Immigration Law News

Robert Young

What Do You Do With 60,000 Uninvited Houseguests?

When the federal government imposed a visa requirement in the middle of July on anyone travelling to Canada from Mexico or the Czech Republic, it acknowledged that it had lost control over the Canadian refugee system. Since over ¼ million Mexicans come to Canada for business, to study and to visit, the federal government probably also cost the Canadian economy several billions of dollars. The backlog of refugees waiting to have their refugee claims heard is as of today over 60,000 people. In 2008 about 35,000 people made refugee claims. In 2008 only about 18,000 cases were finalized. This last figure includes people who abandoned or withdrew their claims.

Is 60,000 people a large town or a small city? One way or another, reform is needed. The situation today greatly resembles the situation in 1988 when again we had a backlog of several tens of thousands of people. In 1988 the federal government in effect declared an amnesty to deal with the backlog. Refugee claimants in Canada, so long as they persuaded a tribunal that there was a "credible basis" to their refugee claim, were allowed to stay. For others, there was a program whereby if they left Canada, and had either a job or relatives waiting for them on their return, that provided a good chance that the person would be granted permanent resident status.

It is not clear what is going to happen in 2009. The 2002 *Immigration and Refugee Protection Act* contained provisions for a "Refugee Appeal Division". Failed refugee claimants were to be given a right, in theory, to appeal a negative refugee decision to the Refugee Appeal Division on a question of law, fact, or of mixed law and fact. The sections of *IRPA* dealing with the RAD though were never given Royal Assent. There have been several attempts over the years to have these sections enacted. The latest attempt, Bill C-291, received second reading in April 2009 but now appears to be stalled in the Standing Committee on Citizenship and Immigration. An attempt to obtain quick passage of C-291 back to the House of Commons was blocked on June 2.

I don't like the Refugee Appeal Division. All you would get is a paper review from the Refugee Appeal Division. There will be no right to make oral representations (§110(3) *IRPA*). A decision of a three-member panel of the RAD will be given the same "precedential value" as a decision from the Federal Court (§117(c) *IRPA*). The people pushing C-291 forget that the RAD is just a division of the Immigration and Refugee Board. There is no demand in the *Act* that the RAD be staffed by lawyers. We are going to have the same problems with the RAD as we do with every other branch of the IRB, which is that the people who are making the decisions often do not have the training or experience appropriate to a quasi-judicial role. If the proponents of C-291 were serious about granting refugees better appeal rights they should instead insist on: a) taking out the demand that Immigration appeals to the Federal Court go through a "leave" process; and b) give a failed refugee claimant the right to an appeal, not just to a limited judicial review.

In any event, none of these proposals deal with the backlog. Rumours are circulating, though, that the federal government does have a plan for the backlog over and above imposing a visa requirement on every non-Canadian on the planet. It is rumoured that early this fall the government will table a plan to fast-track claims from countries that are generally considered to be safe. If a person came from a country considered to be safe they would be interviewed by an Immigration officer who would make a decision on the claim. Since we can assume that these decisions will on the whole be against the refugee claimant, unless the government sets up an appeal process, the government will run into the same problems the federal government ran into in the 1980's resulting in the famous *Singh* decision which created the present Immigration and Refugee Board. If the appeal route is by way of the IRB, we are back to the 1989 to 1993 system of holding "credible basis" hearings. (These were different "credible basis" hearings than those described above for the pre-1989 backlog.) The post 1988 "credible basis" hearings were designed to screen out fraudulent or weak refugee claims. The sys-

tem quickly broke down, though, and the credible basis hearing simply became a clearing house. Claimants were shepherded en masse through the “credible basis” stage to the full hearing stage.

It is possible that the rumours are wrong. It could be that we will go to an American style system whereby an Immigration officer screens all cases, allowing in the best and sending the weakest onto a full hearing.

At this point, I don’t think even the Minister of Citizenship and Immigration knows what he is going to do with the problem. It has simply become too big. History does indeed repeat itself; the first time as tragedy, the second as farce. ■

Robert Young can be contacted at:
Sullivan Festeryga LLP
1 James Street South, 11th Floor
Hamilton, ON L8P 4R5
905-528-7963
ryoung@sullivanfesteryga.com