

**Submission to the *United Nations Human Rights Council*  
in relation to the February 2009 Universal Periodic Review of Canada**

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**Background information**

Canada is a country of immigration. Canada is in the top countries receiving the greatest number of immigrants per inhabitant and per annum. These migrants include individuals recognized as protected persons (refugees or persons at risk of torture) by a Canadian federal body, the *Immigration and Refugee Board* (IRB).

Since 1989, the determination of the status of refugee claimants at the port of entry or within Canada has been effected by means of a quasi-judicial process carried out by an independent decision-making body known as the *Refugee Protection Division* (RPD) of the IRB. The 2002 *Immigration and Refugee Protection Act* reaffirmed the three stages in the determination of status procedure, and established the concept of protected person, which adds to the definition of the refugee that of the individual who would be at risk of torture or cruel and unusual treatment.

The first stage involves the decision of the immigration officers on whether claims are admissible. If their claim is found admissible, the claimants are allowed to enter Canada pending an IRB hearing to consider their claim to refugee status. Refugee claimants receive protection once they are considered to be a protected person, in accordance with the 2002 *Immigration Act*, the 1951 *Geneva Convention the status of refugees* and its 1967 *Protocol*, or the 1984 UN *Convention against Torture*. Also in conformity with the *Convention*, a refugee enjoys protection against forcible *refoulement* to a place where he could be persecuted. The RPD is responsible for handling refugee claims made within Canada: recognizing refugee status, or rejecting it, or terminating it if there exist an alternate protection. Judicial review is possible before the Federal Court of Canada, with leave and generally on issues of law only.

The Canadian refugee determination system is certainly among the best systems in the world. Its distinctive feature is to have dedicated most resources to a front-end examination of the claim by independent administrative judges. This system has limitations however, which have been identified early on, and, twenty years after the creation of the IRB, the Canadian authorities do not seem intent on fixing them.

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## **Three limitations of the refugee determination system point to human rights violations by Canada**

### **1. Political Appointments of IRB Members**

The Act provides for the appointment of IRB members (judges) by an Order in Council. Criteria for selecting IRB Members were adopted in 2003, and their implementation would go a long way to ensuring that IRB members are selected according to the relevance of their experience and expertise. Their implementation depends however on political will: these administrative judges need not be lawyers and purely political appointments of persons devoid of relevant experience or expertise have not been a rare occurrence. This situation has had a very divisive effect on the work of the IRB and it has often been perceived as being too politicized to be really independent. Strengthening the refugee determination process would have to start with reforming the appointment process and ensure the apparent independence of the IRB. Our own research has demonstrated that this lack of experience and expertise by a small number of IRB members can have a considerable influence on how the IRB operates and how individual decisions are taken.

### **2. Lack of legal aid**

The procedures before the IRB are highly complex and require specific legal and factual knowledge. The burden of proving that one is at risk of persecution can be a heavy one. Even though instructions are given to claimants, the cultural differences and language barriers often affect the claimants' understanding of the procedures and of what is expected of them. For lawyers, refugee claims are often very intricate: they include complex sets of facts, difficult legal issues may be at stake, language barriers and cultural patterns may render communication difficult. Meaningful representation is critical to allow claimants to present their case in a comprehensive and logical way, and to answer questions and clear up misunderstandings. Claimants do not generally have the means to afford legal representation. In Canada, legal aid falls under the provincial jurisdiction and the Federal government which is responsible for the IRB, has not seen fit to establish a uniform legal aid scheme for all refugee claimants in Canada. Consequently, a refugee claimant in Toronto may obtain up to 1500\$ to pay for representation, a refugee claimant in Montreal will only have 450\$ and a refugee claimant in Winnipeg will obtain nothing.

### **3. Lack of an Appeal System**

The present judicial review system is very unsatisfactory: leave is granted in less than 10% of the cases and most of the decisions turn on issues of facts (often, the credibility of the claimant) which the Federal court will rarely be in a position to review. Furthermore, a finding by the IRB that the claimant lacks credibility will likely taint any future proceedings and the claimant has no effective recourse against such finding. A long-standing request of the NGO and legal communities, a Refugee Appeal Division (RAD) was included in the 2002 *Immigration Act*, but was never created, allegedly because of lack of resources and a wish not to lengthen procedures. The benefits of RAD would be numerous. It would play the same role as the appeal in criminal cases, where an appeal is considered as resulting from principles of fundamental justice, in view of the potential consequences for the individual. Since recent developments in extradition law and military law, members of the IRB are the only judges in Canada whose decisions may lead to the death, torture or arbitrary detention of claimants wrongly denied refugee status. Moreover, in the absence of a centralized appeal system, the IRB case law shows, at times, vast discrepancies between acceptance rates for similar populations between the different offices of the IRB. A consistent and rational decision-making process is crucial when protecting people's rights and

freedoms: the implementation of the Refugee Appeal Division would be an essential step towards that aim.

### **Solutions have been identified**

It is very difficult to know whether failed refugee claimants who have left Canada have actually faced death, torture or arbitrary detention, for a lack of follow up of individual cases. But Canada certainly doesn't *ensure* that such instance cannot happen by not fixing its refugee determination system.

Considering the potential effects of a wrongful rejection of a refugee claim (death, torture or arbitrary detention), the three criticisms of the Canadian refugee determination system should be answered. A more principled appointment system, a uniform legal aid system available to all claimants, and an effective appeal mechanism, would go a long way to helping Canada better respect both the right to life, freedom and security and the right to equality of refugee claimants.

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