# SOMETHING SHORT OF JUSTICE

## A Comment on Canada's Refugee Determination Process

*By James Hathaway*

The right to an oral hearing before a decision-maker is fundamental to our concept of justice. Whether charged with having committed a crime, seeking redress for a consumer fraud or merely contesting the validity of a parking ticket, Canadians expect and receive the opportunity to appear before a court to argue the merits of their case. Our judicial tradition incorporates the notion that the fairest decision is that made after the parties have been seen and heard and such evidence as they present has been examined. To refuse to accord an individual the right to appear before a judge in order to make out his case is, quite simply, wholly foreign to our experience and expectation of fair play.

In stark contrast to our general pattern of proceeding by way of an oral hearing, claims for refugee status in Canada are determined on the basis of documentary evidence only. While an oral hearing is afforded the applicant in the context of a redetermination before the Immigration Appeal Board, this appeal procedure is only available if the written material filed with the Board in support of the application for a redetermination is sufficiently persuasive to meet the threshold test prescribed by the *Immigration Act*. Thus it is entirely possible for a refugee claimant to be deported to the country in which he alleges to have been persecuted without ever having received a hearing.

The absence of a provision mandating an oral hearing in the context of a refugee application is soundly criticized in the report of the Task Force on Immigration Practices and Procedures issued in November, 1981. In addition to the appearance of unfairness created by the present system, the report cites difficulties in assessing credibility and in resolving evidentiary contradictions as reasons for instituting oral hearings for refugee claimants. This recommendation notwithstanding, the Minister of Employment and Immigration failed to address the question in announcing a series of policy changes at the recent National Symposium on Refugee Determination. Departmental officials subsequently indicated that the reason this key issue was side-stepped was essentially economic. Oral hearings are simply too expensive.

This financial rationale for opposing oral hearings is both inappropriate and of questionable accuracy.

Because the oral hearing is such an integral part of our system of justice, it is inappropriate to retain the present documentary determination system for refugee claims by reason of cost considerations alone. The expense incurred in affording a hearing in the context of many minor criminal cases, the small claims court or highway traffic violations cannot be justified on the basis of a dollar and cent cost-benefit analysis; the right to be heard is nonetheless preserved because of a cherished belief that an oral hearing is the fairest way to decide the issues. Given that an individual's life or liberty is on the line in a refugee case, the importance of being scrupulously fair is all the more evident.

Second, it is anything but apparent that the cost of granting refugee claimants an oral hearing would exceed that incurred under the present system. An applicant for refugee status currently appears first before an adjudicator; a case presenting officer, a stenographer and an interpreter (if required) are present. The case is then adjourned pursuant to the refugee claim for an examination under oath conducted by a senior immigration officer with a stenographer and an interpreter in attendance. After all the testimony has been transcribed, the evidence is forwarded to the Refugee Status Advisory Committee (RSAC) where it is studied by a staff member to determine whether the claim is "manifestly unfounded". The transcript, or in the case of "manifestly unfounded" claims, a summary of the transcript, then proceeds before three or more members of the RSAC for discussion and the formulation of a recommendation to the Minister. This recommendation is, in turn, reviewed by the Chairman of the RSAC, the Minister's delegate and, in some cases, by the Minister himself. Can it seriously be argued that such a cumbersome procedure, sometimes involving a dozen or more people, is more economical than an oral hearing before a single decision-maker?

As an alternative to the present system, we might consider the creation of a specialized Refugee Status Board which would receive cases either directly pursuant to claims made by individuals upon arrival in Canada or by reference from adjudicators when claims surfaced during inquiries. An oral hearing would be afforded a claimant before a single, local member of the Board, with an appeal on a question of law to a panel of three members of the Board. Judicial review pursuant to section (28) of the *Federal Court Act* would still be available.

There is no good reason to hold to the status quo. Oral hearings are not only likely economically feasible, they are mandated by our sense of legal and moral responsibility. □

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### REFUGEE CLAIMS IN EUROPE

A seminar on the problems of asylum seekers in Europe was held in Zeist, Netherlands, January 20, 21 and 22, 1982. It is interesting to compare current Canadian concerns about the treatment of individuals seeking refuge here with the European concerns expressed at the seminar, which included

- the need for asylum seekers to receive a fair and sympathetic hearing at their point of arrival, and to have the chance to contact a lawyer, a representative of UNHCR or a suitable voluntary agency. The seminar recommended that border police, immigration officers and other involved officials receive special training relating to the problems of asylum seekers.
- deportations from certain European countries before the final decision on an asylum request, because the authorities believe the appeal unlikely to succeed;
- the practice in some European countries of not giving consideration to asylum requests of people from certain countries, because people from these countries are presumed not to be subject to persecution;
- increased detention of asylum seekers, including children, in certain European countries. The seminar expressed concern that the concepts of "public order" or "national security" were frequently too loosely interpreted as a pretext for detaining asylum seekers;
- the need for asylum seekers to be able to work and to have access to occupational programs, language training and other educational facilities, and psychological and social assistance while a decision on their asylum request is pending, particularly in light of the trauma they may be undergoing.