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ARE THE CANADIAN AND U.S. REFUGEE/ASYLUM PROCESSES REALLY "SIMILAR ENOUGH"? HOW THE NEW REFUGEE BAR IN BILL C-97 IS BASED ON A MISUNDERSTANDING OF U.S. ASYLUM LAW

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In a development decried by several refugee-serving and civil rights organizations, the Canadian government's proposed budget bill, Bill C-97, contains within it an amendment to the Immigration and Refugee Protection Act (IRPA) that would, as described by the bill's official summary, "introduce a new ground of ineligibility for refugee protection if a claimant has previously made a claim for refugee protection in another country." More specifically, according to the new paragraph c.1 that would be added to subsection 101(1) of IRPA by section 306 of Bill C-97, a refugee claimant would be ineligible to have their case referred to the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) for a full hearing if

> "the claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection to a country other than Canada, and the fact of its having been made has been confirmed in accordance with an agreement or arrangement entered into by Canada and that country for the purpose of facilitating information sharing to assist in the administration and enforcement of their immigration and citizenship laws".

Instead, such claimants would be relegated to a Pre-Removal Risk Assessment (PRRA), a primarily paper-based process which is known to have a significantly lower approval rate than RPD hearings.

There are a few countries with which Canada has such an information-sharing agreement, including the United States, United Kingdom, Australia and New

Zealand. The primary purpose of new paragraph 101(1)(c.1), however, appears to be to bar refugee claims in Canada by those who have already made claims in the United States, or so an official government spokesperson has told the media:

> "Mathieu Genest, a spokesman for Immigration Minister Ahmed Hussen, said the change's primary effect is expected to be on people whose refugee claims have been rejected in the United States and who then try again in Canada. . . . . The provision is based on the belief that Canada's refugee system is similar enough to that of the U.S. that anyone rejected there is likely to be rejected here as well, Genest said."

Although many refugee claimants arriving from the United States at a land port of entry are already barred by the Safe Third Country Agreement (STCA) – which is currently the subject of a challenge in the Federal Court of Canada – the STCA has exceptions for certain persons with relatives already in Canada and others. It also does not apply to claims made by persons already inside Canada, a substantial number of which have recently been made after irregular entries into Canada away from an official port of entry that the government may be trying to discourage through this new legislation. Thus, even with respect to the United States, the new bar would go beyond the STCA.

The "belief" expressed by Mr. Genest regarding the degree of similarity of the U.S. and Canadian asylum and refugee systems, however, is misguided. The systems in fact have significant differences. If the Canadian government is relying on the notion that anyone rejected in the U.S. asylum and refugee system is likely to be rejected in the Canadian one, that is a compelling reason (in addition to other reasons beyond the scope of this blog post) to follow the above-mentioned refugee and human rights organizations and "urge, in the strongest possible terms, that the government withdraw this measure from the Budget Implementation Act."

For one thing, under U.S. asylum law, an asylum application can be denied solely because it was not made sufficiently soon after the applicant's arrival in the United States. Pursuant to INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B), the right to seek asylum generally does not apply "unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States." There are limited exceptions for changed and extraordinary circumstances under 8 U.S.C. §

1158(a)(2)(D), but if not qualifying under those, an asylum applicant will be relegated to seeking withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), or under the Convention Against Torture. Besides allowing removal to other countries and not providing a route to permanent status, however, withholding of removal requires a higher standard of proof than asylum: one must show a clear probability of persecution for withholding, that is, show that persecution is more likely than not, while asylum requires only a well-founded fear of persecution. The difference was made clear more than 30 years ago by the U.S. Supreme Court in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). *(At that time, there was no one-year time limit, but asylum and withholding of what was then deportation were still importantly distinct in that withholding was mandatory if the higher burden of proof was met, while asylum was and remains a discretionary benefit, as the Supreme Court explained.)*

Under Canadian law, on the other hand, while a delay in applying for refugee status may be seen as evidence of lack of subjective fear, it does not lead to a categorical bar. As the Federal Court reiterated less than two years in *Kivalo v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 728*:*

> "Justice Zinn provided a helpful summary of the law regarding delay in claiming protection in Gurung v Canada (Minister of Citizenship and Immigration), 2010 FC 1097, FCJ No 1368 (QL), noting at para 21 that delay may be a valid factor to consider, but delay does not automatically result in a finding of lack of subjective fear. The circumstances and explanations for the delay must be considered."

Indeed, it was already "well settled law" over a decade ago, according to *Juan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 809*, that although "a delay in seeking refugee status may be a relevant factor when assessing a claimant's credibility . . . . delay in claiming protection cannot, in and of itself, justify the rejection of a claim to Refugee status or to protection."*

Thus, a claimant who can show a well-founded fear of persecution, a realistic chance, but cannot meet the more-likely-than-not burden of withholding of removal, and who has delayed in seeking protection, may be rejected under United States law when he would have been accepted under Canadian law.

Moreover, unless an error of law has been made, a denial under the one-year bar is not judicially reviewable under the United States. Pursuant to INA § 208(a)(3), 8 U.S.C. § 1158(a)(3), "No court shall have jurisdiction to review a

determination of the Attorney General under paragraph (2)." While the exception under 8 U.S.C. § 1252(a)(2)(D) allowing judicial review of "constitutional claims or questions of law" is an important one, it does not alter the fact that with respect to factual determinations, there will be no independent review to determine whether an administrative decision may have been unreasonable. In the Canadian system, on the other hand, even aspects of the refugee determination as to which administrative decision-makers are given deference by the courts will be reviewed for reasonableness, because as explained in *Dunsmuir v. New Brunswick*, 2008 SCC 9, *"The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected." This difference is yet a further dissimilarity between the U.S. and Canadian systems.*

Nor is the lack of judicial review of one-year deadline issues the only important procedural difference in the treatment of refugee and asylum claims under Canadian and U.S. law. Members of the IRB generally and the RPD in particular "are independent decision makers at an independent administrative tribunal operating at arm's length from government." "The Immigration and Refugee Board of Canada is an independent tribunal established by the Parliament of Canada." The Immigration Judges and Board of Immigration Appeals (BIA) who process many asylum applications in the United States, on the other hand, rather infamously do not meet that description. Under 8 C.F.R. 1003.1(h)(1)(i), their decisions are subject to review by the Attorney General, a political appointee, to whom they are subordinate. There has been much discussion of proposals to establish an independent "Article I Court" to address U.S. immigration cases, but at the moment the Immigration Judges and BIA are situated firmly within the Executive Branch under Article II of the U.S. Constitution, rather than being at arm's length from the government. Where certain types of asylum claims are deemed politically inconvenient, they may for this reason face rejection under U.S. law where they would not under Canadian law.

The subordination of the BIA and Immigration Courts to the Attorney General is not merely a theoretical issue. Former Attorney General Jeff Sessions rendered several precedent decisions, required to be followed by the BIA and Immigration Judges and without analogy in Canadian refugee law, which sought

to restrict available bases for asylum and the procedures to be followed in adjudicating asylum claims. In *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), *for example, Attorney General Sessions sought to restrict eligibility for asylum by victims of domestic violence (although as discussed in a blog post by my partner Cyrus D. Mehta, some such claims may still be possible), and in Matter of E-F-H-L-, 27 I&N Dec. 226 (A.G. 2018), Attorney General Sessions overturned a BIA decision that had made clear asylum-seekers generally had the right to a full evidentiary hearing. Immigration Judges were also instructed to adhere to a case-completion quota that has been criticized as giving rise to an "assembly line" version of (in)justice.*

An asylum claimant asserting persecution relating to domestic violence, or raising a complex claim the merits of which are not apparent prior to an evidentiary hearing, may thus also be denied asylum in the United States even if they would be granted refugee status in Canada. Victims of domestic violence may still claim protection in Canada, as in *Kauhonina v. Canada (Minister of Citizenship and Immigration)*, 2018 FC 1300, *and Jeanty v. Canada (Minister of Citizenship and Immigration), 2019 FC 453. And while the RPD may favorably resolve some less complex claims upon review of the file without a hearing, the reverse is not true: "where a member determines that a claim cannot be accepted through the file-review process, the claimant will have an opportunity to their case at a hearing."*

The Attorney General's supervisory role in the process, and the related lack of independence of Immigration Judges and the BIA compared to the IRB, is not the only important procedural difference between the U.S. asylum process and Canadian refugee-claim process that could lead to different outcomes. There is also an important difference in the nature of the administrative appellate review provided by the Refugee Appeal Division (RAD) of the IRB as opposed to the review provided by the BIA.

When the RAD reviews a decision of the RPD, it generally, under the decision of the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, *reviews the decision for correctness. There is an exception, set out in paragraph 70 of Huruglica, for certain instances in which "the RPD enjoy a meaningful advantage over the RAD in making findings of fact or mixed fact and law, because they require an assessment of the credibility or weight to be given to the oral evidence it hears." But in general, the RPD's decision may be overturned if the RAD panel believes it not to be correct, even in cases involving the credibility of testimony. The BIA, on the other hand, pursuant to 8 C.F.R. 1003.1(d)(3)(i), "will not*

engage in de novo review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous."

This distinction is particularly significant because of the dramatic disparities between the rates at which different U.S. Immigration Judges grant asylum. Records compiled by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, for example, show that asylum grant rates over the same 5-year period can range from as high as 97% to as low as less than 3%. Another TRAC report covering a slightly different five-year period found that even within the same immigration courts, in Newark and in San Francisco, the asylum grant rates of different Immigration Judges ranged from less than 3% up to as high as 89% (in Newark) or 91% (in San Francisco). When an unusually skeptical Immigration Judge makes an unfavorable finding of fact, even if it relates to country conditions background materials or some other area where credibility of oral testimony is not at issue, the BIA will not intervene unless clear error can be shown.

Where the decision of an overly-skeptical RPD member is subject to RAD review, on the other hand, the RAD's review for correctness can catch factual errors that fall short of being clearly erroneous. RAD review is not available for all refugee claims, and for example claims made at a Canada-U.S. port of entry under an exception to the STCA are not entitled to RAD review pursuant to section 110(2)(d) of IRPA, but an applicant who is outside the coverage of the STCA by virtue of having crossed into Canada away from a port of entry before making a claim would be entitled to RAD review, and indeed such applicants often have their cases reviewed by the RAD. This is another reason why such a claimant, even if denied asylum in the United States, might obtain refugee status in Canada, were it not for the new bar to be added by Bill C-97.

For all of these reasons, it is simply not true that "Canada's refugee system is similar enough to that of the U.S. that anyone rejected there is likely to be rejected here as well." The Bill C-97 amendment to IRPA based on this false premise should itself be rejected.