are intended to persuade Americans to think their northern boundary is secure. Although every document outlining these reforms states that Canada would uphold its international duties regarding human rights, there is scant mention of robust protective mechanisms and effective human rights protections in favour of foreigners.[26]

However, there are still considerable differences between the two nations' practices, and this debate has attempted to highlight both those differences as well as their key commonalities. The extraordinary level of law enforcement collaboration that culminated in the 2002 Canada-U.S. 3rd country agreement may be the new development pertinent to this situation. Collaboration is difficult to argue against, yet it can have a cost, such as a search for the lowest common denominator.[27] Refraining from that temptation will help policymakers in both nations regain some of the lost emphasis on safeguarding the world's disadvantaged refugee population and upholding the human rights and civil liberties of everyone who requests international protection.

In any event, throughout the next years, the authorities in both nations will evaluate these security measures in light of the constitutional (and, at least for Canada, international) norms for civil liberties and human rights. One may wish for a more delicate balance to be re-established once the dust has settled.

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[26] Alcinso-Zaldivar, R. 2003. 'Refugees on Hold and at Risk', L.A. Times, 7 July 2003
[27] Frelick B. 1996. 'Canada, U.S. Resort To Refugee Dumping', Ottawa Citizen, 10 January 1996

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