

HUMAN RIGHTS: REFUGEE RIGHTS

Presentation
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On Human Rights Day, the United Nations calls on the global community to take stock of its achievements and challenges in the area of human rights. It is fitting that the City of Toronto, a microcosm of the global community, turn its attention to the rights of refugees. Toronto, after all, receives the lion's share of refugees who arrive in Canada every year. And our institutions - government, academia, the media and community-based organizations - participate actively in the public discourse on refugee rights.

Let me begin by saying that Canada is a signatory 1951 United Nations Covention Relating to the Status of Refugees and that we have incorporated its definition of a refugee into Canadian law. This definition states that any person who has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group, who is outside her country of nationality and is unable or unwilling because of that fear to avail herself of the protection of that country is a Convention refugee.

The Immigration and Refugee Board (IRB) is mandated by Parliament to determine Convention refugee status in Canada. It is the largest administrative tribunal in Canada and its Convention Refugee Determination Division (CRDD) has more than 200 independent decision-makers.

I will now look at three distinct but inter-related issues: the current debate in the media on refugee rights; Canada's leadership role on women's human rights and female genital mutilation as a form of gender-based persecution.

I. CURRENT DEBATE ON REFUGEE RIGHTS

Recently, the public debate on Canada as a refugee-receiving country has intensified. Some have questioned the number of refugees we accept as well as our system of refugee determination, arguing that both are overly generous. However, in order to avoid misleading conclusions, it is important that we place our acceptance rates and our procedures for determining refugee status in the proper context.

In its 1993 report "The State of the World's Refugees", the United Nations High Commissioner on Refugees (UNHCR) estimates that only a small minority of the world's 20 million refugees seek asylum in the industrialized countries of Europe and North America.

While the number of refugee claims in industrialized countries has risen from 100,000 in 1983 to 800,000 in 1992, this represents only 4 percent of the worldwide refugee population.

The brunt of refugee protection is not borne by the industrialized countries but rather by the developing regions of the world. Figures for 1992 show that Iran ranked first among major receiving countries with 4.1 million refugees; Pakistan was second with 1.6 million; and Malawi was third with 1 million.

The list of the "Top 50 Countries Ranked According to the Ratio of Refugee Population to Gross National Product Per Capita" best depicts the "economic burden" of refugee protection. It shows that Germany ranked 42nd with 700,000 asylum seekers, Canada ranked 46th, and the United States listed in 49th position.

Despite the alarm of some commentators, in recent years Canada

has had a maximum of 30,000 refugee claimants a year arriving at its shores, a tiny fraction of the total number coming to the industrialized world.

Canada's supposedly high acceptance rate of Convention refugees is often compared unfavourably to that of our European counterparts such as Germany and the United Kingdom. However, we must be careful not to make faulty and misleading comparisons which ultimately distort the picture of where Canada stands internationally in refugee determination.

In the past two years, Canada's acceptance rate has ranged from 57 to 69%, depending largely on global conditions. This is in contrast to the 9% of asylum seekers who were granted Convention refugee status in Western Europe in 1992. At first glance, there appears to be a glaring inconsistency. However, the fact is that 80% of asylum seekers remained in Europe under other classifications, according to the UNHCR. The trend in Europe is clear: "a sizeable increase in the number of asylum seekers allowed to remain in the 'asylum country' after their asylum applications have been rejected".

A study by the European Consultation on Refugees and Exiles (ECRE) on de facto refugees in Western European countries outlines the various legislative provisions which allow rejected refugee claims to remain in the "asylum country". For example, "B status" which is in force in a number of northern European countries is often used for "asylum-related need for protection" and "the rights attached to this status are similar to those of a 1951 Geneva

Convention refugee".

Moreover, it is misleading to point to the fact that "B status" and other protection-related classifications in Europe are temporary in nature. Although this is in fact the case, it indicates more about the general outlook on immigration in European countries than it does about specific policies on refugee determination. It must be remembered that the United States, Canada and Australia are the only self-defined "immigrant countries" with long-standing policies of offering permanent status, including citizenship, to immigrants and refugees.

Another issue which has surfaced in the current debate is the possibility of meeting the protection needs of refugees on a temporary basis and closer to the regions from which they originate. This innovative notion may have some merit and refugee scholar James Hathaway, of Osgoode Hall Law School, is pioneering research on how such a system might work in practice.

However, it must be remembered that there will always be spontaneous arrivals to our shores and that, as a signatory to the 1951 Convention, Canada is committed to not returning them to their countries of origin without a fair hearing. Moreover, we are bound by the Charter of Rights and Freedoms in the Canadian Constitution which guarantees refugees both procedural fairness in refugee determination as well as substantive protection of their right to "life, liberty and the security of the person" (Section 7).

The IRB is not alone in setting the boundaries for who is and who is not a Convention refugee in Canada. Our decisions are

reviewed by the Federal Court and the Supreme Court of Canada and the IRB is bound by their rulings on refugee matters. For example, because of higher court decisions such as Rajudeen (Federal Court of Appeal, 1984) and Ward (Supreme Court of Canada, 1993), it is not necessary for a Convention refugee to show that his or her government was involved in the persecution. It is sufficient to show that the state is unable to protect the refugee from the feared harm whether it emanated from the state itself or from private actors, provided the harm feared was for a Convention reason.

This means that the Canada's interpretation of the 1951 Convention definition of a refugee is different from that of other signatories. According to the UNHCR, Germany, for example, has a more restrictive approach and "maintains that a government must be implicated in the persecution if a claim for international protection is to be considered valid". Many countries in Western Europe share this view. It is important that such differences be kept in mind when comparing acceptance rates and the relative costs of refugee determination in western countries.

It is axiomatic that Canadians often devalue their own achievements, and the current attitude of some commentators on refugee matters may be another case in point. While they are wringing their hands about how we have got it all wrong, Canada is held up by the international community as the model of procedural fairness for others to follow.

II. CANADA'S LEADERSHIP ON WOMEN'S RIGHTS

Canada is also seen as a leader in the movement to recognize women's rights as human rights. In March 1993, the IRB issued its groundbreaking Guidelines on Women Refugee Claimants fearing Gender-Related Persecution. The Guidelines provide substantive legal and procedural guidance in analyzing forms of persecution which are particular to women, i.e. rape, genital mutilation, bride-burning, domestic violence, forced abortion and compulsory sterilization. While there is growing awareness internationally that women often fear persecution for reasons different than men, Canada is the only country to have adopted formal guidelines for re-interpreting the meaning of persecution to reflect the experience of women refugees. The same principles which underlie our Guidelines are evident in the draft Guidelines for Women Asylum Seekers presented by the Women Refugees Project at Harvard University to the Immigration and Naturalization Service in the United States.

Shortly after the Guidelines were issued, the International Refugee and Migration Policy Branch of Citizenship and Immigration Canada launched a seven month consultation with non-governmental organizations on gender issues affecting refugees. This process involved a thorough review of both inland and overseas selection and admission policies. And it brought together government policy makers and key players in the community such as the Canadian Council for Refugees, the National Organization of Immigrant and Visible Minority Women and York University's Centre for Refugee

Studies. A final report "Consultations on Gender Issues and Refugees" was written by Ellen Turley and tabled in March 1994.

On June 1, 1994, Citizenship and Immigration Canada issued a Declaration on Refugee Protection for Women which explicitly recognizes that women's rights are human rights. It also signals a shift from "gender-neutrality" to "gender-inclusiveness" and a new commitment to "policies and procedures that respond affirmatively to the special needs of refugee women, both in Canada and abroad".

Canada played a leading role in the 1993 UNHCR Conclusions on Refugee Protection and Sexual Violence. It also sponsored the resolution calling for the United Nations Commission on Human Rights to appoint a special rapporteur on violence against women. Shortly afterwards, Radhika Coomaraswamy, Director of the International Centre for Ethnic Studies in Sri Lanka, was appointed to the post.

III. FEMALE GENITAL MUTILATION AS GENDER-BASED PERSECUTION

In May 1994 Canada became the first country to recognize female genital mutilation (FGM) as a form of gender-based persecution¹. A ten-year-old girl who feared FGM in her native Somalia was determined to be a Convention refugee in Toronto (CRDD

¹ Several years ago the French Commission for Appeals of Refugees denied the claim of Aminata Diop, a twenty-two-year-old woman from Mali, for credibility reasons, but recognized that genital mutilation could be a form of persecution under the Geneva Convention.

Also, in May 1994 the UNHCR issued its Memorandum: Female Genital Mutilation which states that FGM can found the refugee claims of women and girls

T93-12198, 14/7/94). My colleague, Joyce McCaffrey, and I heard the claim and applied the Gender Guidelines to assess the evidence presented in the case.

The Gender Guidelines point to the use of the international human rights instruments to weigh the nature and extent of harm feared and, accordingly, we considered the Universal Declaration of Human Rights (UDHR) and the United Nations Convention on the Rights of the Child (UNCRC).

Article 3 of the UDHR states that "Everyone has the right to life, liberty and the security of person" and the panel concluded that "the minor claimant's right to personal security would be grossly infringed if she were forced to undergo female genital mutilation..."

Article 19 of the Convention on the Rights of the Child calls on governments to "protect the child from all forms of physical and mental violence, injury or abuse..." and calls on governments to "...take all effective and appropriate measures...to (abolish) traditional practices prejudicial to the health of children."

The mother of the young claimant testified at the hearing and described her own experience of undergoing FGM as a child and her determination to spare her daughter the same fate. She stated that "Even though this event took place over twenty years ago, I can still easily visualize the scene and feel the pain and trauma all over again when I start to talk about it."

The panel also relied on documentary evidence from African-based experts on FGM which described the devastating lifelong

effects on the physical and emotional health of girls who are subjected to FGM.

These same sources state categorically that "in spite of the urgency and the magnitude of the problem, very little action has so far been taken by governments in the countries concerned to stop FGM". In Somalia, where FGM has been illegal since 1947, it is estimated that 98% of Somali women have undergone the procedure. Based on the evidence the panel concluded that "the authorities in Somalia will not protect the minor female claimant from the physical and emotional ravages of FGM given the evidence of its widespread practice in that country."

Canada's recognition of FGM as a form of gender-based persecution gives added momentum to the international movement for women's human rights. Increasingly, FGM is recognized as a form of violence against women and a violation of basic human rights.

In 1986 the United Nations awarded Canada the coveted Nansen Medal for our contribution to refugee rights. Canada continues to exercise a strong leadership role internationally, and as a nation of immigrants we continue to wrestle with the challenge of refugee rights. In the City of Toronto, as we celebrate International Human Rights Day, I think we can hold our heads high.

Thank you.