Oral Hearing (cont'd from p.5)

at this stage to assert rights as Convention refugees, having regard to the potential consequences for them of a denial of that status if they are, in fact, persons with a "well-founded fear of persecution," they are entitled to fundamental justice in the adjudication of their status.

The procedure for determining refugee status claims established in the Immigration Act, 1976 is inconsistent with the requirements of fundamental justice articulated in s. 7. At a minimum, the procedural scheme set up by the Act should provide the refugee claimant with an adequate opportunity to state his case and to know the case he has to meet. The administrative procedures, found in ss. 45 to 48 of the Immigration Act, 1976, require the Refugee Status Advisory Committee and the Minister to act fairly in carrying out their duties but do not envisage an opportunity for the refugee claimant to be heard other than through his claim and the transcript of his examination under oath.

Further, the Act does not envisage the refugee claimants being given an opportunity to comment on the advice the Refugee Status Advisory Committee has given the Minister. Under section 71(1) of the Act, the Immigration Appeal Board must reject an application for redetermination unless it is of the opinion that it is more likely than not that the applicant will be able to succeed. An application, therefore, will usually be rejected before the refugee claimant has even had an opportunity to discover the Minister's case against him in the context of a hearing.

Such procedures do not accord the refugee claimant fundamental justice and are incompatible with s. 7 of the Charter. Respondent failed to demonstrate that these procedures constitute a reasonable limit on the appellants' rights within the meaning of s. 1 of the Charter. Pursuant to s. 52(1) of the Constitution Act, 1982, s. 71(1) of the Immigration Act, 1976 is, to the extent of the inconsistency with s. 7, of no force and effect.

Section 24(1) of the Charter grants broad remedial powers to "a court of competent jurisdiction." This phrase premises the existence of jurisdiction from a source external to the Charter itself. These appeals from the Federal Court of Appeal on applications for judicial review under s. 28 of the Federal Court Act. Accordingly, this Court's jurisdiction is no greater than that of the Federal Court of Appeal and is limited to decisions made on a judicial or quasi-judicial basis. Only the decisions of the Immigration Appeal Board were therefore reviewable. All seven cases are remanded to the Board for a hearing on the merits in accordance with the principles of fundamental justice.

Inter-University Consortium for Refugee Research

The Inter-University Consortium for Refugee Research was initiated in August 1985 as a means to establish an information network of scholars engaged in refugee research. It was initiated during an international symposium, "Twentieth Century Refugees in Europe and the Middle East," held in Oxford.

It received very wide support among the participants who represented refugee research programs in Canada, Great Britain, Europe, and the United States. Researchers at any university, university institute, or local inter-university research unit engaged in refugee research are invited to join this consortium.

The main functions of the consortium include the following:

1) To inform scholars, governmental and non-governmental bodies about the range of research currently undertaken by academics in the refugee field.
2) To facilitate contacts and exchange of researchers and staff among various refugee research units.
3) To plan short courses and other instructional programs on refugee matters.

The consortium is headquartered at Queen Elizabeth House, Oxford and is coordinated by Dr. Barbara Harrell-Bond, Refugee Studies Program, Queen Elizabeth House, 21 St. Giles, Oxford OX1 3LA, England.

The Plaut Report, released this summer, is the latest of three reports commissioned by the Canada Employment and Immigration Commission (CEIC) to recommend changes in the refugee status determination process. Following CEIC (1981) and Ratushny (1984), Plaut makes 89 recommendations for the reform of refugee status determination. Many of these are proposals meant to fulfill the humanitarian ideals entrenched in Canada's immigration law and prominent in the rhetoric of many official pronouncements.

This essay attempts to assess those aspects of policy which are central to making Canada's refugee policies truly humanitarian. The first task of this essay is to point to areas where the Plaut Report provides an adequate framework to reform or at least substantially improve the existing refugee determination process.

The second task is to recommend changes in the new structures that could fill in some important policy gaps largely ignored by the Plaut Report. Finally, this paper will discuss some of the wider problems beyond the mandate of the Plaut Report that should be key aspects of a humanitarian refugee policy.

Oral Hearings

One point central to the Plaut Report is that the refugee claimant should have the right to an oral hearing before the actual decision-making body. As did two earlier CEIC-commissioned reports (Ratushny, 1984 and Robinson, 1981), Plaut argues that a recent Supreme Court decision should be put into practice:

Procedural requirements at the level of re-determination by the IAB were dealt with by the Supreme Court of Canada in Habibaj Singh et al v. The Minister of Employment and Immigration. The appellants argued that natural justice, the Canadian Bill of Rights, the Charter of Rights and Freedoms require that they be permitted to present their case at an oral hearing before the IAB reaches a decision. . .

The decision of the Supreme Court in favour of the appellants mandates a new level of procedural fairness.
A related issue, crucial to the refugee determination process, is the protection of refugees' legal rights even prior to the proposed oral hearing. The Canadian Employment and Immigration Advisory Council (CEIAC) has taken the position that:

claimants should be allowed representation ... from the first interview, since from that moment on they can unwittingly make statements and take actions that could be prejudicial to their case. (CEIAC, 1985:9)

It is essential to amend CEIC's policy "not to give the claimant the right to counsel at any other time than that which is strictly required by law." The suggestions made in a recent report by the Concerned Delegation of Church, Legal and Humanitarian Organizations (1985) present a well thought out strategy of how to do this.

**Rationalization**

The *raison d'être* of the Plaut Report is to help rationalize and speed up the process of refugee status determination. The adoption of any one of the three alternative models proposed (see box on pages 4-5 of this issue) would definitely improve the process.

**Special Assistance Programs**

Plaut recommends that claimants awaiting status determination should be given special ID cards, authorization to work, authorization to study, and the same rights as citizens to social assistance, medicare, subsidized housing, etc. This would prove both humanitarian and expedient. As stated:

The task of making sure that claimants are provided with the necessities of life is an obligation of the provinces as it is of the federal government and claimants should be assured proper treatment either by an amendment to the Canada Assistance Plan, explicitly prohibiting provincial legislation that discriminates in the payment of assistance on the basis of immigration status, or by means of federal/provincial agreements. (Plaut, 1985:147)

**Documentation Centres**

Plaut advocates that a Documentation Centre should be set up to provide information to immigration "decision-makers". Following recommendations of the Consultative Assembly of the Council of Europe, 1976, (and echoing, to a certain extent, a report prepared seven years ago in response to the Couture-Cullen agreement), Plaut states:

Documentation centres staffed by professionals and specializing in assembling country-specific material generally have proven to be the most efficient means for the decision-maker of retrieving information pertinent to the applicant's particular race, religion, nationality, social group or political affiliation. (Plaut, 1985:135)

Plaut-style documentation centres are sorely needed, but I would recommend that they include information on conditions in Canada itself. Information should be disseminated to the public as well as to "decision-makers." Also, the education division of the new Refugee Board should try to prevent misunderstanding of refugee movements by the public which might in future lead to "backlash" reactions. Further, the documentation education centres could help to coordinate public services, as suggested by Quebec, 1978.

**Discrimination**

One major weakness, in my opinion, of the Plaut Report is that it does not deal explicitly with the overall issues of present and future discrimination against refugees. Plaut seems to assume that changes in the structure of the refugee determination process will prevent or at least substantially reduce such discrimination.

Refugee claimants sometimes face in Canada a less than cooperative attitude on the part of some immigration officials that hampers pursuit of their claim. I am in full agreement with the CEIAC's recommendations that:

Immigration officers should provide anyone who expresses the intention to claim refugee status with information on his or her rights, the initial procedures he or she should follow, and where to go for services. The federal government pamphlet called *Claiming Refugee Status in Canada — Information for Claimants* should be handed out at that point, in the language required, the claimant asked whether or not he or she is in need of further service ... that Employment and Immigration Canada (CEIC) provide a site at major points of entry for NGO representatives to provide immediate service to refugee claimants in need. (CEIAC, 1985:7,8)

A serious form of discrimination occurs when evidence irrelevant to the issue in question is used to decide an individual case against a claimant — particularly such evidence as the political position of the refugee's country of origin or Canadian attitudes to the ethnic group of the claimant. For example, Howard (1980) makes a strong argument that there seems to be a bias in Canadian refugee policy against those fleeing from right-wing dictatorships in Latin America.

Another problem is that Canadian jurists generally interpret the term "persecution" in the Convention to mean individual persecution, rather than persecution on the basis of membership in a group. For example, black South African claimants are often refused refugee status in Canada on the grounds that they are not victims of persecution but of generalized discrimination.

Further, as J.H. Grey points out in his book *Immigration Law in Canada*:

This problem is made worse by jurisprudence to the effect that persecution must be by government authorities, not by other groups or simply the existence of war or chaos. (Grey, 1984:124)

**The Immigration Appeal Board**

Questions of fairness arise concerning the decisions of the Immigration Appeal Board (IAB). This author examined the published results of over 50 IAB decisions on refugee claims for the 1983-84 period. For all appeal cases cited, 14 were
Beyond the Plaut Report
(cont'd from p.7)

accepted and 42 refused. The major
trends in these cases were that the deci-
sions seemed either quite arbitrary or
they seemed to reflect a bias against
granting appeals to claimants coming
from major source countries. This was
ture for both Guyana (number one source
country) and Sri Lanka (number three
source country). The five appellants each
from the two countries were rejected.
The reasons stated for an IAB decision
often seem random. For example, in
rejecting three cases claiming political
persecution, it was argued that it was not
the political party in power which had
ordered persecution, and that a valid
claim to refugee status could therefore
not be made. In another case, an Argentin-
inian labour leader was refused because
persecution of a trade union was not con-
sidered "political."

Documentation was another ambiguous
criterion. One case was accepted on the
basis of "plausible testimonial" whereas another case was rejected on the
grounds that "second hand evidence"
was used. Even in cases where arrest and
torture were claimed, the burden of proof
lay upon the claimant.

These are just a few of many examples
that point to possible bias on the one
hand and arbitrariness on the other. The
life and death question of how claims are
determined to be "well-founded" cases of
"persecution" is not dealt with by Plaut.
New structures might make the adjudica-
tion more just but abuses of the system
would be less likely if some of the finer
points of law and jurisprudence were
explicitly incorporated into refugee pol-
icy.

Reaction and Preaction

In certain cases, refugee claimants may be
accepted or rejected on the basis of cri-
teria not essential to the merits of their
refugee claim. Such claims may involve
"reacting" to a claim made at the Cana-
dian frontier or "preacting" (making
selections in the refugee camps or other
locales in a third country).

The list of countries from which any visi-
tor requires a visa to enter Canada now
stands at 90 countries, including Guate-
mala, Guyana and El Salvador. These
visa requirements may impede the flight
of legitimate refugee seekers. Even
though the Canadian government
attempts to alleviate this problem by
allowing persons to make asylum claims
in our embassies abroad, this procedure
is fraught with difficulties (for example,
fear that the embassy may be under sur-
veillance, lack of trust in the immigration
officer, etc.).

Canada could turn to "preactive" meas-
ures, recruiting claimants abroad. Often
in the past such selection has been
influenced as much by adaptability as by
humanitarian criteria. A prime example
was the Canadian response to Idi Amin's
The refugees Canada admitted came
disproportionately from the professional,
managerial and entrepreneurial occupa-
tional categories — in other words, hav-
ing the type of capitalist skills Canada
usually welcomes.

My preferred solution to the problem of
"reaction" would be to drop visa require-
ments for a select group of countries
identified by Amnesty International and
the UNHCR. Such a proposal goes
against the current climate of the govern-
ment, perhaps even public opinion.
Therefore as an alternative, Canada could
turn to "preactive" selection, selecting from
the camps both individuals who would
qualify mainly on the basis of Adaptability and their potential contribu-
tion to Canada, as well as more Amnesty
International "mandate" refugees whose
lives are in extreme danger. I would sug-
gest, too, that the officers sent to the
camps for the selection should be
recruited at least in part from the non-
governmental sector.

Non-refoulement

The Plaut Report makes a very important
point concerning Canada's "main obliga-
tion" in international law to Convention
refugees:

The main obligation we owe Conven-
tion refugees in our territory is one of non-refoulement. The
refugee's right is to be protected
from being forcibly expelled to the
country of persecution. (Plaut,
1985:87)

Additionally, it must be recognized that,
by the very act of going into exile and
declaring refugee status, some claimants
who were not originally at great risk may
become at risk and perhaps bona fide Conven-
tion refugees. To be truly fair and
humanitarian, the principle of non-
refoulement should apply to almost
everyone from certain countries known
for human rights abuses. A miniscule
number of such claimants could be con-
sidered abusers or MUC, manifestly
unfounded claims.

A similar problem arises for bona fide Con-
vention refugees who attempt to enter
Canada from the United States and are
turned back (to face possible deportation)
because our quotas have been filled.
Plaut recognizes the importance of this
issue:

Here clearly is an opportunity to play
out the true humanitarian pur-
poses of our refugee admission pro-
cess. Being half generous is some-
times equal to not being generous at
all. (Plaut, 1985:155)

Education and Backlash

Extending the principle of non-
refoulement as discussed above would
create a potentially large group of non-
convention refugees in a special
refugee/immigrant category. If approxi-
amately 10,000 new individuals were thus
to enter the immigration rosters, then
either Canada would have to accept
10,000 more immigrants per year, or else
10,000 fewer landed immigrants — who
would have qualified under criteria other
than refugee or refugee/immigrant
would be accepted. Either situation
could create a backlash among regular
immigrants competing against the new
refugees for the lowest level entry posi-
tions on the labour market. Plaut obvi-
ously is aware of the possibility of such a
backlash.

Public education — ideally originating
from the CEIC documentation centres
and NGOs — is necessary to avoid confu-
sion in the public mind between the spe-
cial situation of refugees and that of the
many thousands of regular immigrants.
A public education effort, undertaken by
the education centres for decision-makers
recommended by Plaut, lays the ground-
work for a humanitarian refugee policy.

Refugee Policy and Diplomacy

A truly humanitarian refugee policy
would have to go well beyond the man-
date of the Plaut Report, including meas-
ures to put pressure on countries where
massive violations of human rights create
a refugee situation. Canada also might