Detaining and Prosecuting Refugee Claimants

by
Stephen Foster

The Detention of Refugee Claimants

It appears that the Department of Immigration has, as a standard practice, detained refugee claimants upon their arrival in Canada because they are indigent.[1]

The Department's position appears to be that if a refugee claimant does not have sufficient funds or personal contacts in Canada prepared to assist him, then there is reason to believe that once released he will not report back for the continuation of his immigration proceedings.[2] The Department has also advanced the argument that the detention of indigent refugee claimants is for their own good, a kind of protection against the cruel realities of life on the streets of Canadian cities.

Detention of refugee claimants on the ground that their indigence may prevent them from reporting for the continuation of proceedings is not justified. How can a person be deprived of his freedom on such flimsy grounds? Surely this could not have been the intention of the Canadian legislator in drafting the Immigration Act nor of the signatories to the Geneva Convention. As well, I suspect, a good case could be made that such a position derogates from the protection in the Charter of Rights and Freedoms against arbitrary detention or imprisonment.[3]

Secondly, the argument that detention of indigent refugee claimants is a means of protection for "their own good" is weak. It affirms Canada's refusal to provide any kind of financial support to needy refugee claimants.[4] Such a position cannot be justified in view of Canada's international obligations: under Article 25 of the Universal Declaration of Human Rights, everyone has a right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services. Finally, the conditions in which the refugee claimants are detained are by no stretch of the imagination for "their own good". The main detention centre for Mirabel International Airport does not meet some of the basic minimum requirements applicable to prisons, such as a provision for outdoor exercise or fresh air.

Some refugee claimants may "pose a danger" to the Canadian public. This is another reason invoked by the Department of Immigration in order to justify the detention of refugee claimants.[5] A claimant may find his statements upon entry being used against him in an Immigration inquiry to justify his detention. For example, a claimant may have explained to Department officials that the authorities of his country of origin had sought to arrest him in connection with an alleged criminal act even though the claimant explains that he was never involved in the alleged or any other crime and that the prosecution was in fact a form of persecution due to his political convictions. The Department demands that the claimant be detained at least until such time as the necessary security checks may be made. These checks are usually nothing more than a verification with the local Interpol branch in the claimant's country, an office staffed by local police. It is difficult, if not impossible, to imagine obtaining any objective information in this manner. Further, the procedure is time-consuming and the refugee claimant remains in detention until a response is received.

Everyone agrees that there is some legitimate need to prevent the infiltration of criminal elements into Canada. However, the means to this end must not be completely out of proportion with the end itself. The *systematic* detention of refugee claimants who voluntarily recount these kinds of incidents of persecution creates more injustice than can be rationalized by any need to protect the physical well-being of Canadians.

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[1]Stephen Foster is basing his conclusions on his personal experience at Mirabel International Airport where a great number of Canada's refugee claimants arrive.
Editors Note: Indigents are detained for three possible reasons cited by Employment and Immigration: (1) failure to report at a hearing; (2) outstanding criminal charges; (3) or if it is felt that they will suffer physical privation such as starvation or homelessness if they are not kept in detention.

[2]S.104 (3) of the Immigration Act, 1976, provides that an adjudicator may detain a person where in his opinion the person "would not otherwise appear for the inquiry or continuation thereof or for removal from Canada".

[3]The Constitution Act, 1982, Part 1, Canadian Charter of Rights and Freedoms, S.9: "Everyone has the right not to be arbitrarily detained or imprisoned". Clearly the expression "everyone" is to be juxtaposed to the expression "every citizen of Canada" as used, for example, in S.6; the former includes refugee claimants.

[4]Editors Note: On March 17, 1983, the Treasury Board approved a new program of Financial Assistance to Indigent Refugee Status Claimants. This program replaces the now defunct Special Adjustment Assistance Program through which refugee status claimants had been able to obtain subsistence funding from Employment Centres. In some regions (e.g., Montreal) this became somewhat of a mini-program, but it was not policy-based.

Under the new program, the Treasury Board approved a sum of $100,000 for the 1982-83 fiscal year and $400,000 for the 1983-84 fiscal year. The $100,000 has been distributed on a regional basis ($50,000 to Quebec, $40,000 to Ontario and $10,000 to B.C.). The regional breakdown for the $400,000 (83-84) has not yet been determined. Eligible under this program are individuals whose claim for refugee status has not been determined by the Minister (although a definition of when a refugee status claimant becomes and ceases to be such is not yet defined.) The government gives the funds to a voluntary organization which in turn provides the funds to the refugee claimant. (In Ontario, for example, the government signed a contract with the United Church of Canada on March 31, 1983, giving them $40,000.) The assistance to be provided (no refugee claimants have yet received funding under this program) is to cover the basic needs of life which represent the minimum requirements for day-to-day survival. The maximum amount must not exceed the existing welfare rates for the province in which the funds are distributed.

Author's Note: There was, until late 1982, a program of financial aid for indigent refugee claimants in the Montreal area. The Department cut the program stating that the great majority of refugee claimants were refused refugee status and that the Canadian public was simply not prepared to support these disguised immigrants. The Department's reasoning (even if it did represent the view of Canadians, which is very doubtful) was fallacious in two ways. Firstly, it failed to take into account the overriding need of those refugee claimants who are accepted (some of whom left Canada prior to even receiving an answer because of their impossible financial situation). Secondly, it incorrectly assumed that because the majority of refugee claimants are rejected that the majority of indigent refugee claimants are also rejected. I would suggest (although I have no statistics) that the majority of indigent refugee claimants in the Montreal area in 1982 — many of whom were Guatemalans — would have been accepted.

Prosecution of Refugee Claimants

A number of refugee claimants arriving at Mirabel International Airport with irregular travel documents have been prosecuted either under Section 95[6] of the Immigration Act or Sections 324–326[7] of the Criminal Code. The penalty provided for in Section 95 is a maximum fine of up to $5,000 and/or imprisonment of up to two years. Under the Sections of the Criminal Code the penalty includes imprisonment of up to 14 years. In addition, the consequence of the conviction under these sections of the Criminal Code is that the refugee claimant becomes inadmissible to Canada even if accepted as a refugee.[8]

A typical scenario might be as follows: a refugee claimant arrives in Canada with a forged passport (which he was obliged to obtain to travel here) and makes a claim for refugee status at the airport. At that time, or as soon as he has overcome his apprehension about being deported to his homeland should the irregularity be found out, he voluntarily explains to the Immigration authorities the problem with his travel documents. To his surprise, he suddenly faces prosecution in the criminal courts for illegal use of a forged passport to enter Canada.

The Department of Immigration and the R.C.M.P. branch responsible for enforcement at Mirabel International Airport seem to have agreed to amend their earlier policy of prosecuting all cases including refugees. They have apparently decided that they will not prosecute cases where the refugee claimant voluntarily explains his illegal entry or attempted entry *prior* to his inquiry. The claimant will be given a final chance to "come clean" before the inquiry, but if he fails to do so he will be prosecuted.[9] This is the Department's interpretation of the proviso "without delay" in Article 31 of the Geneva Convention.[10] Obviously this kind of arbitrariness serves to enforce the need for judicial supervision and application of Article 31 by the courts or some body bound by the rules of natural justice.

Grahl-Madsen, the leading authority on international law relating to refugees, states the following:

> ". . . Article 31(1) obligates the Contracting States to amend, if necessary, their penal codes or other penal provisions, to ensure that no person entitled to benefit from the provisions of this paragraph shall *run the risk* of being found guilty (under municipal law) of an offence.[11] (emphasis added)

Thus, Canada has failed to meet its international obligations in not amending its penal legislation as required to take Article 31(1) into account. Neither Section 95 of the Immigration Act nor the Criminal Code contain any proviso relating to Article 31. Refugees in Canada definitely run the risk of being found guilty under these provisions of law.

Moreover, Canada has failed to meet its international obligations by ignoring the Geneva Convention and imposing penalties on refugee claimants without regard to Article 31. I suggest that this action also constitutes a breach of the spirit and intent of Canadian domestic law, specifically Section 3 of the Immigration Act which provides as follows:

> It is hereby declared that Canadian Immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need . . . (g) to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and persecuted.

It is worth noting that Article 31 does not mean that Canada may never prosecute refugee claimants for illegal entry or presence. As Grahl-Madsen points out:

> By prohibiting the imposition of penalties, Article 31 does not prevent a refugee being charged or indicted for illegal frontier crossing or unlawful presence, *if one of the purposes of the proceedings is to determine whether Article 31(1) is in fact applicable.* As pointed out by Mr. Herment, the Belgian delegate at the Conference of Plenipotentiaries, cases concerning refugees may be submitted to the courts, which would decide whether extenuating circumstances should or should not be taken into account in any given case.[12] (emphasis added)

Canada's domestic law (i.e., the Immigration Act and Criminal Code) must be amended to give the courts or some other judicial or quasi-judicial body the jurisdiction to determine the applicability of Article 31(1) before subjecting a refugee to penalties.

As the situation stands there is no mechanism available to fairly determine the application of Article 31 to a refugee claimant (save the decision of the Minister upon the recommendation of the Refugee Status Advisory Committee — upheld on appeal — that the person is not a refugee which *a fortiori* excludes the application of Article 31). The only fair solution, until the proper amendments to Canada's laws are made, is not to proceed with any prosecutions or at least to delay proceedings until the person has been determined not to be a refugee.

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[5] S. 104(3) of the Immigration Act, 1976, provides that an adjudicator may detain a person where in his opinion the person "poses a danger to the public".

[6] Section 95(b) of the Immigration Act (1976) states that every person who "comes into Canada or remains therein by use of a false or improperly obtained passport, visa or other document pertaining to the admission or by reason of any fraudulent or improper means or misrepresentation of any material fact" . . . is guilty of an offence and is liable on conviction on indictment or on summary conviction to a fine, imprisonment or both.

[7] Sections 324-26 of the Criminal Code cover acts of forgery, falsification of documents and use of knowingly false documents.

[8] I recently defended a refugee claimant prosecuted under S. 326. Luckily, the judge at the preliminary inquiry refused to allow the case to proceed to trial. I note in passing that I have been advised by the Department of Immigration that in future they will reserve prosecution under the Criminal Code for "terrorists" and the like and use the Immigration Act to prosecute ordinary cases.

[9] This was explained to me in late February by the R.C.M.P. officer responsible for the case in another improper prosecution which I am defending.

[10] Article 31(1) of the Geneva Convention provides as follows:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

[11] *The Status of Refugees in International Law* by Atle Grahl-Madsen, A.W. Sijthoff-Leyden, 1966, p.211.

[12] Ibid, p. 210-211.