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 are 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.

Beyo

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 Habbajan 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.

nd the Plaut Report: Toward a Truly Humanitarian Refugee Policy for Canada

(excerpted from a longer article of the same title)

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

Continued on p. 8

Beyond the Plaut Report
(cont'd from p.7)

accepted and 42 refused. The major trends in these cases were that the decisions seemed either quite arbitrary or they seemed to reflect a bias against granting appeals to claimants coming from major source countries. This was true 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 Argentinian labour leader was refused because persecution of a trade union was not considered "political."

Documentation was another ambiguous criterion. One case was accepted on the basis of "plausible testimonials," 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 adjudication 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 policy.

Reaction and Preaction

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

The list of countries from which any visitor requires a visa to enter Canada now stands at 90 countries, including Guatemala, Guyana and El Salvador. These visa requirements may impede the flight of legitimate refuge 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 surveillance, lack of trust in the immigration officer, etc.).

Canada could turn to "preactive" measures, 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 expulsion of Ugandan "Asians" in 1972. The refugees Canada admitted came disproportionately from the professional, managerial and entrepreneurial occupational categories — in other words, having the type of capitalist skills Canada usually welcomes.

My preferred solution to the problem of "reaction" would be to drop visa requirements for a select group of countries identified by Amnesty International and the UNHCR. Such a proposal goes against the current climate of the government, 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 contribution to Canada, as well as more Amnesty International "mandate" refugees whose lives are in extreme danger. I would suggest, 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 obligation" in international law to Convention refugees:

> The main obligation we owe Convention 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* Convention 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 considered abusers or MUC, manifestly unfounded claims.

A similar problem arises for *bona fide* Convention 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 purposes of our refugee admission process.** Being half generous is sometimes 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 approximately 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 positions on the labour market. Plaut obviously is aware of the possibility of such a backlash.

Public education — ideally originating from the CEIC documentation centres and NGOs — is necessary to avoid confusion in the public mind between the special 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 groundwork for a humanitarian refugee policy.

Refugee Policy and Diplomacy

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

find it necessary to criticize the foreign policy of its powerful neighbour and largest trading partner for its disregard of human rights violations in Central America and elsewhere.

I would suggest a permanent liaison between Plaut's proposed ROs (refugee officers) of the immigration department, and decision makers in other branches of the government as well as NGOs, PVOs and private enterprise. Efforts could be coordinated to exert pressure on behalf of refugees in their countries of origin and asylum as well as in Canada.

Conclusion

The Plaut Report recommendations go a long way toward creating a humanitarian refugee determination process in Canada. However, though Plaut recognizes the crucial nature of public support for any refugee policy, I would recommend placing greater emphasis on public education. I concur with his recommendations, but suggest that a closer look must be taken at certain impediments to a fair treatment of refugee claimants (such as discrimination, arbitrary decisions, visa requirements, etc.). In my opinion, a truly effective policy cannot be based solely on what happens within Canada's borders, but must seek to grapple with the root of the problem overseas through diplomatic measures consistent with Canada's humanitarian ideals.

Charles D. Smith *is doing research on Latin American refugees in Montreal at McGill University's Anthropology of Development Project for the Conseil Quebecois de Recherce Sociale (CQRS).*

New Books:

Michael R. Marrus, *The Unwanted: European Refugees in the 20th Century.* (New York: Oxford University Press, 1985).

Dennis Gallagher, Susan Forbes and Patricia Weiss Fagen, *Of Special Concern: U.S. Refugee Admissions Since Passage of the Refugee Act* (Washington, D.C.: Refugee Policy Group, 1985).

Compassion and Pragmatism in Refugee Law

Open wide the floodgates?

Much of the initial media reaction to the recently released Plaut Report on the refugee status determination process unfortunately has given the impression that the changes proposed will in some sense give rise to "gatecrashing" by persons unwilling to comply with ordinary immigration requirements, thereby jeopardizing the ability of Canada to ensure the integrity of its borders. We are told that the adoption of the study's proposals would "encourage purported refugees to arrive here in numbers that would soon overwhelm [the proposed] procedures" (Globe and Mail editorial, June 20, 1985).

This is far from accurate.

It is certainly true that the Plaut Report proposes several important liberalizations to the process by which we assess claims to refugee status. These include the right of a refugee claimant to argue his case at an oral hearing and to have his case decided by an unbiased and knowledgable authority. Furthermore, the Report insists that refugee claimants with genuine financial need have a **right** to work rather than being expected to either starve or panhandle until a decision is made as to whether or not they can remain in Canada. Are these kinds of policies, which are largely required by principles of either domestic or international law, really such as to draw tens of thousands of fraudulent asylum seekers from around the world to Canada?

The answer requires an examination of the whole of the refugee determination process. Insofar as the decision to treat those who have been forced to flee to safety in Canada in a fair and humanitarian way is coupled with a disincentive to abuse of the special procedures by non-refugees, there is little danger of inundation by opportunists. The Plaut Report is emphatic in its recognition of the importance of deterring recourse to the refugee admissions process by persons who are not in danger of persecution, but who seek rather to evade ordinary immigration requirements. The study makes clear that such persons are **not** refugees, and that steps should be taken to ensure that non-genuine claims are discouraged.

How then should we ensure that only genuine refugees benefit from the special admissions procedures?

Rather than imposing general restrictions on access to the refugee determination process (with the attendant risk of inadvertent failure to hear the case of a genuine refugee), the Plaut Report recognizes that the minority of refugee claimants who present abusive petitions do so as a means of securing a prolonged stay in Canada. The unnecessarily complex and unwieldy refugee determination procedures established by current law have resulted in delays of **several years** between the presentation of a claim and its final determination. Since a claimant cannot be required to leave Canada until his case is decided, the law offers tacit encouragement to the making of unfounded refugee declarations as a means of postponing enforced departure from Canada. The Plaut Report's approach to the discouragement of fraudulent claims is thus to dramatically reduce the duration of the determination procedure so as to minimize the incentive to abuse.

To this end, the Report proposes new procedures for the adjudication of refugee cases which are not only more fair than our current system, but also significantly more expeditious. Rather than facing a delay of years between claim and decision, the procedures proposed by Plaut will permit both the hearing and appeal of refugee claims to be dealt with in as little as **six months.** In such a situation, it will not be worthwhile for the majority of fraudulent refugee claimants to come to Canada, as the potential gain from legal or illegal employment while awaiting the decision will in most cases be outweighed by travel and other costs.

Moreover, the government has the opportunity to further discourage unfounded refugee claims by acting on the recent advice of a study by Employment and Immigration Canada, which recommends the doubling of 1985 immigration quotas in order to ensure Canadian economic stability into the next century. Refugee claims abuse is, in large part, a response to the fact that legitimate