

FROM FAIRNESS IN SPIRIT TO FAIRNESS IN LETTER:

A Comment on the New Guidelines for the Refugee Status Advisory Committee

By Howard Adelman

Following recommendations of the Task Force on Immigration Practices and Procedures published in its report on the refugee status determination process, Lloyd Axworthy, Minister of Employment and Immigration, announced the issuance of new guidelines to govern the Refugee Status Advisory Committee (RSAC) in its consideration of claims for refugee status in Canada. Do the guidelines advance the cause of fairness in considering refugee claims?

The Preamble

Under the guidelines the RSAC is to consider each claim individually, subject to two caveats: the legal definition of a refugee and "the 'spirit' of interpretation which the Minister desires in the application of this definition." Presumably the latter is included to clearly tell the RSAC who's boss; but it may set a bad precedent. The present Minister wishes the definition to be interpreted "liberally," which reflects the spirit of the 1951 United Nations' *Convention Relating to the Status of Refugees* as interpreted in case law. The interpretive case law provides an objective basis for determining guidelines. However, with a suggestion in the preamble that the guidelines derive not from this body of law but from Ministerial desire, the guidelines are characterized not as part of administrative law but simply as an expression of Ministerial fiat. This leaves open the possibilities of a subsequent Minister interpreting the definition in a highly restrictive way; of arbitrariness; and of increased inconsistency as Ministers change. Axworthy should correct the formalization of the Minister's role.

Credibility Assessment

The guidelines themselves are of two types: criteria for determining the status of a claimant, and principles for the consideration of evidence in the determination process. In the case of a refugee there is often little independent documentation to prove a claim. But if no proof were needed, anyone could claim to have a well-founded fear of persecution. What then should be the basis for deciding that a claimant is telling the truth?

Under the guidelines, a claimant is to receive the benefit of the doubt. The

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principle of the benefit of the doubt can be interpreted in several ways. The Minister, consistent with case law, interprets it in the direction of the narrowest sense. As he said in his speech when he announced the guidelines, "The applicant is presumed to be telling the truth unless there is clear evidence to the contrary," or, as stated in the guidelines, "unless there be reason to doubt the truthfulness." Not

conclusive contrary evidence, or even an overbalance of contrary evidence, but simply clear evidence or reason to doubt. This reasonably restrictive procedure is a correct one to ensure fairness to refugees without opening the system to abuse.

The Refugee Definition

In the guidelines related to the application of the refugee definition

MEDIA WATCH

By Barrie Zwicker

"OTTAWA TO EASE IMMIGRATION BARRIERS"

— Headline in the Saint John *Telegraph-Journal* over its (CP) story on the National Symposium on Refugee Determination

The majority of daily newspapers in Canada ignored the National Symposium on Refugee Determination. The majority of those that did not ignore it used wire copy. A tiny minority of papers sent staff reporters. Most coverage fell into two archetypes that characterize so much "news" in our papers.

Most of the coverage was based on governmental pronouncements, in this case statements by Employment and Immigration Minister Lloyd Axworthy and External Affairs Minister Mark MacGuigan. Cabinet minister speaks. Notes are taken. Story appears on front page. Appears *because* cabinet minister has spoken. It's a variation of "handout journalism", rooted in an all-too-common journalistic premise that officials make news by pronouncing.

This was aided, in Mr. Axworthy's case, by his use of the magic word "new" in his announcement of the guidelines he issued to the Refugee Status Advisory Committee (RSAC). "New" is one of the seven words found most effective in advertising. "We're breaking new ground here," Mr. Axworthy claimed of his "new guidelines" at a press conference. The quote made nearly every story. Only one paper surveyed, the *Winnipeg Free Press*, ran a subsequent story based on statements by Ken Brown, then Chairman of the RSAC. Mr. Brown was quoted by Canadian Press as claiming the guidelines "are not new at all" and that "no foreigners rejected in the past would have been accepted under the new rules."

The issues that were not addressed by any Minister, including those that were

addressed at some length by the Symposium as a whole such the provision of oral hearings to refugee claimants, were generally not addressed by the press.

The other archetype is the conflict story. "New refugee laws too loose: Professor," read a misleading headline in the *Toronto Star*. The story under that headline was a reasonable attempt by a journeyman reporter to summarize key points in the discussion about the guidelines at the Symposium. The reporter, increasing the chances of his story being used, led off with a criticism of a perceived excessive vagueness in the guidelines, expressed by Professor Howard Adelman. Most of the story, however, reflected general agreement with the guidelines expressed by other Symposium participants. The headline writer - exhibiting one of the common mistakes of headline writers - went further than the story did, by calling the guidelines "law".

The *Globe and Mail's* conflict story, "Two Ministers offer different solutions to refugee problem", was created by an essentially false dichotomy being drawn between remarks of Mr. Axworthy and remarks of Mr. MacGuigan: "Two solutions to the refugee problem were proposed by two federal Cabinet ministers . . . letting more of them into the country and sending them home." Mr. Axworthy had been speaking on refugee protection in Canada and Mr. MacGuigan had been speaking on responses to large-scale refugee movements abroad. □

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