The Refuge Determination Procedure: A Growing Consensus

The Fundamental Concern

The concern of the Canadian churches and other humanitarian organizations for refugees in Canada stems from the fact that they are among the most powerless members in our society. They arrive in Canada, not out of choice, but out of necessity. The refugee determination procedure is an extremely serious procedure for the claimant. A wrong judgment could result in return to persecution or even death in a country of origin. This procedure must have a negligible risk of such a wrong judgment. Canadians, proud of Canada's humanitarian tradition, can join the Standing Committee of Parliament when it affirmed "it is the Committee's strongly held conviction that Canadians do not want people sent back to countries where they may be persecuted".

Developments in 1985

The year 1985 has been a year promising major changes in refugee determination procedures in Canada. On April 4th, the Supreme Court of Canada decision on the case of *Singh et al* made clear that the present procedure does not conform with the fundamental principles of justice as required by the Canadian Charter of Rights and Freedoms. By the end of June, Rabbi Gunther Plaut, a consultant retained by the government, published a full report, "Refugee Determination in Canada," which analysed the present situation, made suggestions and offered three models for a new procedure.

In late September, non-governmental organizations gathered under the auspices of the Standing Conference of Organizations concerned for Refugees to present common positions on outstanding issues to the Minister of Employment and Immigration, Flora MacDonald. The non-governmental agencies then submitted briefs to the Standing Committee on Labour, Employment and Immigration of the Canadian Parliament.

In early November, the Fifth Report of the Standing Committee of Parliament, "Refugee Determination in Canada: The Plaut Report," appeared. A second major non-governmental organization discussion took place at the November meeting of the Standing Conference in the presence of government officials and the Chairman of the Standing Committee of Parliament. It reviewed remaining issues. As the year ends, all signals indicate that the Cabinet of the Canadian government will have the outline of a new refugee determination procedure in its hands before Christmas.

Throughout this year of consultations, overall consensus among non-governmental organizations and the Standing Committee of Parliament has developed in many areas. However, there remain outstanding issues. The lack of an adequate appeal in the proposals of the Standing Committee is a major outstanding problem.

The Agreement on Key Issues

There is almost total agreement on the following range of key issues:

Open Access

There is recognition of the right of access of everyone physically present in Canada to the refugee determination procedure, regardless of the means or manner of arrival, of the immigration status, and of the time at which the application is made. The right to a procedure with an oral hearing conforming to the principles of fundamental justice for everyone physically present in Canada was supported in the decision of April 4, 1985 of the Supreme Court of Canada. This principle was supported in the report of Rabbi Plaut. It was supported in the submissions of all non-governmental groups to the Minister and it was supported in the report of the Standing Committee of Parliament.

Independent Determination Body

All briefs from non-governmental organizations urged that the refugee determination body and its refugee offices be independent of the Department of Immigration. The report of the Standing Committee of Parliament agrees.

The reasons for requiring the separation stem from the shared concern that the decision be made carefully because the consequences of wrong decision are so serious. The skills and training of immigration officials for the enforcement aspects of immigration law or for the selection of persons for immigration are very different from the skills needed to make a judgment under international law designed to protect a refugee from return to persecution in a country of origin.

Non-Adversarial First Hearing before More than One Decision Maker

A similar unanimity supports a principal, non-adversarial first hearing of a refugee claim before more than one decision maker of a competent and specialized refugee determination body.

The judgment on whether or not a person has a well-founded fear of persecution requires a very different procedure and physical arrangement from the courtroom of a trial. A just outcome requires not only a non-adversarial process, but also a relaxed and non-threatening atmosphere for the hearing. To minimize the risk of bias which is present even in the best informed and well-intentioned individual, non-governmental bodies and the Standing Committee favour a hearing before more than one decision maker.

Application of the Convention and Protocol and Recommending Permanent Residence

There is agreement that the so-called cessation and exclusion clauses in the 1951 Convention and 1967 Protocol are largely inappropriate to the Canadian situation and should not be directly introduced into Canadian law.

Most non-governmental organizations feel that the new independent refugee determination body should be competent and specialized in current practices in international law. It should be the appropriate body to apply the Convention and Protocol to refugee claims.

Rabbi Plaut, the Standing Committee of Parliament and non-governmental organizations propose that permanent residence be offered to successful claimants, as is suggested under the 1951 Convention, Article 34. The non-governmental agencies are clear that the new Refugee Determination Body will be competent and specialized in the current interpretation of the 1951 Convention and 1967 Protocol and should have the right to recommend permanent residence to the Minister.

Material Assistance and Right to Work for Claimants

There is full agreement on the importance of ensuring that basic material assistance and the right to work is made available to refugee claimants. (This is made in response to the 1951 Convention, Chapter III.)

Family Reunification

The speedy reunification of a refugee with his or her family members is a principle agreed upon and repeatedly reinforced by the Executive Committee of the United Nations High Commissioner for Refugees.

Competent Counsel and Accurate Translation

There should be competent, independent counsel as an essential part of the refugee determination procedure and on the principle that a just outcome is critically dependent on accurate translation of the discussion between the decison-making body and claimant during the hearing. The Canadian churches and several non-governmental organizations have noted that accreditation of translators will be essential to ensure appropriate security and to ensure linguistic competence.

Some Remaining Issues

An Independent Body for Humanitarian and Compassionate Cases

In many cases where the need for international protection is clear, for example where persons have fled civil strife or generalized persecution, the strict definition of a Convention refugee cannot be met. Nevertheless, these persons deserve protection on humanitarian and compassionate grounds in accordance with Canada's humanitarian tradition. The churches and other non-governmental organizations remain concerned that without an independent body to review and recommend landing on humanitarian and compassionate grounds, the refugee determination procedure will become clogged with cases of a different and humanitarian nature. The presentations before the refugee procedure will be a confused mixture of refugee and humanitarian issues. The churches have proposed an independent body to recommend permanent residency on humanitarian grounds under clearly established guidelines.

Full-time Refugee Officers and Decision Makers

On a more detailed matter, non-governmental organizations have recommended that the training of decision makers and refugee officers proposed by Rabbi Gunther Plaut and the Standing Committee of Parliament will be inadequate unless these offices and decision makers are full-time to ensure the development of the necessary expertise in this highly technical field.

The Remaining Need for Appeal to a Competent Specialized Body

The most significant difference of view at the time of writing is in the form of the appeal procedure. The Standing Committee of Parliament proposed that appeals be by direct application, with leave, to the Federal Court of Canada. Its reasons appear to be cost and speed. The non-governmental organizations and the churches hold this unacceptable.

At the November meeting of the Standing Conference, even the Representative of the United Nations High Commissioner for Refugees noted there should be at least one level of appeal on merits and that the Federal Court may not be an appropriate recipient for such a responsibility.

The Federal Court lacks the expertise in refugee law and lacks understanding of country situations. It is unrealistic to expect that the Federal Court Act, Section 18(1)(c) will be given a more open interpretation in the future. It is puzzling that the Parliamentary Committee would propose to use the costly Federal Court system to receive the brunt of appeals instead of the more usual, specialized appeal tribunal. Attempts to modify the use of the Federal Court, for example to allow appeal directly to it as of right, can only increase the cost.

There can be no doubt that even the proposed new first hearing of the Parliamentary Committee will only reduce, not eliminate, mistakes at the first instance. Appeal to a body competent and specialized in refugee concerns must be part of a procedure where fundamental human rights, the right to life, liberty and security of person, are acknowledged to be at stake.

Functions of an Acceptable Appeal Body

The Canadian churches and many non-governmental organizations agree on the features of any acceptable appeal body. They urge:

— the appeal body should be similar to the refugee determination body and equally or more competent in the Convention and its interpretation in international law;

— a mechanism to allow an expeditious response to clear evidence of error;

— the mandate to receive new factual information and to examine the claimant on it;

— the mandate to reassess the credibility of the claimant;

— a mechanism to ensure a high degree of consistency in decision making;

— a mechanism to allow the representative of the UNHCR in Canada the right to offer opinions and advice.

Options for a Strong Appeal Are Feasible

Although there remain some variations in preferred appeal, there is widespread understanding that the desirable features of the appeal could be satisfied in several ways.

The large majority at the November meeting of the Standing Conference would favour a regionally accessible *de-novo* determination in which consistency is accomplished by such devices as rotation of decision makers and publication of decisions made. A majority of the

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churches support a full appeal as of right. A minority, while supporting the full right of appeal for most appellants, favour the right of leave to appeal for a few carefully defined types of appellant.

Some, among them the Representative for the United Nations High Commissioner for Refugees, favour a centralized appeal, noting that in a regional process lack of a review of the reasons for denying claims would entail inconsistencies in the appeal country-wide when there is a need to create a jurisprudence.

Costs are a legitimate consideration. However, most would find a strong appeal essential irrespective of cost in such an important matter as refugee determination. The additional cost of such an appeal and the additional time could be quite modest. All things considered, it is difficult to imagine that the new procedure with appropriate appeal could be any more costly than the present procedures.

Conclusion

There has been considerable progress towards a consensus. The consensus is shared not only among the non-governmental community but with the Standing Committee of Parliament. The appeal is the major outstanding issue to be resolved between non-governmental groups and the Standing Committee. In this outstanding area, there remains real concern that an adequate appeal will not be provided.

An examination of summary reviews of refugee determination in several countries ("Refugee Status Decision-Making: The Systems in Ten Countries", Avery, Stanford Journal of International Law, Summer 1983; or *The Refugee in International Law*, Goodwin-Gill, Oxford 1985) reveals that the proposed refugee determination, plus an appeal with the features proposed above, would be among the best in the world. Such a refugee determination procedure would mark Canada's coming of age in all aspects of refugee concerns. The procedure would be a statement to the international community of Canada's commitment to the international humanitarian instruments. It would be a signal of justice with compassion to refugees in need of protection in Canada.

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Racism in Canadian Immigration Policy

Part Two: The Present

We now have a sophisticated enough knowledge of racial discrimination to know that there can be racial discrimination in fact without racial discrimination in form. The Immigration Act may not be intentionally discriminatory. The question whether it generates systemic discrimination is an open one. In looking at the question, I want to examine four topics — visitor's visas, delays, the points system, and refugees.

The general rule in the Immigration Act is that everyone must have a visa issued at a Canadian immigration post abroad before coming to Canada. The Cabinet, the Governor in Council, has the power to make exceptions to this rule.

The regulations contain all sorts of exceptions. Citizens of 77 countries do not need visas to enter as visitors. For the U.S. the arrangement is particularly generous. U.S. citizens, as well as permanent residents, do not need visas. People from these countries can appear at the border and get a visitor's permit.

Theoretically it is easier to obtain a visitor's permit at the border than a visitor's visa abroad. Once a person has made a long trip to Canada, it is much more difficult for an immigration officer to deny entry than if the person were still in his home country. Denial of entry may mean deportation, with extra cost to the government. As well, delays are shorter. A person granted a visitor's permit at the border usually has to wait only a few minutes in a queue. A person granted a visitor's visa at a Canadian post abroad typically has to wait months. Imposing a visa requirement, or more accurately, removing the visa exception makes visiting more difficult.

For a select group of immigrants visiting is particularly difficult. Citizens of 14 countries are required to obtain visas even if they are in Canada in transit—even if they never leave the airport or the plane. People from these countries are prohibited from passing through Canada en route to another destination unless they obtain a Canadian visa abroad.

The reason why a visa is required, in general, is that citizens of these countries have been abusing the visitor's permit system. Immigration has found that a significant number of individuals with visitor's permits have overstayed their visits. Enforcement action has been necessary to remove them from Canada. A visa requirement is intended to cut down on this abuse.

In my opinion, it is inherently unfair to anyone that he be told he must get a visa before he enters Canada because Immigration believes, on the basis of his nationality, that he may overstay a visitor's permit.

The Canadian Charter of Rights and Freedoms guarantees the legal benefit of the law without discrimination based on national or ethnic origin. To say that nationals of one country require visas and nationals of another do not is discrimination based on national origin. The Charter guarantee applies to "every individual". It is not limited to Canadian citizens and permanent residents, as are other Charter guarantees. The Supreme Court of Canada has already said that another Charter guarantee, about fundamental justice, can apply to illegal aliens in Canada or at a port of entry who claim refugee status. This Charter guarantee, as well, would apply to persons at a port of entry.

Right now a person from a country with a visa requirement can be ordered deported if he appears at a Canadian port of entry without a visa. In my belief, a person ordered deported on this basis could challenge the deportation under the Charter.

There is yet another problem for visitors and that is a problem faced by those who come from countries for which visas are not required. Foreigners who come to Canada from countries for which no visa is required are subject to examination as to whether they are genuine visitors. Not every visitor is examined. Examination is selective. There is a common feeling that this selection is discriminatory.

The Parliamentary Committee on Visible Minorities that produced the report "Equality Now" noted that rightly or wrongly there is a widespread perception among visible minorities that treatment of minorities at the border discriminates on the basis of race or ethnic origin. In the words of one witness, "Turbans at-