1995

Immigration: Two Years in Review

Chantal Tie

Michael Bossin

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/jlsp

Citation Information
https://digitalcommons.osgoode.yorku.ca/jlsp/vol11/iss1/4

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized editor of Osgoode Digital Commons.
IMMIGRATION: TWO YEARS IN REVIEW

Chantal Tie and Michael Bossin*

RÉSUMÉ
Dans cet article, les auteurs étudient les développements en ce qui a trait à la loi sur l'immigration suite à l’élection, il y a deux ans, d’un gouvernement libéral fédéral. En tant qu’avocats spécialisés dans le droit des pauvres, les auteurs mettent l’accent sur les changements dans le droit des réfugiés et les demandes d’admission se fondant sur des motifs humanitaires et de compassion. Un examen des récentes décisions de la Cour qui ont porté sur l’accès des immigrants à la justice accompagne le sommaire des changements législatifs et de politiques.

A. INTRODUCTION
On February 27, 1995, Fatimeh received the good news that she had been accepted as a Convention refugee in Canada. That evening, the night of the Federal budget, the bad news came. Effective immediately, adults applying for permanent residence in Canada were subject to a Right of Landing Fee. The fee was $975 per adult applicant and would be applied to those determined to be Convention refugees. It was to be paid up front and in addition to the regular processing fees, which all immigrants must pay. For Fatimeh and her son the total cost of application and landing was $1,575.00.

For Fatimeh, a single mother recently arrived in Canada and on welfare, the Right of Landing Fee imposed a genuine hardship. To other low-income immigrants, particularly those in two-adult families, the fee has become a serious impediment to landing. Independent applicants, entrepreneurs, or persons immigrating to Canada from developed countries, can afford to pay the new fee. The same is not true for most refugees and persons coming from “third world” countries, or those who seek landing on humanitarian and compassionate

* Chantal Tie is Executive Director of South Ottawa Community Legal Services and Michael Bossin is Staff Lawyer at Community Legal Services (Ottawa-Carleton). Both teach Immigration Law at the University of Ottawa’s Faculty of Law. Kristin Marshall, who is an immigration lawyer in private practice in Toronto, wrote the section on DROC.
grounds. To them, the Right of Landing Fee is not merely an additional administrative expense, it is a significant barrier. Reviving memories of the methods used by Canada to severely limit Chinese immigration in the nineteenth and early part of the twentieth century, the new fee has been referred to by its critics as "the head tax".¹

The imposition of the Right of Landing Fee is simply one example of how this last year has been a disappointing one for low-income immigrants to Canada. At the same time that this country has introduced measures to encourage the immigration of skilled workers and professionals, those programs designed to benefit refugees and humanitarian applicants have failed to meet initial expectations. Meanwhile, Court decisions have had a serious impact on such matters as the duty of fairness in humanitarian applications, change of country conditions in refugee claims and access to justice. What follows is a discussion of the most noteworthy examples of this trend from the past two years.

B. HUMANITARIAN AND COMPASSIONATE APPLICATIONS

1. Post Determination Refugee Claimants in Canada Class ("PDRCC")

Beginning on February 1, 1993, all failed refugee claimants have received a post-determination review of their claim. The review, conducted by an Immigration officer, was meant to provide a type of "safety net" for those claimants who, although having been refused by the Immigration and Refugee Board ("IRB"), still faced an "objectively identifiable risk".² In May 1994, the Minister of Citizenship and Immigration announced that all refugee claimants whose claims had been refused between February 1, 1993 and May 20, 1994 would now be eligible for a second "post-determination" review.

The problem with the "old" PDRCC review was that it was not a very effective safety net. The program was strongly criticized in a report made to the Minister by Susan Davis and Lorne Waldman, The Quality of Mercy.³ The authors noted that, under the old system, the acceptance rate for claimants across the country

---

¹. See, for example, Sharry Aiken, "A Return to the Abhorrent Head Tax", Spring, 1995 Refugee Update, 1995.
². Immigration Regulations, SOR/78-172, s.2. [hereinafter Immigration Regulations]
³. S. Davis and L. Waldman, The Quality of Mercy: A study of the processes available to persons who are determined not to be refugees and who seek humanitarian and compassionate treatment. (March 1994), Study submitted to The Honourable Sergio Marchi, Minister of Citizenship and Immigration Canada.
was less than 1%. According to Davis and Waldman, this low rate made the entire review meaningless.

One reason so few cases were accepted under the "old PDRCC" was that the standard was very high and the risk faced by the applicant had to be personalized to the individual. This standard was far higher than the "well-founded fear of persecution" test used by the IRB in deciding refugee claims. In the opinion of some advocates, the PDRCC criteria were construed so narrowly that the successful applicant was the person who could provide the bullet with her name on it.

The definition of "member of the post-determination refugee claimants in Canada class" contained in the Immigration Regulations did not change after May 20, 1994. One still had to show that the "objectively identifiable risk ... would apply in every part of the country, and would not be faced generally by other individuals in or from that country". There was, however, to be a more generous interpretation of the criteria. Specifically, the phrase "... would not be faced generally by other individuals ..." was "not restricted to a risk personalized to an individual; rather it included risks faced by individuals that may be shared by others who are similarly situated."

This more expansive approach to interpreting the regulation, although prompted by criticism of the original program, was also consistent with judicial commentary on such rigid criteria. In Abdirizak Yusuf Muse v. Canada (Solicitor General), for example, the Federal Court Trial Division quashed a decision of Canada Immigration that a Somali man would not face unduly harsh or inhumane treatment if returned to his country.

In that case, the applicant had not shown he "would be at greater risk than anyone else in the general population under the prevailing country conditions". By imposing such a "rigid requirement which was inconsistent with the intent of the Immigration Act and the Ministerial standard", the officer had fettered his discretion. Although Muse deals with an application made under section 114 (2) of the Immigration Act, the criteria of "unduly harsh or inhumane treatment" is similar to that set out in the PDRCC

---

4. Supra, note 2 at s.2.
5. PDRCC Interpretive Guidelines (1994) [hereinafter PDRCC Guidelines].
7. Ibid. at 277.
8. Ibid. at 278.
definition of risk to the immigrant’s life, “extreme sanctions” or “inhumane treatment”.  

The Minister’s acknowledgement that all post-determination reviews done prior to May 20, 1994 were essentially inadequate was a welcome and encouraging development. Indeed, at the time of the announcement of the second review, there was hope that a fairer, more generous approach would henceforth be taken in post-claim reviews. Regrettably, the “new PDRCC” has proved to be little different from the “old PDRCC”, at least in terms of the rate of successful applications. Currently, the rate of acceptance is about 5% across Canada, an increase from the earlier 1% level, but still very low.

One reason for the slightly higher acceptance rate could simply be that in those cases affected by the Minister’s announcement a significant amount of time had passed since the IRB decision. In some cases, there may have been a significant change of circumstances in the country, or in the circumstances of the individual applicant.

For IRB decisions made after May 20th, 1994, PDRCC reviews continue to be conducted. In these cases, applications must be submitted 15 days after receipt of the Board decision, or the decision of the Federal Court, whichever comes later. Where leave to commence a judicial review is denied, as are most leave applications, only a few months would normally have passed between the IRB decision and a PDRCC application. Since the criteria applied in the PDRCC are very similar to those in the refugee hearing, a re-evaluation several months later is not likely to garner a different result.

As well, although Post Claim Determination Officers (“Officers”) often deal with complex matters similar to those considered in a refugee claim, they are not trained at the same level, nor to the same degree, as Refugee Board members. In some cases, the quality of the decision-making in PDRCC applications reflects the lack of expertise and training of the officers. That being said, it would appear that in judicial reviews of such decisions, the Federal Court is reluctant to interfere with the reasoning of these officers. In Gharib v. Minister of Citizenship & Immigration, for example, the Officer refused the PDRCC application on the grounds that the applicant had an internal flight alternative (IFA) in Lebanon. In her analysis, there was nothing to indicate that the officer had considered the reasonableness of the IFA, although the guidelines for interpreting the PDRCC regulation suggests that Officers must consider the issue of reasonableness in a “sensitive, culturally aware, flexible and judicious

10. Supra, note 2 at s.2.

11. (September 13, 1995) No. IMM-180-95, (Fed. T.D.)
In his consideration of the judicial review of this decision, Mr. Justice Noel, of the Federal Court Trial Division states:

... the decision of an immigration official not to recommend an individual as being eligible for the PDRCC takes no right away. Thus, the Court will not intervene in discretionary decisions of post-claim determination officers unless such discretion can be shown to have been exercised pursuant to improper purposes, irrelevant considerations, with bad faith, or in a patently unreasonable manner.13

Many PDRCC applications are rejected on the basis of publicly available human rights reports and other similar documentation, which are not submitted by the applicant. Where such materials are considered by the Officer, without disclosure to the applicant, an issue arises as to whether the officer is acting unfairly, by relying on "extrinsic evidence". In Jesbir Singh Klair v. Canada (Minister of Citizenship & Immigration),14 the Federal Court Trial Division found that this question, raised on an application for a stay of removal, amounted to a "serious issue", for the purposes of a stay.

In practice, PDRCC officers continue to place great emphasis and reliance upon the negative decision of the Refugee Board. To overcome the reasoning in those decisions generally requires the applicant to produce new evidence which contradicts the factual findings made by the Board. To do so demands considerable time effort and expertise, none of which is currently covered by the Ontario Legal Aid Plan. Given the high standards to be met in the PDRCC and the low percentage of successful applications, the outlook for potential applicants remains discouraging.

2) "Deferred Removal Orders Class"

On July 7, 1994, the Minister of Citizenship and Immigration announced the creation of the Deferred Removal Orders Class ("DROC"). There was extensive media coverage about his announcement, and, unfortunately, a great deal of misinformation circulated among the failed refugee claimant population in Canada. The announcement was extremely vague. The rumours varied from a general amnesty for all failed refugee claimants to a right of landing for all claimants who had been in Canada for three years. There was no general amnesty, and the eligibility requirements for the class are much more restrictive than merely having been in Canada for three years.

---

On November 4, 1994, some of the uncertainty around the Class was clarified through the amendment to the *Immigration Regulations* which defined "member of the deferred removal orders class". Part of the rationale for the creation of the Class was to address the situation of many failed refugee claimants who had made Canada their home over the years, forming attachments without obtaining any status or security. In many cases, the removals were not being executed by the Department because there was a moratorium on removals to certain war-torn countries. Somalia and Sri Lanka were listed, as well as other countries where there was reason to believe the person deported would suffer human rights abuses if returned, such as the People's Republic of China and Iran. In other cases removals could not be carried out because the failed refugee claimants had applied to the Federal Court for a review of their negative refugee decisions, which stayed the removal. With the announcement of the DROC, moratoriums on removals to certain countries were lifted and Immigration stepped up expulsions, with the emphasis on those with criminal records and refugee claimants most recently rejected.

To be eligible for membership in the DROC, a claimant must have made his or her claim to be a Convention refugee on or after January 1, 1989. The person must be in Canada and be subject to a removal order,\(^{15}\) and at least three years must have passed since the latest of:

- the making or issuance of any removal order; or,
- the date on which the refugee claim was rejected by the IRB, or the person was found not to have a credible basis to their claim at inquiry under the old section 46.03(5) of the *Immigration Act*.\(^{16}\)

Members of the refugee "Backlog" who made their claims prior to January 1, 1989 are excluded from the Class, even though these individuals have been settled in Canada for longer than people who are included. Others are excluded if they were never issued a removal order. For example, someone who came to Canada on a visitor's visa and made a refugee claim while their visa was still valid would not be eligible for DROC, even though it had been three years since his or her claim was rejected.

In addition to the eligibility requirements, there are other hurdles which must be cleared before applicants can be landed under the DROC program. Canada Immigration originally took the position that applicants would have to have a work history under a valid employment authorization for at least six months to

---

15. As these terms were defined in the *Immigration Act* before February 1, 1993.
16. *Supra*, note 9 at s.46.03(5).
be included in the Class. After extensive lobbying, the government changed its position to enable applicants to fulfil the employment requirement after they had met the other eligibility criteria. The hardship for applicants who were never issued an employment authorization was lessened by this amendment. As it now stands, applicants have approximately nine months after becoming eligible for the program to obtain an employment authorization and to complete their six months of employment. The six months need not be consecutive and can include volunteer work, part-time work or self employment, as long as the work was performed under a valid employment authorization. Although generous in some respects, the employment landing requirement still presents a problem for women who are caring for their children and cannot get daycare in order to find employment, and others who simply cannot find employment.

DROC applications must be submitted within 120 days of eligibility and Canada Immigration is inflexible about the deadline. Routine fees are applicable to DROC applications, that is, a $500 processing fee and the $975 Right of Landing fee. As discussed above, these fees pose a hardship for people of low income who are otherwise eligible for favourable consideration.

Finally, although the DROC program is not time limited, it seems clear that there will be fewer and fewer people eligible for DROC over time. The guidelines discriminate against claimants who applied to the Federal Court on or after July 7, 1994. For those failed claimants, the three years is counted from the date the stay of the removal order expires, or the date the Federal Court renders its decision, not the date their refugee claim was rejected. The combination of this requirement and Immigration’s stepped-up removals policy will make the Class inaccessible to most failed claimants, except those from countries to which Immigration has declared a moratorium on removals.

C. JUDICIAL REVIEW OF HUMANITARIAN AND COMPASSIONATE DECISIONS

1) The Content of the Duty of Fairness

When an applicant applies to Immigration for landing on the basis of humanitarian and compassionate considerations and is refused, no statutory right of appeal exists. One must resort to proceedings for judicial review, with leave of the Federal Court, and can succeed by demonstrating that there has been a breach of the duty of fairness. Over the years the Federal Court has attempted to define the factors which affect the fairness of a decision, making it reviewable in a judicial review proceeding. Cases such as Johal v. Minister of Employment

17. Ibid. at s. 82.1(1).
& Immigration,\textsuperscript{18} Kaur et al. v. Minister of Employment & Immigration,\textsuperscript{19} Muliadi v. Canada (Minister of Employment & Immigration),\textsuperscript{20} Thorne and The Minister of Employment and Immigration,\textsuperscript{21} and Ramoutar v. Canada\textsuperscript{22} held that the content of the duty of fairness required knowledge of the case to be met, and an opportunity to respond to reasons for a refusal by the Immigration officer. In June of 1994, in a short oral decision from the bench, Mr. Justice Hugessen, speaking for the Federal Court of Appeal, rendered a decision in Syed Shah v. Minister of Employment and Immigration\textsuperscript{23} which set the content of the duty of fairness at a very minimal level when humanitarian and compassionate immigration applications are being considered. He stated:

The power to grant such exemption resides in subsection 114(2) of the Act. The decision itself is wholly a matter of judgment and discretion and the law gives the applicant no right to any particular outcome. In this respect it differs from any other decisions, e.g. by a visa officer dealing with a sponsored application for landing, where the law establishes criteria which, if met, give rise to certain rights. In a case such as this one the applicant does not have a "case to meet" of which he must be given notice; rather it is for him to persuade the decision-maker that he should be given exceptional treatment and exempted from the general requirements of the law. No hearing need be held and no reasons need be given. The officer is not required to put before the applicant any tentative conclusions she may be drawing from the material before her, not even as to apparent contradictions that concern her. Of course, if she is going to rely on extrinsic evidence, not brought forward by the applicant, she must give him a chance to respond to such evidence. In the case of perceived contradictions, however, the failure to draw them specifically to the applicant's attention may go to the weight that should later be attached to them but does not affect the fairness of the decision.

The Shah decision has now set the standard against which all humanitarian and compassionate applications under section 114(2) are being measured.

\begin{itemize}
  \item \textsuperscript{18} 4 Imm.L.R. (2d) 105.
  \item \textsuperscript{19} 5 Imm. L. R. (2d) 148.
  \item \textsuperscript{20} (1986), 18 Admin. L.R. 243.
  \item \textsuperscript{21} (11 March, 1993), No. T-2652-91 (F.C.T.D.).
  \item \textsuperscript{22} [1993] 3 F.C. 370.
  \item \textsuperscript{23} (1994), 170 N.R. 238.
\end{itemize}
2) **Factual Basis for the Decision**

Despite the outcome in *Shah*, on the facts of this case as they were found in the Federal Court Trial Division, it appears that the applicant had benefited from a substantial degree of fairness in the consideration of his case. He was granted a second interview with a new interpreter, had the benefit of counsel, and both he and his wife were given ample opportunity to explain the discrepancies in their previous answers. With this factual background it is hardly surprising that the application for Judicial Review was dismissed by Jerome, A.C.J.

The *Shah* decision is an example of bad facts making for bad law. The facts revealed a significant degree of procedural fairness accorded to the applicant. The legacy of the case, however, has not been confined to these facts. In *Shah*, the Federal Court of Appeal makes far reaching general statements, which appear intended to apply to all similar cases.

3) **The Meaning of Extrinsic Evidence**

In a number of decisions since *Shah*, the Trial Division has commented on the meaning of "extrinsic evidence". The reliance upon "extrinsic evidence" by an immigration officer provides the most significant exception to the minimal standard imposed by the court. Mr. Justice Gibson in *Adolfo J. Garcia v. The Minister of Employment and Immigration*, found that a handwritten note made by an immigration officer on a file, which purported to record the results of an interview with the applicant was:

... extrinsic evidence, not brought forward by the Applicant for the purposes of this application. The note was not prepared by the Applicant. There is no evidence that it was ever seen by the Applicant. It was not part of the material submitted by him for consideration on his application for visa exemption. There is no reason to believe that he was even aware of its existence.

Mr. Justice Rothstein in the case of *Dasent v. Canada (Minister of Citizenship & Immigration)* has provided the most comprehensive examination of the nature of extrinsic evidence. His analysis presents a rationale for his categorization, as well as his conclusions. In characterizing contradictory statements by the two spouses, made in separate interviews, as "extrinsic evidence" he provides us with clear guidelines for other cases:

---


26. (December 8, 1994), No. IMM-5386-93, (Fed. T.D.) see also *Sorkhabi v. Canada (Secretary of State)*, 26 Imm.L.R. (2d) 287.
I interpret the term "extrinsic evidence not brought forward by the applicant" as evidence of which the applicant is unaware because it comes from an outside source. This would be evidence of which the applicant has no knowledge and on which the immigration officer intends to rely in making a decision affecting the applicant. While this would include information obtained from an outside party as in Muliadi, I fail to see why it would not also include evidence from a spouse obtained separately from the applicant, or other information in the immigration file that did not come from the applicant, of which the applicant could not reasonably be expected to have knowledge.

The relevant point as I see it is whether the applicant had knowledge of the information so that he or she had the opportunity to correct prejudicial misunderstandings or misstatements. The source of the information is not of itself a differentiating matter as long as it is not known to the applicant. The question is whether the applicant had the opportunity of dealing with the evidence. This is what the long-established authorities indicate the rules of procedural fairness require.

It appears from these decisions that the Trial Division has taken a common-sense and liberal approach to the interpretation of the exception in Shah, permitting considerable leeway for counsel to argue for the inclusion of different fact situations within the "extrinsic evidence" exception.

4) Can Shah be Confined to Similar Fact Situations?

Of significant importance is whether Shah limits the content of the duty of fairness for all humanitarian and compassionate applications under section 114(2), regardless of the basis of the application. In Garcia, Mr. Justice Gibson sought to distinguish Shah from the facts in the case before him, to find that while both applications were made under section 114(2) of The Immigration Act, they were very different:

This is not a "bone fide marriage" based application, but, as indicated earlier, an application based upon what would appear to me, at least, to be a subjectively well founded fear of return to Nicaragua, documented psychiatric considerations, and effective attachment to Canada through study, training and community support rather than through marriage.27

Reasoning that in Shah, Mr. Justice Hugessen had limited his decision to "a case such as this one", the Court in Garcia found that Shah did not apply because of the different factual basis. Gibson, J. went further and certified the following question:

27. Supra, note 25 at 6.
When considering the content of the "duty of fairness" owed to an Applicant in subsection 114(2) applications under the Immigration Act, does the decision in Syed Shah v. The Minister of Employment and Immigration apply only in respect of cases with a similar fact basis, or does it apply to all visa exemption applications under subsection 114(2) or, more specifically, where such applications are based upon a subjective fear of removal to the Applicant's country of citizenship, on psychiatric fragility and on alleged effective integration into Canada that is supported by substantial evidence provided by the Applicant?

The Minister did not appeal Garcia, so the question of the ambit of Shah remains unanswered by the Federal Court of Appeal. However, Gibson, J's reasoning in Garcia is consistent with other higher court decisions which have found that the duty of fairness varies according to the circumstances, and the seriousness of the consequences to the applicant. Unfortunately, this approach has not been followed in reviews of negative PDRCC decisions where the Federal Court is applying the "minimal standard of fairness" test set out in Shah. Arguably, PDRCC applications also warrant a higher standard than that applied in marriage applications under s. 114(2), as they address serious issues such as risk to life or inhumane treatment.

D. REFUGEE ISSUES

1) Change of Country Conditions

For several years, the issue of how the IRB should deal with cases involving a change in country conditions has been "debated" in the Federal Court. Article 1C of the 1951 United Nations Convention relating to the Status of Refugees, one of the cessation clauses, is incorporated into subsection 2 (2) of the Immigration Act. It states that:

A person ceases to be a Convention refugee when the reasons for the person's fear of persecution in the country the person left, or outside of which the person remained, cease to exist.

In refugee hearings, the issue generally arises where there has been some significant change in a country after the departure of the refugee claimant. The

---


30. Supra, note 9, s. 2 (2) (e).
judicial controversy concerns the type of analysis required to deal with a change in country conditions. Specifically, is it necessary for the tribunal to apply what has become known as the “Hathaway Test.” Professor James C. Hathaway posits that for the cessation clause to be applicable, the change in country conditions must be “meaningful ... truly effective ... (and) durable”.31

In January 1995, the Federal Court of Appeal effectively curtailed the vigorous discussions on the issue of changed country conditions by its brief, but strongly worded decision in the case of Sofia Mohamed Yusuf v. Canada (Minister of Employment & Immigration).32

The Court in Yusuf makes it clear that consideration by the Refugee Board of the criteria set out by Hathaway is not a requirement in determining whether there has been a change of country conditions. Writing for the Court, Mr. Justice Hugessen states:

We would add that the issue of so-called “changed circumstances” seems to be in danger of being elevated, wrongly in our view, into a question of law when it is, at bottom, simply one of fact. A change in the political situation in a claimant’s country of origin is only relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant will be persecuted in the event of return there. That is an issue for factual determination and there is not a separate legal “test” by which any alleged change of circumstances must be measured. The use of words such as “meaningful”, “effective” or “durable” is only helpful if one keeps clearly in mind that the only question, and therefore the only test, is that derived from the definition of Convention refugee in section 2 of the Act: does the claimant now have a well-founded fear of persecution?33

Since the release of Yusuf, the reasoning of Hugessen J.A. has been followed in at least nine Federal Court Trial Division cases and two Federal Court of Appeal decisions.34 In most cases, the appellate court has accepted that a change of

33. Ibid. at 1.
country circumstances is merely a finding of fact and, therefore, is reluctant to intervene unless the determination is "truly erroneous".\textsuperscript{35}

A different analysis of the issue of change of country conditions can be found in the Federal Court of Appeal decisions of \textit{Ahmed v Canada (Minister of Employment and Immigration)}\textsuperscript{36} and \textit{Cuadra v Canada (Solicitor General)},\textsuperscript{37} both written by Mr. Justice Marceau. Although a determination of whether circumstances have changed to the degree that a refugee claimant would no longer be at risk can be characterized as a finding of fact, it is not, as Marceau J.A. states in \textit{Ahmed}, "a \textit{mere} finding of fact drawn directly from the evidence."\textsuperscript{38} Such a finding is not the same, for example, as a determination that a certain event took place on a particular day. Rather, for a Board to reach a conclusion that there has been a change of country conditions such that it negates the well-founded fear of the claimant "the evidence has to be interpreted and inferences must be drawn from it".\textsuperscript{39}

In \textit{Ahmed}, Marceau J.A. states that evidence of change of country conditions has to be interpreted "in relation to legal concepts and provisions of law."\textsuperscript{40} In other words, it cannot simply be considered in a vacuum. In that case, the IRB expressed its finding regarding change of country conditions in a short paragraph, stating:

With a change of government in Bangladesh, the panel does not find the claimant to have a well-founded fear of persecution should he return to Bangladesh today.\textsuperscript{41}

In his review of this decision, Mr. Justice Marceau made it clear that a deeper analysis was required. Moreover, the finding of fact had to be made within an analytical framework, such as that described by Hathaway. According to Marceau J.A., the evidence had to provide a "clear indication of the meaningful and effective change which is required to expunge the objective foundation of the appellant's claim."\textsuperscript{42}

\begin{itemize}
\item \textsuperscript{35} Manorath, supra, note 34 at 4.
\item \textsuperscript{36} (July 14, 1993), No. A-89-92, (Fed. C.A.).
\item \textsuperscript{37} (July 20, 1993), No. A-179-92 (Fed. C.A.).
\item \textsuperscript{38} Supra, note 36 at 7.
\item \textsuperscript{39} Ibid.
\item \textsuperscript{40} Ibid.
\item \textsuperscript{41} Ibid. at 6.
\item \textsuperscript{42} Ibid.
\end{itemize}
The decisions of Marceau J.A. in *Ahmed* and *Cuadra* are in contrast to the approach taken by Hugessen J.A. in *Yusuf*. Curiously, although made by the same level of Court as *Yusuf*, the reasoning of Marceau J.A. in those earlier decisions has been ignored in recent caselaw.

In spite of *Yusuf*, the recent case of *Tutu v. Canada (Minister of Citizenship and Immigration)*\(^\text{43}\) shows that, in decisions based on a change of country conditions, the findings of the IRB are not completely impervious to review. In that case Mr. Justice Cullen refers to *Yusuf*, and acknowledges that "a reviewing Court should be very hesitant to interfere in factual assessments."\(^\text{44}\) That being said, however, Cullen J. found that the Board's factual finding of change of country conditions "resulted from a serious misreading of the evidence."\(^\text{45}\) He states:

> ... when the old regime's policies are still very much in force – even though there may have been changes – the Board must, at least, consider the contradicting evidence. It is not for this Court to weigh evidence; that is the Board's prerogative. But when it is patently clear that the Board has not weighed the evidence, a finding from that evidence will be erroneous and subject to judicial review.\(^\text{46}\)

The decision in *Tutu* provides a glimmer of hope for counsel whose clients have been affected by a negative IRB decision based on a finding that there has been a change of country conditions. Where there is evidence that conditions have not changed – at least in regard to the particular circumstances of the claimant – the Board is bound to consider and weigh such evidence in making its decision.

2) **Internal Flight Alternative**

In *Yusuf*, the Federal Court of Appeal also dealt with the issue of internal flight alternative ("IFA"). The problem in the decision is not how the Court applied IFA, but that it did not apply the law regarding internal flight where it ought to have done so.

The Applicant in *Yusuf* was a member of the Issaq clan, born and raised in Hargeisa, in the north of Somalia. Although noting that Somalia was far from being a settled country, and that fighting continued among the various Somali clans in the south and central regions of the country, the IRB found that in the north, the situation was more stable. In the view of the Board, the claimant could return to Hargeisa without fear of persecution.


\(^{44}\) *Ibid.* at 8.

\(^{45}\) *Ibid.*

\(^{46}\) *Ibid.*
The Court held that "(t)his was not a case of an Internal Flight Alternative but simply of the Board deciding, as a question of fact, that the appellant could safely return to the very part of the country from which she had fled."  

As in cases where there is an IFA, the claimant in *Yusuf* could live safely in only one part of the country. The distinguishing feature in *Yusuf* is that the part of the country where the Board found it safe for the claimant to live happened to be the place where she was born and raised. The distinction, however, is illusory, and the Court's analysis superficial.

In finding that this was not a case of Internal Flight Alternative, the Court in *Yusuf* avoided the analysis required in an IFA case. In particular, there was no consideration of whether it was "unreasonable" for the claimant to live in the city where she was born. The avoidance of this issue was crucial, since it meant the Board did not have to consider whether it was safe for the claimant to get to Hargeisa.

An IRB paper entitled *Women in Somalia* illustrates the dangers for women travelling in Somali territory:

> According to one analyst, moving [from one] to another area within Somalia presents its own perils. Travelling internally at present is difficult, as it requires money that most Somalis, especially women, do not have. The infrastructure is in disarray. Most importantly, says one analyst, one must attempt to reach an area that is controlled by one's own clan; crossing territory of another clan can be dangerous. For many Somalis, women in particular, the only alternative available to remaining in an untenable situation is often to walk to one of the refugee camps located on the border of Somalia. ... [T]he director of the clinical psychology community programme at Boston University, who is of Somali origin, stated that "Somali women who return to Somalia to obtain documents run the risk of being beaten, raped, imprisoned or even killed."  

Potentially, the Court's analysis in *Yusuf* is applicable to many Somali refugee claimants, and persons coming from other war-torn countries. The problem arises in situations where Boards consider it safe for persons to return to a previously troubled home region, over which the claimant's clan or ethnic group now exerts some measure of control. In such cases, *Yusuf* is authority for decision-makers to by-pass issues of reasonableness and accessibility to that region. For that reason, it is a troubling precedent.

---

47. *Supra,* note 32 at 2.

3) Special Inquiry Model at the Convention Refugee Determination Division (“CRDD”)

With the institution of the “Special Inquiry Model” in October 1995, the IRB will significantly change the way in which it deals with refugee claims. Under the new procedures, Refugee Claim Officers (“RCOs”) formerly known as Refugee Hearing Officers, will work much more closely with Board members. Well before the hearing of the refugee claim, the RCO and presiding panel member will meet to review and analyze the claim in an effort to identify the issues to be addressed, any special circumstances of the claimant, the need to acquire additional information, and the existence of possible exclusion issues. RCOs will no longer be independent researchers. The research will now be directed by the Board.

Aside from publicly available information, panels will now regularly receive a package of information from Citizenship & Immigration, including the report of the Immigration officer at the port-of-entry. All public source information as well as any materials derived from Citizenship and Immigration must be disclosed to the claimant and his or her counsel. In addition, the panel, with input from the RCO, may request special source information on the particular history of the claimant, or issues specific to the claim. This information is obtained from sources that are not readily accessible to the public, such as experts or Canadian diplomatic sources abroad. Before such information can be sought, the claimant and/or counsel must be provided with a draft form, describing the information being sought, why it is being sought, the source and methodology of the search, as well as the estimated cost. An opportunity will be given to the claimant/counsel to respond to the research being proposed.

The primary objective of the new procedural model is to have better informed and better prepared panels. At the moment they enter the hearing room, presiding panel members will have had months to consider the issues, and the documentary evidence. In addition, Board members, as well as RCOs, will be assigned to Case Management Teams, which will concentrate on certain geographic regions. It is hoped that, in this way, Board members will acquire expertise in these countries, thereby further improving the quality of decision-making.

Guidelines for meetings held in the absence of counsel or the claimant and relating to the conduct of Board member and RCOs have been drafted. Members must not solicit, nor may RCOs offer, any comment on the merits of a claim, or the weight to be given to any evidence or conclusions of fact. Moreover, a written summary “capturing the essence”49 of communications between the RCO and panel is to be provided to the claimant and/or counsel.

49. Immigration and Refugee Board, Instructions Governing Extra-Hearing Communications Between Members of the Refugee Division and Refugee Claims Officers, (Ottawa:
Board participants have been trained on the principles of fundamental justice and the distinction between the role of the IRB member “as examiner and decision-maker” and that of the RCO “as assistant and advisor to the decision-maker”.50

Certainly, the new procedural model has its positive attributes. For example, the earlier disclosure of documents and identification of issues should result in more focussed, shorter hearings. Board panels are likely to be better prepared and more informed on country conditions than has often been the case in the past.

That being said, and in spite of the precautions being taken by the Board, several aspects of the new procedure raise serious concerns. The IRB has labelled the new procedure the “Special Inquiry Model”, and points out that “[t]he refugee determination process is essentially an inquiry into the circumstances surrounding a claim to Convention refugee status.”51 As well, in documents used to train Board members in the new procedures, the IRB notes that its members “enjoy broad powers of commissioners appointed under the Inquiries Act to direct the gathering of information relevant to the assessment of claims to Convention refugee status.”52

There is, however, an important distinction between an inquiry, as defined in the Inquiries Act, and a refugee determination. Under the Inquiries Act, commissioners are appointed to “investigate and report”53 to the Minister or Governor-in-Council. IRB members, on the other hand, are decision-makers, not investigators. They act independently, reporting to no one. A close relation with board counsel is essential to a commissioner sitting on a board of inquiry. One questions, however, the appropriateness of such a close working relationship between board counsel and an impartial decision-maker.

Even without specifically commenting on the merits of a claim, an experienced RCO can influence the direction of a Board’s inquiries, and colour a panel’s perception of a claimant. In itself this is not a bad thing. The concern is that such influence will be made in the absence of the claimant and/or counsel. Should the new system work flawlessly, any inappropriate comments made in closed sessions would be communicated to counsel and, therefore, potentially countered. Unfortunately, not all claimants have the benefit of counsel. Moreover, no system

50. Ibid. at 2.
52. Ibid. at 1.
53. Inquiries Act, R.S.C., c. 1-13, s. 6.
which is conducted by human beings ever works flawlessly. Inevitably, errors in judgment and performance will occur.

There already exist rules of law and procedure governing the conduct of Boards in IRB hearings, but this does not mean that there is always adherence to such rules. The difference between Board hearings and closed communications between panel members and RCOs is that the former are recorded and thereby monitored. The latter work on the honour system. Quaere whether, in a procedure which potentially affects the life, liberty and security of each claimant, the lack of a monitoring system is in accordance with the principles of fundamental justice?

These concerns are accentuated when one contemplates the government's announcement, made in early 1995, that it intends to reduce refugee panels from two members to one. This proposal alone will reduce the quality of decision-making. At present, weaker, less experienced Board members are often placed on panels with their stronger, more experienced colleagues. Such a balance will be missing with single-member panels. Moreover, the influence of an experienced RCO will be increased in in camera sessions with one member.

Another concern with the Special Inquiry Model is that the time spent with the file prior to meeting the claimant in the hearing room will make it more difficult for Board members to keep an open mind about each case. In a judicial or quasi-judicial proceeding, extensive pre-hearing discussion between the parties is an excellent way to isolate issues and define the focus of the hearing. This system works well in civil trials. There is one significant difference, however, between a civil trial and the Special Inquiry Model being instituted in refugee claims. In civil proceedings, the judge who presides over pre-hearing matters is not the judge who ultimately hears the evidence and decides the case. That decision-maker has had no opportunity to formulate pre-conceived ideas about the case before he/she begins to hear any evidence. In the Special Inquiry Model of the Refugee Board, the same members who deal with pre-hearing procedures also hear the evidence and make the decision. For them, opportunities to form pre-conceived notions abound.

At the time of writing, the new procedural model has yet to take effect, and the concerns raised in this paper are, therefore, theoretical. One will have to see if, in practice, the positive aspects of the new procedure outweigh those which are potentially negative.

E. ACCESS TO JUSTICE

The Charter under section 24(1) guarantees

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction
to obtain such remedy as the court considers appropriate and just in the circumstances.\textsuperscript{54}

On reading the guarantee, one would assume that \textit{Charter} issues could be raised before Immigration tribunals, within ongoing Federal Court applications, as well as in provincial superior courts. The provincial superior court alternative is particularly important in the immigration context because access to the Federal Court is contingent upon being granted leave for the review of almost all immigration decisions.\textsuperscript{55}

In \textit{Reza v. The Queen in Right of Canada et al.},\textsuperscript{56} the applicant was determined not to have a "credible-basis" to his refugee claim under the now repealed section 46.02(1) of the \textit{Immigration Act}. He sought leave to appeal the "credible-basis" decision in the Federal Court, which was denied. Several humanitarian and compassionate applications were subsequently made to Immigration officers, all of which were rejected, and leave to commence a judicial review of the last Immigration officer's decision in the Federal Court, Trial Division was refused. After exhausting all appeal and review processes available in the Federal Court, the claimant brought an application in the Ontario Court (General Division) for injunctive relief and a declaration that his \textit{Charter} rights had been violated. The application made direct challenges to the constitutionality of the credible-basis hearing under section 7 of the \textit{Charter}; the leave requirement in immigration cases to commence judicial review in the Federal Court; and the application of certain of the transitional provisions.

In a move which preempted the consideration of the \textit{Charter} issues raised, however, the motions judge declined to exercise his jurisdiction and stayed the entire application. At the heart of his decision was a finding that the Federal Court had concurrent jurisdiction to grant the relief requested, and that it was no less advantageous for the claimant to seek his remedy in the Federal Court. The claimant appealed the stay of his application to the Court of Appeal for Ontario.

Madame Justice Arbour, speaking for the majority of the Ontario Court of Appeal, allowed the appeal and held that the applicant should have the right to choose in cases where both courts have full concurrent jurisdiction. She went


\textsuperscript{55} The only exception is the judicial review of a visa officer's decision which can commence as of right pursuant to section 82.1(2) of \textit{The Immigration Act}.

further and found that the leave requirement in the Federal Court was a juridical disadvantage, making the application as of right in the Ontario court more advantageous to the applicant. This decision allowed failed refugee claimants an alternative forum if Charter issues were raised. This was particularly important in cases where all Federal Court remedies had been exhausted.

In a decision released by the Supreme Court of Canada in April of 1994, Madame Justice Arbour’s decision was overturned. The Court found that, notwithstanding the concurrent jurisdiction of the Ontario Court (General Division) and the Federal Court to hear the application, the motions judge properly exercised his discretion to stay the Ontario Court proceedings because “Parliament had created a comprehensive scheme of review of immigration matters and the Federal Court was an effective and appropriate forum”.57 While there is an acknowledgement of the availability of a choice of forum for constitutional challenges in general, the decision effectively forecloses the choice for immigration cases, by the blanket finding that there is a comprehensive scheme already in place in the Federal Court.

The Court agreed in general with the dissenting reasons of Abella J.A. at the Court of Appeal, but did not address the issue of the leave requirement being a “juridical disadvantage”.

The effects of Reza are already being felt in the lower courts. In Baroud v. Canada (Minister of Citizenship and Immigration),58 a refugee claimant was detained on a security certificate issued under s. 40.1 of the Immigration Act. While the review of security certificates provides for a hearing into the reasonableness of the certificate by a Federal Court Judge, there is no provision for an application for release from detention. The claimant commenced an application for a writ of habeas corpus with certiorari in aid in the Ontario Court (General Division), which was refused at first instance on the basis of the Reza decision.

In disposing of the appeal Carthy, J.A., having examined the remedies available in the General Division and the Federal Court, and the practical timing of any hearings in both, concluded that:

the trial procedure in the Federal Court is an adequate and effective alternative remedy which provides relief to the appellant in a forum where proceedings relating to the appellant’s detention are in progress.59

58. 28 Imm.L.R. (2d) 123.
59. Ibid. at 127.
Having come to this conclusion, the Court then proceeded to dispose of the section 10 Charter arguments which had been raised. Section 10 mandates that

10. Everyone has the right on arrest or detention

.....

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

Despite the mandatory wording of section 10, Carthy J.A. found that the guarantee did not apply:

... the answer is an obvious one when s.1 of the Charter is applied. Once there is a finding that an alternative remedy is equally effective it is axiomatic that the denial of the right to the issuance of a writ of habeas corpus is a justifiable limit. There is no real loss and s.1 serves its proper purpose of modifying what would otherwise be absolute rights where there is demonstrable justification.60

It is questionable if the alternative remedy was, in fact, equally effective on the facts of the Baroud case, and more important if it would always be equally effective. The Federal Court review of the certificate could take significantly longer than a habeas corpus application and the Minister can, for security reasons, refuse to grant the claimant access to the materials upon which a decision is based. The secrecy surrounding the issuance and review of security certificates raises some doubts as to the effectiveness of the alternative remedy.61

Despite the outcome, the decision in Baroud endorses the principle that each case should be determined after a consideration of the particular facts. The Court, by embarking on a comparison of the relative merits of each forum, leaves open the possibility that, in certain circumstances, the Federal Court alternative may not be equally advantageous to the applicant and a proceeding could be commenced in a provincial superior court.

The limiting of Charter remedies for immigrants by the Supreme Court of Canada in Reza is the most recent in a series of Superior Court Cases in which the result has been an erosion of immigrant rights. In Ruparel v. Canada (Minister of Employment and Immigration)62 the Federal Court held that the Charter does not apply to visa officer decisions abroad; in Canada (Secretary

60. Ibid. at 129.

61. See section 40.1(4) of the Immigration Act for a review of the in camera proceedings and the treatment of security or criminal intelligence reports, and information obtained in confidence from foreign governments.

of State for External Affairs) v. Menghani the Federal Court found that remedies are not available under the Canadian Human Rights Act for immigrants; and in Chiarelli v. Canada (Minister of Employment and Immigration), the Supreme Court found that the mandatory deportation of persons convicted of serious criminal offenses who are subject to security intelligence review committee hearings does not breach section 7 of the Charter or the principles of fundamental justice.

F. LEGISLATIVE CHANGES

1. Bill C-44

Media publicity surrounding the death of Constable Todd Bayliss and the "Just Desserts" shooting in Toronto led to a public outcry about perceived abuses in the immigration and refugee system. Questions were asked as to why reprieves from deportation were granted by the Immigration and Refugee Board to permanent residents who were criminals, under circumstances which were difficult for the public to understand. Other perceived abuses, including lengthy delays in removing people from Canada and other problems of immigration enforcement came to light at approximately the same time. These events provided the political impetus for the federal government to enact Bill C-44, an enforcement bill which significantly limits access to the refugee and appeals system for criminals and others whom the government believes to be security risks. Royal assent was given June 15th, 1995 and the amendments to the Immigration Act, the Citizenship Act and The Customs Act contained in Bill C-44 came into force on July 10, 1995. Bill C-44 was only one part of a four-pronged government response to the perceived problems. Other announcements made simultaneously included the following:

1. Changes in the management at the Immigration Appeal Division and the appointment of Nancy Goodman as the Deputy Chairperson.

2. Coordination between the Department of Immigration and Correctional Services of Canada for the exchange of parole and release dates of federal offenders.

64. Imm L.R. (2d) 1.
3. The establishment of national guidelines for intervention in refugee cases involving war criminals, multiple identities and patterns of fraud.\textsuperscript{66}

In making a public commitment to give top priority to the removal of criminals, the Minister announced the creation of a special task force composed of both RCMP and immigration officers. The task force was charged with clearing the more than 600 permanent residents convicted of serious criminal offenses, who were backlogged in the removal process. The stepped-up removal of these people, some whom have been in Canada for almost all of their lives, was probably the most visible immigration news story over the last year.

2. \textit{Restricted Access to Refugee Division}

Changes to the \textit{Immigration Act} in 1993 made under Bill C-86 restricted access to the refugee process by excluding from the process persons convicted of serious criminal offences, either inside or outside of Canada. Because of the wording of section 46.01(1)(e), the exclusion applied only to people making refugee claims who were not permanent residents. Thus, with the most recent amendments, the restriction has been extended to permanent residents. Where permanent residents have been found to be described under section 27(1)(a.1(i) and 27(1)(d) they will no longer be eligible to make a refugee claim. These are people who have been convicted of offences in Canada that bear a maximum punishment of ten years or more, or who have received a sentence of more than six months. In either case, the Minister must be of the opinion that the person constitutes a "danger to the public" in Canada.\textsuperscript{67} In passing these amendments, the government hoped to prevent landed immigrants who are convicted of serious criminal offenses from delaying their removal by making refugee claims.

The effectiveness of section 46.01(1)(e) was originally limited to criminality actually existing or known to exist at the time of the eligibility hearing. In cases where criminal convictions are committed or come to light after referral of the refugee claim to the Refugee Division, provisions now exist for the suspension of the Board’s consideration of the refugee case upon notification by a senior immigration officer of the criminality.\textsuperscript{68} These changes allow thecriminality exclusion to be applied to refugee cases currently pending before the Refugee Division, making the issue of eligibility and access to the Immigration and Refugee Board an ongoing issue in all refugee cases.


\textsuperscript{67} \textit{S.O.C.} 1995, C.15 s.9. [hereinafter S.O.C.]

\textsuperscript{68} \textit{Ibid.} at s.11.(1).
3. Limited Access to Immigration Appeal Division

Limitations have also been placed on the right of appeal to the Immigration Appeal Division. Where section 40.1(1) security certificates have been filed, and the certificate has been found to be reasonable under section 40.1(4)(d) by a Federal Court Judge, there is no longer an appeal to the Appeal Division.69 The amendments remove the appeal on questions of law or fact, or mixed law and fact which existed under the previous section 70(4).

Permanent residents and Convention refugees who are inadmissible because they fall within the security exclusions in sections 19(1)(e), (f), (g), (j) or (l)70 no longer have a right to an appeal on humanitarian and compassionate grounds. Further, if the Minister is of the opinion that the person is a danger to the public in Canada, and an adjudicator has found them to be inadmissible because of criminality under sections 19(1)(c), (c.1) (c.2) or (d), or in the case of permanent residents removable under section 27(1) (a) (a.1) or 27(1)(d), there is no appeal at all.

Still unclear is the process which the Minister uses to make his security determinations, or the standard being applied. The term "danger to the public" is an undefined standard, not having been addressed in the Immigration Act, the Immigration Regulations, or by policy. From a procedural perspective, it appears that there is no right to counsel and no disclosure of the material being relied upon by the Minister to make these decisions. In some instances, people are being sent letters advising them that their case is being reviewed to determine if they are a "danger to the public". They are then given fifteen days to make submissions and to advance any humanitarian and compassionate grounds. In other cases, the Minister is reviewing the files of perfected appeals in the Appeal Division, and decisions are being made, often without the input or even knowledge of the person until the day of the hearing.

Needless to say, the removal of the appeal on equitable grounds for refugees and permanent residents in some circumstances raises serious concerns. One can

---

69. Ibid. at s.13.(1).

70. Section 19(1)(e) of the Immigration Act relates to spies and terrorists and members of terrorist organizations who might try to act in Canada;
   (f) relates to those in (e) who have engaged in such acts;
   (g) relates to people whom there are grounds to believe will engage in acts of violence, or who are members of an organization likely to engage in acts of violence;
   (j) relates to war criminals;
   (l) relates to senior officials of governments engaged in terrorism or systematic or gross human rights violations, or war crimes, or crimes against humanity.
project that some people will be removed for criminal violations which provide a severe maximum penalty, but which, in the circumstances of their case, merited only a very minimal criminal sentence. Others will be removed despite a long period of residence in Canada and a substantial connection to this country. It is important to remember that a foreign criminal conviction is not always proof that a person engaged in the activity, particularly when the conviction arises in a country which does not respect fair trial standards or the presumption of innocence.71

More alarming, however, are cases where convictions arise in countries where criminal charges are used as a means to arrest and detain political dissidents. Iran, which has a documented history of arresting people on trumped-up criminal charges when their actual "offences" are political, is an excellent example.72 Refugee claimants caught by the criminality provisions, either through trumped-up criminal charges, the interrelation between the criminal offence and the refugee claim, or as a result of convictions arising from a process which violates all internationally accepted standards, will have no opportunity to state their case or be heard, in circumstances where their removal may pose a real risk to their life or safety.

The new section 46.3 prohibits more than one claim being made by any person. While clearly the intent of the section is to prevent multiple concurrent claims, which are fraudulent attempts to manipulate the system, there is no distinction made between these and legitimate claims which result from a change of country circumstances since the denial of a previous claim.73 The section appears to encompass both situations. Claims are terminated and the decision made by the Refugee Board is null and void on notification that a previous claim had been made, no matter how long ago or under what circumstances the first claim was made.

In the past, citizenship was sometimes granted despite ongoing immigration investigations and, once granted, prevented the removal of the person from Canada.74 The new amendments will effectively prevent this from happening as they include changes to the Citizenship Act which will suspend applications

71. See for example Amnesty International Report 1995, for countries where trial procedures violate international standards, and convictions entered after "summary" trials. A review of this publication suggests that a majority of the countries listed violate the international fair trial standards.


73. Supra, note 67 at s.11(1)

74. Supra, note 9 at s. 4(1)
for citizenship pending the outcome of any inquiry commenced under the *Immigration Act*.\textsuperscript{75}

The Minister now has an overriding control of the process for permanent residents, Convention refugees and visa holders, in that no appeal lies to the Appeal Division if the Minister is of the opinion that the person constitutes a danger to the public in Canada, and the person has been determined by an adjudicator to be inadmissible or removable due to criminality.\textsuperscript{76} It is fair comment that the Minister always had the right to participate in appeals from deportation orders. What the Minister now has is not just the power to participate, but the power to decide in those cases where criminality is involved. Even the responsibility for determining if a person has been rehabilitated has been given to the Minister, a decision previously made by the Governor in Counsel.\textsuperscript{77}

While it is clear that these amendments were enacted in response to the two high profile events in the spring of 1994, it is not so clear that they will address the public concerns which were raised at the time. The new system, which severely limits appeal remedies for many permanent residents and refugee claimants, may in fact do nothing to expedite the process of deportation. The removal of the equitable jurisdiction of the Immigration Appeal Division in cases of serious criminality will undoubtedly deny a person a ground of appeal, but not the appeal process and hearing itself. It is, therefore, questionable how the removal of the appeal ground can be justified on the basis of a speedier process. In an article in *Immigration & Citizenship* by B.J. Caruso,\textsuperscript{78} it is suggested that a far better, more expeditious and cost-effective solution would be to grant jurisdiction to criminal court judges to impose deportation orders as part of a criminal sentencing process.\textsuperscript{79} It is hard to argue with such a proposal, particularly when the sentencing process includes consideration of many of the factors which would have been considered on a humanitarian and compassionate appeal, and which are no longer grounds for leniency as a result of the recent changes.

\textbf{G. CONCLUSION}

With the coming to power of the Liberal government in October of 1993, there were high hopes in the immigrant and refugee communities that positive

\begin{itemize}
\item [75.] Supra, note 67 at s.23.
\item [76.] Ibid. at s. 13(1).
\item [77.] Ibid. at s. 2(1).
\item [78.] B.J. Caruso "A Few Bad Apples" (August 1995). 7 Imm.& Cit,. #6.
\item [79.] A private member's Bill is currently in second reading in the house which would do this.
\end{itemize}
changes would take place in the Department of Immigration and the Immigration and Refugee Board. This optimism was reinforced by the delivery of the Waldman-Davis report, *The Quality of Mercy*, the introduction of the DROC class and announced reforms to the PDRCC. Unfortunately, the programs instituted by the new government have not lived up to expectations and it is clear that government priorities remain focused on the attraction of skilled, educated immigrants. Actions such as imposing the Right of Landing fee, stepping-up removals and restricting appeal rights for permanent residents and refugees reflect the government's decreasing concern for immigrants who do not meet this profile. Meanwhile, there are plans at the IRB to create single member refugee panels and institute a procedural model whose shortcomings may well outweigh its benefits.

A mere two years after the election, there is no longer any serious discussion of progressive change in the Ministry of Citizenship and Immigration.

During the same period, Court decisions have limited the scope of judicial review for humanitarian applicants, and for certain refugee claimants whose claims are rejected. As well, courts have limited the access of immigrants to *Charter* remedies. All of these changes have had a significant impact on low income immigrants.

The scenario presented in this paper is, indeed, gloomy. The forecast, regrettably, is equally dim. At the time of writing, the Ontario government is threatening to eliminate legal aid funding for immigration. Should this occur, the consequent denial of counsel could have a more profound effect on low-income immigrants and refugees than any of the legislative changes, government policies or judicial decisions already described.