Refugee Determination

Commentary by Howard Adelman

The International Context

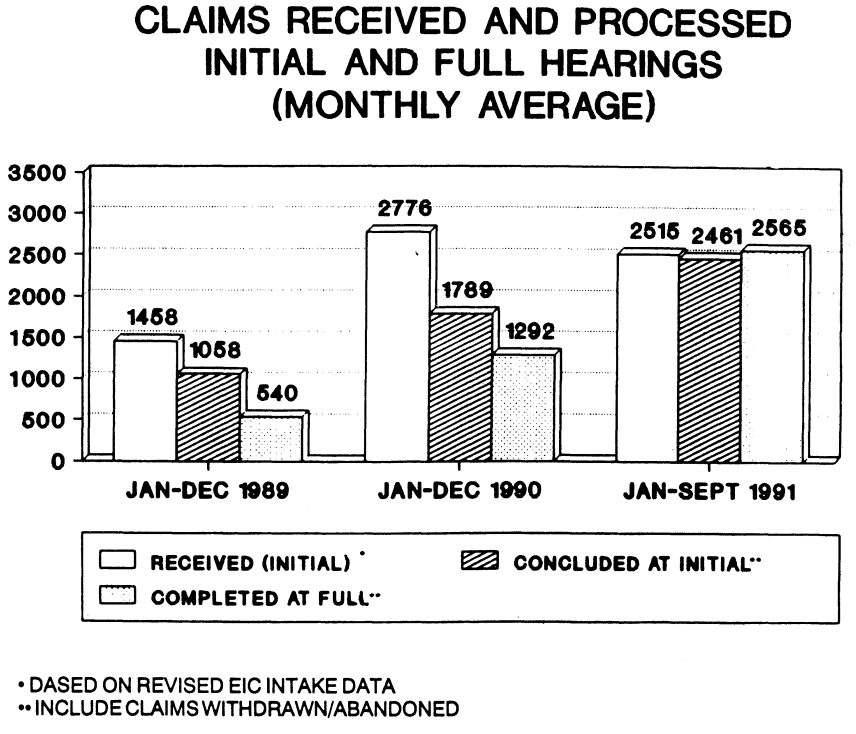
The Cold War is over. The necessity for Western countries to prove they protect human rights while the communist states persecute their own citizens is no longer required. Further, the current international crisis replacing the Cold War is testimony to the disintegration of multinational states, the fragmentation of sovereignty and the weakening of state controls in general. This has been accompanied by a dramatic increase in national conflicts and an exchange of populations more characteristic of refugee flows between the first two world wars than the refugee regime that became pre-eminent after the beginning of the Cold War. While Iranians flee a repressive regime and Somalis and Sudanese flee civil war, Kurds, Croats from the areas of Croatia bombarded and captured by Serbia, Soviet Jews and Armenians, Tamils from Sri Lanka, and many others flee due to inter-ethnic conflict and persecution.

At the same time, Western states have become pro-active on behalf of the protection of refugees. Instead of insisting that Turkey follow the U.N. Convention and allow the Kurds in Northern Iraq fleeing Saddam Hussein's vengeful massacre into Turkey, the Turks were allowed to close their doors, and France, Great Britain and the United States intervened militarily *within* Iraq to create a safe haven for the Kurdish refugees.

At the same time, the UNHCR now stresses repatriation. Only 45,000 refugees are cited by UNHCR as in need of permanent resettlement. By this reckoning, virtually none of the Somalis need to be resettled in Canada.

There have also been moves to harmonize refugee determination so that the procedures do not lead to such radically different results. For example, the Schengen Treaty groups France, Germany and the Benelux countries in a common system of regulation. In Europe, Turks had a 38 percent acceptance rate in France, but only 3.2 percent in Germany. There seems to be no consistency in a system that was purportedly based on a *universal* human rights doctrine. In North America, hardly any Salvadoreans were accepted in the United States until recent changes in U.S. legislation, while Salvadoreans had high acceptance rates during the same period in Canada.

Complementing dramatic changes in the international political system, there have been dramatic changes in the domestic politics of countries where refugee claims are being made. These include a voting public that increasingly distrusts politicians, a new upsurge in populism and populist parties, which have increased their support by exploiting anti-immigration sentiment. Recognition rates of refugee claimants have fallen in virtually all refugee



determination systems, giving the impression of an upsurge in non-bona fide claimants, but it may be the result of governments tightening up the process and refugee adjudicators becoming more experienced and better able to recognize repetitious tales.

Canada is in a severe recession. But so is most of the rest of the world. If Canada's costs for refugee determination are in excess of $200,000,000, the total world cost is estimated to be in excess of $5 *billion*.

What then is the result of the whole process? Only a small percentage of those rejected are actually deported. If one calculates the costs per case deported, the figure is enormous. For how can you deport someone if they have no documents to establish their country of origin? Almost 70 percent of all arrivals are now undocumented. The result is that public support for the system is undermined and the staff responsible for controlling our borders are demoralized. No one can understand why all this money is being spent — to do what?

MAJOR SOURCE COUNTRIES
NATIONAL

	% TOTAL1989	% TOTAL1990	% TOTAL 1 JAN - 30 SEPT 1991
SRI LANKA	16%	12%	13%
SOMALIA	14	11	12
LEBANON	10	6	4
IRAN	6	6	5
CHINA	6	8	5
EL SALVADOR	6	6	5
POLAND	4	2	*
PAKISTAN	2	3	3
CZECHOSLOVAKIA	2	1	*
GHANA	2	3	4
BULGARIA	1	7	2
U.S.S.R.	*	1	6
OTHERS	31	33	40
TOTAL INTAKE	20,742	36,559	22,641

SOURCE: EIC
*LESS THAN ONE PERCENT

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Why Now?

Cabinet will once more be asked to change the way refugee claimants are considered and dealt with in Canada.

Why?

We still have the rest of the backlog to clean up. For the first time since the upsurge in refugee claimants began in the 1980s, the number of refugee claims has actually declined from the year before. For the first time the refugee determination system is functioning well enough that we are not building a new backlog. More cases are being handled and processed than are being received.

Why then is refugee determination up for reconsideration?

There are four factors at work. They can be summarized as a matter of feet, guts, heart and head. What do I mean by this?

First, there is the matter of costs — money enough to put shoes on the feet of refugees all around the world. Per refugee processed, Canada has the most expensive refugee determination system in the world. If we add onto the $90,000,000 it costs to administer the refugee determination system, taking into account only the costs of running, administering and backing up the Refugee Board, the costs of legal aid estimated at $30,000,000 at a minimum, the costs of welfare estimated at another $60,000,000 (the longer the procedure leading to the initial inquiry, the greater the costs), and the costs to the Canadian Employment and Immigration Commission (CEIC) and other departments for adjudication, federal court costs, deportation, etc., we have a system that costs over $200,000,000. Some would argue the expenditures on refugee determination are actually much higher, particularly if the costs of the various other bureaucracies at the federal, provincial and municipal levels are taken into account as well as the large costs to the department itself in dealing with refugee entry on a case-by-case basis that undermines all the systems put in place to control borders. This is at a time of huge budget deficits and a severe recession, when the costs of all government departments are up for scrutiny and welfare rolls have swollen beyond anything Canadians have ever imagined since the Great Depression. When the UNHCR, dealing with 15 million refugees around the world compared to the 30,000 we deal with inside Canada, has a budget only slightly more than twice Canada's to deal with 200 times more refugees, and when it is faced with the challenge of assisting in the repatriation of up to half of those 15,000,000 refugees to Vietnam, Cambodia, Ethiopia, Afghanistan, Mozambique, etc., the need to run a lean operation is readily apparent. The question is, will it become mean in order to be lean?

There is a second reason — *fear*. Germany has 260,000 refugee claimants. France has over 80,000. Will Europeans be faced with as many as 5,000,000 or more people in flight from the effects of the disintegrating Soviet Union. The Europeans are already tightening up their systems. Britain, which experienced an upsurge of claims from 5,000 to an estimated 50,000 this year, introduced a new Asylum Bill in October 1991 to fingerprint refugee claimants and create a common European data base on refugee claimants. In spite of a stinging rebuke of the proposals by the UNHCR, Kenneth Baker, the Home

Secretary responsible for the legislation, is forging ahead with its legislation. Refugee claimants determined to be coming from Safe *First* Countries, that is, countries deemed to be non-refugee producing, will be deported within 48 hours as will claimants arriving from other European countries deemed automatically to be Safe Third Countries.

The Dublin Agreement made the country where the refugee claimant first arrived carry the primary responsibility for determining the claim. This is to prevent refugee asylum shopping and duplicate claims. Eight other tests will be used to deny a refugee claimant credibility: failure to apply immediately on arrival, failure to make prompt and full disclosure of all facts, lack of travel documents, involvement in political activities in the U.K., which might make them targets back home, the failure to seek refuge in another part of their country where they would not be under threat. (Canadian justice department lawyers are already researching the legal basis for such a rule, which could for example be applicable to Tamils from Sri Lanka.) Other refugee claimants will be fast-tracked, given only a paper review if they are deemed to have little merit. (Denial of an oral hearing was made illegal in Canada based on the Singh case, the catalyst for creating the current refugee determination system.) Legal aid for refugee claimants to obtain independent legal counsel will be abolished, as well as entitlements to housing. Though the refugee claimant queue is now about fourteen months, Britain plans to process a refugee claimant within three months.

This is but one step in the alleged attempt to create Fortress Europe, whereby governments are reacting to the rise of vigilante action against refugees and the increase in support for populist parties running on anti-immigration, anti-refugee and racist platforms. Le Pen is only the best known of these. In the last Swedish election, there was a burst of support for a populist anti-immigration party. The political efforts are not only directed towards dramatically toughening up the refugee claims system but at drastically reducing the ELRs, those granted Exceptional Leave to Remain. For although Europeans permit a far smaller proportion of refugee claimants to win their claims, they deport only a very small proportion of those rejected.

As the Europeans tighten their system, Canadian officials anticipate Canada will more and more become the asylum country of choice. Refugee claimants will be drawn towards the system which is the softest or most liberal. The overflow from Europe will impact on Canada. The Yugoslav crisis has alone produced one million displaced persons, half of whom have fled Yugoslavia altogether. This is the result of a multinational state disintegrating. There are a myriad of others.

Thus, although the number of refugee claimants arriving in Canada has begun to shrink, and the existing world refugee population is expected to decline dramatically as repatriation proceeds, Western states are haunted by fears that they are vulnerable to forces they cannot control or handle once set in motion. If Canada merely declared the United States a Safe Third Country, one-third of the claimants who arrive via the United States could be sent back for processing there. Somalis and Tamils who arrive via New York would be sent back to the U.S., putting pressure on the American Government to impose a visa requirement on those countries that are sources of refugee claimants.

In addition to money and fear, very basic and primary forces, there are others just as fundamental though not as spectacular in terms of money and numbers. These include political sensitivity to the consequences of stories appearing in the press about people allegedly either taking advantage of the refugee process or being victimized by it. No minister or department likes to see headlines and front page stories day after day as convicted murderers in the United States or terrorists elsewhere use the refugee process to delay and hopefully prevent extradition. Bambi may have been the victim of a frame-up. But is a victim of a miscarriage of justice in the United States a refugee? If she is, does that open the door to every criminally convicted individual to escape to Canada and claim refugee status where the Canadian Government, at great cost to the taxpayers, will be required to determine whether there indeed has been a miscarriage of justice. When the stories tell a tale of an individual allegedly victimized by the American justice system, the Minister and the department get it from both sides, condemned for coddling a convicted murderer and for using the full weight of the bureaucracy to force a poor victim back into the jaws of a conspiratorial system of which she is a victim. No minister likes to read that an Iranian woman, who was allegedly arrested at a private party for not wearing a veil and then tortured, is about to be deported as a rejected refugee claimant. Because of the privacy of a file, the Minister cannot explain why the claimant was rejected or why he did not accept the claimant initially on humanitarian grounds. The clear public impression is that the system has inflicted further cruelty on a woman who has already suffered more than enough.

Money! Fear! Sensitivity! But there is also another reason. This is an excellent time to make repairs to a system that is not presently under pressure. Further, there is a general move towards rationalization and harmonization amongst the receiving countries — the Dublin Agreement, the Schengen Treaty, etc. The requirement of rationality has been given an impetus in Canada. We will be hosting an informal consultation of Western states on refugee determination in June 1992. Canada wants to show its system at its best. That means putting in process measures to correct flaws in the system now for implementation prior to the June consultation.

For Canadians concerned with the protection of refugees, however, the question remains the same. Will Canada follow Britain's lead and implement the Safe Third Country provision of Bill C-55? In the effort to

make the system more efficacious, will fairness be sacrificed? Or will the search for rationalization make the system more effective so that it is fairer both for the refugee and the Canadian taxpayer, citizen and voter?

Issues of Access

The best way to manage a refugee determination system is to allow as few claimants as possible entry into the system. It will keep out abusers, claimants fleeing refugee producing situations and perhaps many who would be considered Convention Refugees even under the most restrictive system. What are the techniques?

Visa controls are one way to limit the numbers of those who can arrive at the ports of entry of your country. Interdicting people about to board airplanes with illegal documents is another method. Fining airlines for transporting individuals with improper documents is a third technique. All three are widely used now, though many airlines don't pay the fines (KLM) and dare the Canadian Government to take them to court. The airlines prevent many from gaining access to the port of entry so that they cannot even access the refugee determination system.

There are another set of techniques available to turn people back who reach a port of entry. They are simply denied access to the refugee determination system. The new British legislation will provide for designating countries as Safe Countries of Origin — SCOs (not to confuse Safe Country of *Origin* with Safe Third Country). Sweden would presumably be designated as such. Though there is the odd American and European who claim refugee status in Canada, these are few and far between. Since such a provision has been deemed to be in breach of the Convention by the UNHCR and would likely be deemed by the Supreme Court of Canada to be in breach of the Canadian Charter, it hardly seems worth the effort. For the substance of a refugee determination hearing is to determine whether the

INITIAL HEARING

Objectives

- *to deny access to persons:*
  - *who, for example, have been recognized by any other country to be Convention refugees or who can have the merits of their claims decided in another "safe" country*
  - *whose claims have no "credible basis"*

Decisions

There are three types of decisions made at the initial hearing, in the following order:

1. immigration issues (adjudicator only):

- Iis the person inadmissible to Canada?
- has the person violated immigration law?
- should the person be admitted, allowed to come into or remain in Canada?
- should the person be detained or released?

2. eligibility (adjudicator & Immigration and Refugee Board member):

- did the claimant pass through a "safe third country"? [not implemented]
- does the claimant have refugee status in another country?
- has the claimant, since last coming into Canada, been finally determined to be a refugee?
- has the claimant, since last coming into Canada, been finally determined not to be a refugee or to have abandoned his or her claim?

3. credible basis (adjudicator & IRB member):

- is the claim *arguable*? (I'm a refugee because I was unemployed")
- is the claim *believable*? (I was persecuted because of my religion")
- this access test has a low threshold: it was intended to deter the most flagrant forms of abuse

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Step-by-Step

1. Senior Immigration Officer (SIO)

- admits to Canada or "directs back" to USA until hearing date is available
- "out of status" claimants:
  - prepares report for immigration inquiry
  - photographs and fingerprints claimants
- schedules initial hearing and refers to Case Presenting Officer (CPO)

2. Case Presenting Officer (CPO)

- reviews Personal Information Form (PIF); decides whether to contest or concede "credible basis"
- *if conceded*, Simplified Inquiry Process (SIP):
  - completes paperwork to allow:
    - claimant to concede certain facts at issue;
    - EIC to concede that claimant is eligible and has a credible basis
- *if not conceded*, presents case to adjudicator and Refugee Division member
- makes recommendation respecting conditional removal order or departure notice

3. Adjudicator & IRB member

- *if contested*, claim is heard by adjudicator and IRB member; other participants: CPO, interpreter, claimant, counsel
  - adversarial: CPO can cross-examine
- *if not eligible/no credible basis*: in inquiry cases where the allegations are founded, persons are subject to removal *pending* review, with leave, by Federal Court of Appeal (FCA)

DEFINITION OF SAFE THIRD COUNTRY

The safe country provisions are found in s. 46.01 of the *Immigration Act*

46.01(1)(b) in the case of a claimant who is the subject of an inquiry caused pursuant to paragraph 23(4)(a), the claimant came to Canada from a country, other than the country of the claimant's nationality, the country of the claimant's habitual residence,

(i) that has been prescribed as a country that complies with Article 33 of the Convention, either universally or with respect to persons of a specified class of persons of which the claimant is a member, and

(ii)whose laws or practices provide that all claimants or claimants of a particular class of persons of which the claimant is a member would be allowed to return to that country, if removed from Canada, or would have the right to have the merits of their claims determined in that country;

(3) For the purposes of paragraph 1(b)

(a) a claimant who is in this country solely for the purpose of joining a connecting flight to Canada shall not be considered as coming to Canada from that country; and

(b) a claimant who comes to Canada from a country shall be considered as coming to Canada from that country whether or not the person was lawfully in that country.

(4) For the purposes of paragraph (1)(b), where a person who has come to Canada in a vehicle seeks to come into Canada without a valid and subsisting passport or travel document issued to that person and claims to be a Convention refugee, the burden of proving that the person has not come to Canada from the country in which the vehicle last embarked passengers rests on that person.

country from which the refugee is fleeing is a refugee-producing country. Preempting the decision by government fiat undermines the very purpose of the system.

Safe Third Country does not have the same problem. The refugee claimant is not being returned to the country from which they fled, but to the country they transited, which is a signatory to the Convention with a refugee determination process.

But a rose is not a rose is not a rose. There are almost as many genera of refugee claims systems as there are countries that have signed the Convention. Denmark, the U.K. (up until now) and Australia still base their systems on a minister conducting an investigation to determine whether a refugee claimant qualifies as a refugee. In Denmark, the decision is based on a paper review of the transcript of a police interview and, in the U.K. from an interview with an immigration official. There are no oral hearings, rights to counsel or independent adjudicators.

In other countries, such as France, Germany and the United States, the situation is more akin to the old days of the Refugee Status Advisory Committee (before the inauguration of oral hearings); they use the services of an independent decision making body to investigate the claim rather than a police or immigration department official. But there are relatively few oral hearings, no legal aid and no right to counsel in France. There are oral hearings in Germany and the United States, but no legal aid and only some legal representation.

Further, not only do the procedures differ, but so do the definition of persecution and how evidence is to be assessed. Much of the evidence in Canada is assessed based on giving the claimant the benefit of the doubt, while in most other jurisdictions a stricter rule measuring the balance of probabilities is used, while in still others the onus of proof is on the claimant.

Thus, if Safe Third Country is implemented we would be sending claimants back to countries with generally stricter screening and adjudication systems that are less independent and more subject to ideological factors. That is, of course, if the country of transit would accept the claimant back. And why should they if documents have already been destroyed or passed back to the agent who had provided the false documents just before boarding an aircraft. If it could not be determined how long the claimant had sojourned in the Safe Third Country, or if no one could establish that the refugee claimant had not merely been in transit, a terrific political uproar would result. The refugee support community would then be energized again to attack the government, with little actual change in a system neither more efficacious nor fair to the refugee. Charter challenges would ensue. At the same time, the politically feared forces of anti-refugee sentiment would be stirred up.

Why, then, would officials consider implementing the Safe Third Country

provision in the present law? One reason is the need to distribute responsibilities among Western countries. One way to do that is to follow the precedent of the Dublin Agreement and make the country where the refugee first arrives process the claim. But the effect of this measure is likely to be refugees shifting towards the system with the fairest system of adjudication and/or, even more importantly for claims unlikely to be successful, towards states which have a poor history of deporting unsuccessful claimants.

It is a system based on putting the greatest pressure on the weakest (or fairest, though the two are not equivalent) access point in the system, thus pressuring everyone to tighten up rather than attempting to create a system that is fair to refugee claimants, fair to those responsible for carrying out the responsibilities of controlling borders and processing claimants and, most of all, fair to the refugees themselves.

One method of speeding up the process is to provide some incentive for lawyers or legal-aids to ensure that the Personal Information Forms so critical to scheduling are filled out as quickly as possible. At the present time, for weak claims, there is every incentive to drag the process out as long as possible both for the claimant and the counsel for the claimant charging the fees to legal aid.

The key access issue are:

- Safe Country of Origin;
- Safe Third Country;
- Visas;
- Interdiction;
- Airline Fines;
- Direct-Backs;
- Documentation;
- PIF — Personal Information Forms.

LEGISLATIVE PROVISIONS

The following are the direct-back provisions in the *Immigration Act*

20(2) Where an immigration officer at a port of entry is of the opinion that it would or may be contrary to this Act of the regulations to grant admission to or otherwise let come into Canada a person who is residing or sojourning in the United States, the officer may, where a senior immigration officer to whom the officer would otherwise make a report pursuant to paragraph 1(a) is not reasonably available, direct that person to return to the United States until such time as such senior immigration officer is available.

23(5) Where, pursuant to subsection (4), a senior immigration officer is required to cause an inquiry to be held with respect to a person who is residing or sojourning in the United States, the officer may, where an adjudicator is not reasonably available to preside at the inquiry, direct that person to return to the United States until such time as a adjudicator is available.

Hearings

Do we need the initial hearing? It slows down the process. It uses up resources. The threshold for passing the credible basis test is low so that only a small percentage are contested at the first hearing.

But where a case is contested, we, in effect have virtually a full hearing. To establish a credible case, virtually everything needed to establish a refugee case is put on the table. Further, since the hearing is adversarial rather than investigative, the wrong tone is set from the beginning.

Even from a management perspective it is a bad policy. It divides responsibility between two very different branches of government so that one branch cannot be made accountable for the results. It lengthens the hearings. In Canada, 10-20 cases per officer per month can be processed, whereas in Germany the equivalent figure is 40 and in the United States it is 72. Even from a file management point of view, it means two duplicate systems — one in CEIC and one with the Immigration and Refugee Board (IRB), or else passing files between agencies with all the risk of misplacement. In effect, integrated case management is made impossible in order to contest less than ten percent of cases.

To speed up the process, an average of about 40 percent of claims are expedited, that is, never given a full hearing but accepted upon a paper review. Any negative result requires a full hearing.

At present, no legislative provision is included in the Act to allow for an expedited process. The system is rather inflexible in law. It does not

CREDIBLE BASIS CONCEDED BY CPO

	QUE/ATL	ONT	PR	BC	NAT'L
1989	94%	90%	74%	84%	91%
1990	90	94	66	91	92
JAN-SEPT 91	93	92	63	89	92

NOT CONCEDED AND SUCCESSFULLY ARGUED BY CPO

	QUE/ATL	ONT	PR	BC	NAT'L
1989	51%	49%	38%	43%	47%
1990	41	46	51	61	54
JAN-SEPT 91	43	76	44	44	58

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allow for a positive determination at any stage in the process where a claim is manifestly founded. It does not allow for generic rather than case-by-case determination. Because a hearing requires so many people — the Refugee Hearing Officer (RHO), two board members, an interpreter, the refugee claimant, counsel for the refugee claimant — there are many opportunities for adjournments with few incentives in the process to get on with the case.

Further, the adversarial nature of the initial hearing and the formal court style introduced in some jurisdictions at the full hearing acculturated some lawyers to a litigation culture in which the responsibility of counsel was not simply to make sure any relevant fact was not overlooked, but to make sure *every* fact and *every* possible argument was set before the Board.

Eliminating the first hearing and ensuring the full hearing was truly investigative and not adversarial would free up an estimated half of the processing time. Can changes also be made at the Full Hearing Stage to speed up the process?

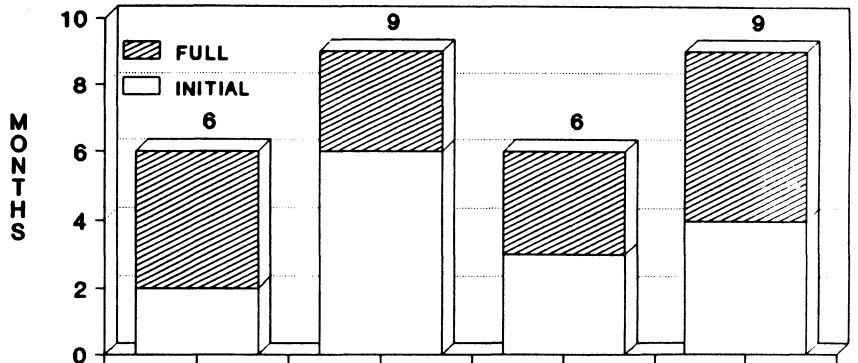
Though the Full Hearing Stage is working rather well, a number of improvements in both style and conception could allow for dramatically improved efficiency. Others could only be introduced at the cost of fairness.

For example, a change from two member panels to one hearing officer would make significant savings, but only at great cost on the appeal side and on the learning curve for the board members. It is probably true that sharing a panel reduces the sense of responsibility and accountability of any one Board member. But shared responsibility, particularly when there is only one full hearing, is important.

Similarly, arguments will be put forth to shift the onus of proof from giving the benefit of the doubt to the claimant, to one of a balance of probabilities, or even putting the onus of proof on the claimant. For those who want a higher rejection rate, this would be a crucial change.

But the issue, surely, is not high or

PROCESSING TIMES INITIAL AND FULL HEARINGS SEPTEMBER 1991



	QUE/ATL	ONTARIO	PRAIRIES	B.C.
FULL	4	3	3	5
INITIAL	2	6	3	4

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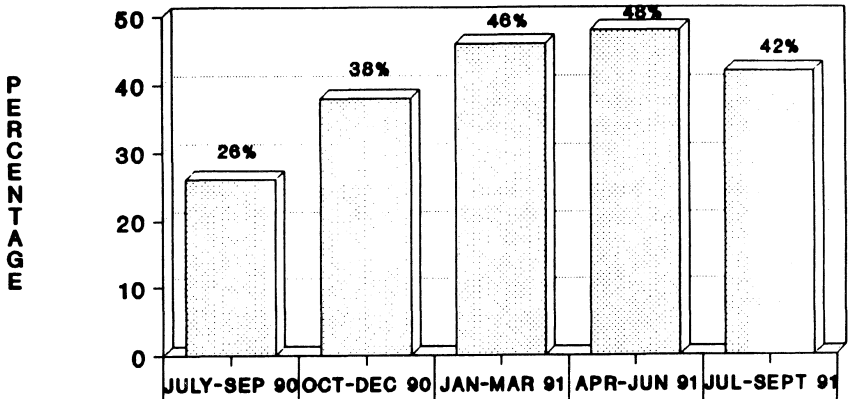
EXPEDITED CLAIMS: % OF ALL CLAIMS HEARD



	JULY-SEP 90	OCT-DEC 90	JAN-MAR 91	APR-JUN 91	JUL-SEPT 91
EXPEDITED	716	1957	3415	4049	2725
ALL CLAIMS	2749	5110	7452	8370	6554

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low acceptance rates, but a system which errs on the side of the claimant and is at the same time speedy so that it is not abused and refugee claimants are processed expeditiously and fairly. What puts the system in doubt is that the public does not understand why 8 percent of Czech claims, 19 percent of Polish claims or even 55 percent of Argentinean claims are being accepted, when these are now supposed to be democratic regimes. Nor, on the other hand, is there any understanding of why the acceptance rates of those fleeing the Peoples Republic of China have dropped so dramatically when Western leaders going to China receive so much publicity about their protests to the Chinese leadership concerning human rights abuses.

Appeals

Other than the initial hearings, which now seem redundant, the main issue is one of appeal. Most rejected cases request leave to appeal to the Federal Court. Over 25 percent are granted leave to appeal and over half of these are allowed at appeal. This means that of the cases turned down by the Board, about 15 percent are reversed at the appeal stage.

This reversal rate is enough to justify an appeal system. But can it be expedited while protecting refugee claimants? Does the absence of a review mechanism within the Board lead to more appeals and more reversals? Would it be prudent, cost effective and fair to allow for a review officer at every full hearing who, while not participating in the hearings, would have the power to reverse the decision? For consistency, that review officer could also work with other officers on a central panel to set guidelines for board members.

This would not eliminate the need for retaining a right to appeal, but it might cut down the number of cases the Federal Court granted leave to appeal. Further, it might reduce even further the number of cases given stays of deportation.

After all, 95 percent of cases heard are fact specific. The only way one can

FULL HEARING

Objectives

- *meet Convention and Charter obligations to protect genuine refugees against return to country against which the claim to refugee status is made*
- *Singh decision requires only one oral hearing on merits of claim*
- *safeguards to reduce need for appeal on merits:*
  - *2 decision-makers*
  - *non-adversarial hearing*
  - *independent and expert body (IRB)*

Decision

- **Is the claimant a "Convention refugee"?**

- Act contains definition used by 1951 Geneva convention and protocol
- "well-founded" fear of persecution: race, religion, nationality, social group, political opinion
- claimant must demonstrate a well-founded fear of persecution, but may be given the "benefit of the doubt"
- all evidence must be unclassified and available to claimant for response

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Step-by-Step

1. Refugee Hearing Officer (RHO)

- checks Personal Information form (PIF) and decision at initial hearing
- may hold pre-hearing interview with claimant and counsel
- decides whether to concede ("expedited" process) or contest ("traditional" process)

2. Board Members

"Expedited" Process (concede)

- one member holds hearing to confirm RHO's recommendation
- if RHO's recommendation is confirmed, claimant is eligible to apply for permanent residence ("landing")

"Traditional" Process (contest)

- two members preside over hearing on merits of the refugee claim
- **RHO** presents facts at issue
  - uses country information from **IRB** documentation centre
  - may question claimant, present other evidence
- lawyer or other counsel presents claimant's case
- *if accepted,* claimant is eligible to apply for permanent residence
- *if rejected,* may remain in Canada pending disposition of appeal, with leave, to the Federal Court of Appeal

really understand if an injustice has been done is to hear all the facts. Yet, a full rehearing of any appeal leads to considerable delay and much greater cost. A paper review might not provide enough protection to satisfy the Federal Court so that appeals to it are granted less frequently. Further, there is no present method of ensuring consistent guidelines are provided to board members in different regions, though a panel undertaking a paper review might be an improvement on this issue.

An appeal mechanism on the substance of the case could ensure fairness while reducing costs and delays.

An Overview

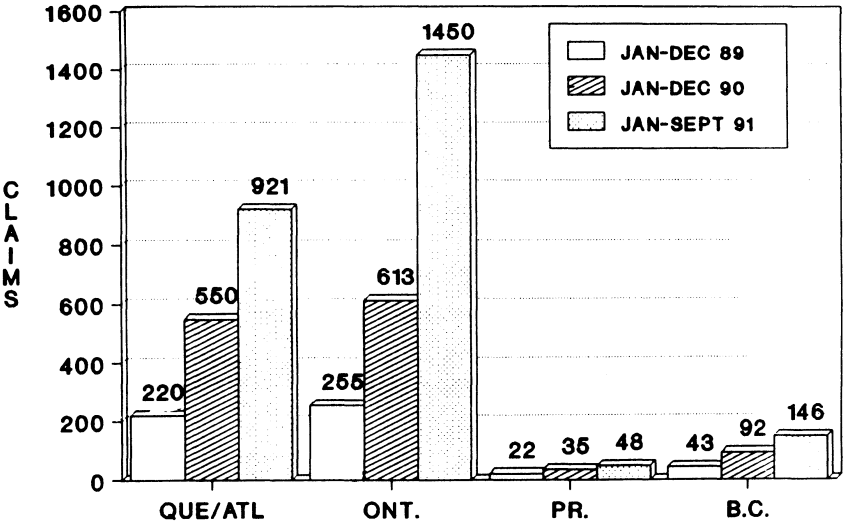
Quite aside from reforms of the Immigration Act, three other areas should be addressed to improve the existing system. The first I refer to as the Xeroxing of CEIC. The second is a move towards multilateralism in processing refugee claims. The third is the expansion of a pro-active policy on behalf of the U.N. to protect refugees and intervene in circumstances producing refugees.

Xeroxing CEIC

At the meeting of the various immigration office managers referred to at the beginning of this special issue of *Refuge* on refugee determination, the Chair of the Board of Xerox gave a luncheon speech describing how Xerox had been in danger of going down the tubes and how strategic planning reversed the process. One critical aspect of strategic planning entails setting a common set of goals for *all* parts of a corporate structure. If one part is pulling in one direction and another part in another, the organization is schizophrenic.

CEIC is clearly schizophrenic. The enforcement branch, which seems dedicated, efficient and committed to protecting Canadians from unwanted visitors and arrivals, is also dedicated to ensuring that as few refugee claimants reach our shores as possible. After

FULL HEARING STAGE: CLAIMS COMPLETED* (MONTHLY AVERAGE)



* INCLUDES CLAIMS WITHDRAWN AND ABANDONED

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ACCEPTANCE RATES (FULL HEARING STAGE)

	JAN-DEC 1989 %	JAN-DEC 1990 %	JAN-JUN 1991 %	JUL-SEPT 1991 %
QUE/ATL	87	74	71	58
ONTARIO I	90	81	83	69
ONTARIO II	-	-	80	64
PRAIRIES	90	86	71	60
BC	86	55	57	50
NATIONAL	88	77	76	62

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ACCEPTANCE RATES (FULL HEARING STAGE)

	JAN-DEC 1989	JAN-DEC 1990	JAN-SEPT 1991
ARGENTINA	69 %	35 %	55 %
BULGARIA*	N/A	47	33
CHINA*	74	44	23
CZECHOSLOVAKIA	75	14	8
EL SALVADOR*	85	78	73
ETHIOPIA*	85	84	94
IRAN*	91	88	88
LEBANON*	87	78	86
PAKISTAN*	85	87	71
POLAND	73	21	19
ROMANIA*	89	79	65
SOMALIA*	97	92	93
SRI LANKA*	96	89	95
U.S.S.R.	50	59	72

*ONE OF THE TOP 10 COUNTRIES IN THE IRB'S CASELOAD IN 1991

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all, in their calculations, for every refugee claimant that does not arrive, the Canadian taxpayer saves $50,000 U.S. in administrative and processing time. They understand the protection of Canada aspect of their mandate, but the humanitarian aspects of the Immigration Act are not seen to be their responsibility.

As a result, a major preoccupation of the enforcement branch is interdicting, through Operation Short Stop, the arrival of refugee claimants using false documents, instead of working with refugee and ethnic organizations to detect the movement of criminals, drug dealers and professional people smugglers. If the CEIC enforcement branch would endorse that a common goal of CEIC is to provide protection to genuine refugees, and that this goal is as much a part of their mandate as that of any other branch, we would go a long way to restoring refugee support groups' trust in the CEIC. Then these groups too could and should assume some sensitivity to and responsibility for enforcement instead of merely giving it a rhetorical assent.

McCamus, the Chair of Xerox, not only stressed the need for everyone in the system to support all the goals so that the corporate structure develops coherence, but that each member and part of the organization had to recognize who their clients are, understand them and be dedicated to giving them top quality service. The clients of one part of an organization are *not* other parts of the organization.

When Xerox employees began to see their job primarily in terms of putting out fires and participating in public relations exercises, it was a sure sign that rot had entered into the organization. The depressing reality of the situation was that one part of the organization saw that its prime clientele were other parts of the organization.

Yet that is precisely how the Case Management Branch defines its mission and clientele. Instead of seeing its job as the elimination of situations which give rise to contentious cases, just as Xerox redefined the mission of its damage control branches, it sees its responsibility as the effective management of cases appealed to the Minister or sensitive and high-profile cases. As such, it sees its clients as the Minister (the equivalent to the Chair of the Board of Xerox), National Headquarters and the regional offices. But the clients are the immigrants, the refugees and the refugee support groups.

The result of this misconception of goals and clients, and of the incoherence in the organization is that those at the front lines — ports of entry at border crossings and airports — are given a schizophrenic task. They are responsible for deciding in 45 seconds whether a person has a proper passport, identity, the appropriate visa, etc. Yet anyone who simply says they are a refugee can waltz right by and enter the system with relatively few ever being deported. Officials at entry points don't understand why they exercise such care, on the one hand, and the system seems so careless on the other. Clearly, enforcement and humanitarianism must be integrated and not seen as polar opposites splitting the organization.

At the same time, the case-management personnel must redefine their focus to concentrate not on the various parts of the bureaucracy as their clients; rather, they must become partners to those on the front lines of decision making to serve those who are properly defined as CEIC clients.

The problem within CEIC is not one of lazy or incompetent civil servants. Everyone with whom I have ever dealt in CEIC, with very few exceptions, is both dedicated and overworked. They are bright, intelligent and committed. But they are working within an organization that has not yet given coherence to its twofold mission. They are working in an organization that has not properly defined its clientele. Obviously, CEIC could benefit from the lessons of Xerox in streamlining its operations, providing internal coherence to its entire structure and, perhaps most importantly, defining its clientele. What is needed is the Xeroxing of CEIC.

OVERALL ACCEPTANCE RATES*

	JAN-DEC 1990	JAN-JUNE 1991	JULY-SEPT 1991
SOMALIA	92%	94%	89%
IRAN	88	90	85
SRI LANKA	88	95	94
PAKISTAN	82	75	48
ETHIOPIA	82	96	82
LEBANON	77	87	75
EL SALVADOR	76	76	62
ROMANIA	69	58	71
BULGARIA	44	36	26
CHINA	43	25	15
ARGENTINA	9	23	40
JAMAICA	0	0	0
TRINIDAD&TOBAGO	0	0	0

*BASED ON TOTAL NUMBER OF CASES CONCLUDED AT INITIAL AND FULL HEARING STAGES, INCLUDING WITHDRAWN CASES.

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Towards Multilateralism

But the cure, and not just more palliative action, requires something else beyond the borders of Canada. Refugee claimants are a problem for the whole Western world. An isolated Canadian solution could merely shift more of the problem on to others if we are mean-spirited, or possibly onto ourselves if we are fair and generous. Further, in a system supposedly based on universal principles, the inconsistencies, ideological distortions and

FEDERAL COURT (FULL DETERMINATION)

	LEAVES			APPEALS	
	REQ'D	DEC'D	% GRANTED	# DEC'D	% ALLOW'D
1989	655	496	28%	4	50%
1990	2242	1728	28	24	63
01-08 1991	3480	1869	26	107	52
TOTAL	6377	4093	27	135	54

OVERALL RATE OF SUCCESS AT APPEAL

	% GRANTED LEAVE		% ALLOWED AT APPEAL		OVERALL SUCCESS RATE
1989	28%	x	50%	=	14%
1990	28%	x	63%	=	18%
01-08 1991	26%	x	52%	=	14%

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wide variations in the system add little to enhance its credibility. Bilateral or multilateral arrangements that merely shift the problem from one jurisdiction to another do little to address the core of the refugee protection problem for those who claim to be Convention Refugees.

What we need is a multilateral (perhaps initially bilateral) quasi-judicial organization for processing refugee claims as well as an agreement to burden share and resettle successful claimants. What we have instead are irregular structures repeated from country to country. We invite asylum shopping by the very structures we build. The refugees, then, are blamed for abusing a faulty system that invites such practices.

Wouldn't a multilateral system tend to move toward the meanest system rather than the best one? There are many reasons to argue that the reverse could be true if the system is not built on a beggar thy neighbour principle. The best elements of various systems would be integrated.

This is particularly true of the border between Canada and the United States. Of 113,000 entries into Canada last year, 106,000 came from the United States. The vast bulk of our resources are used to control entry from a country with whom we now have a free trade agreement, but only capital, not people, move freely back and forth. If our control resources could be redeployed to control the entry of 7,000 rather than 113,000, how much more effective could they be?

The development of a bilateral, and eventually a multilateral, refugee claims system would be a step in this direction. The Americans are already using our country profiles. Moves towards greater integration would mean that any Safe Third Country provision would be a waste of resources. But such a move will require the best of both systems and not the worst.

Pro-active Intervention

With the intervention on behalf of the Kurds in Northern Iraq, we witnessed either idiosyncratic behaviour or a new precedent for protecting refugees. If it is the latter, such measures could eventually prevent the need for any refugee determination process in the first place.

Annual Dinner

The Centre for Refugee Studies' annual dinner will be held on Thursday, 6 February 1992, 6:30 p.m. at the International Restaurant, 421-429 Dundas St. W., 3rd Floor, Toronto and will feature a 10-course meal.

Tickets are $60.00.

The Vincent Kelly Award, presented each year by the Centre for Refugee Studies to Canadians for outstanding work on behalf of refugees, will be presented at the dinner.

Please see page ?? for more information.