ICCR Protests Access Restrictions

ICCR representatives were in Ottawa on May 21, 1986 to hear the government propose the new procedure for determining refugee status and for dealing with the backlog of refugee claims.

Although the announcement of an administrative review will excite many claimants in the 20,000 backlog, the criteria for the review are not yet available and so the ICCR cannot comment on the administrative review at this time.

The proposals for refugee determination have some positive elements but, in spite of ten years of advocacy, still contain measures which erode refugee rights by preventing some claimants from having their case heard by the determination body. The ICCR, with other non-governmental organizations, protested these restrictions in its response to the proposals at a press conference.

On February 5, 1986, leaders of nine Canadian churches and religious bodies had delivered a jointly signed letter to Prime Minister Brian Mulroney seeking assurance that the new guidelines would not limit the right to a full and fair hearing of a refugee claim in Canada (See ICCR Bulletin, Special Issue February 1986). Many individuals and church-related groups had sent similar letters in support of the church leaders. The new proposals ignore this strong consensus.

Short Analysis of the Proposals

The proposed streamlined procedure had three elements: *access*, or who gets to be heard; *determination*, or how the case is decided; *appeal*, or review for possible error. While the new determination procedure contains some welcome improvements, questions of access and appeal would breach the fundamental human rights granted under Section 7 of the Canadian Charter of Rights and Freedoms to all people physically in Canada. No provision is made at the end of the process for a meaningful appeal following a negative decision.

a) Laudable Elements of the Proposals

1. Oral Hearing: The proposals entrench the right to an oral hearing for each refugee case granted access.

2. More than One Decision-Maker: The decision-making body consists of two people. Only one vote is necessary for a claim to be successful so the benefit of any doubt will go to the claimant.

3. Separation between Immigration and Refugee Boards: The decision-making body is separate from immigration procedures and will be directly responsible to the Minister of State for Immigration. However, administrative ties may limit the degree of separation. A research centre will be set up with current information on refugee-producing situations. The Minister's discretion to land refugee claimants under exceptional circumstances is protected.

4. Non-Adversarial Hearing: The oral hearing is to be conducted non-adversarially, thus providing a "helpful" environment conducive to eliciting the facts of the case to be presented.

b) Problems with the Proposals Limiting Access

Four specific groups are denied access to the determination process in the proposals:

1. *Refugees with Status from a Signatory Country:* These must have documents to prove the right to residency there. The Minister subsequently stated publicly that this will apply to people with "durable protection".
2. *Persons in Canada for 6 Months without Asking for Status*
3. *Those returning to Make a Repeat Claim*
4. *People with Removal Orders from Canada*

Decisions of immigration officials who deny access will be reviewable by the Federal Court to ensure they are supported by the evidence.

The restrictions on access are justified by the government as a way of preventing anticipated abuse.

Our General Principles:

The lack of universal access to a fair hearing is a denial of human rights granted under the Canadian Charter of Rights and Freedoms. Denying this right to applicants conflicts directly with the Supreme Court of Canada decision of April 4, 1985 on the case of *Singh et al*, which granted an oral hearing to every claimant in Canada. As Judge Wilson noted in the decision: "certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so" (page 64).

The guidelines for refugee determination, accepted by Canada as part of the 1977 Conclusions of the Executive Committee of the United Nations High Commissioner for Refugees, require that all cases be referred to the refugee determination authority. For immigration officials to control access to this authority is, therefore, unacceptable. The application of such restrictions to access is new and dangerous because it would set a precedent.

Our Specific Objections:

For each group with restricted access we can foresee circumstances where life, liberty or security of person could be at risk. These persons, therefore, have the right to procedures consistent with the fundamental principles of justice.

The ICCR has consistently argued that the just and expeditious refugee determination procedure which it has advocated would not attract abuse.

The proposed restriction of access for some with prior protection as refugees in another country sets a dangerous precedent because other related exclusions could follow. The proposed restriction goes beyond the exclusions set out in the Geneva Convention and Protocol. Canada supported the Conclusions of the Executive Committee of the United Nations High Commissioner for Refugees, 1979, which require Canada to consider a request for asylum where physical safety or freedom are endangered in the present asylum country. Within the same spirit, under Canadian law, a Convention refugee has the right not to "be removed from Canada to a country where his life or freedom would be threatened" (Immigration Act, Clause 55).

The proposed appeal of the access restriction to the Federal Court is inadequate. An evaluation of a claimant's protection or of changed circumstances and their impact on a claimant is outside the jurisdiction of the Federal Court because it is not a matter of law, and should be decided by a body well versed in current refugee cases.

c) Problems with the Proposed Appeal

If a refugee claim has been denied by the refugee determination body, leave to "appeal" to the Federal Court is provided in the proposals.

Our Objections:

The guidelines for refugee determination, accepted by Canada as part of the 1977 Conclusions of the Executive Committee of the United Nations High Commissioner for Refugees, provide for an appeal.

Such an appeal is normally provided throughout the Canadian judicial system. It is particularly important when life, liberty and security of person are at stake.

Any meaningful appeal must be able to review the merits of the case credibility and facts. Leaves to appeal are only granted when there are flagrant legal violations. In that rare event, the Federal Court does not have the expertise to deal with the facts or the credibility of a refugee claim; it can only make decisions on matters of law.

d) Humanitarian Procedures Unclear

Many groups of refugees flee serious civil upheaval or strife. Although individuals in these groups may not meet the strict definition of Convention refugee, the United Nations High Commissioner for Refugees asks that such refugees not be sent back to unsafe places. An example would be sending Iranians back to Iran.

The provisions for such humanitarian cases in the new government proposals are unclear. It will be important to ensure a fair and effective procedure:

Entry to the procedure for humanitarian review must not preclude an application for Convention Refugee status.

An independent credible body with expertise comparable with that required for refugee determination procedures should control who is allowed to stay on humanitarian grounds.

Those who are allowed to stay in Canada should be allowed to proceed to permanent residence status.

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