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Immigration

Reforms urged to reduce Federal Court's 'arbitrary' dismissal of refugee claims

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The Federal Court says it will "closely study" recommendations to reform its practices in refugee cases, following another recent study which indicates that the outcome of life-and-death refugee claims in Canada too often depends on "the luck of the draw" — i.e. which judge happens to be randomly assigned to a failed refugee claimant's application for judicial review.

Sean Rehaag

On Sept. 17, Osgoode Hall Law School professor Sean Rehaag posted his latest analysis of thousands of Federal Court decisions on requests by failed refugee applicants for judicial review of negative refugee determinations by the Immigration and Refugee Board (IRB): "Judicial Review of Refugee Determinations (II): Revisiting The Luck Of The Draw."

(People whose refugee claims are denied by the IRB need the Federal Court's permission to challenge, via judicial review, the IRB's rejection of their claims.)

As with his groundbreaking 2011 study, which reviewed the outcomes in Federal Court of 23,000 leave applications decided between 2005 and 2010 and which found that individual judges' leave grant rates fluctuated from one per cent to 77 per cent, in his 2018 study Rehaag finds a large divergence in the track records of individual judges in the years from 2013 to 2016.

So, for example, the most "permissive" judges granted leave in 49, 46 and 42 per cent of leave applications (respectively Justices Elizabeth Heneghan, Leonard Mandamin and James Russell), while at the most restrictive end of the range, now-retired judges Judith Snider, Andre Scott and Richard Boivin granted leave respectively in five, seven and 10 per cent of the cases.

(Rehaag notes as well that the leave grant rates of the judges have increased since the 2011 study — growing from 18 per cent in 2012 to 29 per cent in 2016. Grant rates for judicial reviews on the merits also increased, from a low of 39 per cent in 2010 to a high of 54 per cent in 2015.)

Rehaag said that despite the good faith efforts the Federal Court made after 2011, that were aimed at promoting more consistency and convergence in the judges' individual leave grant rates, the latest study indicates the gap persists.

"There has been no convergence, if anything it's gotten slightly worse," he told *The Lawyer's Daily*. "Given the life and death stakes involved in refugee decisions, more measures should be adopted."

Rehaag predicted that if nothing is done soon there will be constitutional attacks on the requirement for leave. "I hear from counsel all the time that there's interest in a new challenge to the leave requirement, as well as a challenge to the certification requirement for subsequent appeals" to the Federal Court of Appeal, he remarked.

He recommends that the best way to fix the arbitrariness problem is to legislatively abolish the leave requirement — a measure he acknowledges would require significantly more money (and judges) to be poured into the court system.

Until that happens, the Federal Court itself, and its 44 individual judges can address the problem in several ways, he recommended. This includes routinely assigning the same judge who grants leave to decide the judicial review on the merits (thus reducing the chances that the applicant's claim will ultimately be rejected by another judge who much more frequently rejects claims).

Rehaag urged that the arbitrariness problem is now so well documented in his and other studies, that the time for study is over.

"Something needs to be done because of the fairness issue," he said.

Federal Court Chief Justice Paul Crampton

Federal Court Chief Justice Paul Crampton said in an e-mailed statement that the court is concerned by the "persistent and significant" variation in leave grant rates across its judges. The court will take a close look at Rehaag's recommendations for reform, the chief justice pledged.

"Professor Rehaag's study raises important questions concerning variance in the grant rates of applications to the Federal Court for leave and judicial review of decisions of the Refugee Protection Division of the Immigration and Refugee Board," Chief Justice Crampton told *The Lawyer's Daily*. "The same was true of his initial 2011 study. As I recognized at the time, there is a very real fairness dimension to the wide variation in the rates at which individual judges grant leave. This is so despite the element of subjectivity in making judicial determinations, especially on judicial review, where the standard that the court is called upon to apply in most cases is whether the decision under review was 'unreasonable.' "

Chief Justice Crampton noted that after Rehaag's first study, the court discussed the issue with representatives of the immigration bar, and the judges also discussed it among themselves.

"The internal discussions were structured to avoid encroaching upon the independence of the individual members of the court," he explained. "It was hoped that, with the benefit of additional perspectives on issues such as the test for leave, the evolving jurisprudence pertaining to the standard of review, and hypothetical leave applications [discussed by the judges], the divergence in leave grant rates across the court would eventually reduce over time."

Chief Justice Crampton added that his court has looked at proposed options "to reduce the significant and persistent variation in the leave grant [rates] across the court. One such option was to amend the *Federal Courts Rules* to include a list of factors for judges to consider in applying the existing leave test of 'fairly arguable case'."

However, he explained that the court's Rules Committee, which includes leading members of the bar and specialized immigration bar, decided that it would be better to legislate a list of factors via statute, rather than include them in the Rules. "Given the important principle that individual judges must decide cases before them on the merits, completely independently of any influence by other persons, the court has continued to wrestle with how to reduce the variation in leave grant rates," Chief Justice Crampton said.

"In this regard, the recommendations made by professor Rehaag will be closely studied. Once the court has had an opportunity to discuss those recommendations, the court will be pleased to meet professor Rehaag again."

Rehaag's study concludes that "Federal Court decision making in refugee law cases is inconsistent, with outcomes in cases that involve life or death decisions turning all too often on the luck of the draw. This is unacceptable. While the court has responded to an earlier study of this phenomenon by making efforts to try to address inconsistent decision-making through discussions among the judges, the current study has shown that those measures have not had the desired impact."

He recommended that if Parliament does not abolish the leave requirement — which he called an "arbitrary" and "non-transparent" barrier to access to justice for refugee claimants — the requirement should at least be reformed to "enhance fairness." This could be done, for example, by requiring two judges to independently review leave applications, with disagreements being resolved in favour of the applicants, he suggested.

Rehaag added that if the leave requirement remains unchanged, individual judges could apply the test for a "reasonably arguable case" — not based on their own subjective view — but on whether any of their colleagues, including the most permissive ones, might be of the view that a reasonably arguable case has been made out. "If the leave judge properly applies this approach, then leave will only be denied where there is no purpose to proceeding to a hearing because the case would eventually be denied on the merits by whichever judge was assigned at the [judicial review] stage," Rehaag explained in his study.

He argued that "this approach would significantly improve the luck of the draw by encouraging leave judges to be cautious about denying leave except in the clearest of circumstances."

Photo of Federal Court Chief Justice Paul Crampton by Cristin Schmitz

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