CANADA'S PERIODICAL ON REFUGEES

REFUGE

Vol. 5 No. 1 October 1985

VIVA FLORA! VIVA FLORA!

MONTREAL, September 28, 1985 — Three hundred demonstrators — men and women, adults and children, Latin Americans and Bangladeshis — parade with placards outside a huge Roman Catholic cathedral in the heart of downtown Montreal. Holding signs reading "We want permanent residence," "Canada promised freedom," or protesting tyranny and torture in their homelands, the demonstrators chant their pleas and protests.

Inside the *salle de la cathédrale,* Employment and Immigration Minister Flora MacDonald discusses the Plaut Report with representatives of the Standing Conference of Organizations Concerned with Refugees.

Following the Minister's opening address, a panel of delegates focus on the issues of most concern to them in Rabbi Plaut's recommendations on the process of refugee determination in Canada: separating refugee from immigration issues; universal access to the determination system; the right to counsel; non-adversarial hearings; and the myriad of details on the structure of the system for determining refugee status. How many people should sit on the initial panel? What is their status? How should they be trained? Who should hear any appeal? On what grounds?

How many times in the last five years have the delegates discussed these issues? How many thousands, nay, tens, hundreds of thousands of hours have already been spent discussing them by lawyers, church representatives, academics, government officials, and refugee delegations? How many times has the Minister listened to these same debates?

But perhaps this time was different. The Plaut Report was on the Minister's desk recommending specific changes to the system. Bill C-55 had been tabled in the House of Commons that week to expand the Immigration Appeal Board from 18 to 50 members; a belated response to the huge backlog of cases and the crisis to the whole system wrought by the Supreme Court decision in the Singh case that the absence of an oral hearing for a refugee claimant was a denial of a fundamental right.

The Minister listens patiently. She takes copious notes. When a delegate argues that the hearing officer be required to have legal training, she intervenes to ask whether this means officers had to be lawyers, and receives reassurance that this is not the intent.

At the coffee break, the Minister goes outside to speak to the demonstrators — individually at first and then as a group. The morning's shouts turn to cheers when she finishes. VIVA FLORA! VIVA FLORA! The children form an honour guard, applauding as she returns to the hall.

After all this time, after all the delays, after all the anxiety among those who wait in limbo for months and years for their status to be determined, one would expect the Minister to be the target of anger and fury. One presenter expresses impatience, another is righteous, insistent and demanding. But the overwhelming tone is advisory and supportive. And this meeting is not in Toronto. It is in the heartland of the firebrands of Montreal.

Bill C-55 had just been tabled in a form that seemed to ignore all the representations on the draft bill the participants had made over the summer. Did the bill not appear to undercut their fundamental conviction that immigration and refugee

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issues must be separated entirely? Yet Flora is greeted not simply with courtesy, but with warmth. When her advisers plan to lunch at an outside restaurant to get away from the pressure-cooker atmosphere of the conference, she insists on joining the delegates for their church basement chicken.

One feels the warmth and the hope were direct responses to her sincere convictions and concern. When a delegate from SOS Guatemala describes her personal experience as a refugee coming to Canada and feeling that the interrogation of the immigration officer was just what she had fled in Latin America, Flora's face clearly responds to the distress and terror in the refugee's tale.

Now is the time for sentiment and sympathy to be translated into words and actions.

H.A.

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REFUGE

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Resolution of the Standing Conference of Canadian Organizations Concerned for Refugees

(Spring Consultation, May 30, 1985)

RESOLUTION: REGARDING PROCEDURES TO HANDLE THE REFUGEE CLAIMS BACKLOG CREATED AS A RESULT OF THE APRIL 4, 1985 SUPREME COURT DECISION

WHEREAS, the Supreme Court of Canada has ruled that the refugee determination process in Canada does **not** meet the requirements of the Canadian Charter of Rights and Freedoms,

AND,

WHEREAS, effective April 4, 1985 all claimants in the process are entitled to a process that does meet the requirements,

AND,

WHEREAS, the estimated 20,000 persons in the process now represent a backlog of major logistical proportions since it could take up to 10 years to handle these cases under existing resource constraints,

BE IT RESOLVED, that the Spring Convocation of the Standing Conference of Canadian Organizations Concerned for Refugees recommend that a universal program of special measures be adopted by the government to speedily facilitate a humanitarian solution to all persons in the refugee determination process on April 4, 1985. The special measures should apply equally to all people caught by our faulty process regardless of nationality or ethnic origin. It would be unjust to ask people, many of whom have been in our old and inadequate process for several years, to return to the beginning to start over.

BE IT ALSO RESOLVED, that the special measures taken to handle the backlog be done without any modifications to the Immigration Act.

Letters to the Editor:

Dear Editor:

I am writing to you in regard to the article by David Matas entitled "The Plight of Refugee Claimants" which was in the May, 1985 issue of your magazine volume 4, number 4.

In that article Mr. Matas commented on the Legal Aid Plan in Ontario and stated that except in rare circumstances refugee claimants are not issued legal aid certificates. Unfortunately, he did not address the issue of the community legal clinic which is able to supply legal assistance to refugee claimants on a without cost basis.

There are over 45 community legal clinics throughout the Province of Ontario at last count and many of those clinics supply legal services in the area of immigration.

I agree with Mr. Matas when he speaks of a claimant without a lawyer being at a serious disadvantage. While lawyers in community legal clinics can help in some cases with refugee claims, the workloads necessitate that not all refugee claimants are able to utilize their services. There is a need to have a system financed through the Ontario Legal Aid Plan whereby Duty Counsel is available at the port of entry to assist refugees in the initial processing of their claims. Such a plan would require cooperation between the federal and provincial levels of government in order for it to be successful.

It was an excellent idea to have a special issue dealing with the problems of Sri Lanka. I hope that you will follow such a format in future issues of your magazine.

Yours very truly,

FLEMINGDON COMMUNITY LEGAL SERVICES
Marjorie Hiley
Director

The Plaut Report

In the twilight hours of the former Liberal government of Canada, the Minister of Employment and Immigration, the Honourable John Roberts, appointed Rabbi Gunther Plaut "to find a means of providing a scrupulously fair system for determination of refugee claims in Canada that is also expeditious and viable given the financial and human resource constraints that apply in the public sector."

The terms of reference required the rabbi to assess the existing problems and causes of the backlog of refugee claimants in Canada, formulate alternatives for dealing with refugee determination either within or independent of Immigration program administration, and, after widespread consultation and investigation and considerations of law and jurisprudence, to provide at least two options for a Canadian system which "would respond to human rights commitments, Canada's international obligations and the interface with the immigration control function."

On April 17, 1985, the 221-page Plaut Report on "Refugee Determination in Canada,"including its nine appendices, was officially submitted to the Honourable Flora Macdonald, Minister of Canada's Employment and Immigration Commission (CEIC). In a press release by the Minister on July 17 dealing with the Plaut Report, Canadians were promised the Report would form the basis of a major, comprehensive overhaul of legislation affecting refugee determination by the fall. While we await the reform package, extracts from and several analyses of the Plaut Report follow.

Independence

The report correctly places the refugee determination process in the context of the tension between the responsibilities of immigration authorities to control entry into Canada given current conceptions of sovereignty, and the fact "that Canada, by adhering to the (Refugee) Convention and having made its principles part of Canadian law, has voluntarily limited its sovereignty in this one respect." Non-citizens claiming refugee status have rights to claim to be allowed to stay in Canada.

> To resolve this tension and ensure the separation of concerns, the determination whether or not a person is a refugee must be made by **an independent body.** (p. 20)

A central issue is whether Plaut's recommendations adequately protect that independence. Though the determination of refugee status has been placed in the hands of a separate Refugee Board, the Plaut Report recommends the appointment of Refugee Officers (ROs) within CEIC.

> While many submissions have urged me to separate the CEIC completely from the refugee determination process, I deem it essential that a proper liaison between the CEIC and the RB be maintained. The liaison is to be effected by a new category of CEIC personnel, the Refugee Officer (RO).

The ROs are to be jointly selected by the RB and the CEIC, trained by the RB and seconded to the RB for a minimum three-year term, just as many refugee policy directors have in the past been seconded from External Affairs. The ROs will function within CEIC to provide counselling and support to refugee claimants. A CEIC officer should have the right to present evidence at a hearing when deemed appropriate, but in an information-sharing capacity and not in an adversarial way.

Amnesty International's brief to the Minister seems to endorse this limited information-sharing, non-adversarial role of the CEIC with the qualification that "the person concerned should be allowed ample notice of such evidence, and given an opportunity to respond thereto."

Fairness

Everyone agrees the system must be fair. Most endorse the Plaut recommendation that in order to be fair, it must be non-adversarial. Further it is generally agreed that the training and abilities of the initial hearing officers at the first stage are the most crucial factors in determining fairness. The Plaut Report's recommendations to set up both an educational and a documentation division, as well as ensuring a quality selection and training procedure for both ROs and members of the RB, constitute some of the most important recommendations in the report.

Since the Supreme Court has already required oral hearings to ensure fairness, one crucial issue is the quality of that body. Amnesty International endorses the model which provides for a three-person panel at the initial hearing and decision stage rather than a one person panel (see article by Michael Schelew, former President of Amnesty International (Anglophone), Canada, in this issue).

The other crucial issue regarding fairness is access to the system itself. One of the most important contributions of the Plaut Report is the decimation of the concept of

RABBI GUNTHER PLAUT

"I was a refugee once, having fled from Hitler under whose rule I had lived for more than two years. I came to the New World exactly 50 years ago, after finishing law school in Germany and having been deprived of pursuing my chosen profession because I was a Jew. In a miniscule fashion my own life rehearses the story of my people who have been refugees all too often. I know the heart of the refugee, a person who desperately seeks for a place to stand, for the opportunity to be accepted as an equal amongst fellow humans.

"I belong to the fortunate ones whose quest has been generously answered. My personal experience and my own religious tradition have moved me to put on Canada's national agenda the larger issues that arise from a consideration of refugees and their problems."

(The above statement by Rabbi Plaut is taken from the introduction to Part II of his Report on Refugee Determination, not yet published by the Minister.)

Plaut Report *(cont'd from p. 3)*

a manifestly unfounded claim, and the procedure by which claims are determined to be manifestly unfounded in order to limit access to the system by such claimants. As Plaut argues, a claim by its very character must be rationally considered and weighed before its value can be assessed; by its very nature, the value of a claim cannot be manifest or apparent. Further, the vast majority of claims, even when rejected, are not unfounded; they are inadequately supported to meet the strict criteria of the Refugee Convention. Such claims are not abuses of the system. Hence, Plaut rejects pre-screening. Plaut does introduce a category of inadmissible claims to be determined by the RB, such as the claimant: not basing the case on fear of persecution; not filing before the expiration of a time limit (say six months) after arrival in Canada; or filing a repeat claim. The panel representing the Concerned Delegation of Church, Legal and Humanitarian Organizations argued that a time limit might interfere with the principle of fairness.

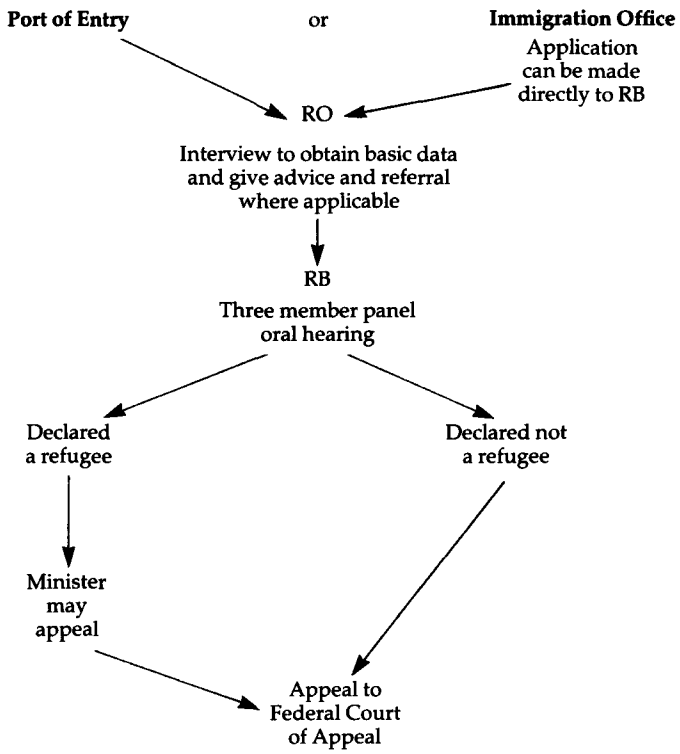
Expeditious

Balancing the principle of fairness was the requirement that the procedure be expeditious. In fact, as many have pointed out, an expeditious procedure is necessary to guarantee fairness. Plaut offered three models (see boxes). The first provides for an initial three-member panel but allows for no review within the system. Model B has only a one-member initial hearing and a central three-member review panel without an oral hearing. Model C allows for an oral hearing *de novo*.

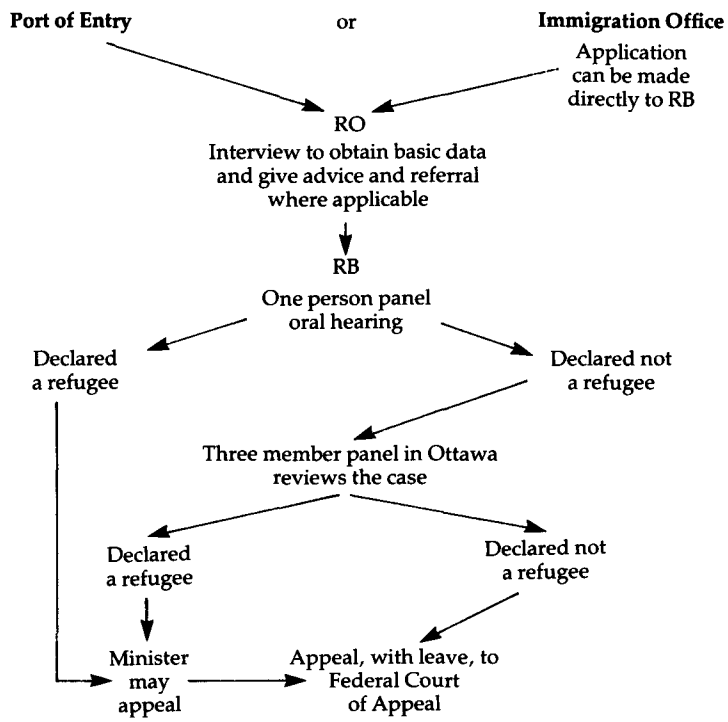
In the briefs to the Minister, the delegates asked for the ideal elements of all the models — an initial three-member panel and an appeal procedure which allows for *de novo* hearings. No cost estimates were presented by the delegates. Nor were comparisons made with applications of the principle of fairness to administrative hearings in other contexts such as compensation for victims of crime or work injuries. The delegates reiterated over and over that in cases where the life of the refugee claimant may be at stake, it is crucial to take every precaution to ensure fairness.

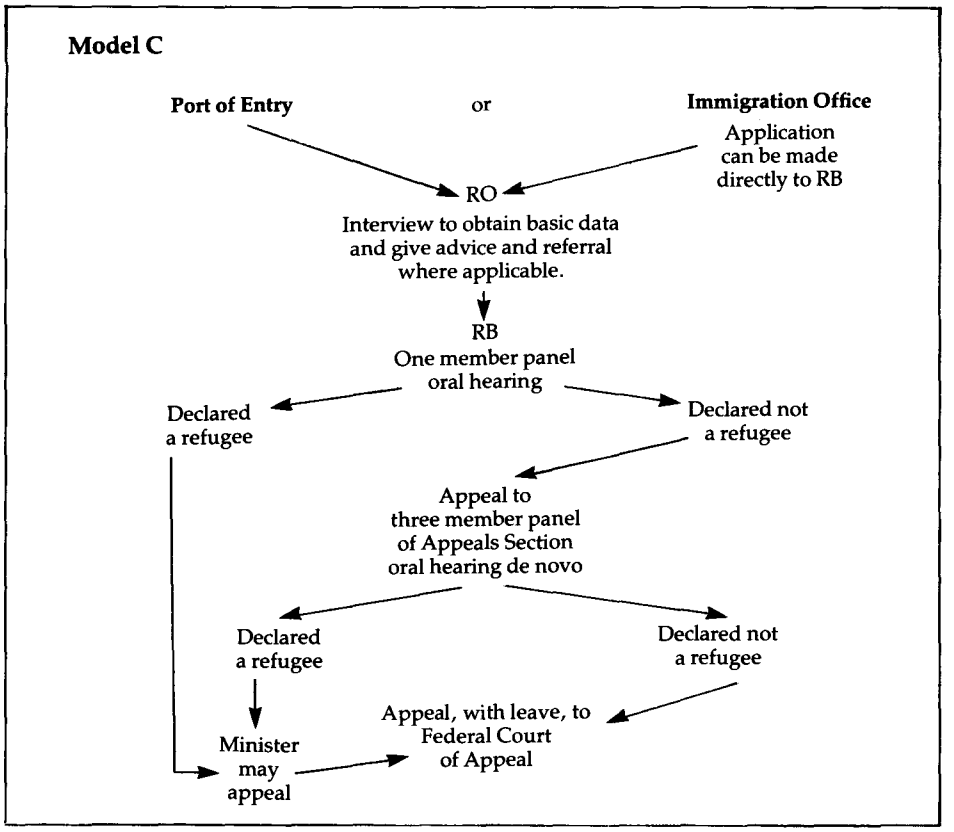
The Plaut Report included the requisite recommendations on procedural guarantees, including notice requirements, fair

Model A



Model B





scheduling, publication of rules of procedure, the provision of written reasons for rejecting claims, the provision of adequate time for appeal and guarantees to ensure confidentiality especially in situations which pose dangers for the claimant and his/her family.

Humanitarian Cases

The Plaut Report notes that many refugee claimants are borderline cases. It recommends that both the ROs and the RB be allowed to refer cases on humanitarian and compassionate grounds to the Minister's Office. The RB may recommend favourable consideration. It is here that one can anticipate the new frontier of debate in the refugee area as delegates make pleas on behalf of fairer and institutionalized procedures governing special programs and consideration of individual cases which do not fall within the strict guidelines of the Convention Definition.

But the most contentious current debate is what to do about the 12,000 to 18,000 cases that are backlogged in the system. The Plaut Report recommended that CEIC process for landing the bulk of cases who come "from countries to which we do not return individuals, unless, of course, they represent a risk to our national security. Examples would be claimants from Afghanistan, Iran, El Salvador, Sri Lanka and most of the East Bloc countries." Similarly, special programs should be available to those individuals in the backlog who are "from areas of the world experiencing civil disorder, racial tension or violence." Finally, for those "who are presently involved in refugee determination . . . where there is a **reasonable likelihood that the claimant may indeed be a refugee,**" Plaut recommends that "such doubt be resolved in favour of the claimant."

We would not need Bill C-55. The process would be relatively quick and inexpensive without giving into pleas for a universal, non-selective amnesty. We could also get on with the job of introducing the comprehensive legislation, based on the Plaut Report, that the Minister promised for this fall.

At the time of its release Flora MacDonald commended the report for its excellence. There is a 95 percent consensus on the recommendations by those involved in the refugee issue. The time for comprehensive legislative action is now.

Howard Adelman *is Director of the Refugee Documentation Project at York University and Editor of Refuge.*

Oral Hearings — A Right

On April 30, 1985, the Supreme Court of Canada handed down a landmark decision requiring refugee claimants to be given an oral hearing. The following extract from the 72 page decision provides only the highlights.

Background

Appellants claim Convention refugee status as defined in s. 2(1) of the *Immigration Act, 1976*. The Minister of Employment and Immigration, acting on the advice of the Refugee Status Advisory Committee, determined pursuant to s. 45 of the Act that none of the appellants was a Convention refugee. The Immigration Appeal Board, acting under s. 71(1) of the Act, denied the subsequent applications for redetermination of status and the Federal Court of Appeal refused applications, made under s. 28 of the *Federal Court Act*, for judicial review of those decisions. The Court considered whether the procedures for the adjudication of refugee status claims set out in the *Immigration Act, 1976* violate s.7 of the *Canadian Charter of Rights and Freedoms* and s. 2(e) of the *Canadian Bill of Rights*.

Rationale

Appellants, in the determination of their claims, are entitled to assert the protection of s. 7 of the Charter which guarantees "everyone the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The term "everyone" in s. 7 includes every person physically present in Canada and by virtue of such presence amenable to Canadian law. The phrase "security of the person" encompasses freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself. A Convention refugee has the right under s. 55 of the *Immigration Act, 1976* not to ". . . be removed from Canada to a country where his life or freedom would be threatened. . . ." The denial of such a right amounts to a deprivation of "security of the person" within the meaning of s. 7. Although appellants are not entitled

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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.

ıd 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

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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

immigration to Canada is at present possible only for persons who have close family already here or who possess investment capital. By moving to create immigration opportunities for those who seek to improve their personal or economic opportunities, the temptation on the part of such persons to use the refugee process as a means of entry would be dramatically reduced.

It is right to be concerned about the possibility of abuse of a more humane determination process, but we must be equally mindful of the need to treat genuine refugees in a way that commands both legal and moral respect. The Plaut Report acknowledges this imperative by proposing an effective yet unobtrusive means of controlling fraudulent claims, while minimizing the negative impact of immigration concerns on those who truly seek a safe haven from persecution.

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Supreme Court of Canada Requiring Oral Hearings for Refugee Claims

The appeals are allowed and the decisions of the Federal Court of Appeal and the Immigration Appeal Board are set aside. The applications of the appellants for redetermination of their refugee claims are remanded to the Immigration Appeal Board for a hearing on the merits in accordance with principles of fundamental justice.

The appellants are entitled to a declaration that s. 71(1) of the *Immigration Act, 1976* in its present form, has no application to them.

A New Inland Refugee Determination Procedure — A Challenge for Canada

The Canadian government must review its inland refugee determination procedure in light of a recent Supreme Court decision requiring the federal government to give all refugee claimants an oral hearing before a decision is made on the merits of their claim. The Plaut Report has been submitted to the Minister of Immigration outlining three models to be considered for a new refugee determination procedure. Amnesty International, the churches, and over 70 refugee/resettlement agencies share the view that the decision made at the initial determination is the most important, given the difficulty of reversing negative decisions once made.

Because the consequences of the determination are serious — the life or liberty of the claimant may be in question — decisions should not remain the sole responsibility of one decision-maker; collegial decision-making leads to a higher quality of decisions because it allows for an exchange of ideas. Consequently, refugee decisions at the first level should be made by a panel of more than one person.

With regard to an appeal, it is essential that redeterminations be dealt with by a decision-making body that is distinct from the entity handling the initial determination; fairness dictates that one does not appeal to the same people that already have decided against one. Though initial determinations will be made throughout the country, the redetermination entity should be centralized in order to ensure consistency of the decision-making procedure. A centralized review can set the standards throughout Canada and ensure that the same criteria are applied to all refugee claimants; it would deal with issues of law and apply accepted refugee criteria if the facts are not in dispute.

The decision-makers on review, not having seen the claimant in person, cannot be expected to second-guess the initial determination regarding the claimant's credibility. Furthermore, justice would not be served if the centralized review had to piece together the claim when the record revealed that the legal representation or translation were inadequate. Therefore, where credibility or the adequacy of legal representation and translation are in doubt, the centralized review should have the authority to refer the matter to another local panel for a new oral hearing.

Given the importance of the accurate identification of legitimate refugees, it is essential that the appointments of refugee decision-makers at all levels be other than on a patronage basis. Individuals should be appointed who have a demonstrated expertise in refugee matters. Such persons should be drawn from the community at large and their appointments should be full-time. It is advisable that the government consult with credible, non-governmental organizations with expertise in this area before making appointments. Another important consideration is that the decision-makers be independent of the Canada Employment and Immigration Commission (CEIC) to ensure that humanitarian refugee criteria be applied exclusively. One fears that immigration considerations may be applied if the decision-makers are or were once accountable in any way to the Commission.

A well-conceived inland refugee determination procedure could effectively deter abusers from taking advantage of Canada's traditional generosity towards the persecuted. An expeditious determination would eliminate the opportunity of long-term employment in Canada for illegitimate refugee claimants, thereby removing one of the main reasons for abuse.

All rejected claimants are not abusers, notwithstanding the position of the CEIC to the contrary. Many have fled their countries out of fear for their lives and those of their spouses and children. While they may not meet the technical requirements of the refugee definition, their fears are certainly well-founded and understandable. Consequently, it is unfair and inappropriate to label these claimants as abusers. The Canadian government should create a mechanism whereby non-refugee, humanitarian

claims can be determined outside the refugee determination process. This mechanism will ensure that any new refugee determination procedure will not become overloaded by humanitarian claims.

Amnesty International shares the concerns of the Canadian government with respect to the abuse of the process, given that abuse impacts upon legitimate refugee claimants. However, Canada's primary concern should be the accurate identification and protection of legitimate refugees, and the deterrence of abusive claims secondary.

The Canadian government has a challenging opportunity to devise an inland refugee determination procedure that can be a model for the rest of the world. The challenge is twofold. We must have a procedure which is both expeditious and fair with competent decision-makers at all levels of the process. Otherwise, miscarriages of justice will continue. If these basic principles can be respected, then Canada will have met the challenge and will once again prove to the international community that we truly are leaders in the area of refugee policy.

Michael Schelew *is Executive Member responsible for Refugee Affairs and past President of the Canadian Section (Anglophone) of Amnesty International.*

Profile: The Refugee Documentation Project, York University

The Refugee Documentation Project (RDP) was established in August 1982 to ensure that a centralized body of documentation on refugees would be assembled and made available to individuals and organizations in Canada and abroad. The RDP has compiled a bibliography with over 5,000 entries on key areas of refugee-related research. It maintains a library of books and reports filling 30 metres of shelving and four filing cabinets.

In addition, the RDP supports research on refugee topics and has published a number of studies. With regard to countries of origin research, the RDP has published a firsthand report on the "Homeless, Displaced Persons and Refugees in Lebanon, 1982," which was used as a reference by the United Nations and both sides in the conflict. It also has published a brief, firsthand report on the situation of the Tamils in Sri Lanka.

In the area of settlement research, the RDP did a study of Canadian Government and non-governmental policy for bringing Indo-Chinese refugees to Canada. A major report on settlement policy led directly to the establishment of pilot projects as precursors to a new official settlement policy. The RDP also has published a major study on *Unaccompanied Children in Emergencies: The Canadian Experience.*

The Refugee Documentation Project coordinated the preparation of briefs to the Plaut Commission and spoke to the Association of Immigration Lawyers on status determination in Canada and other legal issues. The RDP chaired the Refugee Policy Review in 1982 and wrote a report for the Minister on priorities in the refugee area.

Earlier this year, the RDP published a study of the archival resources of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA).

In addition, the Project publishes the quarterly *Refuge: Canada's Periodical on Refugees.*

A founding member of the Inter-University Consortium for Refugee Research, the RDP co-sponsored with Oxford's Refugee Studies Program a workshop on "Refugees in the Twentieth Century in Europe and the Middle East" in August 1985. In May 1986 it will co-sponsor, with the University of Toronto, a conference on "Canada: Land of Refugees, Land of Asylum?"

Current research projects of members of the RDP include:

Scholar	Affiliation	Research
Adelman, Howard	Philosophy/York U.	Palestinians and UNRWA
Angus,William	Law/York U.	Immigration & Refugee Law
Basok, Tanya	Sociology/York U.	Salvadorean Refugees in Costa Rica
Gismondi, Michael	Social & Political Thought/York U.	Central American Refugees in Canada
Hathaway, James	Law/York U.	Refugee Law in Canada; Comparative Refugee Law
Lam, Lawrence	Sociology/York U.	Adjustment of Female Vietnamese-Chinese Refugees in Montreal
Lanphier, Michael	Sociology/York U.	NGOs and Refugee Resettlement
Luciuk, Lubomyr	Geography/U. of T.	Ukrainian Refugee Migration; Canadian Refugee Policy Post WW II; Afghan Refugees in Pakistan
Mata, Fernando	Sociology/York U.	Immigrant Satisfaction: Latin Americans in Canada
Simmons, Alan	CERLAC/York U.	International Migration and Social/Economic Transformation in the Caribbean
Van Esterick, Penny	Anthropology/York U.	Lao & Khmer Adaptation in Toronto
Zisman, Alex	Social & Political Thought/York U.	Media and the Response to Refugees

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