

# Recommendations for Changes in Canada's Refugee Status Determination Procedures\*

## Introduction

In his address to the National Symposium on Refugee Determination, Toronto, February 20, 1982, the former Minister of Employment and Immigration, Lloyd Axworthy, underlined that the development of a humane, fair and workable system for determining refugee status is an evolutionary process, moving "from practices which met our former needs to those that will respond to our needs today and in the future." The Concerned Delegation has been an active participant in that evolutionary process. On March 13, 1979, a brief on "Recommended Changes in Canada's Refugee Status Determination Procedure" was presented to the Honourable Bud Cullen. In that brief, recommendations were made to support four key principles.

"The refugee claimant should:

- have the right to appear in person and present his case before the people who make the decision;
- know the reasons for the decision in his case;
- be assisted to obtain competent legal counsel;
- have the right to know and to respond to information which can be used against him."

On May 9, 1980, a second brief, "The Refugee Determination Process", was presented to the Honourable Lloyd Axworthy.

Several changes have been effected during this period which have the potential to improve our refugee determination procedure:

- The issuance of new guidelines with respect to the application of the refugee definition and assessment of credibility;
- the separation of the Refugee Status Advisory Committee from the Immigration Commission;
- the appointment of additional independent members to the Refugee Status Advisory Committee;
- the initiation of an oral hearing "pilot project."

A key issue is the need for an oral hearing — a need that was overwhelmingly supported in the Report of the Task

Force on Immigration Practices and Procedures on the Refugee Status Determination Process, November 1981, by participants at the National Symposium on Refugee Determination, February 20, 1982, by the Canadian Bar Association, and by the Standing Committee on External Affairs and National Defence in its Eleventh Report on "Canada's Relations with Latin America and the Caribbean." It is time to act concretely to implement this widely supported principle.

## Recommended Refugee Determination Procedure

It is felt that the recommended refugee determination procedure would ensure fairness to the claimants as well as protect the integrity of the process. Claimants with strong cases would be accepted quickly and without the necessity of convening a full oral hearing. Claimants who may be refugees would be ensured an oral hearing and would be entitled to work to support themselves while waiting for the hearing and final determination. Claimants abusing the system would be screened out without a hearing but would be guaranteed the right to fully contest the initial recommendation. As the work authorizations are dependent on a recommendation to accept or to refer to an oral hearing, non-bona-fide claimants would be discouraged from applying as the present material benefits associated with making the claim would be removed.

The proposed scheme would streamline the refugee determination process. The present cumbersome process of automatically preparing the transcript would be discontinued and transcripts would be necessary in only a small percentage of cases. The costs involved in providing an oral hearing to every claimant are high and the procedure may well be unnecessary. Initial interviews conducted by staff officers will be a less costly and more efficient mode of screening cases. Clearly well-founded cases need not go to a hearing. Manifestly unfounded cases — providing the qualifying guidelines be strictly controlled — need not be

granted a hearing and yet these claimants would be given a full opportunity to reply in writing to initial assessment of their claim. Thus, the Refugee Review Board can concentrate its efforts on those cases most requiring its expertise.

As well, the cumbersome procedure associated with the present redetermination application through the Immigration Appeal Board will be abolished and this will free the Immigration Appeal Board to deal more efficiently with appeals to it from other areas of jurisdiction.

## Recommended Transitional Procedure

The most difficult impediment to an efficient transitional refugee determination process is the legislative requirement that transcripts be prepared for all refugee claimants. We feel, however, if legislative change will take some time and a transitional procedure is required, the following recommended scheme parallels the ideal process outlined above as closely as is possible within present legal confines.

It is recommended that the Refugee Status Advisory Committee be established as a full board with offices in the major centres. This can be done within the context of the present provisions of the Immigration Act. Staff officers of the Refugee Status Advisory Committee in various centres can be delegated by the Minister as Senior Immigration Officers for the purpose of conducting the examination-under-oath. These officers will play essentially the same role as contemplated for the staff officer of the Refugee Review Board under the ideal system. No more than 60 days should elapse before an examination-under-oath is held. While an examination-under-oath must be held, there is no prohibition to prevent the staff officer, acting as an SIO from examining the claimant in any way he/she wishes.

Therefore declarations or outlines of the claimant's case could still be presented, documentary evidence provided and the person examined by the senior staff officer. The Federal Court of Appeal has



made it clear that documents such as affidavits from witnesses would not form part of the transcript for the purposes of the application for redetermination to the Immigration Appeal Board. However, there is no bar to their use in the examination-under-oath per se.

The staff officer conducting the interview would then make a recommendation to the Refugee Status Advisory Committee within 30 days of the interview.

The staff officer would again make one of three recommendations to the Refugee Status Advisory Committee:

- that the claim be accepted outright without need for an oral hearing;
- that the case proceed to an oral hearing before the Refugee Status Advisory Committee;
- that the claim be rejected without an oral hearing on the grounds that it is manifestly unfounded.

#### **Refugee Definition and Assessment of Credibility Guidelines**

It is recommended that the guidelines be incorporated into the Immigration Regulations. The guidelines if left as such cannot offer the protection intended to a claimant.

If the guidelines are incorporated into the Regulations as recommended, this will ensure that the Refugee Status Advisory Committee can apply them without the danger that presently exists of reaching decisions which do not correspond with present judicial interpretation and without the danger of having their decisions overturned on review as being an incorrect application of the law.

Unless future court decisions reinterpret the law in a manner consistent with the guidelines, the guidelines will have no legal force and effect. Incorporating the guidelines into the Immigration Regulations would avoid this problem without the necessity of relying on courts to perhaps reinterpret the specific points in the future — a reliance at best uncertain and indefinite.

#### **Review of the Recommendations of March 1979 and May 1980**

In light of the above recommendations for change in the present procedure, not all of the previous recommendations made by the Concerned Delegation need be reviewed.

#### **Transfer of Claimants' Files**

Difficulties continue to be encountered

by claimants and counsel in transferring cases to the centre nearest to the person's intended destination. Under the proposed ideal and transitional system, Immigration Centres would have to be prepared to transfer claimants' files in order that applications for work authorizations and other immigration proceedings could be conducted within the same general area where the Refugee Status Advisory Committee office or the Refugee Review Board office is located.

#### **Family Reunification**

Mr. Cullen originally promised Minister's Permits to all spouses and children of refugee claimants. This commitment was later withdrawn by the Commission through subsequent ministers, both Mr. Atkey and Mr. Axworthy. Spouses and children are routinely required to make claims in inquiry and thereafter are generally permitted to include themselves in the major claimant's claim.

Family members should be entitled to claim under the spouse's application as a matter of course without the necessity of separate proceedings. Children in all cases should be entitled to apply for a student authorization once the claim is made, and the right to the student authorization should not be dependent on the parent receiving a work authorization.

The Commission did implement a program of reunification of refugee families once a claimant has been accepted and prior to the granting of permanent resident status to the claimant. Visa officers do not appear to be treating such cases as ones deserving of priority. Some officers have not shortened their procedures; they are following the regular procedure in applications for permanent residence, requiring that the IMM-8 be completed first, then the family member interviewed, and then medicals given and approved before a Minister's Permit is issued. Children and spouses can wait for up to a year or more to be reunited. Moreover, even where the program is applied it is not being applied to all family members as intended. In international law, "de facto" family members can claim under the person's application for refugee status. The reunification program is only being applied to family members who are sponsorable under the Regulations.

#### **Right to Counsel**

Persons arriving at the port of entry are still denied counsel even when counsel is waiting outside the Immigration office. The right to counsel is guaranteed to all inland claimants and should also be guaranteed to all port of entry claimants.

Although the Commission has prepared a pamphlet outlining the refugee procedure and made it clear that this pamphlet would be distributed to persons making refugee claims, the pamphlet is still not widely distributed. As well, to the Delegation's knowledge, claimants are not always advised of their right to counsel.

#### **Examination-Under-Oath**

There is still no consistent practice with respect to the conduct of examinations-under-oath. Some officers continue to conduct the examination while others permit counsel to conduct the initial examination.

Under the proposed transitional and ideal system, the senior staff officers would have no responsibilities other than to conduct examinations-under-oath and could be trained to conduct the interviews. As the initial interview is envisaged as being more informal than is presently the case, the individual should be permitted to have conduct of the basic presentation of the claim before being questioned by the interviewing officer.

"Fully competent translators should be provided for refugee examinations. Translators who have proved inadequate should be removed from service." In principle, every minister involved in the process has agreed with this recommendation. To the Delegation's knowledge, this review has never been conducted and the situation has improved little. Translators known to be inadequate still interpret in examinations-under-oath. The Commission cannot hope to offer competent service in this area if it is not prepared to pay rates similar to those offered in the private sector.

#### **Claimant Review of Transcript**

"The claimant and counsel should be provided with a copy of the transcript of the examination-under-oath and should be given the opportunity to correct it prior to it being forwarded to the Refugee Status Advisory Committee." The claimant does review a copy of the transcript and has the opportunity to

correct it. However, as such corrections are not then transferred to the original transcript it may be difficult for the Refugee Status Advisory Committee members making the decision to properly utilize the corrections.

Under the transitional and ideal programme, the transcript would still be prepared for consideration by the Refugee Status Advisory Committee and Refugee Review Board in oral hearing referrals and in cases where the interviewing officer recommends rejection as being manifestly unfounded. However, while the claimant is entitled to receive the transcript, the time period

given to correct it prior to its being sent to the Refugee Status Advisory Committee or Refugee Review Board could be eliminated. Persons referred for an oral hearing could present corrections at the outset of the hearing. Persons who have been determined to have frivolous claims could append corrections to the transcript as part of their declarations under oath to the Board.

#### Reasons Provided for Rejected Claims

In principle, "The claimant should be provided with the reasons for the Committee's decision at the time that he/she is notified of the decision." However,

the reasons are incomplete and often irrelevant. They are often stock reasons for rejection without any real analysis of the claim.

Under the recommended procedure, the Refugee Review Board would be required to give reasons for its decisions. Under the transitional procedure, the Refugee Status Advisory Committee would provide reasons when a claim is rejected after an oral hearing or because it is determined to be manifestly unfounded.

*\*This is an edited version of a report prepared in April 1983 by a Delegation of Concerned Legal, Church and Humanitarian Organizations.*

## Books and Periodicals

The *World Refugee Survey 1983*, 25th anniversary issue, contains articles on international and U.S. definitions of refugees, repatriation as a solution to refugee situations, resettlement in the U.S. and Australia, emigration of Soviet Jews, and congressional perspectives on refugee policy. Country-by-country descriptions of refugee situations in Africa, East Asia, the Pacific, Europe, Latin America and the Caribbean, the Middle East, and Southeast Asia are provided. Extensive statistical information includes numbers of refugees in need and resettled and contributions by international refugee aid agencies in 1982.

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*Escape to Freedom: The Story of the International Rescue Committee*, by Aaron Levenstein, has been published to commemorate the 50th anniversary of the IRC. Originally founded to help those fleeing Hitler's Germany, the IRC has continued its work since then, tirelessly helping refugees from all over the world. In the course of attempting to sum up IRC's diverse experience, the book notes the many invaluable contributions refugees have made over the years. The late Reinhold Niebuhr, prominent theologian and one of IRC's chairmen, recognized the value of refugee work in a quote recorded near the end of the book: "Never before in the 20th century has any nation been presented a greater opportunity to contribute so directly to the preservation of invaluable creative sources and to the enrichment of its own civilization." 338 pages. Greenwood Press, 88 Port Road West, P.O. Box 5007, Westport, CT. 06881 U.S.A. (203) 226-3581. Hardcover \$29.95.

## New Indochina Studies Program

The Committee on Southeast Asia — jointly sponsored by the Social Science Research Council and the American Council of Learned Societies — is pleased to announce a new Indochina Studies Program. The Program is intended to encourage and support research, writing, and the archiving of materials on Cambodia, Laos, and Vietnam, drawing on the knowledge and experience of the refugees who have left those three countries since 1975, and who are now residing in North America.

The Indochina Studies Program will sponsor an annual fellowship competition open to researchers, writers, journalists, artists, and other professionals and individuals. Fellows will be expected to produce a written product which will contribute to understanding the three countries, or the lives of specific people within them. Individual applicants must be residents of the United States or Canada. Joint projects involving one or more North American scholars and one or more refugees are encouraged. In these cases, at least one of the applicants must be a resident of North America. As needed, the Program will assist Fellows to obtain an academic affiliation for the period of the award.

Projects may be based on life histories, personal memoirs, focused interviews, studies of particular groups, the recording and analysis of

oral, ritual, performance, and other artistic traditions, or written literatures. Specifically excluded are projects concerned with the American experience in Indochina, and the experience of Indochinese refugees in North America. Program Fellows will be expected to place project materials in a selected archive to help assure their availability for others in the future.

Fellowships may be short-term, or for up to as much as 12 months. Projects should be designed to be completed within a single year. Skill in the relevant language(s) will be a major criterion in the selection process. Fellowships may include full-time or part-time maintenance, essential travel and research expenses, as well as summer language training or refresher courses in Hmong, Khmer, Lao, or Vietnamese. Supplemental funding for archival purposes will be considered. In exceptional cases, awards may be renewed for a second year, and support may be provided for a full year of language training in Khmer or Lao if in preparation for a subsequent research and writing project. The maximum award for any project will be \$25,000.

For application materials or other inquiries, please send the information requested above to the Indochina Studies Program, Social Science Research Council, 605 Third Avenue, New York, New York 10158.