A Refugee Claims Procedure: An Overview

by David Matas

There are two striking features of the refugee-claims procedure. One is its complexity. The other is its incompleteness. The process is filled with inquiries and examinations, determinations and redeterminations, applications and appeals. Yet a refugee claimant can go through the whole system without ever having been heard by anyone deciding on or advising on his claim. He may never have a chance to respond to any objections that are made to his claim.

A refugee claimant is faced with the intricacies of the Canadian system as soon as he arrives at a Canadian airport. On his arrival, without access to counsel, he must decide whether to claim refugee status immediately, or attempt to obtain visitor status and make an inland refugee claim. If he gets visitor status, it may be at the cost of a bond that is subject to forfeiture should he go out-of-status to make a refugee claim. If he claims immediately, and his port of entry is not his ultimate destination, he may be stuck with several trips between his port of entry and his destination in order to process his claim. (A refugee claimant is not entitled to have his claim processed by the Immigration office nearest his destination.)

If a refugee claimant enters as a visitor, he is then faced with the conundrum of making his claim in-status or out-of-status. The law contemplates refugee claims only out-of-status, at an inquiry, when someone is reported for a violation of the Immigration Act. Needless to say, many refugees come to Canada with no intent or desire to violate Canada's law.

The Department of Immigration, not wanting to force refugee claimants into Immigration Act violations simply in order to make their claims, has allowed the making of in-status claims. Since the Act does not provide for these claims, there are no statutory criteria indicating when the Department should permit such a claim to be made.

In determining whether or not to permit the making of an in-status claim, departmental officials look at the bona fides of the claim, the ability of the claimant to sustain himself if his status is extended, how soon the claimant's status expires, and whether the intention to make a refugee claim was formed before or after arrival. Depending on the office, the official and the occasion, the making of an in-status claim will be permitted if the claim is not frivolous, if the claimant can sustain himself financially should his status be extended, if the status of the claimant is not expiring shortly, or if the claimant formed his intention to claim refugee status only after his arrival in Canada.

For the claimant, the decision to claim either in-status or out-of-status is complicated by the issue of bonds, work permits and redeterminations. If a claimant posts a bond on entry and makes an out-of-status claim, his bond is subject to forfeiture. An in-status claimant (again depending on the office, the officer and the occasion), may be denied a work permit simply because he has made his claim in-status. An in-status claimant is denied the right to apply to the Immigration Appeal Board (I.A.B.) for a redetermination. However, if he goes out-of-status after a negative Ministerial determination and makes a second claim, he gets, in effect, three chances to put forward his claim — twice before the Minister and once before the I.A.B., rather than the two chances he would have had if he had made an out-of-status claim at the start.

A claimant making an out-of-status claim will normally wait until the day after the expiry of his status and appear voluntarily at the local Immigration office. An Immigration officer will report the claimant to inquiry for overstay. The officer in charge will direct an inquiry into the issue of whether the claimant has indeed overstayed. An adjudicator conducts an inquiry into whether there was an overstay. Once the adjudicator decides that the claimant did overstay, he adjourns the inquiry to allow for the making of the refugee claim. There is no possibility of avoiding this procedure for an out-of-status claim even though the claimant does not contest his overstay. The requirement of this inquiry can, depending on the office, add months of delay to the refugee-status determination process.

Once the inquiry is adjourned, the refugee examination is scheduled. Depending on the examining officer, the refugee exam is either presided over or conducted by the examining officer. Some examining officers attempt to elicit the nature of the claim through their own questioning, even though they have no prior knowledge of the claim. Questioning by counsel is relegated to the end. Others allow counsel to examine the claimant from the very beginning of the examination. Witnesses are not allowed to testify at the examination in support of the claim, although, depending on the case, the testimony of witnesses could bolster the claim.

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A transcript of the claim is sent to the claimant and his counsel. They are
given from two weeks to a month to correct the transcript before it is sent to
the Refugee Status Advisory Committee (R.S.A.C.) in Ottawa for considera-
tion. Counsel may add written sub-
missions. Affidavit evidence of others
may be forwarded.

Until recently, the R.S.A.C. had mem-
bers of the Department of Immigration
and the Department of State for Exter-
nal Affairs as part-time members of the
Committee. The R.S.A.C. did not con-
sider the transcripts of claims the
R.S.A.C. Secretariat believed to be
manifestly unfounded. The R.S.A.C.
now, members of the R.S.A.C. ap-
pointed from the Department of Immi-
gration and Department of State for Exter-
nal Affairs must serve full time
and be free of departmental responsi-
bilities. The screening of manifestly un-
unfounded claims has ceased. Credibility
and refugee-definition guidelines have
been announced.

The R.S.A.C. does not hear the claim-
ant before advising the Minister on the
claim. The R.S.A.C. does not present
the claimant with apparent objections
to his claim and give him an opportu-
nity to respond before advising the
Minister on the claim. There are pilot
projects operating in Montreal and
Toronto allowing claimants, at their
option, to have an oral hearing before a
member of the R.S.A.C. The R.S.A.C.
can, and sometimes does, examine in-
formation other than that submitted by
the claimant. Occasionally, when that
additional information is considered
important by the Committee, the ex-
amination will be reconvened to allow
the claimant to comment on the infor-
mation.

The R.S.A.C. advises the Minister. It is
the Minister who decides on the claim.
He has delegated his power to decide to
several departmental officials. If the
Minister denies a claim, he gives written
reasons for the refusal.

A refused claimant may apply to the
I.A.B. for a redetermination. The re-
quest for a redetermination is simply a
paper application. The I.A.B. may
grant an oral hearing. It may, and often
does, deny the request without a hear-
ing and without an opportunity to re-
respond to objections the I.A.B. may
have to the claim.

While the R.S.A.C. may and does ex-
amine information additional to that
submitted by the claimant, the I.A.B. is
restricted by law to examining the tran-
script of the claim and the material
submitted by the claimant. While the
R.S.A.C. is a specialized body knowl-
edgeable about the political and social
conditions of the countries from which
claimants seek refuge, the I.A.B. is not.
In an application to the R.S.A.C., the
claimant need say little about country
conditions. In an application to the
I.A.B., the claimant is well-advised to
detail country conditions.

At the Ministerial level, the claimant
receives the benefit of the doubt. The
Minister has announced guidelines for
the R.S.A.C. that state the claimant is
to be given the benefit of any doubt
there might be both about the claim-
ant's credibility and about the applica-
tion of the refugee definition to the
claimant. At the I.A.B. level, any
doubt must be resolved against the
claimant. The Federal Court of Appeal
has said of refugee determinations by
the I.A.B. that claimants do not have
the benefit of the doubt.

A person refused by the I.A.B. may
apply to the Federal Court of Appeal
(F.C.A.) to set aside the decision of the
I.A.B. It is here, for the first time, that
the claimant is entitled to appear before
someone deciding his case. It is here,
for the first time, that the claimant gets
an opportunity to answer apparent ob-
jections to his position. However, the
F.C.A. hears no evidence. It cannot de-
termine the claimant to be a refugee. Its
powers are limited to setting aside the
decision of the I.A.B., for failure of the
I.A.B. in law or fact or natural justice,
and referring the matter back to the
I.A.B. for reconsideration.

From the F.C.A., the claimant can go
to the Supreme Court of Canada
(S.C.C.) by way of an application for
leave to appeal. The S.C.C. suffers
from the same restrictions as the F.C.A.
It can hear no evidence. It cannot find
the claimant a refugee. All it can do is
send the matter back to the I.A.B.

Until recently, the practice was to post-
pone resumption of the inquiry until
after the F.C.A. or S.C.C. disposition.
Now inquiries are resumed immediate-
ly after the I.A.B. redetermination.

The refugee-claims process ends for the
claimant, as it began, with a dilemma.
If the claimant wants to stay until his
F.C.A. case is heard, he will be ordered
deported as not willing to leave. If the
claimant is willing to leave before his
F.C.A. case is heard, gets a departure
notice, and does leave, he has, in effect,
abandoned his claim. Even if he should
win at the F.C.A. and the matter is sent
back to the I.A.B., even if the I.A.B.,
the second time around, should deter-
mine him to be a refugee, he is not enti-
titled to re-enter Canada. A refugee
lawfully in Canada is entitled to remain.
A refugee outside of Canada is not enti-
titled to enter.

Should the claimant be ordered de-
ported, he may apply to the F.C.A. a
second time, this time to have the de-
portation order set aside. Departmental
policy is to stay execution of deporta-
tion orders pending applications to the
F.C.A., where, in their opinion, the
applications are not frivolous.

If the claimant wins on his first appli-
cation to the F.C.A. (i.e., to set aside
the determination of the I.A.B.), he
will automatically win on his second
application (i.e., to set aside the dis-
position of the adjudicator). Once the
I.A.B. determination is set aside, then
the adjudicator is without jurisdiction
to proceed.

There is one final twist. A person
recognized as a refugee, whether by the
Minister or the I.A.B., is not entitled to
remain. In order to be entitled to re-
main, he must be given a Minister's
Permit. Departmental policy is to give
Minister's Permits to every refugee not
already given refugee by another coun-
try. Once given a Permit, the refugee
will be processed, in Canada, for land-
ing.

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