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Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System

Sean Rehaag
Osgoode Hall Law School of York University, srehaag@osgoode.yorku.ca

Angus Gavin Grant

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Angus Grant & Sean Rehaag[⊕]

[⊕] Angus Grant is a PHD Candidate at Osgoode Hall Law School. Sean Rehaag is an Associate Professor at Osgoode Hall Law School. They would like to thank the Social Sciences and Humanities Research Council of Canada for generously supporting this project, as well as the Immigration and Refugee Board and Citizenship and Immigration Canada for providing timely access to requested data. They also appreciate the research assistance undertaken by Angelica Buggie, Michelle Osuwu, Joshua Patlik and Jennifer Yoon Lee.

1. Introduction

Refugee adjudication is hard.

It is hard because adjudicators must decide how likely it is that claimants may be persecuted in foreign countries due to their race, religion, nationality, membership in a particular social group or political opinion.[1] Not only does this involve predictions about what may happen in the future,[2] but it also involves factual findings about conditions in unfamiliar places, where information may be scant and unreliable.[3]

It is also hard because much of the evidence is testimony given by claimants, who have a strong interest in the outcomes of their claims.[4] Credibility is often a determining factor, but the refugee law context makes credibility difficult to assess consistently.[5] In refugee hearings, cross-cultural communication failures are common,[6] and are compounded by challenges posed by hearing testimony through interpreters, sometimes of poor quality.[7] Moreover, claimants, who are often under great stress, may be suffering from post-traumatic stress disorder or other conditions that affect their ability to testify persuasively.[8] Refugee claimants may also lack meaningful assistance in preparing their claims and in putting together their evidence because some are not represented by counsel. For those who do secure counsel, quality varies dramatically.[9]

[1] *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] s 96.
[2] Refugee protection is forward-looking, which is to say the question is not whether claimants faced persecution in the past but whether they would face persecution in the future. Immigration and Refugee Board, "Interpretation of the Convention Refugee Definition in the Case Law" (31 December 2010), online: < http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef.aspx#table>.
[3] France Houle, "The Credibility and Authoritativeness of Documentary Information in Determining Refugee Status: The Canadian Experience" (1994) 6:1 Int J Refugee L 6; Susan Kerns, "Country Conditions Documentation in US Asylum Cases: Leveling the Evidentiary Playing Field" (2000) Indiana J Global Legal Studies 197; Arwen Swink, "Queer refuge: A review of the role of country condition analysis in asylum adjudications for members of sexual minorities" (2005) 29 Hastings Int'l & Comp L Rev. 251.
[4] Martin Jones & Sasha Baglay, *Refugee Law* (Toronto: Irwin Law, 2007) at 241.
[5] Cécile Rousseau, et al, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board" (2002) 15:1 Journal of Refugee Studies 43.
[6] *Ibid* at 62-64.
[7] Robert F Barsky, "The Interpreter and the Canadian Convention Refugee Hearing: Crossing the Potentially Life-threatening Boundaries Between 'coccode-e-eh,' 'cluck-cluck,' and 'cot-cot-cot'" (1993) 6:2 TTR: traduction, terminologie, rédaction 131 at 141-146; Adrian Humphreys, "Translator error sinks woman's refugee hearing", in *The National Post* (18 July 2011).
[8] Hilary Evans Cameron, "Refugee Status Determinations and the Limits of Memory" (2010) 22:4 Int'l J Refugee L 469 at 504.
[9] Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 Osgoode Hall LJ 71 at 92-93; Sean Rehaag, Julianna Beaudoin, Jennifer Danch, "No Refuge: Hungarian Romani Refugee Claimants in Canada" (forthcoming) Osgoode Hall Law Journal, available online: <http://ssrn.com/abstract=2588058>; Sule Tomkinson, "The impact of procedural capital and quality counsel in the Canadian refugee determination process" (2014) 1:3 Int J of Migration and Border Studies 276.

Refugee adjudication is hard, also, because of the decision-making process itself. Refugee hearings are brief.[10] Decision-makers have heavy case-loads,[11] and they are encouraged to decide cases quickly – immediately after the hearing, if possible.[12]

Moreover, refugee adjudication is hard because there are systemic challenges in terms of consistency.[13] Some adjudicators adopt skeptical attitudes towards refugee claimants and view their role as largely about protecting the integrity of Canada's immigration system. Others are more generous and understand their roles to be primarily about giving effect to human rights.[14] This leads to large adjudicator-by-adjudicator variations in recognition rates.[15] As a result, refugee adjudicators cannot easily identify consensus positions on whether a particular claim – or even a particular type of claim – is well-founded.[16]

In addition to being hard, refugee adjudication involves high stakes. False negatives may result in refugees being deported to countries where they face persecution, torture or even death.[17] Such a result would put Canada in breach of international law.[18] False positives also have serious consequences, because they may undermine the integrity of Canada's immigration system and encourage future unfounded claims, thereby eroding public confidence in the refugee determination system.[19]

Because refugee adjudication is hard, mistakes are inevitable. Because the stakes are so high in a decision-making process where mistakes will occur, advocates for refugees, human rights organizations, international organizations, scholars and parliamentarians have long called for a robust appeal mechanism in Canada's refugee determination process.[20]

Partly in response to these calls, when Canada's refugee determination system was revised in 2012,[21] the new process included a quasi-judicial administrative appeal on matters of both fact and law at the Refugee

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[10] Hearings typically last half a day. Immigration and Refugee Board, "Claimant's Guide" (2013), online: <http://www.irb-cisr.gc.ca/Eng/RefClaDem/Pages/ClaDemGuide.aspx#_Toc340245820>.

[11] For statistics on refugee adjudication, including the number of cases heard by each adjudicator, see Sean Rehaag, "2013 Refugee Claim Data and IRB Member Recognition Rates" (14 April 2014), online: <http://ccrweb.ca/en/2013-refugee-claim-data> [Rehaag, "2013 Statistics"].

[12] *Refugee Protection Division Rules*, SOR/2012-256, r 10(8).

[13] Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39:2 Ottawa L Rev 335 at 352 [Rehaag, "Troubling"].

[14] Rousseau, et al, *supra* note 5 at 66.

[15] Rehaag, "Troubling", *supra* note 13; Rehaag, "2013 Statistics", *supra* note 11.

[16] Audrey Macklin, "Truth and Consequences: Credibility Determination in the Refugee Context" in *The Realities of Refugee Determination on the Eve of a New Millennium: the Role of the Judiciary* (Haarlem: International Association of Refugee Law Judges, 1999) 134 at 139.

[17] A refugee, by definition, faces such risks. See IRPA, *supra* note 1, s 96-97.

[18] Under international law, Canada is generally obliged to refrain from returning refugees to countries where they face persecution, and a person is a refugee when they factually meet the refugee definition, irrespective of whether they have been recognized as such through formal legal procedures. James C. Hathaway & Michelle Foster, *The Law of Refugee Status 2d ed* (Cambridge: Cambridge University Press, 2014) at 1.

[19] Stephen Gallagher, "Canada's Dysfunctional Refugee Determination System: Canadian Asylum Policy from a Comparative Perspective" (2003) 78 Public Policy Sources at 20.

[20] See below, notes 24-50 (and accompanying text).

[21] *Balanced Refugee Reform Act*, SC 2010, c 8 [BRRA]; *Protecting Canada's Immigration System Act*, SC 2012, c 17 [PCISA]. See also, Lorne Waldman & Jacqueline Swaisland, *Canada's Refugee Determination Procedure: A Guide for the Post Bill C-31 era* (Markham: LexisNexis Canada, 2013).

Appeal Division (RAD) of the Immigration and Refugee Board (IRB).[22] Under the new process, however, many claimants are denied access to the RAD.[23]

This article assesses these limits on access to the RAD, drawing mostly on quantitative data obtained from the IRB and Citizenship and Immigration Canada (CIC) through access to information requests. Our aim is to provide evidence-based analysis and recommendations for reform. Essentially, our conclusions are that the bars on access to the RAD are arbitrary and dangerous, and that the system should be reformed to provide access to the RAD for all refugee claimants.

The article proceeds in two parts. First, we set out the context for our research, explaining why access to the RAD matters. Specifically, we discuss the history of the RAD, explain how the process works, explore the difference between the appeal and judicial review, and provide an overview of the results from the revised system's first two years of operation. Next, we examine in detail each of the bars on access to the RAD for claimants whose applications were refused at first-instance. The article ends by setting out our conclusions.

2. Context: the Refugee Appeal Division and the Revised Refugee Determination System

2.1. History of the RAD

In the mid 1980s, Ed Ratushny and Gunther Plaut were separately commissioned to provide reports on the state of Canada's refugee determination system and the directions it should take. Their reports called for an overhaul of the system, such that it would include an initial oral hearing into the merits of refugee claims and a fulsome appeal process.[24] The recommendation for an appeal was, at least in part, a response to the United Nations High Commissioner for Refugees, which had suggested that a full merit-based appeal process was a "basic requirement" of a fair refugee determination system.[25]

While critics argued that the government of the day appeared intent on ignoring the reports,[26] the government could not ignore the Supreme Court, which, in its 1985 decision in *Singh*,[27] found that oral hearings into refugee claims, at least where credibility is at issue, are required by both the *Canadian Bill of Rights*[28] and the *Canadian Charter of Rights and Freedoms.*[29] The IRB was established in 1989 in response to the *Singh* decision. Yet, while the new IRB provided for first-level oral hearings into refugee

[22] IRPA, *supra* note 1, s 110-111.
[23] See below, notes 101-106 (and accompanying text).
[24] Ed Ratushny, *A new refugee status determination process for Canada: Report to the Minister of Employment and Immigration* (Ottawa: Department of Employment and Immigration, 1984); Gunther Plaut, *Refugee Determination in Canada: A Report to the Honourable Flora MacDonald, Minister of Employment and Immigration* (Ottawa: Supply & Services Canada, 1985). See also, Mary Hurley, "Principles, Practices, Fragile Promises: Judicial Review of Refugee Determination Decisions Before the Federal Court of Canada" (1995) 41 McGill Law J 317 at 380.
[25] See United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (December 2011) HCR/1P/4/ENG/REV. 3, at para 192, citing Official Records of the General Assembly, Thirty-second Session, Supplement No 12 (A/32/12/Add.1), para 53 (6) (e).
[26] See e.g., "They ask for asylum", in the *Globe and Mail* (4 June 1984) A6.
[27] *Singh v Canada (MEI)*, [1985] 1 SCR 177.
[28] SC 1960, c 44.
[29] Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK) [*Charter*], c 11.

claims, it did not include an appeal process for refugee determinations. Instead, a claimant's recourse following a negative refugee determination was initially limited to an appeal to the Federal Court of Appeal,[30] and then, after a subsequent round of legislative changes, to a highly circumscribed judicial review process before the Federal Court[31] – processes that, according to empirical scholarship, resulted in arbitrary limits on access to mechanisms to correct errors in refugee determinations.[32]

Throughout the 1990s, rights groups pressured the government to create an administrative appeal.[33] International organizations also took notice. For example, the UNHCR indicated that Canada should "afford a clear opportunity for the review of decisions on their merits in the post-claim review process."[34] Similarly, in 2000, the Inter-American Commission on Human Rights criticized the lack of a merit-based appeal in Canada's refugee determination system:

> Where the facts of an individual's situation are in dispute, the effective procedural framework should provide for their review. Given that even the best decision-makers may err in passing judgment, and given the potential risk to life which may result from such an error, an appeal on the merits of a negative determination constitutes a necessary element of international protection.[35]

In 2001, Parliament passed the *Immigration and Refugee Protection Act.*[36] It provided, at least notionally, a response to these critiques.[37] The IRPA restructured the IRB, eliminating dual-member panels that had previously conducted first-instance refugee hearings at the (newly renamed) Refugee Protection Division (RPD).[38] The shift to one-member refugee determination hearings was controversial because, under the previous regime, any disagreement on the overall merits of a refugee claim was settled in favour of the claimant and, as such, dual-member panels were viewed as an important safety valve.[39] At the same time, the costs associated with two-member panels, together with the allure of being able to virtually double the number of hearings conducted, were sufficient to carry the day.[40] To compensate for the elimination

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[30] *Immigration Act*, RSC 1985, c I-2, s 83.3, as amended by SC 1988, c 35 [repealed], s 19.
[31] *Ibid*, s 82.1, as amended by SC 1992, c 49 [repealed], s 73.
[32] Ian Greene & Paul Shaffer, "Leave to Appeal and Leave to Commence Judicial Review in Canada's Refugee-Determination System: Is the Process Fair?" (1992) 4:1 Int'l J Refugee L 71; Ian Greene, et al, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: James Lorimer & Company, 1998) at 19–21.
[33] Karlene Nation, "Planned refugee rules attacked", in the *Toronto Star* (30 August 1992) A10; Lila Sarick, "Refugee board to assign single-person panels", in the *Globe and Mail* (3 March 1995) A4.
[34] Dessalegn Chefeke, Representative in Canada of the UNHCR, Statement to the House of Commons, Legislative Committee on Bill C-86 (11 August 1992).
[35] "Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System" (28 February 2000), Inter-Am Comm HR, OEA/Ser.L/V/II.106 doc. 40 rev, online: <https://www.cidh.oas.org/countryrep/Canada2000en/table-of-contents.htm>.
[36] IRPA, *supra* note 1.
[37] For a general discussion of these reforms, see Catherine Dauvergne, "Evaluating Canada's New Immigration and Refugee Protection Act in Its Global Context" (2003) 41 Alta L Rev 725 at 733.
[38] *Ibid*, at 728-29.
[39] *Ibid*; Audrey Macklin, "Refugee Roulette in the Canadian Casino" in Jaya Ramji-Nogales, Andrew I Schoenholtz & Philip G Schrag, eds., *Refugee Roulette* (New York: NYU Press, 2009) 135 at 146-47; Peter Showler, "Submission to the Standing Committee on Citizenship and Immigration" (29 March 2007), online: Canadian Council for Refugees <http://ccrweb.ca/sites/ccrweb.ca/files/static-files/documents/showler07.pdf>.
[40] IRPA, *supra* note 1, s 163.

of two-member panels, the government created (at least on paper) a new appeal division of the IRB: the RAD.[41] However, in a move that refugee rights groups have long felt amounted to a bait and switch,[42] the government of the day refused to implement that which it appeared to have legislated into existence.[43]

When then Immigration Minister Denis Coderre first announced that the RAD would not be implemented immediately, the decision was characterized as a "delay" for up to a year due to "pressures on the system."[44] The year, however, passed without implementation. Governments since that time appeared content with an appeal process that had been duly legislated by Parliament, but left to wither unimplemented on the desks of successive immigration ministers.

Not surprisingly, refugee rights groups were extremely disappointed with the elimination of the procedural safeguard of two-member panels and the corresponding failure to implement an appeal.[45] Once again, the international community took notice, with the UNHCR calling on Canada to implement the appeal, which it called "a fundamental, necessary part of any refugee status determination process."[46] Even the Parliamentary Committee on Citizenship and Immigration, typically dominated by the government of the day, was frustrated with the failure to implement the RAD and unanimously called on the Minister to either implement it or advise the Committee of an alternative proposal.[47]

There were a number of responses to the government's somewhat bizarre course of (in)action on refugee appeals. Advocacy campaigns were mounted to pressure the government into implementing the RAD and, in 2006, a private Member's bill was introduced to compel its implementation.[48] The bill appeared to have considerable support, but it died on the Order Paper with Parliament's proroguing in 2007. The bill was reintroduced during the next session, and while it was approved by both the House of Commons and the Senate, it too died on the Order Paper with the call of the 2008 election.[49] After the election, the bill was

[41] Bill C-11, *Immigration and Refugee Protection Act*, 37th Parl, 1st Sess, 2001, cl 110-111 & 171 (as passed by the House of Commons 13 June 2001).
[42] Cambell Clark, "Coderre to delay plan for refugee appeal division", in the *Globe and Mail* (29 April 2002) A6.
[43] *Order Fixing June 28, 2002 as the Date of the Coming into Force of Certain Provisions of the Act*, SI/2002-97, (2002) C Gaz II, 1637 (IRPA).
[44] Citizenship and Immigration Canada, "Press Release: Refugee Appeal Division Implementation Delayed" (29 April 2002).
[45] See e.g., Canadian Council for Refugees, "The Refugee Appeal: Is No One Listening?" (31 March 2005), online: <http://ccrweb.ca/sites/ccrweb.ca/files/static-files/refugeeappeal.pdf>; Amnesty International, "Canada: Amnesty International Submission to the UN Universal Periodic Review: Fourth session of the UPR Working Group of the Human Rights Council, February 2009" (8 September 2008) at 5.
[46] Letter from UNHCR Representative in Canada Judith Kumin to Citizenship and Immigration Minister Denis Coderre (9 May 2002), online: Canadian Council for Refugees <http://ccrweb.ca/sites/ccrweb.ca/files/static-files/unhcrRAD.html>.
[47] House of Commons, Standing Committee on Citizenship and Immigration, 38th parl, 1st sess, No 16 (14 December 2004) (motion).
[48] Bill C-280, *An Act to Amend the Immigration and Refugee Protection Act (coming into force of sections 110, 111 and 171)*, 39th Parl, 1st Sess, 2006.
[49] Bill C-280, *An Act to Amend the Immigration and Refugee Protection Act (coming into force of sections 110, 111 and 171)*, 39th Parl, 2nd Sess, 2007.

once again introduced, but, in 2009, it was defeated at third reading by a single vote cast by the Speaker of the House.[50]

"The law hath not been dead, though it hath slept."[51] Those are Shakespeare's words, but they could equally have described the situation of the RAD when, in 2010, the minority Conservative government introduced a wide-ranging set of reforms to Canada's refugee determination system that included the implementation of the appeal.[52] A further round of legislation[53] (passed after the Conservative government obtained a majority in Parliament) maintained the RAD's implementation, but prevented certain classes of refugee claimants from accessing it.[54]

As a result, on 15 December 2012, over a decade after its notional legislative creation, the RAD was formally launched – though with restrictions that were not initially contemplated.

2.2. RAD in the New System

The basic structure of the RAD is more or less the same as was first contemplated. It is a division of the IRB,[55] presided over by Governor in Council appointees,[56] who determine appeals of RPD decisions on matters of both law and fact.[57] As was originally intended, the RAD is meant to serve as a full appeal on the merits. Speaking in the House of Commons, former Minister of Citizenship and Immigration Jason Kenney remarked that

> [T]he bill would [...] create the new refugee appeal division. The vast majority of claimants [...] would for the first time, if rejected at the refugee protection division, have access to a full fact-based appeal at the refugee appeal division of the IRB. This is the first government to have created a full fact-based appeal.[58]

While the RAD is meant to offer a "full fact-based appeal", it is also meant to be part of a dramatically expedited refugee determination system. The broad aims of the government's recent refugee reforms have been to quicken the pace of determination and to rapidly remove unsuccessful refugee claimants.[59] Thus, for example, first-instance refugee hearings before the RPD are now supposed to be conducted within 30-60 days,[60] whereas, under the former regime, a refugee claim could take several years to

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[50] Bill C-291, *An Act to Amend the Immigration and Refugee Protection Act (coming into force of sections 110, 111 and 171)*, 40th Parl, 2nd Sess, 2009.
[51] William Shakespeare, *The Oxford Shakespeare: Measure for Measure*, ed by N W Bawcutt (Oxford: Clarendon Press, 1991) at 126.
[52] BRRA, *supra* note 21.
[53] PCISA, *supra* note 21.
[54] See below, notes 101-106 (and accompanying text).
[55] IRPA, *supra* note 1, s 151.
[56] *Ibid*, s 153(1)(a).
[57] *Ibid*, s 110(1).
[58] House of Commons Debates, 41st Parl, 1st sess, No 90 (6 March 2012) (Jason Kenney).
[59] For a discussion of the broad aims of the reforms, see Jason Kenney, "Address delivered at a news conference in Ottawa following the tabling of Bill C-31, Protecting Canada's Immigration System Act" (16 February 2012), online: <http://www.cic.gc.ca/english/department/media/speeches/2012/2012-02-16.asp>.
[60] *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPA Regs], s 159.9.

schedule.[61] Similarly speedy time lines apply to the RAD. Appellants – who could be either the Minister or eligible claimants – must file a Notice of Appeal within 15 days of receiving the written reasons of the RPD's decision.[62] Then, within 30 days of receiving the decision, appellants must perfect their appeals, including in their written materials any portions of the RPD transcript they intend to rely upon, any evidence that the RPD refused to consider, any eligible new evidence that the RAD should consider and a memorandum of argument outlining the errors that the RPD is alleged to have made.[63]

The appeal process not only has strict time limits but also limitations on the evidence that will be considered. Appellants and respondents may rely on any evidence that was submitted to the RPD. There are, however, severe restrictions on the submission of new evidence by refugee claimants appealing negative RPD decisions. Such appellants may only present evidence that "arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection."[64] Interestingly, the Minister is not subject to similar restrictions.[65]

The evidence and arguments submitted will typically be considered in a paper based process, though oral hearings can be held where the evidence raises a potentially determinative credibility issue that is central to the claim.[66] Upon hearing an appeal – either on paper or in person – the RAD generally has three dispositions available: it may confirm the RPD's decision; it can set aside the RPD decision and substitute its own determination on the merits; or it may refer a matter back to the RPD and order a new hearing, providing whatever directions it considers appropriate.[67]

While RAD applications or decisions are pending, refugee claimants benefit from automatic stays on removal.[68] They also typically benefit from automatic stays pending judicial review of RAD decisions.[69] This means that claimants with access to the RAD will generally not be deported while the oversight process runs its course.

2.3. RAD and JR

Despite the RAD's implementation, judicial review before the Federal Court continues to play an important role in Canada's refugee determination system. For refugee claimants with access to the RAD, judicial review provides an opportunity to challenge RAD decisions.[70] For those barred from the RAD,

[61] For example, in FY2011-12 the average processing time for RPD cases was 20 months. Immigration and Refugee Board, *2011-12 Departmental Performance Report – Part III* (Ottawa: Immigration and Refugee Board of Canada, 2012).
[62] IRPA Regs, *supra* note 60, s 159.91(1)(a).
[63] *Ibid*, s 159.91(1)(b); *Refugee Appeal Division Rules*, SOR/2012-257, rr 2-3.
[64] IRPA, *supra* note 1, s 110(4).
[65] *Ibid*.
[66] See below, note 79 (and accompanying text).
[67] *Ibid*, s 111.1.
[68] *Ibid*, s 49(2)(c). Technically, this provision delays the coming into force of removal orders rather than staying removal orders -- but the effect is the same as a stay.
[69] IRPA Regs, *supra* note 60, s 231. For exceptions, see *Ibid*, s 231(2-4).
[70] Refugee claimants who are eligible to access the RAD must exhaust all recourses at the RAD prior to applying for judicial review. IRPA, *supra* note 1, s 72.

judicial review is the only recourse against unlawful RPD decisions and, potentially, unlawful removal.[71] Nonetheless, judicial review and appeals to the RAD should not be mistaken as equivalent.

The most obvious difference between judicial review and the RAD appeal process is that they are conceptually species of an entirely different order. Judicial review of decisions made by delegated authorities is first and foremost a mechanism designed to supervise the relationship between the legislative, executive and judicial branches of government. To be sure, judicial review implicates the interests of various parties, but more fundamentally it is meant to maintain a division of powers that respects legislative choices while preserving the role of the judiciary in ensuring the legality of executive action. It is for this reason that judicial review generally extends deference to administrative decisions: if its *raison d'etre* is primarily one of democratic placekeeping, its role in reviewing administrative decisions is a limited one, confined to ensuring that legislative intent is not exceeded and the rule of law is respected. This is further reflected in the statutory limits on remedies available in Federal Court judicial review, and on the grounds upon which those remedies can be granted.[72] This also explains the bifurcated standards of review in the current jurisprudence on judicial review of administrative decision-making. According to this jurisprudence, courts should apply a standard of correctness (i.e. decide the matter on a *de novo* basis without showing any deference to the administrative decision-maker) when deciding constitutional or jurisdictional issues, matters related to procedural fairness, or general legal questions of central importance to the legal system that are not within the administrative decision-maker's specialized expertise. [73] In most other areas, including factual findings and legal determinations within the administrative decision-maker's specialized expertise, a more deferential standard of reasonableness applies. Where the reasonableness standard applies, the court will not overturn an administrative decision if it falls within a range of reasonable possible outcomes – even if the court would have decided the case differently had it approached the matter on a *de novo* basis.[74]

Administrative appeal bodies, however, are created under an entirely different set of operating principles. They play no role in the equilibrium of the constitutional order and their powers are more constrained. They are not intended to govern the relationship between the judiciary and specialized tribunals, but exist, rather, to enhance the quality of decision-making emanating from first-instance administrative matters.

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[71] Refugee claimants barred from access to the RAD can apply for judicial review of RPD decisions. (*Ibid*). Other mechanisms to assess risks prior to removal are, under the new system, no longer available to most refugee claimants. See e.g., *Ibid*, s 112.

[72] *Federal Courts Act*, RSC, 1985, c F-7, [*FC Act*] s 18-18.1.

[73] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 18. It should be noted, however, that in some recent Federal Court of Appeal jurisprudence, the court has suggested that deference may be warranted on questions related to a tribunal's choice of procedures, see for example *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at paras 34-42, *Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59 at paras 50-56 and *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at paras 70-73. That said, the jurisprudence of the Supreme Court of Canada remains clear that the standard for determining whether a decision-maker has complied with the duty of procedural fairness continues to be correctness, see *Mission Institution v Khela*, 2014 SCC 24 at para 79.

[74] *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 43-64.

Paying attention to the conceptual differences between internal administrative appeals and judicial review is important because failing to do so renders the former redundant: if appeals amount to little more than a deferential review for compliance with legislative intent and the rule of law, then nothing was gained by the creation of the RAD, aside from a senseless bifurcation of review streams. As the Federal Court noted in a recent case on the RAD's appellate role, the creation of an appellate tribunal is, in itself, an indication that "Parliament sought to achieve something other than that available under judicial review."[75]

There are also procedural differences between the RAD and judicial review that are perhaps born out of the conceptual differences. The first and most obvious difference between the two is that those seeking judicial review must first obtain leave from the Federal Court.[76] There is no direct right of judicial review, and, in determining leave applications, reasons are not required and are seldom provided.[77] The RAD must, in contrast, render substantive decisions with reasons on all appeals properly brought before it.[78]

Another difference is that, while the RAD is mostly a paper-based process, oral hearings may be conducted where there is evidence that raises a serious issue with respect to the refugee claimant's credibility and that is determinative of the merits of the claim.[79] In contrast, given its supervisory nature, the Federal Court does not allow for oral testimony of refugee claimants to assess credibility.[80]

Along similar lines, judicial review is almost always confined to a consideration of the evidence that was before the first-instance decision-maker.[81] The only real exception to this general rule is where an issue of procedural fairness has effectively impeded the production of evidence at the first-instance.[82] As we have noted, however, although the RAD has limited authority to consider new evidence submitted by

[75] *Huruglica v Canada (MCI)*, 2014 FC 799 [*Huruglica*] at para 41. It should be noted that there has been some disagreement at the Federal Court about the proper understanding of the RAD's relationship to the RPD -- and, by implication, the distinction between the RAD and judicial review. For a discussion, see below, notes 99-100 (and accompanying text). It is also worth noting that administrative appeal mechanisms in several jurisdictions are also determined, to varying extents, on the merits, as in the decisions of the New Zealand Immigration and Protection Tribunal (see *IPT* "Practice Note 2/2015 (Refugee and Protection)", online: Ministry of Justice <http://www.justice.govt.nz>); the United States Board of Immigration Appeals on questions of law, discretion and judgment (see *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008)) and the U.K. Immigration and Asylum Chamber (see *Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules* 2014; Gina Clayton, *Immigration and Asylum Law* (UK: Oxford University Press, 2012) at 255).

[76] IRPA, *supra* note 1, s 72.

[77] For an empirical analysis of how the process works in the refugee law context, see Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw" (2012) 38 Queens LJ 1 [Rehaag, "Luck of the Draw"].

[78] IRPA, *supra* note 1, s 111(1) & 169.

[79] *Ibid*, s 110(6).

[80] Indeed neither the *FC Act, supra* note 72, nor the corresponding *Federal Courts Immigration and Refugee Protection Rules* SOR /93-22 provide a mechanism for the taking of oral testimony in the context of its judicial review proceedings. The overarching rule is that an applicant on judicial review can only rely on evidence that was before the decision-maker, see *Ochapowace Indian Band v Canada (AG)*, 2007 FC 920 at para 9 [*Ochapowace*].

[81] *Ibid*. This rule was recently reaffirmed in *Association of Universities and Colleges of Canada and the University of Manitoba v the Canadian Copyright Licensing Agency*, 2012 FCA 22 at paras 17-20.

[82] *Ochapowace*, *supra* note 80 at para 9.

claimants, such evidence can be admitted if it was not reasonably available at the time of the initial hearing – and new evidence by the Minister is not subject to similar limitations.[83]

The dispositions available on judicial review and at the RAD also differ. When the Federal Court quashes an improper refugee determination, its ability to influence the redetermination of the claim on the merits is limited to providing directions to the RPD in hearing the matter afresh.[84] And, while such directions occasionally all but require the board to accept a claim, Federal Court justices, perhaps sensitive to the limitations of their role, rarely provide them. In contrast, as noted above, the RAD has relatively broad remedial powers ranging from upholding the RPD decision to substituting its own decision.[85]

Another important difference relates to stays on removal. Claimants eligible to appeal to RAD generally benefit from automatic stays on removal pending both RAD decisions and judicial reviews of RAD decisions.[86] Claimants who are not eligible to access the RAD, however, are not entitled to automatic stays of removals pending determination of judicial review applications of RPD decisions.[87] This may result not only in removal prior to any oversight of RPD decisions, but also in the mooting out of remedies available at the Federal Court if removal has already taken place.[88] The failure to provide automatic stays also has significant resource implications for the Federal Court, for the Department of Justice and perhaps most significantly for claimants (and legal aid programs), as claimants who are not eligible to appeal to RAD must now go to Federal Court seeking stays on removal under common law principles pending judicial review of their RPD decisions.[89]

In sum, there are several important distinctions between judicial review and the RAD. These differences indicate that the availability of judicial review is not a replacement for a full appeal on the merits at the RAD.

2.4. Overview of First Two Years of New System Results

As discussed above, Canada's new refugee determination process, including the RAD, has been in operation since 15 December 2012.[90] To find out how the new system is working, we made access to information requests to the IRB and reviewed early jurisprudence from the new system.

According to data provided by the IRB,[91] under the first two years of operation in the new system, there were 22,871 first-instance claims referred and 17,082 claims finalized. Of the finalized cases, 10,030 were

[83] See above, notes 64-65 (and accompanying text).
[84] *FC Act, supra* note 72, s 18.1(3)(b).
[85] See above, note 67 (and accompanying text).
[86] IRPA, *supra* note 1, s 49(2)(c). IRPA Regs, *supra* note 60, s 231.
[87] Automatic stays are limited to those appealing RAD decisions. IRPA, *supra* note 1, s 49(2)(c). IRPA Regs, *supra* note 60, s 231.
[88] This possibility was raised in the context of the new statutory scheme, though not resolved, in *Del Pilar Bravo v Canada (MCI)*, 2014 FC 1099. See also, *Rosa v Canada (MCI)*, 2014 FC 1234.
[89] The common law test for stays of removal is set out in *Toth v Canada (MEI)*, 1988 CanLII 1420 (FCA).
[90] See above, notes 52-53.
[91] ATIP A-2013-00193 (23 May 2013), ATIP A-2013-02091 (9 April 2014) & ATIP A-2014-04296 (20 February 2015) [IRB Country Reports]. These requests were for IRB Country Reports (from 2001 to 2014), which are documents setting out yearly statistics on outcomes in all claims (including principal applicants and dependants), broken down by country. For 2013 and 2014, the statistics distinguish between new system cases and legacy cases.

accepted, 5,865 were rejected, and 1,187 were abandoned, withdrawn or otherwise resolved. As can be seen in Table 1, the 63.1% recognition rate[92] under the new system significantly exceeds recent historical averages and reverses a trend of declining recognition rates. While some of the increase is likely due to changes in the countries of origin of claimants,[93] even within particular countries one sees an increase in recognition rates. For example, as indicated in Table 2, the recognition rates increased under the new system in seven of the top ten countries in terms of number of claims finalized. Thus, it would seem that, for the first two years of its operation, the new system was on average more accepting of refugee claims decided on the merits than the old system.

Notwithstanding the increase in recognition rates, there are some troubling patterns in first-instance decisions under the new system. According to data provided by the IRB,[94] consistency in adjudication across decision-makers is a problem. As can be seen in Table 3, under the new system, some decision-makers granted refugee claims in most of the cases they heard, while others denied most cases. Although some recognition rate variation is to be expected due to different countries from which decision-makers hear claims, variations persist even when one compares the recognition rates of particular decision-makers against recognition rates that would be predicted based on weighted country of origin averages for the set of cases decided. Similarly, as Table 4 shows, there are significant differences in recognition rates across decision-makers even when one looks only at cases decided from a single country.[95]

Regarding the RAD, as can be seen in Table 5, there were 1,871 principal applicant RAD appeals finalized in 2013 and 2014. Of these, 1,812 (96.8%), were appeals by refugee claimants of negative first-instance refugee determinations, and only 59 (3.2%) were appeals by the government of positive first-instance refugee determinations. In other words, the new appeal is used almost exclusively by claimants rather than by the government.

Table 5 also lists outcomes for the 1,871 finalized RAD appeals. Many of these appeals were dismissed on procedural grounds (534 cases, 28.5%). Of the 1,337 cases decided on the merits, when the government brought the appeal, the success rate was 75.6%, and when the claimant brought the appeal, the success rate was 26.4%. This last figure is especially notable because the comparable success rate in perfected Federal Court applications for judicial review of negative first-instance refugee decisions under the prior refugee determination system was 7.8%.[96] In other words, in a context where recognition rates at first-instance are significantly above recent historical averages, success rates in appeals of negative first-

[92] Throughout this article, the term "recognition rate" refers to the percentage of claims granted relative to claims decided on the merits (i.e. excluding claims abandoned, withdrawn or otherwise resolved).
[93] See below, section 3.3.6.
[94] ATIP A-2013-01523 (4 April 2014) & ATIP A-2014-04109 (25 February 2015) [IRB RPD/RAD Data]. Electronic data was requested from the IRB's database regarding each RPD and RAD decision from 2003 to 2014, including dates, outcomes, file numbers, country of origin, name of decision-maker, etc. Note that this data covers only principal applicants (i.e. one claim per family, regardless of the number of family members). The data distinguishes between new system and old system decisions.
[95] For further discussion of variations in recognition rates in a prior year, including an analysis of potential explanations for these variations, see Rehaag, "Troubling", *supra* note 13.
[96] This is the average success rate in perfected Federal Court applications for judicial review brought by unsuccessful refugee claimants from 2005 to 2010. See Rehaag, "Luck of the Draw", *supra* note 77 at 51.

instance refugee determinations decided on the merits at the RAD are more than three times as high as success rates at the Federal Court for similar applicants under the old system.

As with the RPD, however, there are reasons to be concerned about consistency in decision-making at the RAD. As can be seen in Table 6, in principal applicant RAD appeals brought by refugee claimants and decided on the merits in 2013 and 2014, some decision-makers frequently granted appeals, whereas others did so far less often. Concerns have also been raised about some of the RAD appointees having previously been outliers in terms of decision-making at the RPD,[97] including one decision-maker, Daniel McSweeney, who had extremely low recognition rates at the RPD for several years (2013: 14 cases, 0%; 2012: 80 cases, 1.3%; 2011: 129 cases, 0%).[98]

In addition to troubling inconsistencies in success rates, there are also concerns about how adjudicators view their roles in terms of the level of deference they show to first-instance decision-makers. Many early RAD decisions adopted – wrongly, in our view – the position that RPD decisions are to be reviewed using the same deferential standard of review analysis used by courts vis-à-vis administrative decisions.[99] These RAD decision-makers defined their function as being confined to reviewing the reasonableness of RPD decisions, with little regard for their own assessment of the merits of the case. While, at the time of writing, the Federal Court of Appeal has not yet considered the appropriate standard of intervention to be used by the RAD, several Federal Court judges have now found that the RAD's early approach ignores the conceptual differences between administrative appeals and judicial review and is, therefore, incorrect.[100]

Despite these concerns, in our view, the first two years of operation of the RAD has been, on balance, promising. In particular, the fact that the average success rate at the RAD in cases brought by refugee claimants and decided on the merits far exceeds the equivalent success rate on judicial review under the old system suggests that the RAD is catching significant numbers of errors in refugee adjudication – mostly in claims initially denied by the RPD – that would likely not have been caught in the Federal Court judicial review process. Thus, access to the RAD appears to be a key means to correct false negative refugee determinations, and to prevent Canada from deporting refugees to face persecution, torture or death. This makes limits on access to the RAD particularly worrisome.

3. The Study: Bars on Access to RAD for First-Instance Appeals on the Merits

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[97] Louise Elliott, "Decisions by Refugee Appeal Division members vary widely" (14 December 2014) CBC News, online: <http://www.cbc.ca/news/politics/decisions-by-refugee-appeal-division-members-vary-widely-1.2867191>.

[98] Yearly data on RPD Member recognition rates from 2006 to 2013 is available online via links in Rehaag, "2013 Statistics", *supra* note 11.

[99] See e.g., *X (Re)*, 2013 CanLII 76473 (CA IRB) at paras 10-29; *X (Re)*, 2013 CanLII 76405 (CA IRB) at paras 26-49.

[100] See for example *Huruglica*, *supra* note 75; *Lyamuremye v Canada (MCI)*, 2014 CF 494; *Alyafi v Canada (MCI)*, 2014 FC 952; *Spasoja v Canada (MCI)*, 2014 FC 913; *Diarra v Canada (MCI)*, 2014 FC 1009; *Akuffo v Canada (MCI)*, 2014 FC 1063; *Ngandu v Canada (MCI)* 2015 FC 423; *Ozedmir v Canada (MCI)*, 2015 FC 621. It should also be noted that while the Federal Court has now consistently found that the RAD is not to engage in a reasonableness analysis, there remains disagreement amongst Federal Court judges as to the standard of review that the court should employ in reviewing the RAD's interpretation of its appellate role. Contrast, for example, the decisions in *Huruglica*, *supra* note 75 at paras 25-34 and *Akuffo*, above at paras 16-26.

3.1. Overview of RAD bars

As noted earlier, under Canada's new refugee determination system some groups of refugee claimants are not eligible to appeal to the RAD. Specifically, six groups are denied access to the appeal: claimants who come to Canada via the United States (US) through an exception to the Canada-US Safe Third Country Agreement (STCA);[101] claimants who come from a designated country of origin (DCO);[102] claimants whose applications for refugee protection have been declared to have no credible basis (NCB) or to be manifestly unfounded claims (MUC);[103] claimants who are designated foreign nationals (DFN) due to their irregular arrival;[104] claimants who abandon or withdraw their applications;[105] and, finally, individuals who were previously recognized in Canada as refugees but who have had their refugee status taken away through cessation or vacation processes.[106]

This article is concerned with the first four groups – that is to say, claimants denied access to the RAD to appeal negative first-instance refugee determinations decided on their merits.[107]

To get a sense of the frequency with which each of these bars on access to the RAD applies, we made an access to information request to the IRB.[108] As can be seen in Table 7, according to the data provided, most claimants in 2013 who were denied access to the RAD to appeal first-instance refugee determinations decided on the merits were covered by a STCA exception (2,253 claims; 23.1% of claims referred). A large number (468 claims; 8.6% of claims finalized) were denied access because they came from a DCO. A much smaller number of claimants were denied access to the RAD bar due to NCB or MUC declarations (120 claims: 2.2 % of claims finalized), while only a handful (43 claims; 0.4% of claims referred) were barred from the RAD because they were DFNs.

The remainder of this article examines each of these four grounds for exclusion from the RAD in more detail.

3.2. Safe Third Country Agreement

As we have just noted, the largest cohort of individuals denied access to the RAD are those who were covered by a STCA exception (2,253 claims in 2013). This is a strikingly high number of claims excluded from what was originally intended to be a comprehensive appeal process. It is also, in our view, entirely arbitrary.

3.2.1. Overview of the STCA

In order to understand how the STCA bar operates, it is important to first have a sense of the contours of the agreement and its general implications for refugee claimants. Canada's immigration scheme has long

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[101] IRPA, *supra* note 1, s 101(1)(e), 102 & 110(2)(d); IRPA Regs, *supra* note 60, s 159.1-159.7.
[102] IRPA, *supra* note 1, s 107(2), 107.1, 109.1 & 110(2)(d.1).
[103] *Ibid*, s 110(2)(c).
[104] *Ibid*, s 20.1 & 110(2)(a).
[105] *Ibid*, s 110(2)(b).
[106] *Ibid*, s 108, 109, 110(2)(e) & 110(2)(f).
[107] We do not mean to suggest that the other RAD bars are unproblematic. In our view, all claimants should have access to the RAD. However, the final two groups raise distinct issues that are better dealt with separately.
[108] ATIP A-2013-02030 (14 May 2014) [IRB RAD Bars].

contemplated barring refugees from protection in Canada if they transited via a safe third country.[109] Canada persuaded the US to enter into an agreement to facilitate such a bar in exchange for increased cooperation on border security shortly after the attacks on the World Trade Center in 2001.[110] This resulted in the STCA in December 2002.[111] The STCA is based on the premise that, as both Canada and the US provide protection for refugees on their territory, refugee claimants are legitimately limited to asserting a claim for refugee status in their first country of arrival.[112] Thus, refugee claimants who enter North America via the US are required to pursue their claims in the US and will, unless subject to an exception, be turned back at a Canadian land border should they attempt to initiate a refugee claim (the inverse is also true).[113] In Canada, the STCA has been operationalized through legislation and regulations that came into effect on 29 December 2004.[114]

The STCA produced a precipitous drop in refugee claims made in Canada. In the first full year following the STCA's implementation, Canada received only 20,786 claims, compared to an average of 35,095 claims per year in the prior 5 years.[115] While the numbers of claims rose somewhat in following years,[116] the STCA's impact on Canada and the US has always been asymmetrical, as far fewer individuals arrive in Canada and continue on to the US to initiate a refugee claim than the inverse.[117]

3.2.2. Exceptions to the Application of STCA

There are several exceptions to the STCA that permit refugee claimants to initiate a claim in Canada after transiting via the US. The first exception is more accurately described as a limitation on the STCA's application, namely that the STCA only applies to those seeking entry into Canada or the US via a land border.[118] Therefore, an individual who has come to Canada from the US, but who initiates their refugee claim at some other port of entry (*e.g.*, airports, ferry terminals) will be permitted into the country to pursue their claim. Similarly, an individual who enters Canada without initiating a refugee claim, but does so later at an inland office, will not be subject to the STCA.

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[109] *An Act to amend the Immigration Act, 1976 and to amend other Acts in consequence thereof*, SC 1988, c 35, s 14. See also, James Hathaway, "Postscript -- Selective Concern: An Overview of Refugee Law in Canada" (1989) 34 McGill LJ 354 at 355-356.

[110] Clark Campbell, "Canada in talks with U.S. on pact dealing with refugees, visitor visas", in the *Globe and Mail* (26 October 2001) A6; Clark Campbell, "Canada reaches border deal with U.S.", in the *Globe and Mail* (1 December 2001) A1.

[111] *Agreement between the Government of Canada and the Government of the United States of America For cooperation in the examination of refugee status claims from nationals of third countries* (5 December 2002), online: <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp> [*STCA*].

[112] *Ibid*, Preamble.

[113] *Ibid*, art 4.1.

[114] IRPA, *supra* note 1, s 101(1)(e); IRPA Regs, *supra* note 60, s 159.

[115] United Nations High Commission for Refugees, *2005 Statistical Yearbook* (Geneva: UNHCR, 2006).

[116] United Nations High Commission for Refugees, *Statistical Online Population Database*, online: <http://www.unhcr.org/pages/4a013eb06.html>.

[117] Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement" (2005) 36 Columbia Human Rights Law Review 365 at 394-5 [Macklin, "STCA"]; Efrat Arbel, "Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement between Canada and the United States" (2013) 25 Int'l J Refugee L 65 at 70-73.

[118] STCA, *supra* note 111, art 4; IRPA Regs, *supra* note 60, s 159.4(1) (see also s 159.4(2) for an exception).

In addition to this general limitation, there are also exceptions to the STCA that apply to those who seek to enter Canada at land ports of entry. One such exception is for those who have an adult family member in Canada.[119] Also excepted from the STCA's application at land ports of entry are unaccompanied minors[120] and those who have a Canadian visitor visa, work or study permit or other prescribed documents.[121] Another exception applicable at land ports of entry is a public interest exception, which currently applies to those who have been charged with or convicted of an offence that could subject them to the death penalty.[122]

As can be seen in Table 8, according to data obtained from CIC,[123] of the 2,253 claimants benefiting from exceptions to the STCA at land ports of entry in 2013, those with anchor family members were by far the most frequent category (2,215 cases, 98.3%). The next most common categories were unaccompanied minors (28 cases, 1.2%) and document holders (8 cases, 0.4%). It would, therefore, be fair to say that claimants with family members in Canada represent the vast majority of land port of entry exceptions to the STCA.

3.2.3. Confusion over the STCA Bar on RAD Appeals

As outlined above, refugee claimants excepted from the STCA are barred from appealing an unsuccessful RPD decision to the RAD.[124] Unfortunately, cumbersome legislative wording leaves some ambiguity as to the scope of the bar's application. Specifically, it is unclear whether the bar applies to all refugee claimants who entered Canada from the US, or merely those who initiated a claim at land ports of entry and are subject to one of the land port of entry exceptions. While a plain reading of the provisions may suggest that the bar applies to all refugee claimants who entered Canada from the US,[125] the RAD has interpreted its jurisdiction to exclude only those found to fall into one of the land port of entry exceptions.[126] We do, however, worry about the possibility of the broader plain textual interpretation, which would significantly expand the application of what is already the most frequently invoked RAD bar – and which does not appear to have been the government's intention.[127]

3.2.4. Problems with the STCA RAD Bar

[119] *Ibid*, s 159.1 & 159.5(a)-(d).
[120] *Ibid*, s 159.5(e).
[121] *Ibid*, s 159.5(f)-(g).
[122] *Ibid*, s 159.6. Previously, this exception also applied to nationals of countries subject to moratoriums on removals. However, this exception has been repealed. See *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2009-210, s 1.
[123] CR-14-0095, OPS-2014-2109 (25 September 2014) [CIC STCA/DFN Data].
[124] See above, note 101.
[125] IRPA, *supra* note 1, s 101(1)(e) & 110(2)(d); IRPA Regs, *supra* note 60, s 159.2, 4 & 5-6.
[126] See e.g., VB4-01273 (6 March 2015) [RAD] at paras 25-43. This interpretation of the RAD's jurisdiction has also been explicitly communicated to potential appellants by the IRB. Immigration and Refugee Board, *Appellant's Guide, v2* (2013), online: <http://www.irb-cisr.gc.ca/Eng/RefApp/pages/RefAppGuide.aspx>.
[127] Julie Béchard and Sandra Elgersma, "Legislative Summary of Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act" (Ottawa: Library of Parliament, 2012) at n10.

The primary justification for curtailing full access to Canada's refugee determination system for those who have entered the country via the US is to discourage so-called "asylum shopping".[128] According to this reasoning, because the US has a functioning refugee determination system, claimants who come to Canada via the US could have – and should have – applied for refugee status in the US rather than in Canada. If they did not make claims in the US, then this means that they did not make their refugee claims at the first available opportunity, thus casting doubts on the bona fides of their claims and suggesting that they are primarily motivated by economic migration rather than by fears of persecution. If, on the other hand, they did make claims in the US and were refused, then in coming to Canada they are essentially seeking a second kick at the can. Either way, according to this logic, Canada can legitimately take measures to discourage such claimants from coming to the country – including through policies that facilitate their rapid removal.

This rationale is problematic in a number of respects.

First, one can question the basic premise of the STCA, namely that both countries are in fact safe for refugees. Such questions can be raised without necessarily making judgments about the refugee determination system in either country. Instead, it is sufficient to note that there are many differences between the two systems, including different procedures[129] and different substantive interpretations of the refugee definition.[130] This inevitably means that at least some claimants who would be recognized in one country would not be recognized in the other, and would therefore be at risk of chain refoulement. From a Canadian perspective, the legislation and regulations implementing the STCA do not include any mechanism to prevent removal from Canada to the US of individuals at land ports of entry who would be recognized as refugees in Canada but not in the US – and who would therefore likely be deported on their return to the US. In other words, through the STCA, Canada risks doing indirectly what it cannot lawfully do directly: returning people who meet Canada's refugee definition to their home countries. Such returns, in our view, breach Canadian constitutional law.[131] To the extent that such returns leave at least some who meet the international refugee definition unable to fully access all the rights to which they are

[128] Jennifer Hyndman & Alison Mountz, "Refuge or Refusal: The Geography of Exclusion" in Derek Gregory and Allan Pred, *Violent geographies: fear, terror, and political violence* (New York: Routledge, 2007) 77 at 81; Macklin, "STCA", *supra* note 117 at 381-2.

[129] Consider, for example, the bar on asylum applications for claimants who have been in the US for over a year -- a procedure that has no equivalent in Canada. Arbel, *supra* note 117 at 73-74. For an empirically based critique of this policy, see P. Schrag, et al, "Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum" (2010) 52 William and Mary Law Review 651.

[130] Consider, for example, that gender-based persecution (especially involving domestic violence) became part of Canada's refugee definition while the matter was still unclear under US law. Macklin, "STCA", *supra* note 117 at 405-407.

[131] *Ibid* (see especially at 424-426). The legality of the STCA has not yet been definitively decided by the courts. The Federal Court found that the STCA violates sections 7 and 15 of the Canadian Charter of Rights and Freedoms. *Canadian Council for Refugees v Canada*, 2007 FC 1262. However, the Federal Court of Appeal overturned that decision on procedural grounds without addressing the underlying constitutional law questions, and the matter has not yet returned before the courts. *Canadian Council for Refugees v Canada*, 2008 FCA 229.

entitled,[132] they also leave Canada in violation of international law.[133] As such, the STCA RAD bar is premised on a procedure the lawfulness of which remains contested.

Second, setting aside objections to the STCA itself and assuming that everyone who would receive refugee protection in Canada would receive equivalent protection in the US, the notion that claimants transiting to Canada via the US should have applied for refugee protection in the US rather than Canada is problematic. Under international law, asylum seekers are under no obligation to make refugee claims in the first available country.[134] Moreover, claimants may have any number of good reasons for wanting to have their claims heard in Canada rather than the US (or vice versa). Indeed, the STCA exceptions themselves recognize that there are circumstances in which it would be appropriate to allow claimants to make claims in one country after transiting through the other.[135] This is especially evident if one considers that the STCA exception invoked by the vast majority of claims at land ports of entry relates to family members in Canada. Family reunification has long been recognized as a prime – and legitimate – driver of refugees' choices with respect to their countries of destination.[136] What is more, family reunification is not only the rationale underlying the STCA family member exception itself. It is also codified as a fundamental objective of Canada's immigration legislation [137] and as a basic human right under international law.[138] In this context, there is no reason to infer anything untoward from a claimant's decision to avail himself or herself of an exception to the STCA, especially of the most commonly invoked exception.[139]

Third, refugee protection is a forward-looking exercise.[140] Even if one takes the position that claimants transiting to Canada via the US should have made their claims in the US rather than Canada, once they are in Canada the determination of their claim involves a prospective assessment as to whether they have a well-founded fear of persecution at the time of the determination.[141] It is worth emphasizing here that, in the event of removal from Canada after an unsuccessful refugee claim by a claimant who benefited from a STCA exception, deportation will not be back to the US. Rather, it will be to the refugee claimant's

[132] For an argument to this effect, see e.g., Efrat Arbel & Alletta Brenner, *Bordering on Failure: Canada-US Border Policy and the Politics of Refugee Exclusion* (Boston: Harvard Immigration and Refugee Law Clinical Program, 2013).
[133] Hathway & Foster, *supra* note 18, at 30-49.
[134] *Ibid* at 30.
[135] *STCA, supra* note 111, at art 4.2.
[136] For a discussion of the importance of family reunification in the refugee context, see United Nations High Commissioner for Refugee, "Protecting the Family: Challenges in Implementing Policy in the Resettlement Context" (2001), online: <http://www.refworld.org/pdfid/4ae9aca12.pdf>.
[137] IRPA, *supra* note 1, s 3(1)(d).
[138] *Universal Declaration of Human Rights,* 10 December 1948, GA Res 217A, UN GAOR 3d Sess, UN Doc A/810, art 16(3); *International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 171, arts 17 & 23. See also, James Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005) [Hathaway, *Rights*] at 533-560.
[139] This has been noted in the jurisprudence numerous times. See e.g., *Alekozai v Canada (MCI)*, 2015 FC 158 [*Alekozai*] at para 12; *Gopalarasa v Canada (MCI)*, 2014 FC 1138.
[140] See above, note 2.
[141] *Mileva v Canada (MEI)*, [1991] 3 FC 398 (CA) at 404.

country of origin.[142] In other words, even if the US was at one point a safe country for a claimant, at the time of a refugee hearing for a claimant who has been admitted to Canada through a STCA exception, the US is no longer accessible.[143] Transit through the US is therefore, by and large, irrelevant to the forward-looking refugee determination.[144]

Fourth, there is no empirical evidence suggesting that refugee claims made by those availing themselves of an exception to the STCA are more likely to lack merit than are other claims. In fact, the opposite appears to be the case. While we are not aware of any statistics on recognition rates for those who entered Canada under an exception to the STCA, we were able to obtain data about the countries of origin of all such claimants.[145] Using this data, Table 9 lists the top ten source countries for claimants benefiting from a STCA exception in 2013, as well as the average recognition rates in all claims decided by the RPD under the new system in 2013 for those countries. As can be seen, several of the top ten countries, including Syria, Afghanistan, Pakistan, and Eritrea, have poor human rights records and high recognition rates. Table 10 also sets out the weighted country of origin average recognition rates for all claimants who entered Canada via a STCA exception in 2013 (66.3%), which is higher than the 60.4% overall recognition rate for new system claims in the same year.

With all of this in mind, it is difficult to conceive of a justification for the STCA RAD bar that is about anything more than a simple numbers game – a mechanism designed to limit the impact of the STCA exceptions and reduce the number of refugee claimants in Canada, irrespective of whether those claims are well-founded. One can see this motivation at play in an internal CIC document on the RAD bars:

> The STCA [...] exception[s] [are] quite broad and this has reduced the effectiveness of the agreement. While exceptions agreed with the U.S. remain, we propose no access to the RAD for those who were eligible to make a refugee claim based on the application of one of these exceptions. Such individuals could have made asylum claims in the United States. This won't affect the Agreement itself, but will allow us to streamline these individuals coming from the United States more quickly.[146]

In our view, then, if there is, as a general matter, merit in having an appeal mechanism to ensure the correctness of refugee decisions with life and death consequences, then there is equal merit in extending this appeal to those who have initiated refugee claims in Canada after transiting via the US. The lack of justification for the RAD STCA bar, combined with its application to a large number of claimants (most of

[142] Under Article 5 of the STCA, if a person removed from Canada to the United States makes a refugee claim in the US, they will be returned to Canada. Thus Canada removes unsuccessful refugee claimants who came to the country via the US directly to their countries of origin rather than to the US.

[143] If a claimant went back to a land port of entry and sought admission to the US for the purposes of making a refugee claim, they would be turned back in accordance with the terms of the STCA.

[144] A failure to initiate a claim in a safe third country may provide a basis on which to question refugee claimants about their subjective fear of persecution. See e.g., *Toma v Canada (MCI)*, 2014 FC 121. However, the jurisprudence is clear that a failure to claim elsewhere is not, in and of itself, determinative of a claim to refugee protection. See e.g., *Valencia Pena v. Canada (MCI)*, 2011 FC 326 at para 4; *Alekozoi*, *supra* note 139 at para 12.

[145] CIC STCA/DFN Data, *supra* note 123 & IRB RPD/RAD Data, *supra* note 94.

[146] Citizenship and Immigration Canada, *Questions and Answers related to changes to the Refugee System*, on file with the authors [emphasis added].

whom are simply exercising their right to family reunification), makes it imperative, in our view, to reconsider this bar.

3.3. Designated Countries of Origin

3.3.1. DCOs: The DCO Regime

The next-largest group of refugee claimants who are most frequently barred from accessing the RAD are those who come from a DCO.[147]

According to CIC, the purpose of the DCO regime is "to deter abuse of the refugee determination process by people who come from countries generally considered safe."[148] To this end, the Minister of Citizenship and Immigration may designate countries as safe,[149] which results in claimants from those countries being denied access to the RAD.[150] In addition, claimants who come from DCOs face other restrictions, including: expedited refugee hearing timelines,[151] no automatic stays of removal pending judicial review,[152] delayed access to pre-removal risk assessments,[153] delayed access to work permits,[154] and – at least until this was recently overturned by the courts on constitutional grounds[155] – limits on access to publicly funded health care.[156]

3.3.2. DCOs: Designation Process

There are two scenarios where the Minister may designate countries: one based on quantitative criteria, and the other based on qualitative criteria.

The first scenario allowing for designation is where outcomes in refugee claims from a country meet quantitative criteria established through legislation (which sets out quantitative formulas to be applied)[157] and Ministerial orders (which assign values to variables in the legislative formulas).[158] Under the current Ministerial orders, the quantitative criteria apply where, during any 12-month period in the prior 3 years, the RPD finalized at least 30 refugee claims from a country. Where a country meets this threshold, the

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[147] See above, note 108 (and accompanying text).
[148] Citizenship and Immigration Canada, "Designated Countries of Origin" (updated 10 October 2014), online: <http://www.cic.gc.ca/english/refugees/reform-safe.asp>.
[149] The term "safe" does not appear in the legislation or regulations. However, the process is often described as a safe country of origin mechanism, and we therefore employ this terminology in this article. For a similar approach, see Audrey Macklin, "A safe country to emulate? Canada and the European refugee" in Hélène Lambert et al (eds), *The Global Reach of European Refugee Law* (Cambridge: Cambridge University Press, 2013) 99 [Macklin, "Safe Country"] at 101.
[150] IRPA, *supra* note 1, s 107(2), 107.1, 109.1 & 110(2)(d.1).
[151] *Ibid*, s 111.1(2); IRPA Regs, *supra* note 60, s 159.9.
[152] See above, notes 86-87 (and accompanying text).
[153] IRPA, *supra* note 1, s 112(2)(b.1) & (c).
[154] IRPA Regs, *supra* note 60, s 206(2).
[155] *Canadian Doctors For Refugee Care v Canada (AG)*, 2014 FC 651 [*Canadian Doctors*].
[156] *Order Respecting the Interim Federal Health Program*, OC 2012/433, as amended by OC 2012/945.
[157] IRPA, *supra* note 1, s 109.1(2)(a).
[158] *Order Establishing Quantitative Thresholds for the Designation of Countries of Origin*, C Gaz vol 146 no 50 (December 15, 2012).

country can only be designated if, during at least one of the 12-month periods with 30 claims finalized, the rejection rate (i.e. the sum of rejected, withdrawn and abandoned claims, as a proportion of finalized claims) is at least 75% or the abandon/withdraw rate (i.e. the sum of withdrawn and abandoned claims, as a proportion of finalized claims) is at least 60%. The legislation and Ministerial orders do not require the Minister to consider qualitative criteria if these quantitative criteria are met.

The second scenario allowing for designation is if the quantitative criteria are not applicable because the country does not meet the minimum threshold of 30 claims finalized in any 12-month period in the past 3 years. In these circumstances, the Minister may designate a country where, in the Minister's view, three qualitative criteria are met: (1) the country has an independent judicial system; (2) basic democratic rights and freedoms are recognized in the country and there must be procedures available to seek redress for infringements of those rights and freedoms; and (3) there are civil society organizations in the country.[159]

It should be emphasized that designation does not occur automatically for countries that meet the quantitative or qualitative criteria. Rather, countries that meet the criteria are eligible for designation at the Minister's discretion.[160] There is no guidance in the legislation or in the Ministerial orders regarding how the Minister should exercise that discretion.

There are also no provisions in the legislation or in the Ministerial orders addressing de-designation, nor is there a requirement for ongoing or periodic reconsideration of designation. It would therefore seem that, once a country has been designated, it can continue to be designated even if the quantitative or qualitative criteria that originally allowed for designation no longer hold.

3.3.3. DCOs: Quantitative Criteria

There are, in our view, at least six serious problems with the quantitative criteria that allow for designation.

The first problem is that, while the quantitative formulas for designation are established in legislation, because the Minister sets the values used in the formulas (including the threshold number of claims and the applicable rates), and can change those values at any time, the quantitative criteria are entirely discretionary: the Minister can, by manipulating these values, effectively make any country vulnerable to designation.

The second problem relates to complications in applying the legislative formulas. For example, how should outcomes in refugee claims be counted when claimants are nationals of multiple countries or when the claimant's country of origin is contested? Similarly, how are outcomes recorded when RPD decisions are overturned at the RAD or the Federal Court (and what should be done pending appeal or judicial review)? Or what if a claim is granted, but several years later the claimant's refugee status is vacated due to fraud? These questions could go on and on. Neither the legislation nor the Ministerial orders provide any guidance as to how to answer them.

[159] IRPA, *supra* note 1 s 109.1(2)(b).
[160] The legislation indicates that if the criteria are met, the "Minister *may* [...] designate a country". *Ibid*., s 109.1 (emphasis added).

A third problem with the quantitative criteria is that there is a basic mistake in the legislative formulas: the rejection rate and the abandonment/withdrawal rates (both of which include abandoned and withdrawn claims) are calculated with reference to claims finalized within a 12-month period, without taking into consideration the number of claims pending at the end of that period. This is a departure from reporting practices at the United Nations High Commission for Refugees, which, for reasons that will shortly become clear, report "recognition rates" as the proportion of positive cases relative to cases decided on their merits (i.e. excluding withdrawn and abandoned cases), and which then also separately report the number of claims abandoned or withdrawn.[161]

An analogy may help to show why including abandoned and withdrawn claims in the rates, while simultaneously failing to consider pending claims, is misleading. Suppose that there is a footrace with 100 participants. It takes most runners approximately 1 hour to run the race. By the 30 minute mark, 10 runners have withdrawn from the race and no runners have yet completed the race. At the 30 minute mark, what proportion of the runners have dropped out of the race? The answer should be 10% (10 dropouts out of 100 runners). But that is not how the legislative formulas for designation work. Instead, the formulas are based on claims finalized, or, in our analogy, runners for whom a result is known (i.e. either they dropped out or they completed the race). According to this formula, the dropout rate would be 100% at the 30 minute mark (10 dropouts out of 10 runners for whom a result is known). Obviously, this formula does not provide any meaningful information (i.e. what could the 100% dropout rate possibly mean?), which is why the formula should be viewed as misleading.

Table 10 demonstrates how this can produce misleading results in the legislative formulas. The table summarizes data obtained from the IRB about refugee claims from Hungary in 2009.[162]

At first glance, the table may seem to indicate that claims from Hungary in 2009 were not well-founded, especially given the high rejection rate (98.9% – or (5 + 259) / 267) and abandon/withdraw rate (97.0% – or 259 / 267). Not only could Hungary be designated as a safe country of origin on the basis of these rates, but former Minister Jason Kenney relied heavily on these very figures to argue that the prior refugee determination was vulnerable to abuse and in need of reforms along the lines of the DCO regime. For example:

> [Hungary] has become our number one source country for asylum claims. [In 2009] 97% [...] abandon[ed] or withdr[e]w their claims after they [were] filed saying by their own admission that they actually do not need Canada's protection. [...] Of the 3% of claims that went on to adjudication at the IRB, three, not 3%, but three of the 2,500 asylum claims from Hungary were accepted as being in need of protection. That is an acceptance rate of nearly 0%.[163]

[161] See e.g., United Nations High Commissioner for Refugees, *UNHCR Statistical Yearbook 2013* (2015), online: <http://www.unhcr.org/54cf9bd69.html>.
[162] IRB Country Reports, *supra* note 91.
[163] House of Commons Debates, 40th Parl, 3d Sess, No 36 (29 April 2010) at 1110. See also House of Commons Debates, 40th Parl, 3d Sess, No 63 (15 June 2010) at 1515.

However, the rejection rates and abandonment rates cited by the Minister, which are similar to those used in the legislative formulas, are misleading. If one takes a closer look at the figures, one sees that what was really going on during this period was that the RPD scheduled few hearings for Hungarian claims. Despite the large numbers of Hungarian claims under consideration in 2009, only 8 hearings on the merits were scheduled. Meanwhile, the number of abandoned and withdrawn cases was modest compared to the number of claims under consideration (9.6% – or 259 / (272 + 2,440)). The vast majority of claims under consideration were simply pending by the end of 2009 (89.7% – or 2,434 / (272 + 2,440)). Thus, to use our footrace analogy, the Minister's loud protestations about unfounded Hungarian claims in 2009 are the equivalent of a sportscaster excitedly castigating the participants in a footrace for a meaningless 100% dropout rate 30 minutes into the race, long before most participants (the vast majority of whom were still running) had the chance to cross the finish line. The same can be said about the quantitative criteria for designation: the legislative formulas do not necessarily tell us anything about whether claims for a given country are likely to be well-founded.

A fourth problem with the quantitative criteria relates to the content of the variables defined in the Ministerial orders, especially the threshold of 30 claims in any 12-month period. Another analogy may help to demonstrate the problem with this threshold. Imagine that a newspaper wants to predict the outcome of a referendum with a binary (i.e. yes/no) question that requires a bare majority to pass (for the sake of simplicity, we'll assume a 100% voter turnout). To make this prediction, the newspaper hires a pollster. The pollster conducts a random poll of 50 voters, of whom 20 intend to vote yes and 30 intend to vote no. Based on this poll, what prediction should the newspaper make? At first glance, the newspaper might be tempted to report that there is little chance that the referendum will pass, as only 40% of voters polled plan on voting yes. However, a newspaper would normally also report the margin of error for the poll. To calculate the margin of error, pollsters typically use the following formula:

$$z^* \sqrt{\frac{\hat{p}(1-\hat{p})}{n}}$$

where $\hat{p}$ is the sample proportion, n is the sample size, and z^* is the z-value for the desired confidence level

For this poll, this works out to: 40.0% +/- 13.6% (at the 95% confidence level). Another way of saying this is that, based on the sample size and the responses to the poll, the newspaper can only be confident that the actual percentage of voters planning on voting yes in the referendum is somewhere between 26.4% and 53.6%, 19 times out of 20. Thus, in our hypothetical example, because the percentage needed for the referendum to pass (50% + 1) is within the margin of error of the poll (at the 95% confidence level), the poll is inconclusive.

Now, with this example in mind, let's return to the formulas allowing designation. Let's suppose that a country barely meets the criteria for designation due to the rejection rate – that is to say, in one 12-month period with only 30 claims finalized, the rejection rate was 75%. Next, let's suppose that we wanted to know, based on this rate, how likely it is that any given claim from that country will be unfounded. While we might be tempted to use a similar type of calculation to work out the margin of error that would be used in the polling context, we cannot do so because many of the assumptions that underlie such calculations are not applicable in this context. First, the rejection rate counts all claims, not just principal applicant claims. Thus, for example, a family of four whose claims are rejected in one single decision counts as four rejections, not as one rejection – and there are some refugee decisions that involve 20 or

more extended family members. In other words, the actual sample size, in terms of independent decisions, is likely smaller than 30 claims, which is already a very small sample. Second, claims from a country are not randomly selected. Instead, claimants self-select, and we have no idea whether claimants who come to the country in a given 12-month period are representative of the total pool of potential claimants from that country. Third, if the country meets the rejection rate in any 12-month period with 30 claims finalized in the past 3 years (for example 7 February 2013 to 6 February 2014), the country can be designated, even if in all other 12-month periods in the past 3 years the rejection rate is lower than the one set out in the criteria. In other words, the government can select outlier samples. This means that a 95% confidence level (i.e. 19 times out of 20) is insufficient, but if we significantly increase the confidence level while keeping the very small sample size, the margin of error becomes extremely large. Fourth, what we would be trying to infer from the 75% rejection rate is not how likely it is that past or current claims from the country are unfounded, but how likely it is that claims from the country in the indefinite future will be unfounded – knowing full well that conditions can change dramatically over time. Because of these considerations, it is very difficult (if not impossible) to determine a reasonable margin of error or to draw meaningful inferences based on a single (potentially outlier) rejection rate or abandon/withdrawal rate in 30 decisions in a 12-month period in the previous three years.

These are not merely theoretical points. To the contrary, they have affected which countries could be designated under the quantitative criteria over the past several years. Table 11 sets out yearly statistics on refugee claim acceptance rates for selected countries from 2003 to 2012. As is evident in the tables, there can be a great deal of variation in rates for a country over time due to the factors outlined above. For example the rejection rate for Morocco was 86.2% in 2003 and 44.3% in 2004, and the rejection rate for Georgia went from 26.7% in 2008 to 60.7% in 2009. Similarly the abandon/withdrawal rate for Jordan varied widely, going from 6.9% in 2006 to 62.3% in 2008 and to 13.3% in 2010. Thus, a country that meets the DCO quantitative criteria in one year may have much higher recognition rates in subsequent years, which suggests that qualifying for designation under the quantitative criteria is not a reliable indicator that claims in subsequent years are unlikely to be well-founded. It should, moreover, be recalled that the Minister is not required to use calendar years as the basis for calculating the rates for the relevant 12-month period, whereas the data we used to construct these tables relied on yearly data. Because the Minister is able to select any 12-month period in the prior 3 years where 30 or more claims were finalized, the variability in rates is no doubt more pronounced than the calendar year data in the tables suggest (in other words, the likelihood of at least one outlier rate increases as the number of samples increases). And it should also be recalled that once a country is designated, there is no process in the legislation or Ministerial orders requiring ongoing or period review – meaning that a country could in principle continue to be designated for decades based on a single outlier 12-month period.

Beyond just the issue of variability, Table 11 also indicates that some countries with especially egregious human rights records could qualify for designation under the quantitative criteria if the DCO regime had applied during the 2003-2012 period. Perhaps the most extreme example is North Korea. In 2008, North Korea would have met the quantitative criteria for designation, even though from 2006 to 2012 the vast majority (91.9%) of North Korean refugee claims decided on the merits resulted in grants of refugee protection. The fact that North Korea could be designated as “safe” by virtue of the quantitative criteria

is, in our view, perhaps the clearest evidence available showing that the quantitative criteria are problematic.

A fifth problem with the quantitative criteria relates to potential disconnects between refugee claim outcomes for a country as a whole and for subsets of claimants from that country. The problem is this: a country may be relatively safe for most refugee claimants, thus potentially leading to high rejection rates overall, while at the same time being unsafe for particular subsets of claimants, thus leading to higher recognition rates for that particular subset of claimants. Such a country may qualify for designation under the quantitative DCO criteria because the quantitative criteria apply to countries as a whole. This can occur even if the subset of claimants in question have outcome rates that would preclude designation if the quantitative criteria were calculated based only on the subset of claimants and not on all claims from the country.

This problem can be seen by considering two subsets of claimants: gender and sexual orientation based claimants. An earlier empirical study found that, from 2004 to 2008, gender and sexual orientation based claims are more likely to succeed than other types of claims made by claimants from the same country.[164] Tables 12 and 13 set out figures from the new system from 2013 and 2014, using data similar to that used the earlier empirical study.[165] According to data provided by the IRB,[166] in many countries – including countries with low overall recognition rates – claims categorized by the IRB as involving gender/age or sexual orientation were much more likely to succeed than other claims from the same countries. For example, claims involving gender or age based persecution from India were much more likely to succeed than claims based on other claim types (45.2% versus 14.6%). Similarly, claims from Jamaica involving sexual orientation succeeded much more frequently than other types of claims (70.3% versus 25.3%). Table 13 also indicates that claims involving either gender/age or sexual orientation were more likely to succeed under the new system in 2013 and 2014 than would be expected based on country of origin averages. It seems clear from these tables that low overall recognition rates for a country do not necessarily mean that sexual orientation or gender/age based claims made from these countries are likely to be unfounded. No doubt one could make similar points about other subsets of claimants who may have well-founded claims despite coming from countries with lower than average recognition rates.

A sixth problem we see with the quantitative criteria is that they involve stereotypes about refugee claimants. The quantitative criteria implicitly interpret unsuccessful or abandoned/withdrawn refugee claims as evidence of abuse of the refugee determination system by claimants who were in fact safe. This reasoning – and the oft-repeated language of "bogus" refugee claimants "abusing Canada's generosity" that accompanies it[167] – is deeply flawed. There are any number of reasons why claimants might abandon claims (for example, because they have another means to acquire permanent status in Canada) that are entirely unrelated to the merits of their refugee applications. Moreover, many claims are denied on the merits not because claimants are safe, but rather because the genuine harms they fear are not recognized

[164] Sean Rehaag, "Do Women Refugee Judges Really Make a Difference? An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determinations" (2011) 23 CJWL 627 at 643.
[165] For a discussion of the methodology used and the limitations of this methodology, see *Ibid* at 637 to 640.
[166] IRB RPD/RAD Data, *supra* note 94.
[167] See e.g., Citizenship and Immigration Canada, "Speaking notes for the Honourable Jason Kenney" (29 June 2012), online: <http://www.cic.gc.ca/english/department/media/speeches/2012/2012-06-29.asp>.

under the technical and narrow refugee definition. Castigating all such claimants as fraudsters seeking to abuse the refugee determination system – and depriving all claimants from particular countries of procedural rights due to the frequency of such alleged fraud among their co-nationals – is unfair and perpetuates negative stereotypes about vulnerable groups.[168]

In sum, the quantitative criteria do not amount to reliable indicators that countries are safe or that errors in first-instance refugee adjudication from those countries are likely to be rare or inconsequential. Indeed, because of problems with the quantitative criteria, countries that are clearly unsafe and countries that are unsafe for particular groups are vulnerable to designation, with potentially devastating consequences for claimants from those countries whose refugee claims are denied in error.

3.3.4. DCOs: Qualitative Criteria

While we are of the view that the quantitative criteria for designation are particularly problematic, we also have concerns about the qualitative criteria. As noted earlier, the qualitative criteria for designation apply only to countries for which there is no 12-month period in the past three years during which at least 30 claims from the country were finalized. In such circumstances, countries can be designated "if the Minister is of the opinion that in the country in question (i) there is an independent judicial system, (ii) basic democratic rights and freedoms are recognized and mechanisms for redress are available if those rights or freedoms are infringed, and (iii) civil society organizations exist."[169]

In our view, there are at least three problems with the qualitative criteria.

First, the criteria invite politicization of the refugee determination process by placing the decision-making powers solely in the hands of the Minister. In the DCO regime, the question of whether countries meet the three criteria is left to the Minister's opinion. In forming that opinion, the Minister will necessarily be making assessments about conditions in other countries – and these assessments can have significant political and foreign policy ramifications. What if, for example, Canada is in the midst of delicate negotiations surrounding a trade agreement with a particular country? Or what if the political party in power will be courting a specific demographic community in an upcoming election? Or how might a Minister's opinion be affected if the governing political party is seeking to shore up its credentials in terms of taking tough measures against asylum seekers? It is precisely in order to ensure that these sorts of political considerations do not enter into refugee decision-making that the IRB was created as an independent quasi-judicial administrative tribunal. To limit the problem of politicization, a better arrangement would have been to have an independent body made up of experts in refugee issues and human rights assess whether qualitative criteria are met.

Second, the qualitative criteria are too vague. This would not be as much of a problem if the criteria were simply factors aimed at guiding Ministerial discretion. Instead, however, they are framed as conditions precedent. As a result, the Minister must make binary assessments of matters that, because they are vague, inevitably involve questions of degrees. For example, in many circumstances it will not be possible to give a meaningful yes/no answer to the question of whether a particular country recognizes basic

[168] Federal Court Justice Mactavish offers an especially compelling analysis of this problem in *Canadian Doctors*, *supra* note 155 at paras 810-848.
[169] IRPA, *supra* note 1 at s 109.1(2)(b).

democratic rights and freedoms and provides mechanisms for redress if these are infringed. How would one answer such a question if it were posed about Canada during a period where, say, same-sex sex was a criminal offence, or when marriage could only take heterosexual forms? Or, what if one were asked about whether Canada currently provides a mechanism for redress for violations of indigenous rights or for the disproportionate number of murdered or missing indigenous women in Canada? A binary yes/no answer to these sorts of questions is, in our view, overly simplistic, and yet making such simplistic assessments is what the qualitative criteria require the Minister to do.

Third, the qualitative criteria are surprisingly unconnected to the refugee definition. For example, the existence of civil society organizations is mostly irrelevant in the refugee determination process. Both case law and doctrine have established that the ability of non-state actors to protect claimants against persecution is not a consideration, and that, instead, decision-makers must focus solely on whether the state offers protection against persecution.[170] Indeed, if anything, the existence of civil society organizations can bolster a refugee claim, such as where organizations emerge in response to ongoing human rights violations.[171] Similarly, the refugee definition looks at whether claimants face a risk of persecution, not at whether a country recognizes human rights or whether there are mechanisms for redress. Because of these disconnects between the qualitative criteria and the refugee definition, the qualitative criteria do not tell us much about whether a country is likely to generate well-founded refugee claims.

For these reasons, in our view, the qualitative criteria are problematic, and do not ensure that only safe countries are amenable to designation.

3.3.5. DCOs: Ministerial Discretion

As noted earlier, countries are not automatically designated when they meet the qualitative or quantitative criteria. Rather, meeting the criteria merely allows the Minister to decide whether or not to designate the country. The Minister therefore has a great deal of discretion with respect to designation, and both the legislation and the Ministerial orders are silent regarding how the Minister should exercise that discretion.

According to a government website, the current practice (which could be changed at any time at the Minister's discretion) is that countries meeting the quantitative or qualitative criteria are reviewed based on the following factors:

> democratic governance; protection of right to liberty and security of the person; freedom of opinion and expression; freedom of religion and association; freedom from discrimination and protection of rights for groups at risk protection from non-state actors (which could include measures such as state protection from human trafficking); access to impartial investigations; access to an independent judiciary system; and access to redress (which could include constitutional and legal provisions).[172]

[170] See *Doreitha Codogan v Canada (MCI),* 2006 FC 739 at para 24; Hathaway & Foster, *supra* note 18 at 289-292.
[171] Macklin, "Safe Country", *supra* note 149 at 124.
[172] Citizenship and Immigration Canada, "Backgrounder — Designated Countries of Origin" (2 January 2013), online: <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-11-30.asp>.

This review results in a recommendation as to whether to designate the country, but the final decision on designation rests with the Minister.[173]

Some might suggest that the existence of ministerial discretion – particularly where that discretion is exercised in accordance with the above criteria – can correct the kinds of defects in the quantitative and qualitative criteria that we identified in the prior two sections. According to such an argument, even if the quantitative and qualitative criteria allow for designation of countries that are not safe, the Minister will only designate countries that are in fact safe. In our view, this rationale is flawed for at least two reasons.

First, as with our discussion of the qualitative criteria, we think that relying on Ministerial discretion risks politicizing the refugee determination process. Because the assessment of the factors set out on the government's website is ultimately left to the Minister – rather than to an independent body of refugee lawyers and human rights experts – there is a real danger that assessments will be distorted by the same types of political factors that we raised regarding the qualitative criteria. This problem of politicization is exacerbated by the lack of transparency in decision-making. The government does not release assessments or the evidence used in the assessments, and has not located the list of factors in legislation or regulations. Instead, the government has left it to the Minister to articulate factors, which can be changed at any time without seeking any kind of parliamentary approval.

Second, as we will now see, in the first year of operation of the DCO regime, the Minister did, in fact, designate countries that are unsafe.

3.3.6. DCOs: First Two Years of Operation

In the DCO regime's first two years of operation, 42 countries were designated, 19 through the quantitative criteria[174] and 23 through the qualitative criteria.[175] As can be seen in tables 14 and 15, according to data provided by the IRB,[176] while the number of countries designated through the quantitative and qualitative criteria are similar, far more claimants are affected by designation under the quantitative criteria. Of the 2,084 refugee claims referred to the RPD under the new system in 2013-14 who came from DCOs, 1,977 (94.9%) came from countries designated by virtue of the quantitative criteria. This is troubling in light of the problems raised above regarding the quantitative criteria.

It should also be noted that, in the first two years of the DCO regime's operation, relatively few claimants appear to be directly impacted by the DCO provisions. Only 9.1% of the 22,871 claims referred under the new system in 2013-14 were from DCO countries. That having been said, the mix of countries of origin

[173] *Ibid*. See also, IRPA, *supra* note 1, s 109.1.

[174] Croatia, Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, the Slovak Republic, Spain, the United Kingdom, and the US were designated on 15 December 2012, Israel and Mexico were designed on 15 February 2013, Chile and South Korea were designated on 31 May 2013, and Romania was designated on 10 October 2014.

[175] Austria, Belgium, Cyprus, Denmark, Estonia, Finland, Greece, Ireland, Luxembourg, Malta, Netherlands, Slovenia, and Sweden were designated on 15 December 2012, Australia, Iceland, Japan, New Zealand, Norway and Switzerland were designated on 15 February 2013, and Andorra, Liechtenstein, Monaco and San Marino were designated on 10 October 2014.

[176] IRB Country Reports, *supra* note 91. Figures are based on all claims referred from countries that were designated as of 31 December 2014, irrespective of whether the countries were designated at the time the particular claims from those countries were referred or finalized.

under the new system differs significantly from the long term historical averages. Under the old refugee determination system (in place from 2003 to 2012), of the 265,728 refugee claims referred, 75,509 (28.4%) came from countries designated during the first two years of the DCO regime.

Tables 14 and 15 also indicate that at least some of the designated countries are not safe, in the sense that some generate significant numbers of recognized refugees. From 2003 to 2012, 10,150 individuals obtained refugee protection in Canada from countries that were designated during the first two year of operation of the DCO regime. In 2013-14, under the new refugee determination system, 337 more claimants from these countries obtained refugee protection.

Most of the recognized refugees from DCO countries came from a handful of countries. In fact, 94.6% of the recognized refugees from these countries from 2003 to 2012 came from Mexico (6,653), Hungary (1,022), Israel (657), Romania (479), Czech Republic (281), South Korea (265) and Poland (242) – and 75.6% came from Mexico and Hungary alone. Under the new system, in 2013-14, 95.8% of all the recognized refugees from DCOs came from a small number of countries: Slovak Republic (126), Hungary (110), Mexico (29), Romania (19), Croatia (18), Czech Republic (11) and Israel (10). Recognition rates for some DCO countries were quite high, both from 2002 to 2012 (*e.g.* Romania: 47.9%; Lithuania: 44.3%; Latvia: 44.3%; Estonia: 43.6%) and in 2013-14 (e.g. Slovak Republic: 66.3%; Romania: 63.3%; Hungary: 59.5%; Israel: 33.3%; Mexico: 29.6%; South Korea: 28.6%). In our view, it is simply not reasonable to call countries "safe" if they have, in recent years, produced hundreds if not thousands of recognized refugees.

While we have concerns about many of the countries that have been designated, we are especially worried about two: Mexico and Hungary. Both have been major source countries for recognized refugees in Canada (7,675 refugees were recognized from these countries from 2003 to 2012 and a further 139 were recognized in 2013 and 2014). Both countries have long been subject to critiques regarding their human rights records by reputable human rights organizations. Of particular note is that Mexico continues to persecute sexual minorities,[177] systematically fails to address gender based violence[178] and is confronting increased violence related to gangs and corruption.[179] Meanwhile, in Hungary, anti-Roma and anti-Semitic persecution is both rampant and growing at an alarming rate.[180] Tellingly, however, Canada's refugee policies were major foreign relations irritants for both countries.[181] Moreover, the government had long held up Hungarian Roma refugee claimants as an example of abuse of Canada's refugee

[177] See e.g., Egale Canada, "LGBT Persecution in Mexico and Canada's Refugee Program" (2013), online: <http://egale.ca/wp-content/uploads/2013/08/Backgrounder-Mexico-and-Bill-C-31.pdf>.

[178] See e.g., Nobel Women's Initiative, "From Survivors to Defenders: Women Confronting Violence in Mexico, Honduras & Guatemala" (2012), online: < http://nobelwomensinitiative.org/wp-content/uploads/2012/06/Report_AmericasDelgation-20121.pdf>.

[179] See e.g., Human Rights Watch, *World Report 2014: Mexico* (2014), online: <http://www.hrw.org/world-report/2014/country-chapters/mexico>.

[180] François-Xavier Bagnoud Center for Health and Human Rights Harvard School of Public Health and Harvard University, "Accelerating Patterns of Anti-Roma Violence in Hungary" (2014), online: <http://fxb.harvard.edu/report-growing-patterns-violence-roma-hungary-sound-alarms/>. See also Elspeth Guild and Karin Zwaan, "Does Europe Still Create Refugees? Examining the Situation of the Roma" (2014) 40 Queen's Law J 141.

[181] Macklin, "Safe Country", *supra* note 149 at 119 (re: Hungary); Steven Chase, "Three Amigos Summit: Harper blames Canada for visa furor Prime Minister aims to soothe feelings of insulted NAFTA partner by saying dysfunctional refugee system encourages bogus claims", in the *Globe and Mail* (10 August 2009) A1 (re: Mexico).

determination system.[182] In this context, there was significant political pressure on the Minister to designate both countries as "safe", notwithstanding that they cannot, in our view, reasonably be characterized as such.

All of this to say that we think the DCO regime is fundamentally flawed. The quantitative criteria are poorly designed, and, as a result, they allow for designation of unsafe countries. The qualitative criteria provide excessive discretion to the Minister and are largely disconnected from the refugee definition. Ministerial discretion – which risks politicizing the refugee determination process – does not adequately cure these problematic criteria. And the DCO's first two years of operation confirms that unsafe countries have been designated, leading to potentially serious consequences for refugee claimants from DCOs whose first-instance claims have been denied in error. In our view, then, the entire regime needs to be fundamentally re-thought. At a minimum, however, access to the RAD for DCO claimants should be restored. There is no justification for preventing DCO claimants from accessing an appeal mechanism that is available to some other claimants to correct false negative refugee determinations, and to prevent Canada from deporting refugees to face persecution and other serious harms.

3.4. No Credible Basis & Manifestly Unfounded Claims

The next group of claimants who are denied access to the RAD are those whose claims are declared to have no credible basis or to be manifestly unfounded. As with other applicants barred from access to the RAD, such claimants are also denied an automatic stay pending an application for judicial review in Federal Court.

At first glance, this might seem to be the least objectionable of the RAD bars. That is because the bar is based, not on the claimant's manner of entry to Canada (unlike STCA exception claimants and DFN claimants), and not on stereotypes about claimants based on country of origin (unlike DCO claimants), but on the RPD's judgment that the claim is either entirely baseless or clearly fraudulent. As we will now see, however, in practice there are problems with this RAD bar.

3.4.1. No Credible Basis

As was the case under the prior refugee determination process, in the new system the RPD is required to make NCB declarations if it "is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision."[183] Case law establishes a high threshold for NCB declarations, and, as a result, courts have held that the RPD "should not routinely state that a claim has 'no credible basis.'"[184] Along similar lines, courts have held that "if there is *any* credible or trustworthy evidence that could support a positive determination the Board cannot find there is no credible basis for the claim."[185]

[182] See above, note 163 (and accompanying text).
[183] IRPA, *supra* note 1, s 107(2).
[184] *Rahaman v Canada (MCI)*, 2002 FCA 89 at 51.
[185] *Levario v Canada (MCI)*, 2012 FC 314 at 19.

Given the high threshold for NCB declarations, it is perhaps unsurprising that such declarations are rare. According to data provided by the IRB in response to access to information requests,[186] of the 134,719 principal applicant refugee determinations made on the merits under the prior refugee determination system from 2003 to 2012, only 3,669 (2.7%) resulted in NCB declarations. Another way of saying this is that 97.3% of principal applicant decisions on the merits were implicitly found to have at least some credible basis. NCB declarations have continued to be rare under the new system: only 282 (2.6%) of the 10,781 principal applicant refugee decisions finalized on the merits under the new system in 2013 and 2014 involved NCB declarations. These figures contradict the exaggerated rhetoric about Canada's refugee determination process being subject to widespread abuse by fraudulent claimants in the lead up to the reforms.[187]

While NCB declarations are rare, Tables 16-18 highlight a serious problem with barring access to RAD due to such declarations: a small number of decision-makers appear to be especially prone to making such declarations, thus raising questions about whether access to the RAD is denied based on the merits of cases or based on who happens to be assigned to hear cases. For example, from 2003 to 2012, 10 decision-makers who together decided only 3.3% of the total number of principal applicant cases finalized on the merits were responsible for 31.5% of the NCB declarations made during this period. These 10 decision-makers were collectively 12.6 times more likely to make such declarations than their colleagues. Moreover, the massive variations cannot be explained by differences in the countries of origin in cases decided, or by changes in decision-making practices over the 10 year period because variations persist even when one looks at a single country during a single year. For instance, Table 18 shows that 5 decision-makers who collectively decided 12.9% of the Mexican principal applicant cases finalized on the merits in 2009 were responsible for 71.4% of the NCB declarations in those cases – and these 5 decision-makers were 15.5 times more likely to make NCB declarations than their colleagues deciding cases from the same country in the same year.

In our view, these figures suggest that NCB declarations hinge, at least in part, on who is assigned to hear a particular case. Moreover, several of the decision-makers who were likely to make NCB declarations were also outliers in terms of their overall recognition rates, even when taking country of origin into consideration.[188] This raises the troubling possibility that outlier decision-makers on the negative side – the very decision-makers whose cases one would be especially keen to have reviewed by a robust appeal process – are also disproportionately likely to make NCB declarations, which has the consequence of both preventing claimants from accessing the RAD and removing the automatic stay on removal pending judicial review. Thus, the RAD bar for NCB cases may insulate outlier decision-makers from administrative oversight as well as timely and effective court oversight. This could result in uncorrected false negative refugee determinations. In our view, the resources saved by eliminating the appeal for the small

[186] IRB RPD/RAD Data, *supra* note 94.

[187] See above, note 167 (and accompanying text).

[188] Nicholas Keung, "Getting asylum the luck of the draw", in the *Toronto Star* (4 March 2011); Nicholas Keung, "Canadian refugee decisions hinge on presiding judge, says report", in the *Toronto Star* (12 March 2012); Louise Elliott, "Decisions by Refugee Appeal Division members vary widely", *CBC.ca* (15 December 2014). Yearly recognition rates for individual RPD members from 2006 to 2013, including comparisons to rates that would be expected based on yearly country of averages, are available at Rehaag, "2013 Statistics", *supra* note 11.

proportion of refugee claimants whose claims are declared to have NCB are outweighed by these risks, and as such, the RAD bar for NCB claims should be revoked.

3.4.2. Manifestly Unfounded Claims

MUC declarations are a new feature of Canada's revised refugee determination system. Under the revised legislation, when the RPD rejects a refugee claim, "it must state in its reasons for the decision that the claim is manifestly unfounded if it is of the opinion that the claim is clearly fraudulent."[189]

The threshold for when MUC declarations are appropriate and the precise difference between NCB and MUC declarations have not yet been definitively established. While several published decisions have resulted in MUC declarations,[190] none of those cases offers an extended analysis of exactly what "clearly fraudulent" means for the purposes of MUC declarations. In our view, the threshold should, as with NCB declarations, be high, in light of the serious consequences of MUC declarations. In addition, the use of the term "clearly" suggests that MUC declarations ought to be assessed against a particularly demanding standard of proof. Moreover, the use of the term "fraudulent", instead of "misrepresentation", which is found through Canada's immigration legislation, suggests that direction should be taken from criminal law provisions relating to fraud. At any rate, it is problematic that the published cases do not bother to explain how the test for MUC declarations should be understood. Hopefully the Federal Court will have the opportunity to address this question soon – though the impediments to judicial review for MUC cases mean that it may take some time for the matter to come before the courts.

According to data provided by the IRB in response to an access to information request,[191] there were only 107 MUC declarations in principal applicant refugee determinations in 2013 and 2014 under the new system. To put these figures in context, according to the same data there were 10,781 principal applicant claims finalized on the merits in 2013 and 2014 under the new system, meaning that less than 1.0% of these claims resulted in MUC declarations.

Because of the very small number of MUC declarations, it is not yet possible to discern patterns in decision-making in this area. As with the low rates of NCB declarations, however, the rarity of MUC declarations suggests that fraud is not a significant problem in Canada's refugee determination process, notwithstanding government rhetoric to the contrary. It also indicates that very few resources are saved by depriving applicants whose cases are "clearly fraudulent" from access to the RAD. In this context, we think little is gained by the RAD bar for cases where there is a MUC declaration. We also worry that, between the lack of clarity regarding the test for MUC declarations and the pattern identified above regarding outlier decision-makers and NCB declarations, the RAD bar in MUC cases risks insulating outlier decision-makers from administrative and court oversight. Thus, as with NCB declarations, we believe the risks outweigh the limited costs savings, and that this RAD bar should be repealed.

[189] IRPA, s 107.1.
[190] See e.g., X (Re), 2014 CanLII 60277 (RPD); X (Re), 2014 CanLII 47709 (RPD); X (Re), 2013 CanLII 94680 (RPD); X (Re), 2014 CanLII 51668 (RPD); X (Re), 2013 CanLII 76396 (RAD); X (Re), 2013 CanLII 76395 (RAD); X (Re), 2013 CanLII 69347 (RAD); X (Re), 2014 CanLII 68371 (RAD); X (Re), 2013 CanLII 76472 (RAD).
[191] IRB RPD/RAD Data, *supra* note 94.

3.5. Designated Foreign Nationals

The final RAD bar that we will discuss is, like the STCA bar, based solely on a refugee claimant's mode of entry into Canada – the so-called Designated Foreign National category. This category is, to date, the least utilized of the RAD bars.

3.5.1. DFNs: The DFN Regime

The DFN regime is an attempt to deter human smuggling. It is a direct response to the arrival of two boats off the coast of British Columbia – the *Ocean Lady*, carrying 76 Sri Lankan Tamil passengers in 2009 and the *Sun Sea*, carrying 492 Tamil passengers in 2010.[192] The regime gives the Minister of Public Safety the authority to designate the arrival of a group of two or more persons in Canada as an "irregular arrival" if the Minister believes that examinations of those in the group cannot be conducted in a timely manner, or if the Minister has reasonable grounds to suspect that the group arrived in connection with a contravention of human smuggling laws for profit or in association with a criminal or terrorist organization.[193] When a designation is made, a foreign national who is part of the designated group becomes a DFN.[194] While the DFN regime was ostensibly created to respond to large-scale smuggling events, the broad wording of the provision potentially captures a much larger number of arrival scenarios.

Designation carries with it several serious consequences. DFNs who are 16 years of age and older are mandatorily detained and have less frequent access to detention reviews than other detained non-citizens.[195] All DFNs – even those whose refugee claims are accepted – are also barred from applying for permanent resident status in Canada for a period of at least five years.[196] DFNs are similarly barred from seeking relief on humanitarian and compassionate grounds for five years.[197] These provisions have the effect of delaying DFNs from obtaining any kind of permanent status and they also prevent them from being reunited with family members abroad for a much longer period of time, as sponsorship applications may not be submitted until permanent residence has been obtained. They also leave DFNs who are recognized as refugees vulnerable to loss of refugee protection and removal from Canada in the event that conditions improve in their home countries.[198] After their release from detention, DFNs also face mandatory reporting requirements that continue until they receive permanent resident status.[199] DFNs who are found to be refugees are also barred from obtaining a refugee travel document.[200] Finally, and most relevant for present purposes, DFNs are barred from appealing negative refugee determination

[192] Jan Bailey & Gloria Galloway, "Kenney insists on smuggling crackdown", in the *Globe and Mail* (22 October 2010) A9. The regime was first proposed in *Bill C-49*, *Preventing Human Smugglers from Abusing Canada's Immigration System Act*, 40th Parl, 3rd Sess. The provisions were then included in the reforms to Canada's refugee determination system in 2012. See, PCISA, *supra* note 21, s 10 .
[193] IRPA, *supra* note 1, s 20.1(1).
[194] *Ibid*, s 20.1(2).
[195] *Ibid*, s 55(3.1); 56(2), 57 & 57.1.
[196] *Ibid*, s 11(1.1-1.3).
[197] *Ibid*, s 25(1.01-1.03).
[198] *Ibid*, s 108(1)(e).
[199] *Ibid*, s 98.1; IRPA Regs, *supra* note 60, s 174.1.
[200] IRPA, *supra* note 1, s 31.1.

decisions to the RAD[201] and face removal with no access to a statutory stay of removal pending judicial review of negative refugee determinations.[202]

On December 4, 2012, the Public Safety Minister made the first use of the DFN regime, designating five separate arrivals that had taken place between February and October, 2012. The designations did not involve the large scale arrival of smuggling ships. They instead consisted of several discrete interceptions at Canadian land borders, resulting in a total of 43 refugee claimants becoming subject to the RAD bar on this basis.[203]

3.5.2. DFNs: Punishing the Smuggled

The DFN regime is a penalizing one, meant primarily to deter the "irregular arrival" of asylum seekers and other migrants. This is not speculation. The government itself has stated that its main justification is one of deterrence. For example, in an Operational Bulletin on DFNs, the government explains that the "…five-year bar on [applications for permanent residence] by DFNs is intended to act as a deterrent to those considering coming to Canada as part of an irregular arrival."[204] Similarly, in a Parliamentary summary of the regime, it was readily acknowledged that a "key objective" was "to deter large-scale events of irregular migration to Canada, particularly where these involve human smuggling."[205]

Setting aside broader questions about whether Canada may legitimately carry out measures to deter large-scale smuggling involving would-be refugee claimants,[206] our primary concern with the DFN regime and its corresponding RAD bar is that, instead of targeting the organizers of such events the regime targets passengers, most of whom assert a fear of persecution if returned to their countries of origin. The right to seek asylum is deeply embedded in international law.[207] International law also recognizes that refugees must frequently engage in irregular migration to assert this right and states should not, therefore, impose penalties on refugees on account of their illegal entry into a country of asylum.[208] Because the DFN regime uses penalties for the irregular arrival of refugees – including the RAD bar – as a way to discourage human smuggling, the DFN regime contravenes international law.

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[201] *Ibid*, s 110(2)(a).
[202] See above, note 87 (and accompanying text).
[203] *Designation as Irregular Arrival,* [No 1-5], 41st Parl, 1st Sess, Can Gaz Vol 146, No 50 (15 December 2012). See also, above, note 108 (and accompanying text).
[204] Citizenship and Immigration Canada, *Operational Bulletin 440-D* (30 August 2012), online: <http://www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob440D.asp>.
[205] Julie Béchard, "Legislative Summary of Bill C-4: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act" (Ottawa: Library of Parliament, 2012) at 2.
[206] For discussions of these broader questions , see e.g., Macklin, "STCA", *supra* note 117; Janet Dench and François Crépeau, "Interdiction at the Expense of Human Rights: A Long-term Containment Strategy" (2003) 21:4 Refuge 2; Andrew Brouwer & Judith Kumin, "Interception and Asylum: When Migration Control and Human Rights Collide" (2003) 21:4 Refuge 6; François Crépeau & Delphine Nakache, "Controlling Irregular Migration in Canada - Reconciling Security Concerns with Human Rights Protection" (2006) 12:1 IRPP Choices.
[207] *Universal Declaration of Human Rights*, *supra* note 138, art 14.
[208] *1951 UN Convention relating to the Status of Refugees*, 189 UNTS 150, art 31. For a general discussion, see Hathaway, *Rights*, *supra* note 138 at 370-439.

It is moreover, worth noting that there has never been even a pretense that the DFN regime and its corresponding RAD bar are connected to the merits of DFN refugee claims. That is to say that the concern is not that too many people are making unfounded refugee claims after arriving in Canada with the assistance of human smugglers. Rather the concern is that, irrespective of whether would-be refugee claimants have well-founded claims, they should be discouraged from coming to the country through human smuggling. That this is the real concern is evidenced by the fact that the DFN regime imposes some penalties that apply only to DFNs who succeed with their refugee claims (such as the five-year bar on applying for permanent residence after a successful refugee claim). In the context of the RAD bar, this is especially problematic because the bar limits access to measures to challenge incorrect or unlawful denials of refugee protection for a group of claimants, not on the basis of anything related to the merits of the claims by those in the group, but rather on the basis of their mode of entry to Canada.

Worse yet, because DFNs are subject to mandatory detention, they are highly vulnerable to miscarriages of justice in respect of their RPD refugee determinations. Under the new system for refugee determination in Canada, refugee determinations are now rendered very quickly – usually within 60 days of receipt of the claimant's initiating forms.[209] Given these compressed timelines, detained refugee claimants are severely hampered in their ability to obtain and instruct counsel, collect evidence and prepare for their hearing.[210] Moreover, if the Sun Sea and Ocean Lady incidents are reliable indicators, refugee claims involving mass irregular arrivals will often involve difficult legal and factual questions that pose challenges for fair and consistent RPD decision-making.[211] In this context, it is our view that DFNs are, if anything, more in need of a full appeal on the merits than other refugee claimants.

In our view, then, the entire DFN regime is problematic on various levels and should be reconsidered. At a minimum, however, the DFN RAD bar should be dropped.

4. Conclusion

Refugee adjudication is a complex, high-volume and high-stakes undertaking. That is a fraught combination. Under Canada's new refugee determination regime it is also an undertaking that proceeds at a near-frantic pace. The potential for error in this context is very real. In this article, we have illustrated the importance of adequate appeal mechanisms for first-instance refugee determinations and highlighted the early success of the RAD. At the same time, we lament the extent to which this success is tempered by the bars on access to the RAD. These bars bear little, if any, connection to the merits of the claims of those subject to them. They are born of faulty premises and conceptual errors and they unlawfully

[209] See above, note 60 (and accompanying text).

[210] Report of the UN Working Group on Arbitrary Detention following its Visit to Canada (5 December 2005), (online) < http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2006/7/Add.2&Lang=E>; see also Global Detention Project, "Canada Detention Profile" (July 2012), online <http://www.globaldetentionproject.org/countries/americas/canada/introduction.html>.

[211] The refugee claims of passengers who arrived on the Sun Sea and Ocean Lady have now been extensively litigated in the Federal Court and several of the cases raise complex issues of law. These include the determination of whether asylum seekers themselves engaged in smuggling by helping the ships' operation and of whether mere voyage on the ships gave rise to a well-founded fear of persecution because of the Sri Lankan government's perception that the ships were organized by the Tamil Tigers. See, e.g., *B010 v Canada (MCI)*, 2013 FCA 87 and *Canada (MCI) v. B344*, 2013 FC 447.

penalize refugees for asserting their protected right to seek asylum. In creating the RAD, the Canadian government has recognized that appeals of refugee decisions are important. Now the government must also recognize that such appeals are equally important for all refugee claimants.

5. Update: *Y.Z. v Canada*

After this article was written, the Federal Court decided an important case on the subject of RAD bars: *Y.Z. v Canada*.[212] In that case, the court found that the bar on RAD access for DCO claimants is unconstitutional due to a violation of the equality provisions in section 15 of the *Charter* in a manner that cannot be saved by section 1 of the *Charter*.[213] The government has indicated that it intends to appeal the decision.[214]

On the section 15 equality argument, the court rejected the government's contention that the distinctions made between DCO and non-DCO claimants merely reflect that DCO claimants are relatively safe from persecution and other harms, as informed by statistical generalizations and thorough reviews of country conditions.[215] Rather, the court noted that, according to the government, one of the principal reasons for the DCO regime was to deter abuse of the refugee system.[216] The court found that attempting to deter abuse of the refugee system by creating two different classes of refugee claimants based on country of origin, with procedural advantages provided to one of those classes, was discriminatory on its face.[217] In other words, according to the court, the DCO RAD bar treats claimants differently based on country of origin, not based on relative safety from persecution and other harms. The court further found that the distinction between DCO and non-DCO claimants "serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries" and "perpetuates a stereotype that refugee claimants from DCO countries are somehow queue-jumpers or 'bogus' claimants who only come here to take advantage of Canada's refugee system and its generosity."[218] As such, the court found that the DCO RAD bar constitutes discrimination on the basis of national origin, and thereby violates section 15 of the *Charter*.

The court then went on to examine whether this violation could be saved by section 1 as a reasonable limit on *Charter* rights that is demonstrably justified in a free and democratic society. In this regard, the court held that the government failed to establish that the RAD bar is minimally impairing in achieving the stated objective of deterring fraudulent refugee claims.[219] In its reasoning on this point, the court placed particular emphasis on the existence of bars on appeals for claims found to have no credible basis or to be manifestly unfounded -- which means that the RAD bar for DCO claimants only impacts DCO claimants whose claims have a credible basis and are not manifestly unfounded. In these circumstances, the court

[212] 2015 FC 892 [*Y.Z.*].
[213] *Ibid* at paras 102-131, 144-170.
[214] Nicholas Keung, "Court rules denial of appeals for 'safe country' refugees unconstitutional", in the *Toronto Star* (23 August 2015).
[215] *Y.Z., supra* note 212 at para 124.
[216] *Ibid* at para 7.
[217] *Ibid* at para 124.
[218] *Ibid* at paras 123-124 [citations omitted].
[219] *Ibid* at paras 162-164.

held that the government failed to demonstrate that the DCO RAD bar was needed in order to deter fraudulent refugee claims.[220]

While Y.*Z.* is an important development, it leaves several issues unresolved, three of which are particularly germane to this article.

First, notwithstanding the applicants' attempts to challenge the DCO regime generally, the court confined its ruling to the constitutionality of the DCO RAD bar. As a result, while the Court referred to criticisms of the DCO designation mechanisms, including some of the critiques we have set out above, it did not engage with these critiques in a sustained manner.[221] The court also sidestepped the applicants' arguments under section 7 of the Charter, as it found that these arguments were primarily related to the designation mechanisms.[222] All of this is, in our view, unfortunate. There was a fulsome evidentiary record -- both on the part of the applicants and on the part of the government -- available that would have allowed the court to examine the constitutionality of the DCO regime more generally.[223] Unless a different approach is taken on appeal, it would appear that the constitutionality of that broader regime will need to be tested through future litigation. Such future litigation will impose significant -- and largely unnecessary -- costs on the Department of Justice, on legal aid programs that fund test cases, on the courts, and potentially on DCO claimants who will continue to be subject to a regime of questionable constitutionality until this matter is ultimately decided.

Second, as noted above, the court's conclusion that the DCO RAD bar is unlawfully discriminatory is predicated at least in part on the existence of the parallel appeal bar for claims found to have no credible basis or to be manifestly unfounded. We understand the logic underlying the court's findings – i.e. that the government's objective of addressing the problem of 'bogus' claims is more appropriately met through the MUC and NCB bars than through making broad-based distinctions between claimants based on national origin. However, as we have argued above, the MUC and NCB bars suffer from their own infirmities. We think the court could easily have come to the same conclusion without relying on the existence of these problematic RAD bars.

Third, as we have shown in this article, the SCTA bar is the RAD bar that affects the largest number of claimants. Testing the constitutionality of this bar is, in our view, a matter of some urgency.

[220] *Ibid* at paras 164-165.
[221] *Ibid* at paras 15-23, 142.
[222] *Ibid* at 142.
[223] *Ibid* at paras 44-101.

6. Tables

Table 1: Overview of outcomes under old and new system						
Year	**Referred**	**Accepted**	**Rejected**	**Abandoned/ Withdrawn**	**Finalized**	**Recognition Rate**
2008	34,800	7,554	6,784	3,774	18,112	52.7
2009	33,970	11,154	9,796	5,702	26,652	53.2
2010	22,543	12,305	13,642	6,510	32,457	47.4
2011	24,981	12,983	16,122	5,151	34,256	44.6
2012	20,223	10,294	14,448	4,697	29,439	41.6
2013 (New system only)	9,738	2,988	1,957	527	5,472	60.4
2014 (New system only)	13,133	7,042	3,908	660	11,610	64.3
New System (2013-14)	22,871	10,030	5,865	1,187	17,082	63.1
Source: IRB Country Reports (ATIP ATIP A-2013-00193, A-2013-02091 & A-2014-04296)						

Table 2: Top 10 countries (by claims finalized) under new system (2013-14)							
Country	**Referred**	**Accepted**	**Rejected**	**Abandoned/ Withdrawn**	**Finalized**	**Recognition Rate**	**2012 Recognition Rate**
CHINA	2,154	782	670	81	1,533	53.9	41.7
PAKISTAN	1,413	924	171	29	1,124	84.4	73.3
SYRIA	1,067	838	34	13	885	96.1	82.0
COLOMBIA	1,094	466	358	34	858	56.6	39.7
NIGERIA	1,045	386	365	15	766	51.4	57.3
AFGHANISTAN	787	489	78	46	613	86.2	84.1
HAITI	681	243	288	10	541	45.8	48.6
IRAQ	771	389	55	41	485	87.6	72.6
DEM REP CONGO	564	219	182	37	438	54.6	63.2
EGYPT	511	382	45	4	431	89.5	76.1
All Countries (2013)	9,738	2,988	1,957	527	5,472	60.4	N/A
All Countries (2014)	13,133	7,042	3,908	660	11,610	64.3	N/A
All Countries (2013-14)	**22,871**	**10,030**	**5,865**	**1,187**	**17,082**	**63.1**	N/A
Source: IRB Country Reports (ATIP A-2013-02091 & A-2014-04296)							

Table 3: Top 10 extreme variance between actual and expected recognition rate based on COO averages in new system principal applicant cases finalized on the merits (2013-14)

RPD Member*	Accepted	Rejected	Finalized (merits)	Recognition Rate	Expected Recognition Rate (COO)**	Nominal Variation
TIWARI, RABIN	167	27	194	86.1	59.1	27.0
BOUSFIELD, JOEL	127	35	162	78.4	59.1	19.3
MARCINKIEWICZ, CHRISTOPHER	73	12	85	85.9	68.0	17.9
SOMERS, MICHAEL	150	40	190	78.9	63.2	15.8
ROCHE, PATRICK	156	32	188	83.0	67.8	15.2
VEGA, MARIA	65	16	81	80.2	65.1	15.2
RAYMOND, CATHERINE	66	23	89	74.2	60.2	14.0
DOOKUN, MICHELLE	63	29	92	68.5	55.3	13.2
FABER, PAULA	93	34	127	73.2	60.9	12.3
CUNDAL, KERRY	128	46	174	73.6	61.4	12.1
THIBAULT, MARIE-LYNE	43	68	111	38.7	53.8	-15.1
ALARY, SUZANNE	56	71	127	44.1	60.1	-16.0
CASSANO, NATALKA	39	48	87	44.8	60.9	-16.0
DORTELUS, HARRY	57	101	158	36.1	53.5	-17.4
DAUBNEY, JENNIFER	74	79	153	48.4	66.6	-18.2
LLOYD, BRENDA	32	91	123	26.0	46.5	-20.5
MAZIARZ, TERESA	29	54	83	34.9	56.2	-21.3
GULLICKSON, JEFFREY BRIAN	45	87	132	34.1	55.4	-21.3
WITTENBERG, CLAIRE	21	38	59	35.6	59.2	-23.6
MORIN, STEPHANE	9	49	58	15.5	48.0	-32.5
All Members (2013-14)	**6,610**	**4,171**	**10,781**	**61.3**	**61.3**	**0.0**

Source: IRB RPD/RAD Data (ATIP A-2014-04109)

*Members deciding 50+ cases

** Expected Recognition Rates calculated based on weighted country of origin averages in cases finalized on merits

Table 4: Outcomes in new system principal applicant claims from China, by RPD Member (2013-14)

RPD Member*	Accepted	Rejected	Finalized (merits)	Recognition Rate
TIWARI, RABIN	31	2	33	93.9
SOMERS, MICHAEL	39	6	45	86.7
SEYAN, RAVI	19	5	24	79.2
PEARSON, HEATHER	22	8	30	73.3
ROCHE, PATRICK	19	7	26	73.1
JUNG, ALICE	26	12	38	68.4
SPRUNG, HEIDI	15	7	22	68.2
KHAMSI, KHAMISSA	17	8	25	68.0
RILEY, ROBERT	18	10	28	64.3
CARTY, MAUREEN	16	10	26	61.5
BOUSFIELD, JOEL	16	12	28	57.1
ANDREWS, TANYA	12	11	23	52.2
DALRYMPLE, JOSEPH	15	14	29	51.7
GREENWOOD, KAREN	10	12	22	45.5
STOCKS, NAMIJI	11	15	26	42.3
POPATIA, BERZOOR	8	14	22	36.4
BOOTHROYD, KEVIN	11	20	31	35.5
MORGAN, SARAH	10	21	31	32.3
DAUBNEY, JENNIFER	9	19	28	32.1
CASSANO, NATALKA	10	24	34	29.4
MURATA, JESSICA	8	24	32	25.0
QADEER, NADRA	4	16	20	20.0
WAGNER, JULIE	4	17	21	19.0
CUKAVAC, HILDA	3	17	20	15.0
All Members (China)	**353**	**311**	**664**	**53.2**

Source: IRB RPD/RAD Data (ATIP A-2014-04109)

*Members deciding 20+ cases from China

Table 5: RAD outcomes in principal applicant appeals (2013-14)*

Decision Type	Decision	Claimant as Appellant	Minister as Appellant	Total
Procedurally Dismissed	Administrative	6	0	6
	Appeal not perfected	181	1	182
	Deceased	1	0	1
	Lack of Jurisdiction	292	4	296
	Withdrawn / Abandoned	36	13	49
	Subtotal	**516**	**18**	**534**
Decided on Merits	Allowed (referred back)	274	12	286
	Allowed (substituted decision)	68	19	87
	Dismissed (other reasons)	25	2	27
	Dismissed (same reasons)	925	8	933
	Dismissed (NCB declaration)	4	0	4
	Subtotal	**1,296**	**41**	**1,337**
Total		**1,812**	**59**	**1,871**

Source: IRB RPD/RAD Data (ATIP A-2014-04109)

* Excluding cases with duplicate entries for a single RAD number

Table 6: Outcomes in principal applicant RAD apeals brought by claimants and finalized on merits, by RAD Member (2013-14)*

RAD Member**	Allowed	Dismissed	Finalized (merits)	Grant Rate
ZICHERMAN, DORIS	4	0	4	100.0
DHIR, RENA	5	5	10	50.0
MACAULAY, PHILIP	20	27	47	42.6
FORBES, CATHRYN	16	22	38	42.1
KULAR, SUSAN	12	18	30	40.0
DE ANDRADE, MARIA	9	16	25	36.0
BOSVELD, EDWARD	47	84	131	35.9
ATKINSON, KEN	10	19	29	34.5
LOWE, DAVID	4	8	12	33.3
MORRISH, DEBORAH	2	4	6	33.3
AHARA, ROSLYN	21	45	66	31.8
BISSONNETTE, ALAIN	49	113	162	30.2
UPPAL, ATAM	24	62	86	27.9
LEDUC, NORMAND	37	96	133	27.8
MCSWEENEY, DANIEL	25	69	94	26.6
PETTINELLA, MICHELE	2	6	8	25.0
ISRAEL, MILTON	17	57	74	23.0
FORTNEY, DOUGLAS BRUCE	8	28	36	22.2
KINGMA, MARYANNE	2	8	10	20.0
FAVREAU, LEONARD	13	74	87	14.9
GARNER, ROBERT S.	1	8	9	11.1
AGOSTINHO, LUIS F.	6	69	75	8.0
GALLAGHER, STEPHEN	7	91	98	7.1
SOKOLYK, DIANE E	1	15	16	6.3
BRYCHCY, ANNA	0	10	10	0.0
Total	**342**	**954**	**1,296**	**26.4**

Source: IRB RPD/RAD Data (ATIP A-2014-04109)

* Excluding cases with duplicate entries for a single RAD number

** First RAD Member listed in the IRB database for each case

Table 7: Grounds for RAD bars for new system RPD claims in 2013

Grounds*	Number of Claims	Percentage (Referred or Finalized)
Safe Third Country Agreement Exception**	2,253	23.1
Designated Country of Origin***	468	8.6
No Credible Basis / Manifestly Unfounded Claim***	120	2.2
Designated Foreign National**	43	0.4
New System Claims Finalized	5,472	N/A
New System Claims Referred	9,738	N/A

Source: IRB RAD Bars (A-2014-02030), IRB Country Reports (A-2013-02091)

* Claims may be subject to multiple RAD Bars

** Based on claims referred in 2013

*** Based on claims finalized in 2013

Table 8: Refugee claims processed at land POEs, by STCA exception type (2013)

Exception Type	Number	Percentage (of excepted)
"Anchor" family member	2,215	98.3
Citizen / permanent resident	1,478	65.6
Refugee claimant	631	28.0
Refugee	102	4.5
Student	2	0.1
Worker	2	0.1
Unaccompanied minor	28	1.2
Document holder	8	0.4
Moratorium country*	2	0.1
Public interest (death penalty)	0	0.0
Total (STCA exceptions)	**2,253**	**100.0**
Missing or invalid	738	N/A
Total (Land POE claims)	**2,991**	**N/A**

Source: CIC STCA/DFN Data (CR-14-0095, OPS-2014-2109)

Table 9: Top 10 countries for cases referred through STCA exceptions (2013)

Country	STCA Exception Claims Referred	Country Recognition Rate*
Colombia	412	50.5
Pakistan	237	87.0
Syria	157	96.5
Burundi	147	73.0
Congo, Dem Rep	102	59.9
Sri Lanka	93	78.4
Iraq	88	78.8
Honduras	79	48.5
Afghanistan	77	88.2
Eritrea	76	83.2
Total (STCA exceptions)	2,253	66.3**
Total (All RPD claims)	9,738	60.4

Source: CIC STCA/DFN Data (CR-14-0095, OPS-2014-2109) & IRB Country Reports (A-2013-02091)

* Based on all RPD claims in 2013, not just STCA exceptions

** Based on weighted country recognition rates, excluding 65 claims from countries with no claims finalized on merits in 2013

Table 10: Overview of Hungarian refugee claims (2009)

Pending (Jan 1)	272
Referred	2,440
Accepted	3
Rejected	5
Abandoned/Withdrawn	259
Finalized	267
Pending (Dec 31)	2,434
Recognition Rate (%)	37.5
Rejection Rate (C-31) (%)	98.9
Abandon/Withdraw Rate (C-31) (%)	97.0

Source: IRB Country Reports (ATIP A-2013-00193)

Table 11: Overview of refugee claims from selected countries (2003-2012)

Country	Year	Referred	Accepted	Rejected	Abandoned/ Withdrawn	Finalized	Recognition Rate	Rejection Rate (C31)	Abandon / Withdraw Rate (C31)
Georgia	2003	53	39	25	4	68	60.9	42.6	5.9
	2004	49	28	26	4	58	51.9	51.7	6.9
	2005	57	42	9	3	54	82.4	22.2	5.6
	2006	74	35	15	5	55	70.0	36.4	9.1
	2007	56	20	16	5	41	55.6	51.2	12.2
	2008	86	22	6	2	30	78.6	26.7	6.7
	2009	67	24	25	12	61	49.0	60.7	19.7
	2010	88	35	31	10	76	53.0	53.9	13.2
	2011*	56	22	69	12	103	24.2	78.6	11.7
	2012	87	25	41	17	83	37.9	69.9	20.5
	Total	**673**	**292**	**263**	**74**	**629**	**52.6**	**53.6**	**11.8**
Jordan	2003	172	29	34	14	77	46.0	62.3	18.2
	2004	104	76	95	17	188	44.4	59.6	9.0
	2005	39	50	35	16	101	58.8	50.5	15.8
	2006	79	34	20	4	58	63.0	41.4	6.9
	2007	83	14	10	6	30	58.3	53.3	20.0
	2008*	118	11	9	33	53	55.0	79.2	62.3
	2009	78	25	30	23	78	45.5	67.9	29.5
	2010	49	37	54	14	105	40.7	64.8	13.3
	2011	78	39	53	14	106	42.4	63.2	13.2
	2012	53	17	30	4	51	36.2	66.7	7.8
	Total	**853**	**332**	**370**	**145**	**847**	**47.3**	**60.8**	**17.1**
North Korea	2003	2	1	1	3	5	50.0	80.0	60.0
	2004	0	0	0	2	2	N/A	100.0	100.0
	2005	1	1	0	0	1	100.0	0.0	0.0
	2006	25	0	0	0	0	N/A	N/A	N/A
	2007	109	1	0	9	10	100.0	90.0	90.0
	2008*	30	7	1	22	30	87.5	76.7	73.3
	2009	43	66	8	41	115	89.2	42.6	35.7
	2010	177	42	2	14	58	95.5	27.6	24.1
	2011	385	117	12	41	170	90.7	31.2	24.1
	2012	719	230	18	42	290	92.7	20.7	14.5
	Total	**1,491**	**465**	**42**	**174**	**681**	**91.7**	**31.7**	**25.6**
Morocco	2003*	51	8	35	15	58	18.6	86.2	25.9
	2004	42	34	23	4	61	59.6	44.3	6.6
	2005	42	17	13	3	33	56.7	48.5	9.1
	2006	38	15	17	2	34	46.9	55.9	5.9
	2007	44	17	10	5	32	63.0	46.9	15.6
	2008	37	14	6	10	30	70.0	53.3	33.3
	2009	50	14	9	8	31	60.9	54.8	25.8
	2010	35	10	6	12	28	62.5	64.3	42.9
	2011	44	20	21	8	49	48.8	59.2	16.3
	2012*	40	13	21	21	55	38.2	76.4	38.2
	Total	**423**	**162**	**161**	**88**	**411**	**50.2**	**60.6**	**21.4**

Source: IRB Country Reports (ATIP A-2013-00193)

** Meets quantitative criteria*

Table 12: Outcomes in new system principal applicant claims from selected countries, by selected claim types (2013-14)

Country	Claim Type*	Accepted	Rejected	Finalized (Merits)	Recognition Rate
Algeria	Gender/Age	16	12	28	57.1
	Sexual Orientation	15	4	19	78.9
	Other Claim Types	15	42	57	26.3
Haiti	Gender/Age	65	29	94	69.1
	Sexual Orientation	1	1	2	50.0
	Other Claim Types	121	185	306	39.5
India	Gender/Age	14	17	31	45.2
	Sexual Orientation	5	7	12	41.7
	Other Claim Types	25	146	171	14.6
Jamaica	Gender/Age	16	20	36	44.4
	Sexual Orientation	90	38	128	70.3
	Other Claim Types	11	32	43	25.6
Russia	Gender/Age	11	2	13	84.6
	Sexual Orientation	50	3	53	94.3
	Other Claim Types	20	14	34	58.8
Saint Lucia	Gender/Age	8	12	20	40.0
	Sexual Orientation	19	13	32	59.4
	Other Claim Types	0	15	15	0.0
Saint Vincent	Gender/Age	14	16	30	46.7
	Sexual Orientation	12	16	28	42.9
	Other Claim Types	3	23	26	11.5
Ukraine	Gender/Age	24	7	31	77.4
	Sexual Orientation	57	4	61	93.4
	Other Claim Types	71	53	124	57.3

Source: IRB RPD/RAD Data (ATIP A-2014-04109)

* Figures for Gender/Age & Sexual Orientation include intersecting claim types, whereas Other Claim Type covers only cases which are not categorized as involving Gender/Age or Sexual Orientation

Table 13: Outcomes in new system principal applicant claims, by selected claim types (2013-14)

Claim Type*	Accepted	Rejected	Finalized (Merits)	Recognition Rate	Expected Recognition Rate (COO)**	Nominal Variation
Gender/Age	808	512	1,320	61.2	56.3	4.9
Sexual Orientation	865	385	1,250	69.2	57.2	12.0
Other	4,965	3,290	8,255	60.1	62.7	-2.6
Total	**6,610**	**4,171**	**10,781**	**61.3**	**61.3**	N/A

Source: IRB RPD/RAD Data (ATIP A-2014-04109)

* Figures for Gender/Age & Sexual Orientation each include 44 cases with intersecting claim types, whereas Other Claim Type covers only cases which are not categorized as involving Gender/Age or Sexual Orientation

** Expected Recognition Rates calculated based on weighted country of origin averages in cases finalized on merits

Table 14: Outcomes in DCO countries under new system, by claims referred (2013-14)*

Country	Designation Type	Referred	Accepted	Rejected	Abandoned / Withdrawn	Finalized	Recognition Rate	Rejection Rate (C31)	Abandon / Withdrawal Rate (C31)
Slovak Republic	Quantitative	510	126	64	27	217	66.3	41.9	12.4
Hungary	Quantitative	469	110	75	46	231	59.5	52.4	19.9
Croatia	Quantitative	213	18	164	20	202	9.9	91.1	9.9
Mexico	Quantitative	135	29	69	22	120	29.6	75.8	18.3
USA	Quantitative	135	0	60	41	101	0.0	100.0	40.6
Czech Republic	Quantitative	109	11	32	7	50	25.6	78.0	14.0
Israel	Quantitative	83	10	20	35	65	33.3	84.6	53.8
Italy	Quantitative	69	1	44	3	48	2.2	97.9	6.3
Poland	Quantitative	65	4	38	15	57	9.5	93.0	26.3
Romania	Quantitative	54	19	11	17	47	63.3	59.6	36.2
Greece	Qualitative	41	3	31	6	40	8.8	92.5	15.0
Spain	Quantitative	41	0	26	12	38	0.0	100.0	31.6
Portugal	Quantitative	31	0	21	14	35	0.0	100.0	40.0
South Korea	Quantitative	31	6	15	6	27	28.6	77.8	22.2
France	Quantitative	15	0	10	6	16	0.0	100.0	37.5
Belgium	Qualitative	12	0	8	4	12	0.0	100.0	33.3
Ireland	Qualitative	12	0	0	6	6	N/A	100.0	100.0
Netherlands	Qualitative	9	0	6	2	8	0.0	100.0	25.0
Chile	Quantitative	7	0	6	0	6	0.0	100.0	0.0
Japan	Qualitative	6	0	2	2	4	0.0	100.0	50.0
Sweden	Qualitative	6	0	5	0	5	0.0	100.0	0.0
Germany	Quantitative	5	0	4	1	5	0.0	100.0	20.0
Austria	Qualitative	4	0	1	2	3	0.0	100.0	66.7
Malta	Qualitative	4	0	4	0	4	0.0	100.0	0.0
Norway	Qualitative	4	0	2	2	4	0.0	100.0	50.0
Lithuania	Quantitative	3	0	2	1	3	0.0	100.0	33.3
Slovenia	Qualitative	3	0	3	0	3	0.0	100.0	0.0
Latvia	Quantitative	2	0	1	1	2	0.0	100.0	50.0
Switzerland	Qualitative	2	0	2	0	2	0.0	100.0	0.0
Cyprus	Qualitative	1	0	0	1	1	N/A	100.0	100.0
Estonia	Qualitative	1	0	1	4	5	0.0	100.0	80.0
Finland	Qualitative	1	0	0	1	1	N/A	100.0	100.0
New Zealand	Qualitative	1	0	1	0	1	0.0	100.0	0.0
Andorra	Qualitative	0	0	0	0	0	N/A	N/A	N/A
Australia	Qualitative	0	0	0	0	0	N/A	N/A	N/A
Denmark	Qualitative	0	0	0	0	0	N/A	N/A	N/A
Iceland	Qualitative	0	0	0	0	0	N/A	N/A	N/A
Liechtenstein	Qualitative	0	0	0	0	0	N/A	N/A	N/A
Luxembourg	Qualitative	0	0	0	0	0	N/A	N/A	N/A
Monaco	Qualitative	0	0	0	0	0	N/A	N/A	N/A
San Marino	Qualitative	0	0	0	0	0	N/A	N/A	N/A
UK	Quantitative	0	0	0	0	0	N/A	N/A	N/A
Total (DCO - Quantitative)		1,977	334	662	274	1,270	33.5	73.7	21.6
Total (DCO - Qualitative)		107	3	66	30	99	4.3	97.0	30.3
TOTAL (DCO)		2,084	337	728	304	1,369	31.6	75.4	22.2
TOTAL (All Countries)		22,871	10,030	5,865	1,187	17,082	63.1	41.3	6.9

Source: IRB Country Reports (ATIP A-2013-00193)

** Based on all claims referred from countries that were designated as of 31 December 2014, irrespective of whether the countries were designated at the time the particular claims from those countries were referred or finalized.*

Table 15: Outcomes in DCO countries under old system, by claims referred (2003-12)*

Country	Designation Type	Referred	Accepted	Rejected	Abandoned / Withdrawn	Finalized	Recognition Rate	Rejection Rate (C31)	Abandon / Withdrawal Rate (C31)
Mexico	Quantitative	40,804	6,653	24,917	10,590	42,160	21.1	84.2	25.1
Hungary	Quantitative	11,757	1,022	5,093	4,736	10,851	16.7	90.6	43.6
USA	Quantitative	4,424	56	3,061	1,142	4,259	1.8	98.7	26.8
Israel	Quantitative	3,430	657	2,356	852	3,865	21.8	83.0	22.0
Czech Republic	Quantitative	3,315	281	1,126	1,805	3,212	20.0	91.3	56.2
South Korea	Quantitative	1,742	265	1,248	518	2,031	17.5	87.0	25.5
Portugal	Quantitative	1,101	10	1,318	236	1,564	0.8	99.4	15.1
Romania	Quantitative	1,465	479	521	363	1,363	47.9	64.9	26.6
Poland	Quantitative	1,260	242	722	346	1,310	25.1	81.5	26.4
Slovak Republic	Quantitative	1,525	35	319	702	1,056	9.9	96.7	66.5
Chile	Quantitative	514	89	434	150	673	17.0	86.8	22.3
Croatia	Quantitative	1,691	79	326	130	535	19.5	85.2	24.3
Lithuania	Quantitative	247	85	107	95	287	44.3	70.4	33.1
Germany	Quantitative	248	12	143	103	258	7.7	95.3	39.9
Latvia	Quantitative	297	81	102	71	254	44.3	68.1	28.0
France	Quantitative	244	7	140	96	243	4.8	97.1	39.5
Spain	Quantitative	234	8	98	59	165	7.5	95.2	35.8
UK	Quantitative	138	5	98	58	161	4.9	96.9	36.0
Italy	Quantitative	188	0	97	53	150	0.0	100.0	35.3
Netherlands	Qualitative	151	11	86	38	135	11.3	91.9	28.1
Greece	Qualitative	202	13	73	26	112	15.1	88.4	23.2
Estonia	Qualitative	57	24	31	18	73	43.6	67.1	24.7
Japan	Qualitative	90	3	45	23	71	6.3	95.8	32.4
Sweden	Qualitative	74	2	50	17	69	3.8	97.1	24.6
Belgium	Qualitative	63	7	16	21	44	30.4	84.1	47.7
Slovenia	Qualitative	41	12	17	14	43	41.4	72.1	32.6
Australia	Qualitative	44	0	28	13	41	0.0	100.0	31.7
Denmark	Qualitative	26	5	19	8	32	20.8	84.4	25.0
Ireland	Qualitative	34	4	16	6	26	20.0	84.6	23.1
Norway	Qualitative	30	0	12	14	26	0.0	100.0	53.8
Austria	Qualitative	17	0	9	9	18	0.0	100.0	50.0
Switzerland	Qualitative	16	1	6	6	13	14.3	92.3	46.2
New Zealand	Qualitative	10	0	3	10	13	0.0	100.0	76.9
Cyprus	Qualitative	11	1	8	2	11	11.1	90.9	18.2
Finland	Qualitative	10	0	5	2	7	0.0	100.0	28.6
San Marino	Qualitative	3	1	0	3	4	100.0	75.0	75.0
Malta	Qualitative	2	0	3	1	4	0.0	100.0	25.0
Iceland	Qualitative	2	0	2	0	2	0.0	100.0	0.0
Luxembourg	Qualitative	2	0	0	1	1	N/A	100.0	100.0
Andorra	Qualitative	0	0	0	0	0	N/A	N/A	N/A
Liechtenstein	Qualitative	0	0	0	0	0	N/A	N/A	N/A
Monaco	Qualitative	0	0	0	0	0	N/A	N/A	N/A
Total (DCO - Quantitative)		74,624	10,066	42,226	22,105	74,397	19.2	86.5	29.7
Total (DCO - Qualitative)		885	84	429	232	745	16.4	88.7	31.1
TOTAL (DCO)		75,509	10,150	42,655	22,337	75,142	19.2	86.5	29.7
TOTAL (All Countries)		265,728	115,175	123,352	46,135	284,667	48.3	59.5	16.2

Source: IRB Country Reports (ATIP A-2013-00193)

** Based on all claims referred from countries that were designated as of 31 December 2014, irrespective of whether the countries were designated at the time the*

Table 16: NCB declarations in princpal applicant cases finalized on merits under old system, by RPD Member (2003-12)

RPD Member*	Finalized (Merits)	Accepted	Rejected**	NCB Declaration	Recognition Rate	NCB Rate (merits)	Proportion of Refused with NCB Declaration
MCSWEENEY, DANIEL	560	72	488	178	12.9	31.8	36.5
LEVESQUE, SYLVIE	596	85	511	166	14.3	27.9	32.5
FOURNIER, LLOYD	365	109	256	137	29.9	37.5	53.5
RANDHAWA, SAJJAD	201	12	189	107	6.0	53.2	56.6
MCBEAN, DAVID	281	2	279	105	0.7	37.4	37.6
FISET, EVELINE	636	133	503	104	20.9	16.4	20.7
BADOWSKI, JOHN	439	117	322	103	26.7	23.5	32.0
BYCZAK, MICHEL A.	690	98	592	89	14.2	12.9	15.0
HOMSI, ELKE	458	169	289	88	36.9	19.2	30.4
LAMONT, DEBORAH	251	88	163	80	35.1	31.9	49.1
Subtotal	4,477	885	3,592	1,157	19.8	25.8	32.2
Other RPD Members	130,242	67,182	63,060	2,512	51.6	1.9	4.0
All RPD Members	134,719	68,067	66,652	3,669	50.5	2.7	5.5

Source: IRB RPD/RAD Data (ATIP A-2013-01523)

** Ten RPD Members making the largest number of NCB declarations*

** Includes cases rejected with NCB declaration

Table 17: NCB declarations in princpal applicant cases finalized on merits under new system, by RPD Member (2013-14)

RPD Member*	Finalized (Merits)	Accepted	Rejected**	NCB Declaration	Recognition Rate	NCB Rate (merits)	Proportion of rejected with NCB Declaration
CASSANO, NATALKA	87	39	48	40	44.8	46.0	83.3
BOOTHROYD, KEVIN	180	92	88	33	51.1	18.3	37.5
CUKAVAC, HILDA	133	82	51	28	61.7	21.1	54.9
BOURDEAU, RICHARD	111	81	30	11	73.0	9.9	36.7
TIWARI, RABIN	194	167	27	9	86.1	4.6	33.3
MEKHAEL, RANDA	157	96	61	8	61.1	5.1	13.1
COTE, MAUDE	97	52	45	8	53.6	8.2	17.8
VOLPENTESTA, BERTO	41	18	23	8	43.9	19.5	34.8
BOUSFIELD, JOEL	162	127	35	7	78.4	4.3	20.0
POPATIA, BERZOOR	152	91	61	7	59.9	4.6	11.5
Subtotal	1,314	845	469	159	64.3	12.1	33.9
Other RPD Members	9,467	5,765	3,702	123	60.9	1.3	3.3
All RPD Members	10,781	6,610	4,171	282	61.3	2.6	6.8

Source: IRB RPD/RAD Data (ATIP A-2014-04109)

** Ten RPD Members making the largest number of NCB declarations*

** Includes cases rejected with NCB declaration

Table 18: NCB declarations in princpal applicant cases from Mexico finalized on merits under old system, by RPD Member (2009)							
RPD Member*	**Finalized (Merits)**	**Accepted**	**Rejected****	**NCB Declaration**	**Recognition Rate**	**NCB Rate (merits)**	**Proportion of rejected with NCB Declaration**
BYCZAK, MICHEL A.	121	10	111	30	8.3	24.8	27.0
LAMOUREUX, ANDRE	23	0	23	15	0.0	65.2	65.2
LEVESQUE, SYLVIE	32	5	27	11	15.6	34.4	40.7
MCBEAN, DAVID	33	0	33	8	0.0	24.2	24.2
BADOWSKI, JOHN	40	1	39	6	2.5	15.0	15.4
Subtotal	249	16	233	70	6.4	28.1	30.0
Other RPD Members	1,674	194	1,480	28	11.6	1.7	1.9
All RPD Members (Mexico)	1,923	210	1,713	98	10.9	5.1	5.7
Source: IRB RPD/RAD Data (ATIP A-2014-04109)							
** Five RPD Members making the largest number of NCB declarations in cases from Mexico in 2009*							
** Includes cases rejected with NCB declaration							