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 only 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 consideration. Counsel may add written submissions. Affidavit evidence of others may be forwarded.

Until recently, the R.S.A.C. had members of the Department of Immigration and the Department of State for External Affairs as part-time members of the Committee. The R.S.A.C. did not consider the transcripts of claims the R.S.A.C. Secretariat believed to be manifestly unfounded. The R.S.A.C. had no guidelines under which to operate.

Now, members of the R.S.A.C. appointed from the Department of Immigration and Department of State for External Affairs must serve full time and be free of departmental responsibilities. The screening of manifestly unfounded claims has ceased. Credibility and refugee-definition guidelines have been announced.

The R.S.A.C. does not hear the claimant 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 opportunity 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 information other than that submitted by the claimant. Occasionally, when that additional information is considered important by the Committee, the examination will be reconvened to allow the claimant to comment on the information.

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 request 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 hearing and without an opportunity to respond to objections the I.A.B. may have to the claim.

While the R.S.A.C. may and does examine information additional to that submitted by the claimant, the I.A.B. is restricted by law to examining the transcript of the claim and the material submitted by the claimant. While the R.S.A.C. is a specialized body knowledgeable 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 claimant's credibility and about the application 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 objections to his position. However, the F.C.A. hears no evidence. It cannot determine 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 postpone resumption of the inquiry until after the F.C.A. or S.C.C. disposition. Now inquiries are resumed immediately 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 determine him to be a refugee, he is not entitled to re-enter Canada. A refugee lawfully in Canada is entitled to remain. A refugee outside of Canada is not entitled to enter.

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

If the claimant wins on his first application 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 disposition of the adjudicator). Once the I.A.B. determination is set aside, then the adjudicator is without jursidiction 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 remain, he must be given a Minister's Permit. Departmental policy is to give Minister's Permits to every refugee not already given refuge by another country. Once given a Permit, the refugee will be processed, in Canada, for landing.

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