CANADA'S PERIODICAL ON REFUGEES

REFUGE

Vol. 9, No. 4 May 1990

Convention and Humanitarian Refugees

This issue focuses on the two fundamental aspects of Canadian refugee policy — the refugee determination system dealing with claimants who arrive in Canada and claim to be Convention refugees, and the designated classes and special measures focused on humanitarian refugees whom we select abroad under relaxed immigration criteria.

In the interview with Gordon Fairweather, Chairman of the Immigration and Refugee Board, and in the one with Lorne Waldman, a prominent refugee lawyer in Toronto, we have two very contrasting views of the current refugee determination system. From one perspective, the system is somewhat short of perfection, but in the process of evolving in that direction. From the critical perspective, the system is about to implode on itself.

In the pieces dealing with humanitarian refugees, the central concern is the self-exiled class, those who fled communist regimes in Eastern Europe (excepting Yugoslavia) and were granted refugee status on humanitarian grounds. With glasnost in the Soviet Union and the sudden and radical transformation of authoritarian communist regimes in that area into societies in transition to democracy, the application of the self-exiled category as a rubric for receiving refugees from Eastern Europe becomes suspect and brings the whole meaning and rationale for special refugee measures into disrepute.

The articles deal with those issues. This editorial, however, is not concerned with the crisis *within* either the regime dealing with Convention refugees or the one dealing with humanitarian refugees but the emerging one *between* Convention and humanitarian refugees.

In the late 70s Canada received 200 to 400 spontaneous arrivals claiming refugee status. Between 1982 and 1986, RSAC, the Refugee Status Advisory Committee then vested with the prime responsibility of dealing with Convention refugee claimants, began receiving 2,500 to 4,000 claims per year, a tenfold increase. As we enter the 90s, the Immigration and Refugee Board, whether efficient or inefficient, whether approaching ideal standards of fairness or failing any fairness test, will be receiving between 20,000 and, some estimate, up to 40,000 refugee claims per year, another tenfold

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increase. For the first time, the Convention refugee program will surpass the humanitarian refugee program.

In a discussion paper specified for official use only in the early 80s, Raphael Girard, who emerged later as the civil servant charged with drafting Bill C-55 (not to mention C-84), the legislation which is the basis for currently dealing with Convention refugee claims, wrote, "it is not desirable to have a resettlement program straddling two main themes, active off-shore selection and the use of asylum as a pro-active program." Girard argued against tolerating a spontaneous inflow of refugees in favour of off-shore selection program. The former was subject to abuse, lack of control and was prone to become involved in legal entanglements. The latter was subject to management and planning, was sensitive to the Canadian public's political preferences, could be aligned with our foreign policy priorities and would avoid the cumbersome and tremendously difficult problem of removals.

Some fear that the increasing number of spontaneous arrivals claiming Convention refugee status will result in the government implementing the "safe third country" provision in the new legislation which Raphael Girard had included precisely to deter and limit large numbers of legitimate refugee claimants which have emerged as anticipated. Claimants who could have made a claim in a country they transited on route to Canada would be sent back to that country.

But there is another fear. The danger may not be that the current Convention refugee determination process is in danger by new government initiatives to undermine it, but that the Canadian program which allows a flexible response towards refugees who may not be able to prove as individuals that they are subject to a well-founded fear of persecution may be sacrificed to pay the increasing costs of handling Convention refugee claims within Canada. We may be on the verge of an impending attack and an attempt to dismantle the humanitarian refugee program.

The discussion on the current refugee determination process and the problems with the self-exiled class should be read with this as a possibility.

Howard Adelman, Editor

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Immigration and Refugee Board Status of Claims

January 1 — March 31, 1990

Initial Hearing Stage	*Atlantic*	*Quebec*	*Ontario*	*Prairies*	*B.C.*	*National*
Claims initiated	212	1883	3308	114	470	5987
Hearings adjourned/postponed	6	76	(24)*	9	41	108
Claims withdrawn/abandoned	5	14	29	4	7	59
Decisions rendered	201	1793	3303	101	422	5820
* More claims were concluded then initiated.						
Of these decisions						
Claims rejected:						
Eligibility	0	2	7	0	1	10
Credible basis	21	49	91	12	10	183
Claims to full hearing	180	1742	3205	89	411	5627

Full Hearing Stage	*Atlantic*	*Quebec*	*Ontario*	*Prairies*	*B.C.*	*National*
Claims heard to compleation	72	1228	1600	107	266	3273
Decisions rendered	23	906	1355	90	170	2544
Decisions pending at December 31, 1989	51	519	390	42	97	1099
Decisions pending at March 31, 1990	100	841	635	59	193	1828
Claims withdrawn/abandoned	0	12	23	2	14	51
Of these decisions						
Claims rejected	7	195	189	11	60	462
Claims upheld	16	711	1166	79	110	2082

An Interview with Gordon Fairweather

Alex Zisman: *Bill C-55 defined the new refugee determination system and led to the creation of the Immigration and Refugee Board which you are now heading. Did you make any personal contributions to this Bill?*

Gordon Fairweather: I had discussions with the Minister about how best to comply with the policy of the government. I had something to say about "safe third country" in concert with other people who were advising the Minister. The Bill, as enacted, contemplates advice from me on this section.

AZ: *How and when did your decide to accept the chairmanship of the IRB?*

GF: I was invited to allow my name to go forward by the Deputy Clerk of the Privy Council, Jack Manion, in July of 1987. I gave them an answer shortly afterwards, because I saw in the chairmanship of the Immigration and Refugee Board a natural extension of my work as Chief Commissioner of the Canadian Human Rights Commission. Human rights and refugee determination are inexorably linked in my opinion.

AZ: *One of the most controversial aspects of the new refugee determination system has been the "safe third country" provision. Why has the "safe third country" access test never been implemented?*

GF: This is a matter of the policy of the Government of Canada on the recommendation of the Minister of Immigration, and I assume (I have nothing but an assumption) that the Minister was persuaded by the advice she received about "safe third country" and has not seen, in the first 11 months of the working of the new Board, any need to implement the provision.

AZ: *Why do you think the government thought it imperative to include this principle in the legislation in the first place, in spite of the opposition voiced by refugee advocates?*

GF: Because I believe the government was persuaded that many claimants who had access to refugee determination processes in the United States or in Western Europe would shop for a country, depending on where they would prefer to settle eventually. And it was to prevent "forum shopping" (and I put that phrase "forum shopping" in quotes) that I assume the "safe third country" provision was included.

> ... if the system were to be flooded by claimants from one of the "safe third countries" ... the "safe third country" provision could be utilized ...

AZ: *What lies ahead for the "safe third country" provision?*

GF: It is part of the legislation and can be invoked if circumstances dictate — for example, if the system were to be flooded by claimants from one of the "safe third countries", where claimants would have appropriate means of asserting their claim. The "safe third country" provision could be utilized if large numbers of claimants prefer Canada as a place to have their claims determined rather than making a claim in, say, the Netherlands, Belgium or the United States for that matter. At the moment no consideration is being given to invoke that section; there is no recommendation that it be utilized, either in all or in part. The section is there, but it is not now in use.

AZ: *I think that the problem with implementing that clause lies in the difficulties to determine which country is actually a "safe third country" for particular claimants and under particular circumstances.*

GF: That is exactly right, but that does not prevent it from being proclaimed discreetly, in the sense that a country might be safe for claimants from country X, but not safe for claimants from country Y. That's a possibility.

AZ: *The initial or preliminary hearing was designed primarily to apply the credible basis test (in addition to deciding whether a claimant was eligible) and was intended to be very brief. But, on average, initial hearings have been far fro m brief and quite often have rivalled full hearings in length. This may have resulted from interpreting the credible basis test as one involving the credibility of the claimant and not just whether there is credible evidence for a claim. Furthermore, so far the initial hearings*

*have managed to eliminate, according to the January 1- October 31, 1989 figures, barely 5.4 per cent of all claims initiated (480 rejected claims out of 8,894 decisions rendereed). In fact, this percentage has been slowly but steadily dropping every month over the past few months. This is coupled with the fact that fewer and fewer claimants are forced to go through these hearings. Yet, initial hearings kept the cost of processing each claimant eliminated at this stage, according to some estimates, at well over $20,000. Do the initial hearings still make any sense in light of the possible misinterpretation of credibility, their extended length, low elimination rate and high cost per claimant eliminated?**

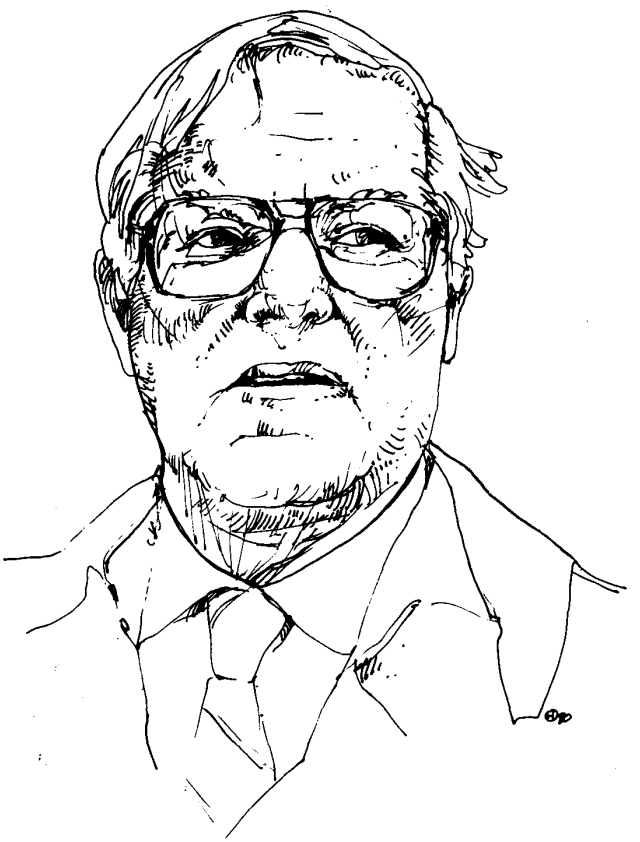
GF: I do indeed believe initial hearings continue to make sense. An initial hearing is a very handy, quick and expeditious way of preparing, in a sense, for the full hearing. The personal information forms, for instance, that arise at border points or inland, may need improving.

AZ: *Do you envisage streamlining the preliminary hearings?*

GF: We do indeed envisage streamlining initial hearings because 60 per cent of the refugee claims come from five source countries, and we would hope that that fact will be reflected in a more rapid process where manifestly founded claims could be identified and the procedure completed in much less time than it now takes.

AZ: *How would this be done? Have there been any guidelines, official or unofficial to streamline claimants from any of these countries?*

GF: We are working first with the Immigration Bar and with Immigration Canada to see what steps are to be taken to shorten the time a manifestly founded claim would require to go through the system. Now, having said that, that will put great stress on the full hearing. If the claims are manifestly founded, and move rapidly, there is only one outcome, and that is the full hearing.



Gordon Fairweather: *"There is not a more independent refugee determination system that I know of in the Western world."*

AZ: *So you still believe in the usefulness of the initial hearings ...*

GF: I don't think that eliminating them is going to do what some people think. The problem is the numbers of people who are making claims and getting to the full hearing stage. I don't mean that that is an insurmountable problem and therefore makes the act or provision any less efficacious. What it does is tell us that we need to streamline that process and make sure that there isn't an unconscionable delay in allowing or getting a claimant his or her entitlement to the full hearing, which is, after all, where the final status is determined. But just eliminating the preliminary hearing would not accomplish that.

AZ: *Would it not be better to use the initial hearings as a very exceptional procedure to screen only groups of refugee claimants from non-refugee producing countries, and otherwise allow people to go directly to the full hearings?*

GF: I am not yet prepared to do that. I would be quite surprised if we were able to identify so readily non-refugee producing countries. It is true that 70 per cent of the claims come from five countries. Having said that, there are 30 per cent that come from other countries, not in large numbers. But if one is a refugee, a Convention Refugee from that lesser number, one would want the same entitlement as, say, those coming from the ignominy of Iran, Sri Lanka, Lebanon, China, or El Salvador for that matter. Those

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* The downward trend in the elimination rate at the initial hearing stage has become even more palpable since the conduction on December 10, 1989 of this interview with the IRB Chairman. The new rate for the first quarter of 1990 is 3.3 per cent. For the latest IRB statistics see pp. 2 and 26.

countries are the major source countries, but that doesn't mean that we forget the fewer claimants from, say. Burma. In truth, the initial hearing is part of the legislation. I am not persuaded by numbers or by policy, that it is an appropriate time to ask Parliament to open up the Immigration Act for the long debate that will ensue before change occurs. The good, if there is any good in it, is not worth the price in parliamentary time, nor in the time of the Immigration and Refuge Board to effect this change. It is not an urgent matter, yet, in my opinion I will be prepared to talk to the Parliamentary Committee when they ask the Board to appear, but I can't imagine the Government agreeing to find the parliamentary time necessary to m ke this change. We live in the real world where Parliament has a host of issues before it. A very long and intensive debate has transpired over the issue of refugee determination and I don't think it is yet the time to go back to Parliament and say: "Look, how about another bit of your time to make this change." That may come, but not immediately.

AZ: *I conclude, therefore, from what you say, that large numbers of claimants will be fasttracked to full hearings. There will be fewer claimants de facto having preliminary hearings, but no de jure change will take place. In reference to de jure issues, another contentious issue has been that of appeals. Why have appeals been limited only to areas of law or jurisdiction?*

GF: Because this is the trend signalled by the Supreme Court and our Superior Courts that judicial deference will be given to the expertise of Boards that Parliament sets up to decide the facts. I find no mystery in this. And I am very surprised that lawyers fix on this issue. The Board was set up to try to relieve the courts in a variety of areas. The court gives deference to the Boards that Parliament has decided will be the fact finders. This is true in human rights law. It's true in labour law. It's true in rate settings for electrical energy or power, and so on. It is a natural evolution of administrative law.

AZ: *As anticipated, decisions have not been immune to inconsistencies, errors in judgement and mistakes in fact. Has the IRB been able to categorize the most common errors and mistakes affecting the decisions so far? How has the IRB handled these errors and mistakes to ensure that they will not be repeated? What alternative mechanisms would you prefer to see implemented to ensure the correction or rectification of these errors or mistakes?*

GF: Yes, decisions have not been immune to errors in judgement and mistakes of fact. And if they are capricious, the courts will tell us so.

> We ... do indeed envisage streamlining initial hearings ... where manifestly founded claims could be identified and the procedure completed in much less time ...

AZ: *How many decisions have been appealed on points of law or jurisdiction? How many decisions appealed on points of law or jurisdiction have been overturned? How many decisions have been contested because of errors in judgement and mistakes in fact? How many decisions contested because of errors in judgement and mistakes in fact have been overturned by the Minister?*

GF: I have brought along the latest statistics for the period from January to November. There have been 363 negative decisions at the full hearing of the Refugee Determination Division. There have been 181 applications for leave to appeal, of which 50 were granted. Seventy-five were denied and one appeal up to now has been allowed. So that must say something about, first of all, what the courts think of our ability to find facts. Also, I have to say frankly, I was very surprised that only 50 per cent of those who got a negative decision applied for leave to appeal.

AZ: *Some lawyers complain that reasons are not being given for denying an appeal ...*

GF: I suppose lawyers will always object when the courts make a decision against their client's interest, but I am not overly disturbed about that. The Federal Court of Canada has been very vigorous in ensuring that the former Immigration Appeal Board, and now our Immigration Appeal Division and Refugee Determination Division, live up to the expectations inherent in the legislation. It doesn't mean that every time a lawyer has a case, he or she is going to be successful.

AZ: *The main concern is that when the errors in judgement and mistakes are not related to areas of law or jurisdiction, then rejected refugee claimants have no grounds to launch an appeal.*

GF: Well, perhaps that is the case. That is the scheme of the legislation, and as I say, about 50 per cent of the applications for negative decisions have been before the courts, and that signals to me that in an area where 10,000 decisions have been made, not very many of them lend themselves to being overturned by the courts. We are a human institution. Errors will be made. And the scheme of the Act is to allow the Minister discretion to intervene before deportation. And she has carried out that responsibility. I am not defending the Minister. We are an independent agency. But the Act seems to me to be unfolding as the policy indicated.

AZ: *So on the whole you seem satisfied with what the percentages indicate.*

GF: I am surprised at the percentages, I am not satisfied with any legislation — or the perfection of any legislation — having to do with human entitlement. We have given very extensive training to members of our Board, unheard of in Federal Boards and Commissions, and have, just in the last month, completed an intensive refresher course for every member of the Board, given by outside experts, including Professors Hathaway and Lemieux, and Professor Murray Rankin from the Faculty of Law at the University of Victoria, and by a specialist in evidence who is with the Federal Department of Justice in the Montreal district.

AZ: *The Canadian Section of Amnesty International has suggested a centralized review capable of reversing a negative decision on points of law, on the facts or merits of the claim and on questions of mixed fact and law. What do you think about this proposal?*

GF: There is a centralized review. A centralized review is the Minister on any deportation. But I have no comment. That would be a matter for the Government to decide. This matter was thoroughly debated, and the number of applications for leave seems to show — at least it indicates to me — that, by and large, the system has worked rather effectively. But Amnesty has been helpful, and continues to be helpful to us. We use Amnesty and York University, of course, the Centre for Refugee Studies, for our country profiles and for the evolution of international law and refugee matters. I am frankly a little bit worried. I wouldn't myself want to be in a position of being a kind of court of appeal to colleagues who have the responsibility and duty to make independent, unfettered decisions about claims based on hearings.

AZ: *The hearings were designed to take place in an informal and non-adversarial setting. Yet in most hearings panel members occupy podiums. If being on a raised platform were not enough to inspire respect, other participants must also stand up whenever the members enter or leave the court room. Why did this formalization take place? What sort of impact has it had on the hearings?*

GF: I think it has had a positive impact, and the informality is still the rule. There have been importunings on both sides of this issue and we try to balance. The Board itself is a quasi-judicial kind of place. I am of the generation that is not unduly upset by standing up when somebody enters the room. What we want is the result. The non-adversarial plan is very fully in effect, and it is mostly in effect in matters of substance. This is not a casual matter, like getting a drivers license or marriage license. The members have important discretion, important decisions to make, involving the life and liberty of human beings. I think I have looked at most of the rooms. Some have the podiums, some don't, but I don't think it has had any impact on the hearings. I hope not. Why six inches would unduly affect somebody's rights is beyond me. But the main point is the non-adversarial aspect of the full hearing. That is a breakthrough. It is unheard of, it gives us very serious issues to contemplate in global law, of evidence and all these other matters. That's the change, not the trappings of a hearing.

... the number of applications for leave seems to show ... that, by and large, the system has worked rather effectively.

AZ: *What role do you play in the appointment of new panel members? Can you or do you actually nominate or veto any candidates?*

GF: I am flattered to say that the Government consulted very widely in an unprecendented way. And I most certainly actually did nominate and did veto candidates. Veto in a sense. I can't veto. That is the prerogative of the Governor in Council. But what I did was warn the Governor in Council — or the Minister in this case, who made the nominations to the Governor in Council —. But actually we (the Board and the people who advise me) are rather proud of the openness of the Minister to hear, to accept suggestions about appointments, and not make other appointments. This is unprecedented in my experience in Ottawa.

AZ: *The Refugee Board has been quite a model in terms of appointing members from ethnic communities and visible minorities. Yet, in one category it seems to be lacking. A lot of refugee claimants come from Spanish-speaking countries. Despite the fact that many Board members do speak Spanish, no members so far have come from any of those Spanish-speaking countries.*

GF: I don't accept that at all. There are many people on the Board who are from the Philippines, from other parts. But we didn't go through a process of saying X number of Spanish-speaking Canadians, therefore there would be a percentage or quota. We wanted to get representative candidates. And I am not going to have a discussion here on whether every group that makes up the plurality of this country is as thoroughly represented as other groups. It is a very plural Board. And I've heard from the Czech community that there is nobody from that wonderful East European country, and I've heard from the Chinese community that there are not enough Chinese. In truth, it is a national plural Board with 50 per cent of its members from identifiable ethnic groups.

AZ: *That's right. But, what I'm saying is there are close to 20 countries where Spanish is the official language. And the Philippines is not one on them. And, as far as I know, I haven't seen any Board members who come from any of those countries.*

GF: I didn't expect that question, because my mind doesn't work in that way. I am a pluralist. And I wanted to have a representative Board. I didn't want to have the Board divided by percentiles of this or that or the other who make up the plurality of Canada.

AZ: *How are the refugee hearing officers hired?*

GF: They are hired by Public Service Commission notices like any other public servants.

AZ: *The RHOs have been concerned about the fact that neutral cross-examination could be ineffectual and could only contribute to uncertainty. As a result, as Sam Laredo, Elaine Pollock and Jan Marshall indicate in the December 1989 issue of Refuge, "the RHOs have been encouraged to be more persistent and probing in their questioning". Do you believe that RHOs can actually remain neutral and strictly non-adversarial if they are to be effective?*

GF: I have nothing to say about this question. We spent the 9th of December with the Immigration Bar in Toronto discussing the role of the RHO. I haven't any problem with their neutrality and being non-adversarial, but they are certainly entitled to be probative. I mean, they are not just sitting there. It is important that the Board have the facts, and the RHOs' duty is to help them ascertain the facts. But they are not to emulate some of the vigorous cross-examination that one sees on television. But Sam Laredo is in charge of this, and his comment in *Refuge* is the Board policy.

AZ: *So you don't see any contradiction?*

GF: Cross-examination has become a pejorative. The cross-examination doesn't need to be if it is pursued professionally. We are reminding RHOs of that. Otherwise, it means that Board members might get into that kind of questioning. And that is something that I personally want to avoid.

AZ: *Interpreters at the IRB still remain officially untested and untrained. They have been informally hired and no specific and uniform guidelines exist to rate them. They feel sidelined within the participatory nature of the hearings. I understand that the IRB intends to introduce, in the near future, written and oral tests which will contribute to screen, hire and rate the interpreters.*

GF: I agree thoroughly in the need to professionalize the profession of the interpreter. It continues to be a challenge. We ourselves have worked to achieve this. First of all, we have increased the per diems, the pay for interpreters. In some places they are more informally organized to increase their own professionalism, and so on. But the lack of formality and screening of interpreters remains a challenge for the Board. And, of course, for CEIC, who has charge of the initial hearing.

... the main point is the non-adversarial aspect of the full hearing. That is a breakthrough.

AZ: *Has the IRB any plans to ensure a greater participation of interpreters in the decision-making process, particularly with regard to their specific performance at the hearings?*

GF: While we would want to consult with them about their performance at the hearings, we would not, of course, involve them in the actual decision itself. We realize that the unevenness of interpreters can contribute to difficulties with the hearings and we are trying to do something about that.

AZ: *You mentioned that the members are receiving what could be described as an exemplary ongoing training. Do you anticipate providing the same quality of ongoing training for the interpreters?*

GF: I can't answer that today because I am not totally sure. I think that what certainly can happen is training about what is expected of them at hearings. What I am hedging about is training about their ability in that language. I presume that comes when their ability is tested in screening and hiring. But we well could be of assistance. If interpreters would like, we could offer assistance in what we expect during the hearing itself. That might be helpful. A good suggestion.

AZ: *The IRB has been trying to get the latest academic research fed into the system to boost documentation resources. How successful have these efforts to engage the academic community been?*

GF: They have been successful in the sense that we expect within the next six to eight weeks to be on-line. It has been a hardware problem. We've had to first of all get the Board up and running. And then get the proper computer. And we needed first of all the computers to assist our work in scheduling and all that kind of business. But I am informed that we will be on-line with a variety of sources of academic research within the next couple of months.

AZ: *In any procedure, the analysis of previous cases can prove helpful. Will case studies be made available to lawyers and other interested parties in the refugee determination process?*

GF: Yes, absolutely. Lawyers are entitled to know reasons, both positive and negative for refugee determination; lawyers and any other interested party. We must be accountable to both research and the profession of law.

AZ: *How long does it now take to process a claimant from the time of landing to that of the full hearing?*

GF: It is different depending on where you are in the country. And that is one of the sad realities. Sixty per cent of the all the claims originated in the Toronto Regional Office. So, the length of term here is longer than it is in Vancouver, Calgary or Montreal. And I can try to give you a breakdown, I don't have in my head the actual weeks, but I think in the rest of the country it is from six to eight weeks. Here it might be three to four months, and that is very troublesome.

AZ: *Have there been marked changes in this waiting period over the past eleven months?*

GF: Yes. The time in Toronto has expanded. And that is unacceptable to our Board. We are trying to do something about it.

AZ: *What is causing the "front-end backlog" or "frontlog"?*

GF: The relentless and quite understandable pressure of numbers. In particular, the numbers of claimants in Toronto is causing this.

AZ: *What is being done to reduce or eliminate this threat?*

GF: We are working on a system to try and speed up the manifestly justified.

AZ: *Is this just a matter of numbers, or is it also related to the types of claims? I understand that there has also been an emerging trend for persons who have been in Canada for extended periods of time suddenly applying for refugee status after facing deportation for serious criminal convictions. How much has this trend affected the refugee determination process? What do you plan to do about it?*

GF: There are those kinds of things, but they wouldn't account for this very huge backlog. They would be the exception, rather than the rule. There is no doubt that those claims are coming but not to the extent of making a huge impact on numbers.

AZ: *Is there a procedural way of dealing with them?*

GF: There are procedural ways. First of all, I think the cooperation with the Immigration Bar is at its highest point since we began operations. However, there are still — and there are fortunately very few — lawyers, who would use a delay to benefit — what they think is benefitting — a client. Now, those are rare exceptions. Constant adjournments are not a tactic used by the majority of the Bar, but where it is used, we have urged our members to be very tough, not granting adjournments. I can't embellish that answer. Adjournments that subvert through the courts of the Minister of Justice are wrong and should be discouraged.

AZ: *Some of them are unavoidable, when a member is sick and cannot be substituted, for example ...*

GF: A member or lawyer. But the courts of justice have been reluctant to grant adjournments. I mean, lawyers are expected to be ready to proceed. And one should expect the same deference from the Immigration Bar to this Board as one would get in the Civil Court.

AZ: *Would it be fair to say that, in spite of some reservations about what have been perceived as specific legislative flaws, the implementation of Canada's new refugee determination process has generally proven successful in practice?*

We must be accountable to both research and the profession of law.

GF: Well, I am embarrassed to be answering this. Some think I am too sanguine. What I am not sanguine about is where delays or where build-ups mean that people have to wait too long in great anxiety about the completion of their claim. On the other hand, we have been able to make some 10,000 — just over 10,000 — decisions. Granted that some of that has been because CPOs have conceded. Those concessions may be a key to speeding up the process. What, of course, this will mean — and I have said this earlier in this interview —, is more strain on the full determination.

AZ: *How do you account for this?*

GF: Well I think, certainly from the point of view of the Immigration Bar, they have told us in no uncertain terms, that it is time to go on with it, get on with it. That Parliament has spoken.

We live in a country where there is respect for the rule of law. And it's diverting in energy, time and resources to try to reargue something that has now been decided.

Meanwhile, out there there are convention refugees who are entitled to the protection of Canada, and I think that our critics have seen that they remain our major objective.

That doesn't mean that the court challenge, mounted by the Canadian Council of Churches, will not give us useful guidelines when it is argued, and presumably — depending on the result — it will eventually end up in the Supreme Court of Canada.

That doesn't cause me to lie awake at night wondering what the courts will do. What it causes me is to say that the courts may indeed want to indicate this or that section, does not conform with the Charter.

If so, of course, Parliament may want to respond to that. But meanwhile the Board will go on about its duties.

Of course, I am not frightened by what the courts might do. Who could be frightened living in a country like this about what a court might say about a law that Parliament has propounded in the middle of a charter that is the supreme law of Canada?

Now, if this law exceeds the Charter, we will be told so, and we will make the necessary adjustments.

But, it won't, by any means, hobble the Board, or the Board's ability, to make a decision for a refugee claimant.

AZ: *Do you think that Canada by now has more than earned its stripes to act as a respected international consultant on adjudicating procedures?*

GF: I do indeed. I have just come back from Oxford, from Ditchley Park, together with Professors Adelman and Hathaway. The group included American, British and some European refugee experts, including the United Nations High Commissioner. And the result of the conference was that the Canadian system was held up as the model that the Western world may wish to follow, based on the fact that we are independent and objective and not subject to government foreign policy in refugee determination.

AZ: *Could this expertise be turned into a profitable proposition?*

GF: I think that the country profiles could be used widely. I am not sure that they will be profitable in the monetary sense, but we distribute them widely. The United States immigration judges use them. They have been exported to many countries in Western Europe. France has told us that there are exceptional in their objectivity. So, if by the word profit you mean whether their objectivity is used by others, then yes, of course.

AZ: *What about the other meaning of profitable?*

GF: Whether Canada would sell them? I am not sure. We might contemplate a cost return, but I haven't put my head to this yet. I am so pleased that we are recognized for our objectivity, that I don't mind sharing our work at the moment. And in a way it may be the contribution Canada can make to a much larger refugee determination posture that the world would have to make.

AZ: *Critics are always complaining about the costs of the IRB ...*

GF: Well I have never thought that the life and liberty of a person should be evaluated in a monetary way. Yes, it is expensive. The Supreme Court of Canada, in Singh, said that administered convenience was no excuse not to give a person an oral hearing. Parliament has shown us the dimensions of the oral hearing and, yes, it will be expensive. The justice system is expensive. The medical system is expensive.

AZ: *How important do you consider your personal involvement at the hearings?*

... the Canadian system was held up as the model that the Western world may wish to follow ...

GF: I think it is important that the Board and its Chairman participate personally in hearings. A Chairman, seems to me, must take part in the actual, substantial part of the Board's work — a hearing —, and not be some kind of remote kuba in the capital issuing directives. The year has been an extraordinary one because the work is absolutely basic to human rights; it's offering protection to children, women and men who, by a convention signed by 106 countries, are entitled to it. To be asked to do this at this stage in my life is immensely satisfying intellectually, philosophically and emotionally.

AZ: *How does this compare to your role as Chief Commissioner of the Canadian Human Rights Commission?*

GF: At the Human Rights Commission it was a period of honeymoon. That's a trite word to use in the sense that there were a great number of allies who looked to the Human Rights Commission to be the exemplar of human rights determinations and so on.

So, although there were some critics within society, there weren't very many. In refugee determination, it is slightly different, because there are those who have a different view of immigration, both if we were in a spectrum, you would say the right and the left, although I find the objectivity of our work immensely liberating. There isn't any ideology in the determination of a Convention refugee anymore. There are no B lists. There is no automatic acceptances because of whether a state is totalitarian or authoritarian, and that is comforting to me.

AZ: *You have discussed the whole development and set up of the IRB. How does it compare to what is being done in other countries? To what extent are other countries trying to imitate Canada's model?*

GF: This is uncharacteristically boastful of Canada. Canada has some part of it's psyche, had to have trouble coming to terms with what we do rather well. There is not a more independent refugee determination system that I know of in the Western world. This isn't the place where the border police make determinations. It is a place where an independent Board makes the decision with the benefit of the doubt given to the claimant. That is extraordinary. At least I think it is an extraordinary and a very deeply moving experience. And the fact is that many countries welcome us, want to learn about us. We have had a stream of visitors, both senior political elected people and officials from all over the world, saying: "Show us how you've done this and is there anything we should copy." This, of course, gives me pleasure as a Canadian.

It was exciting to me that the Supreme Court relied on the Bill of Rights and the Charter to say that an earlier system for determining whether Canada is fulfilling it's obligations was not adequate. It was somebody's duty to put in place a better system. We did. But it isn't primarily the Canadian aspect. It is whether the claimant, wherever he or she may come from, has an opportunity for a fair hearing.

Lorne Waldman Speaks

Alex Zisman: *How do you rate the operational implementation of the new inland determination process in terms of fairness and efficacy?*

Lorne Waldman: I think that the evidence of the last few months has shown that the system is not very efficient and it is getting less efficient as time goes on. Part of that problem has to do with the big mistake that was made by the Minister when she decided to try and run two parallel systems, the backlog system to deal with the old cases and the new system to deal with the new cases. By splitting the resources of the Immigration Commission in this fashion she doomed both to failure. First, the backlog isn't going to work efficiently and effectively. Either they are going to let all the people stay or they are going to take ten years to process the cases. And the new system, because of the diversion of resources to the backlog, has been weakened as well.

The credible basis test is an extremely inefficient time-consuming mechanism for dealing with frivolous cases. The statistics suggest that over 90 per cent of the people get through the first stage hearing; yet this hearing, even in conceded cases, takes many resources — lawyers paid by Legal Aid and by the Federal Government, Immigration officers, interpreters, adjudicators, Immigration and Refugee Board members. All these people have to be brought together for what is essentially a useless procedure that is only effectively weeding out a very small percentage of the cases. Contested credible basis cases are much more inefficient; they tend to go on session after session after session. I have seen a hotly contested one go on for five, six, seven sessions. Of course, every time you adjourn, it takes two or three months to reconvene.

The first stage is very inefficient and we might as well eliminate it.

The third source of inefficiency is the second hearing stage, the full determination before the Board; it too is quite time-consuming. Recently the Board made some effort to streamline it. Even so the system has proven to be totally incapable of dealing with the number of cases that we are seeing in Canada. And the danger is that, as it becomes more backlogged, the temptation to abuse the system becomes greater. Many of us are now beginning to fear that we will see a rise of abusive claims over the next months, claims from non-refugee producing countries.

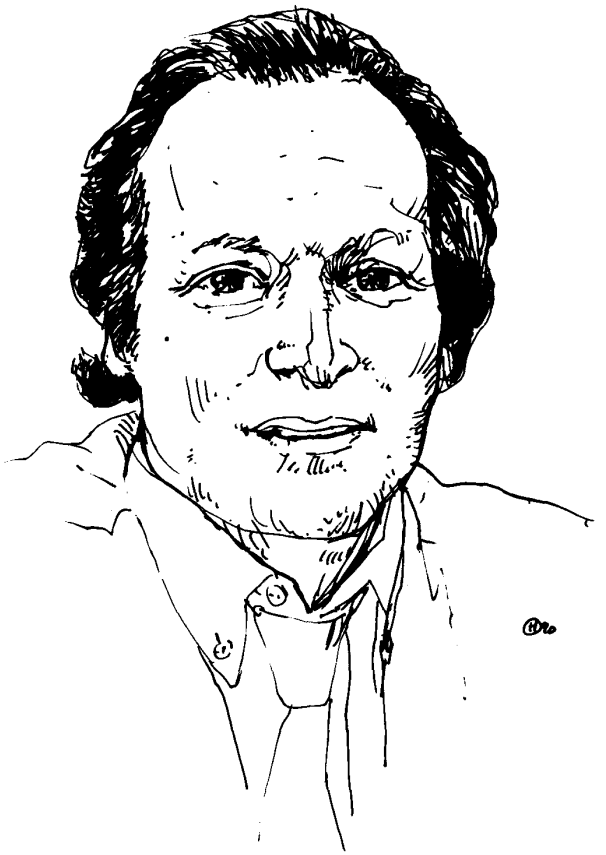
The credible basis test is an extremely inefficient time-consuming mechanism for dealing with frivolous cases.

So, from an efficiency point of view, the system is not at all working. I think if you talk to Immigration officials they would agree and, in fact, would rate the system even lower that many of the refugee advocates.

From the point of view of fairness, Mr. Fairweather and the Board members point to the very high acceptance rate. That is true. In general terms, the system has proved to be extremely generous. I think that is a product to a large extent of the fact that most of the people are coming from refugee-producing countries. Having said that, there are many areas in which mistakes can be made. At the credible basis stage it is especially critical that the decision-makers understand that it is a minimum threshold test. We have seen many cases where ministerial intervention has been necessary because of the misapplication of the credible basis test. The credible basis test is a difficult legal concept to apply correctly and we perceive that many of the adjudicators who apply the test have had great difficulty. The Board members as well. In addition, when the adjudicators and Board members attempt to apply the definition of Convention refugee, in many cases they seem to have problems with understanding the concepts. Many of the decision-makers, who are being called upon to apply complex legal definitions, just don't have the capacity to do that.

The other major failure of the system with respect to fairness has been, of course, the absence of an appeal on the merits in terms of rejected cases. The application for leave to apply or leave to appeal to the Federal Court, depending on which stage, is a very cumbersome and time-consuming legal process which takes a lot of time, energy and expertise. And it is only effective in checking the most flagrant legal errors, because it is not possible to attack errors of fact but only errors of law. The effect of that has been that, in many cases, the appeal mechanism available to correct negative decisions has not been satisfactory. And the effect of that in turn has been the need for ministerial intervention in many cases. Unfortunately, ministerial intervention cannot replace an effective appeal on the merits in these types of cases.

So I think that those seem to be the major failings of the system — the lack of an effective appeal, the quality of



Lorne Waldman: "From an efficiency point of view, the system is not at all working."

the decision-makers, and the misapplication of the credible basis test at the first level. So, from a fairness point of view, although the system in general has been fair, even generous, many mistakes have been made and continue to be made. And there aren't sufficient checks on mistakes. The ultimate and only real check in the system is the ministerial intervention and that is subject to political interference and political considerations.

AZ: *So what do you suggest should be done in order to have a more efficient determination system in place?*

LW: Well, let's look at both of those questions again.

What should be done to make the system more efficient?

I think one of the most obvious things would be to eliminate the credible basis test in all cases except where the claims are manifestly unfounded. Instead of having a hearing in all the cases, the Commission would opt to only hold credible basis hearings in cases where they felt they were serious reasons to doubt the claim and that it was really a manifestly unfounded one. Then the credible basis stage would serve its purpose, which is to serve as a check against manifestly unfounded claims. So, eliminate the credible basis stage, except in those cases which are manifestly unfounded and streamline the second stage. Those are steps that could be taken to save the system from collapse.

Unfortunately many of us doubt whether there is the political will to take the steps that are necessary.

Another step, from a practical point of view, is to scrap the backlog program. You can't have an effective system as long as you have the backlog progam because it is just taking too many resources at every level — lawyers, interpreters, Immigration officials, adjudicators, Board members. We all need to save the new system from collapse, because, if the new system collapses, the backlash this time around would be far greater than what it was in 1987. The consequences will not only be negative for refugees when the government tries to introduce more restrictive legislation to deal with the crisis, but it will be a negative backlash that will affect our society, the values in our society, the generosity of our society. On a broader level it will affect race relations, things like that. So, I think we should do everything in our power to avoid a backlash. And I genuinely fear that, unless something is done quickly, the system will collapse and there will be a very serious backlash and the results of that backlash will be felt for a long time.

AZ: *The Government refuses as a matter of principle to scrap the backlog; and the Minister, in spite of all the negative reports and projections , thinks that she is going to clear the backlog within the prescribed period of time. Can it be done?*

LW: It depends; it could be done. For example, they started on April 17th to redo the humanitarian interview as a result of the Federal Court decision in Yhap. It depends on how those interviews are done. They can do 125 interviews per day in Toronto and a similar number in Mississauga. So if you are doing 250 cases a day, you could do over a thousand cases a week. You could finish the backlog in less than two years provided they accept the majority of people on humanitarian review.

No one knows how generous they are going to be. The guidelines are totally ambiguous. If the guidelines are applied in generous fashion and 50, 60 or 70 per cent of the people are accepted, then conceivably the backlog could be cleared in two years.

I have heard the rumours that they are thinking of other ways of streamlining cases. They are encouraging case presenting officers to review files and concede. They are

talking about dispensing with hearings and conceding through an administrative process. They are thinking of going all sorts of different ways to try and streamline the backlog process which defeats the whole purpose of having undertaken the backlog process in the beginning, since the stated motivation was to send a message to the world. Now, as the process gets more and more bogged down, they are looking desperately for ways to complete it within the time frame to save face.

But, what's the point of spending the money? The most frustrating part about it is that as long as you keep the program running, the resources that are desperately needed in the new system are used in the old system, in the backlog system, and this weakens the new system to a great extent. The answer to your question is: maybe they'll get the backlog done in two years, but by then it would probably be too late for the new system. And whether or not they'll get the backlog done in two years depends on how many corners they cut. But the more corners they cut the less sense it makes to have a backlog program.

AZ: *Streamlining appears to be the way to go not only for the backlog process but also for the new determination process. What do you think of the new measures being considered to streamline the latter?*

LW: I think that they are necessary measures. It is obvious that the way the system was drafted it could not possibly deal with the numbers of people that are coming in. And I think the Government has to look seriously at measures to make it look more efficient.

Those measures would be the ones I suggested before in terms streamlining the credible basis hearings and the full hearings.

The Board seems to have been more responsive to imput from the Bar in terms of expediting the process. The expedited procedure that it instituted was suggested to the Board by members of the Bar in a meeting, and was implemented as a result of these suggestions after the conversations that we had. I think that there are other options that could be implemented. Dilaogue between the Board and the Bar should continue so that we could look at different ways of expediting and improving the efficiency and productivity of the Board itself. Those are necessary measures.

... the resources that are desperately needed in the new system are used in the old system, in the backlog system, and this weakens the new system

Unfortunately, unlike the Board, the Immigration Commission seems to be less receptive to suggestions. Ultimately, since the two stages in the process are interdependent, if either stage breaks down, then the whole sustem collapses.

In some cases, undoubtedly, the problem is inadequate preparation and expertise on the part of the lawyer.

That's what seems to be happening now. The direction has to come from the political level to the Immigration Commission to take the necessary steps to streamline the system.

There are certainly many things that could be done. We talked to officials about the different possibilities but we do not really see anything being done. One gets the sense now of a fatalistic view — that it is too late and nothing can be done. The system was doomed anyway. I mean that is the kind of message that we have been hearing from Immigration officials over the last few months. That is depressing when you think of the consequences of the collapse of the system. Yet many people seem to be waiting for it now.

AZ: *Not surprisingly, inconsistencies, errors in judgement and mistakes in fact have been pointed out during the implementation of the new determination process. While Board members have been blamed for some mishaps, would it be fair to say that poor planning and preparation displayed by some lawyers have also compounded these problems?*

LW: All levels involved have to share the blame when a mistake is made. Sometimes it is obvious that the problem is with the Board members who are predisposed to make decisions in certain ways regardless of the quality of presentation by counsel and the quality of evidence given by the claimants. Certainly when you review cases, especially when you do appeals, you see in the appeals that there are occasions when the cases where not presented properly. That could be a problem of the client, who, despite all of the best preparation in the world, doesn't present his case well for whatever reason, because he usually is nervous or whatever. In some cases, undoubtedly, the problem is inadequate preparation and expertise on the part of the lawyer. That is certainly inevitable within the context of a system where the number of lawyers practising refugee law expanded dra-

matically overnight, because, up until January 1989, you could count the number of lawyers who had an exclusive or almost exclusive refugee practice on four sets of hands probably. Now all of a sudden you have a Legal Aid pannel in Toronto which has several hundred lawyers on it, many of whom, when they started working, had absolutely no exposure to refugee cases.

So it is inevitable, especially at the beginning, that lots of people are going to make mistakes. It is a function of training, experience and things like that.

It is the same with the Board, As the Board members get more experience they become experts and the errors tend to go down. Having said that, some lawyers, because of their attitude, will never make good counsel for refugee claims. They don't have the sympathy or the empathy required. By the same token some of the Board members whom you see will never make good members or adjudicators because they don't seem to have the capacity to understand the complex factors that are involved in these types of cases.

AZ: *You mentioned the problems of the appeal process. Could you expand on what do you perceive as the solutions in terms of a centralized review or something similar to that?*

LW: The Immigration Commission's argument against an appeal on the merits has always been that we can't have a centralized appeal process, or any type of appeal process, because, if we do it is just going to delay the system too much. The reason why a system collapses is that it takes too long to process a case. If you are given the right to appeal at any stage you are going to bog the system down.

The system is already backlogged. If the person is found not to have a credible basis he must be removed quickly because that is the only way you send a message to the rest of the world. The fact is quick removal has not been taking place, but that is the philosophy.

On the other hand, the danger, of course, (especially with inexperienced decision-makers), is that there are cases in which they make mistakes. You don't often have time to correct that. How do you find the balance between the two positions. I don't pretend to have all the answers, but it seems there could be an administrative type of appeal process which could allow, let us say, someone like the Chairman of the Board to intervene in cases that were brought to his or her attention by affidavit and to request a stay of removal or something like that and to allow a review in those cases.

... any appeal mechanism that would allow for an appeal on merits would also have to take into account the danger of making a cumbersome system more cumbersome.

It is essentially the function that the Minister performs now, but I think many of us would find it preferable if it were taken out of the political arena and put into the discretion of a tribunal or appeal board. Certainly any appeal mechanism that would allow for an appeal on merits would also have to take into account the danger of making a cumbersome system more cumbersome. I don't offer solutions. I know that there have been suggestions to have a centralized appeal in Ottawa at the Board level reviewing negative decisions. There is probably a lot of merit to that.

AZ: *You alluded to the philosophy behind the 72-hour deportation clause applicable to those found not to have a credible basis What do you think of such other deterrence mechanisms as tourist and transit visas, fines for air carriers or other methods being discussed to prevent people from coming to Canada without proper documentation?*

LW: Some of them are more effective than others. They all have their pros and cons. One of the most effective has been the visas, because the visas effectively prevent people from getting on the planes and coming to Canada. Of course, once you impose the visa, there is a cost of having to send visa officers over to process. But the more serious problem is that it denies genuine refugees access to Canada and puts them at greater risk. Sure, all of the other measures, the fines, etc. are effective to a certain extent, but only to a certain extent and are not completely effective in dealing with the problems. Ultimately the only effective deterrant is an efficient system that works quickly and fairly and allows a proper determination and the removal of those people who do not qualify. Everyone who has studied determination recognizes that the only real way to prevent abuse is if this type of system is working properly. Which is why there is so much danger when the system collapses.

AZ: *We have seen an increasing number of refugee claimants as a result of the high percentage of successful cases. One could anticipate an annual unflux of 20 to 30 thousand Convention refugees alone. Do you think that is a fair estimate? Do you think it might push or influence the government to introduce the "safe third country" provision?*

LW: There are two separate questions there. The first point is, I don't think that is an unreasonable estimate. I think there are statistics for the first year of somewhere around 20 thou-

sand claims with an acceptance rate probably, globally, (when you take into account all the people who abandon claims, all the people found not credible and refused at the second stage) of around 80 per cent. We are looking at around 16 thousand accepted claims and the numbers are probably going to go up. So I would say that, sure, we are looking at somewhere around 20 thousand, perhaps slightly more as times progresses.

The second point is I do not think there is anything wrong with that. I think we need more people. I think we can easily assimilate them. And I think all of the studies seem to indicate that refugees, although they may have more difficulties initially, tend to assimilate quickly and work harder and contribute.

Well, certainly we have room and a need for immigrants. Refugees can become contributing members of society quite quickly, so the fact that we are going to get 20 thousand or 25 thousand Convention refugees doesn't alarm me at all. I think it is wonderful that we can be so generous as a country.

However, bearing in mind the priorities of the Immigration Department (they have been putting more and more emphasis on economic immigration — entrepreneurs and skilled workers at the expense of refugees —, so the Immigration Commission is not happy about the thought of 20,000 Convention refugees taking spots of other immigrants), I would suggest that the pressures to introduce "third country" will grow. I know there have been pressures over a long period of time.

The question is why have they not introduced "third country" up until now. If they haven't it is because there are political considerations. It's a difficult thing to do. If you want to put the United States on the list, do you put Central American refugees on or off the list as far as the US is concerned? If you take them off then you offend your closest friend. If you put them on you offend everyone else because it is obvious that the Americans are not dealing appropriately with the Central American refugee problem. Why should the European countries, who are put on the list, accept back refugee claimants who come to Canada? They've got more claimants in Europe than we have in Canada. There are very serious logistical difficulties. I think this is one of the main reasons why we have not seen "third country" and why we may not in fact see it. It was obviously one of the key elements in the new system and one of the reasons why the system is collapsing is because it has to deal with a lot more claims than antipated because the "third country" was seen as a mechanism for eliminating a very large percentage of the claims.

> Ultimately, the only effective deterrant is an efficient system that works quickly and fairly and allows a proper determination and the removal of those people who do not qualify.

AZ: *What views do you have on the challenge of The Canadian Council of Churches to Bill C-55? What chances will this challenge have for success?*

LW: I think that the Federal Court decision has substantially weakened the impact of the challenge because they have only allowed a very small percentage of the issues to go forward, the ones that deal with areas that could not be easily raised in other types of proceedings. I understand that the decision is being appealed to the Supreme Court of Canada on the issue of standing and if they get leave then there is a possibility that the Supreme Court will review the decision of the Federal Court and allow the Council to challenge more aspects of the Bill. So we hope that the Court would give leave so that the issue of public interest standing could be decided by the Court once and for all.

AZ: *Regardless of any defficiencies of the new determination system, Canada appears to have arguably the fairest refugee determination record in the Western world. Is there any proof that this factor is attracting genuine refugee claimants to Canada?*

LW: There is no question that it is. If you are someone in danger of persecution and are looking for a country of safe heaven, where would you go? You go to a country that has proved to be generous. And the word gets out. I mean there is no question that the acceptance rate attracts refugees

AZ: *And is there going to be a backlash as a result of that?*

LW: Whether or not is there a backlash I think depends on how the issue is handled. If the collapse of the system becomes a big issue in the media and everyone starts talking about the collapse and we have five or six more stories about hordes of people arriving from this or that country to parts of Canada and people start getting upset, then, sure, there will be a backlash and it will be very negative. It depends on how it is handled. The positive stories about Canada giving safe heaven to people who suffered persecution don't make news. What makes news are the bad stories about how the system isn't working. And, unfortunately, if there is a public perception that the system isn't working, then there is a serious danger that there would be a very serious backlash. There is no question about that.

New Guidelines on Discretionary Powers

On March 20, 1990 Employment and Immigration Minister Barbara McDougall brought forward new guidelines for immigration officers regarding the application of humanitarian and compassionate considerations when reviewing refugee claims. The guidelines, which we reproduce below, were announced in response to the recent Federal Court of Canada judgement rendered by Associate Chief Justice James Jerome in the case of Ken Yung Yhap. In announcing her response, the Minister rejected any suggestion of an amnesty and said that she intends to continue the refugee backlog clearance program.

Legal authority

It is a cornerstone of the Immigration Act that persons apply for and obtain their immigrant visas from outside Canada. There may be instances, however, where the requirement to leave Canada to apply for a visa would create undue hardship for the applicant. Therefore, A114 (2) enables the Governor in Council to facilitate the admission of persons for reasons of public policy or for compassionate or humanitarian considerations. The Governor in Council may prescribe regulations to exempt persons from the requirement of A9 (1) or from any Immigration Regulation made under A114 (1).

Exercise of discretionary powers

In its decision in the Jiménez-Pérez case, the Supreme Court confirmed that immigration officers are under a duty to consider requests for an exemption under A114 (2) of the Immigration Act from the visa requirements of A9 (1) for reasons of public policy or on compassionate and humanitarian grounds. The Court added that immigration officers will, in the name of the Minister, deal with such requests and advise the petitioners of the result. In short, immigration officers may decide which cases warrant a *recommendation* to the Governor in Council for a exemption due to the existence of humanitarian and compassionate grounds of for reasons of public policy and also decide, on behalf of the Minister, that special relief is not warranted in other cases.

The proper exercise of discretion not only benefits our applicants, but is also consistent with the objectives of the Immigration Act in upholding Canada's humanitarian traditions. Officers are therefore encouraged to use their good judgement in applying discretion.

It is implicit in the exercise of any discretionary power, whether that of the immigration officer who makes the initial recommendation, the Minister who makes the recommendation to the Governor in Council, or the Governor in Council who, in law, makes the decision, that decisions are made on a case by case basis. It is important therefore, that officers realize that the guidelines that follow are not intended as hard and fast rules. They will not answer all eventualities, nor can they be framed to do so. Officers are expected to consider carefully all aspects of cases, use their best judgement, and make the appropriate recommendations.

Although officers are not expected to delve into areas which are not presented during examination or interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated.

Discretionary authority, as it relates to humanitarian and compassionate grounds, is described in greater detail below under Definition of Humanitarian and Compassionate Grounds. Situations relating to public policy are described in the following section on Public Policy Situations. The two areas are not mutually exclusive, but as they involve different assessments, they have been grouped separately.

Parameters for the exercise of discretion

Discretionary recommendations must be informed recommendations. Officers are encouraged to seek advice from senior officials if they have any reason to believe that they could benefit from another person's experience.

It is recognized that not all officers will react identically, every time, to any given situation. To ensure absolute consistency in recommendations, it would be necessary to provide guidelines which answer every eventuality. This is not possible, nor even desirable, as it would negate an officer's discretionary authority under A114 (2) as noted by Justice Jerome in the Yhap decision. In order to maintain an acceptable level of consistency, the following guidelines will apply.

Definition of humanitarian and compassionate grounds

Humanitarian and compassionate grounds exist when unusual, undeserved or disproportionate hardship would be caused to a person seeking consideration. A humanitarian and compassionate review is a case by case response whereby officers are expected to consider carefully all aspects of a situation, use their best judgement and make an *informed* recommendation. For example, in dealing with requests for consideration from within Canada, officers should ask themselves: "What would a reasonable person do in such a situation?"

To assist officers in identifying situations which may warrant a humanitarian and compassionate response, the examples outlined below have been provided. They are by no means exhaustive. For example, all of the circumstances described under Public Policy situations may be considered when making a humanitarian and compassionate assessment. While a person may not meet the guidelines described under Public Policy Situations, the officer may feel that on balance there exist humanitarian and compassionate considerations which would lead to a positive humanitarian and compassionate recommendation. Economic and establishment situations alone would not normally constitute grounds for a positive humanitarian and compassionate recommendation.

Situations involving family

These situations refer to any family situation other than those involving spouses (which are described under Public Policy Situations), e.g. parents, children and other relatives or family members of Canadian residents. This may also apply to a person, not necessarily related by blood to the Canadian resident, but who is a de facto part of the family. The requirement to leave Canada and to apply abroad in the normal manner could result in undue hardship because of the would be immigrant's financial or emotional dependency on family in Canada.

Officers should examine considerations such as the reason why the person did not apply abroad as required by A9 (1), the degree of independence exhibited before coming to Canada, the existence of family or other support in the home country, the physical capability to travel, etc. Issues such as the cost or inconvenience of having to return home to apply in the normal manner would not generally constitute hardship. Having weighted all these factors, officers should be able to conclude whether favourable consideration is warranted.

The Backlog Clearance Program

The Backlog Clearance Program is based on the new refugee determination system; that is, those who claimed or indicated an intention to claim refugee status prior to January 1, 1989 will have the credibility of their claims assessed by an adjudicator and a member of the Immigration and Refugee Board (IRB). If either the adjudicator or the Board member finds the claim to be credible, the claimant will be able to apply for permanent residence pursuant to the Refugee Claimants Designated Class Regulations instead of going to a second hearing before the IRB for a determination of refugee status.

The Refugee Claimants Designated Class Regulations exclude persons determined under the former Act to be Convention refugees, whose applications were already refused under these regulations or the 1986 Administrative Review, who are under removal order, who have eluded inquiry, who leave Canada for more than 7 days after December 27, 1989, who are serious criminal or security risks, or who are found not to be refugees by the IRB.

The program provides for humanitarian and compassionate (H & C) reviews both before the panel hearing and, if there is no credible basis for a refugee claim, prior to removal. Persons accepted on H & C grounds may apply for permanent residence from within Canada.

All persons who are permitted to apply for permanent residence from within Canada, whether as a result of a positive H & C recommendation or from determination of credible basis, must meet all statutory requirements.

Those persons who cannot establish credible basis for their refugee claims will face removal. Claimants who voluntarily leave the country before their panel hearings will be given a letter of introduction to the visa office abroad which will assure them of a interview with a visa officer. Every consideration will be given to their Canadian experience as part of the application process.

Severe sanctions or inhumane treatment in country of origin

Consideration should be given where there exists a special situation in the person's home country, and undue hardship would likely result from removal. Some persons might face severe government sanctions on returning home because of things they have said or done while in Canada, e.g. while in Canada, a visitor has made public condemnatory comments on the policies of his/her government or has publicly embarrassed a repressive government. Examples include members of official delegations, athletic teams or cultural groups who may have spoken out against their government or whose attempt to remain in Canada could in itself result in official sanctions upon return home.

Other may warrant consideration because of their personal circumstances in relation to current laws and practices in their country or origin. Such persons could reasonably expect unduly harsh or inhumane treatment in their country should they be removed. In these cases there should be strong reasons to believe that the person will face a life-threatening situation in his or her homeland as a direct result of the political or social situation in that country. Such situations are more likely to occur in countries with repressive governments or those experiencing civil strife or at war.

Officers will consider the facts of the case and recommend what they believe is reasonable in the particular situation. The onus is on applicants to satisfy the officer that, b) their *personal circumstances* in relation to that situation warrant positive discretion.

Public policy situations

A114 (2) also provides for discretion for reasons of public policy. These are situations that warrant consideration from within Canada as a result of a policy direction taken by the Commission in the interests of the Immigration Program and not necessarily because officers feel that humanitarian grounds exist. Persons dealt with under "Public Policy", would normally be expected to fall into one of the categories listed below. While a person may not warrant a positive recommendation under public policy considerations, there may exist humanitarian and compassionate grounds which warrant favourable consideration.

Spousal policy

Requests for visa exemption made by spouses of Canadian residents will be sympathetically examined bearing in mind that separation of spouses entails hardship which warrants the exercise of special relief. In the case of a genuine marriage, that is, a marriage of substance and of likely duration that has been entered into in good faith, and not merely for immigration purposes, it is *not* necessary for the persons concerned to prove additional hardship in order for a request for relief from A9 (1) to be processed (see IS 2 "Relationships of Convenience").

Illegal de facto residents policy

Persons who meet the definition of an illegal de facto resident may be considered from within Canada.

Illegal de facto residents are administratively defined as those persons who have *not* previously come to out attention and who, although they have no legal status in Canada, have been here so long and are so established that, in fact if not in law, they have their residence in Canada and not abroad.

These persons will have gone "underground" and will not have come previously to official immigration attention, e.g. as refugee claimants, members of the refugee claims backlog or persons previously ordered removed. Such persons would have severed their ties with their home country and would undergo undue hardship if they were required to leave Canada in order to seek a visa to return (legally) as permanent residents.

Long-term commitment to Canada policy

Officers may consider sympathetically the situation of long-term employment authorization holders in valid status who request processing of their application for permanent residence from within Canada.

Such cases should be examined along lines similar to the illegal de facto residents guidelines. The principal criterion will be the applicants' long-term prospects for continuation of their employment in Canada and social integration into the Canadian way of life.

Such persons will have established homes in Canada, may have raised and educated children here; their children may be Canadian citizens by birth. There would be no real residence abroad where these persons could reasonably be expected to apply for immigrant visas.

Foreign domestics policy

The foreign domestics program is premised on a two-year assessment period which provides an opportunity for candidates to work in Canada and to upgrade their skills.

Provided the foreign domestic appears able to establish in Canada, is not inadmissible and has provided satifactory service while in Canada, a positive recommendation should be made.

National interest policy

There may be situations not elsewhere described, where it is in the national interest to facilitate a person's admission to Canada. These situations must have a considerable impact on the economic, cultural, social or scientific aspects of life in Canada.

East European Refugee Symposium

On March 29, 1990, the Centre for Refugee Studies organized a symposium at Osgoode Hall Law School, York University, to discuss the Canadian policy towards Eastern Europeans seeking to come to Canada as refugees under the current rapidly-changing circumstances. Participants were invited to express their own opinions based on their knowledge and not to represent any organizational views. Further, it was agreed that there would be no attribution of comments. Nor would the meeting be reported, though the results could be. In any case, there was no commitment by anyone to endorse the results. The intention was to encourage a free exchange of information and ideas without inhibition.*

The problem

Everyone agreed that the problem of the movement of East Europeans as refugees was a complex and multi-faceted one in which simplicity or deformation by selection of one or two aspects does an injustice to the issue. The following factors seemed to constitute most of the key items:

1. The altered political situation

With the relaxation of any exit restrictions (with the exception of Albania), and with the sudden transformation of Hungary, Czechoslovakia, Poland, Romania and Bulgaria into democracies or, at least into countries on the path to becoming democracies, and the institutionalizing of glasnost in the Soviet Union, the automatic right to refugee status and asylum for anyone leaving the Eastern Bloc was, at the very least, questionable.

2. The changing economic situation

As the Eastern Bloc economies begin to go through some radical changes as a result of the lengthy economic stagnation and the structural shifts involved in radical economic transformation, many people may want to leave for economic reasons.

3. Numbers outside their home country

Other than East Germans, the largest national group living outside their homeland consists, according to one of the participants at the symposium, of about 300,000 Poles. Of these, 150,000 are in West Germany, a large number in Italy, smaller numbers in Greece and a build-up beginning in Turkey. By contrast, there are only 1,000 Ukrainians; and 600 of these already have sponsorships in place. Most East Europeans in this group fled their home countries before the dramatic changes of the last six months. They are part of what will be referred to henceforth as the European backlog.

4. Families

Included among the East Europeans throughout Europe are families with children. A serious problem arises becausue the education of these children is at a standstill.

5. Canadian immigration number

Some people in the backlog have received a number from the Canadian immigration authorities in Europe and are at different stages of the interview, medical and security checking process but some in West Germany are being pushed out before the process is completed as Germany attempts to cope with the huge influx of East Germans.

* Those attending included Howard Adelman, Director, Centre for Refugee Studies, York University; Janek Ajzner, doctoral candidate, Sociology, University of Toronto; Andre Batko, psychologist, Polish Social Services; Deyaniia Benavides, Community Legal Services, Welland; immigration lawyer Richard Boraks; Eugen Duvalko, Canadian Ukrainian Immigration Society; Anna Dymek, Multicultural Centre, Mississauga; Andrew Goodman graduate student, Political Science, York University; Paul Kaihla, Associate Editor, Maclean's Magazine; Theresa Kott, sociologist; Sister Alice Kwiecien, sponsorship organizer; Joe Mackenzie, graduate student, Social and Political Thought, York University; Nestor Mykytyn, Canadian Ukrainian Immigration Society; John Oostrom, MP; and Peter Skeris, Polish Alliance Press.

6. Convention refugees

Individuals in the Eurpean backlog are attempting to come to Canada as humanitarian refugees under the Designated Class category as self-exiles. Given the tremendous backlog, the immanent possibility (and likelihood) that Canada may follow the Australian and American lead and end any special designation of East Europeans as humanitarian refugees, many of these have been taking advantage of the new ease in exiting and the direct route to Canada. East Europeans, particularly Bulgarians and Poles, have begun to arrive in Gander in much larger numbers than the processing system, the welfare system or even the hotel system can handle. Further, they do not appear at first glance as genuine Convention refugees, and the impression is given that these refugee claimants are abusing the system.

7. Alternatives

Though the alternative of asylum in European countries is less and less likely, repatriation is now physically and politically possible without apparent risk to the vast bulk of the claimants, certainly from Eastern Europe. Further, in the case of Hungarians fleeing Romania, Hungary had become a signatory to the Geneva Convention and Hungary could now be expected to take in the vast bulk of Hungarians from Romania if a mass movement does begin.

8. Risks

But there are some risks. Though democracies may be well on the way to establishing themselves, even if on a shaky foundation, many argued that the old appartchniks of the Communist party still hold power in the countryside and, more importantly, use that power to put individuals at risk. Further, there is a new source of danger: inter-ethnic strife with the rise of old nationalistic animosities. Since economic problems are likely to get worse before they get better, inter-ethnic disputes can be expected to increase. Most participants felt that the USSR was in a separate category because it was still not a democracy in spite of glasnost. As the Lithuanian situation exemplified, glasnost was subject to being turned off to suit the Kremlin when it was under threat. Finally, specific ethnic groups in the Soviet Union, and sometimes elsewhere, who lacked a distinctive national homeland in those countries (Jews) or where the national homeland was somewhat unsafe (Armenians) might be particularly at risk, mainly if individuals from such groups were involved in the old political structures.

9. Lack of previous and current opportunity

One of the clearest problems which directed those leaving Eastern Europe into the refugee stream was not the fear of persecution at the present time, but the lack of opportunities to apply to migrate given the absence of visa officers in Eastern Europe. Further, since families had been separated for years, even decades, there was a huge build-up of demand which the drop in barriers has allowed to move. But the absence of visa officers has not been able to facilitate this movement.

10. Humanitarian issues

Even if these East Europeans were by and large not Convention or even humanitarian refugees, there was still a moral concern for those wasting their productive years in camps and the lack of opportunities for their children to attend school; the fact that these migrants would have virtually nothing if they did return to their countries of origin, a problem which would be exacerbated by the economic problems involved in restructuring, made their claims particularly poignant. Further, there was also the humanitarian factor of the long years their relatives were unable to bring them over while other Canadians were able to sponsor theirs. This left East Europeans with the conviction that they had a claim to special consideration.

11. Sponsorship

Under the current system, as long as the individuals in Europe were eligible to come as Designated Class immigrants, there was not supposed to be a quota or limit on the numbers sponsored. On the other hand, everyone experienced a limit, whether that limit resulted from the limited funds available for interest free loans for transit, the lack of personnel to process applications and undertake the security checks or for other reasons. Further, there was a difference in perception when Poles or Ukrainians in Europe advance funds to Canada to facilitate their own sponsorships. Whereas some federal officials viewed this as a corrupt practice totally at odds with the intent of private sponsorship, East Europeans saw this as a guarantee of successful re-establishment at great saving to Canadians.

12. The Canadian dimension

Though there was some focus on the ways to help these people improve in their speed and ability to resettle by undertaking such programs as language training while they sat in camps in Europe, the major question that emerged was over the reputation of the ethnic group in Canada. They did not like being portrayed as being engaged in corrupt practices when what they did was open and above board. They did not like the use of such language as "overwhelming numbers" which created a false impression when the numbers were really not that great in absolute terms. Any program should have as one feature an effort to rehabilitate the reputation of the community and, at the very least, inhibit any aspersions on their integrity.

Criteria for resolving the problem

1. Fairness

It was agreed that if the present program was unfair in putting a group into the refugee category, either by guiding them into the Convention refugee claims system or continuing to regard most of them as designated classes when the category was no longer applicable, this would be unfair and should be discontinued.

2. Universalism

Any changes which were made to meet the needs of the East Europeans should be available to other groups in the same situation.

3. Unpredictability

Any changes should take into account the highly volatile situation in Eastern Europe and be prepared to reinstate programs that are discontinued.

4. Feasibility

It was recognized that there were pragmatic factors that influenced and affected the role the Canadian government was willing to play — costs, numbers, percentage of burden sharing, etc.

5. Reputation

Any changes which take place should take into account the responsibility of protecting any particular ethnic group from any aspersions on its reputation.

Recommendations

The recommendations were seen to be part of a package since the implementation of one without introducing another would be seen as both unworkable and totally unfair. For example, if most of the East European nations are dropped from the class of those eligible to be taken in as humanitarian refugees under the self-exiled designated class category without, at the same time, introducing immigration visa officials into Eastern Europe and, preferably, introducing a bonus system to make up for lost opportunities in the past, then the changes would both be regarded as unfair and attempts would continue to undermine existing systems such as the inland refugee determination system.

1. The self-exiled class

This category should remain as part of the laws in Canada.

2. Countries eligible for obtaining self-exiled status

Hungary, Poland, Czechoslovakia, Romania and Bulgaria shouid be deleted from the list. While most were not yet prepared to delete the USSR, one participant wanted to go on record as objecting to any exception being made for the Soviet Union since the dangers for persecution per se were not significantly different than in the East European states and the Soviet citizens were now more or less free to apply to leave. There was agreement that Albania should remain on the list. The union of East Germany with West Germany would resolve that problem for the Germans.

3. Alternatives

Though settlement in countries of first asylum was understandable and appropriate for some ethnic groups (Hungarians from Romania) and repatriation might be the reality for others (e.g. Poles), the ethnic groups did not want to participate or be seen to be endorsing a program of repatriation and certainly not facilitate such repatriation with financial assistance, quite aside from whether such a solution was reasonable or just, simply because of the way repatriation, with its historical resonances, was perceived in the ethnic communities from Eastern Europe.

4. Refugee determination

Though refugee claimants from Eastern Europe arriving in Canada and claiming refugee status were very unlikely to be Convention refugees, and though they were contributing to the gumming up of the refugee claims system, a fact which could rebound to the discredit of their local ethnic communities, the communities did not believe their active participation in a campaign, through advertisements or other means, even if subsidized by the Government, would be effective or accepted by the respective communities.

5. European backlog

Special consideration should be given to those already in the backlog, particularly those who have already begun the process of applying to come to Canada and particularly those families with children.

6. Numbers

If the numbers total 300,000 and Canada's historic role in burden-sharing varied from 10 per cent to 25 per cent, Canada should assume its normal share of the burden of taking these people into Canada.

7. Humanitarian bonus immigration points

The most original recommendation that emerged from the seminar was that these people no longer be dealt with as self-exiled, except for those already in process under the old rules, but should be dealt with as immigrants. Only special extra humanitarian points should be granted to any immigrant applicant who, because of the past restrictions of his/her native state, was unable to

apply for immigrant status and, further, was currently in exile because of that policy and practice. These humanitarian bonus points would be available to any immigrant applicant from anywhere so long as the immigrant fulfilled the criteria. The number of points granted would be a product of the estimated numbers Canada felt should be part of its burden and the amount needed to be allocated to achieve that objective.

8. Immigration visa officers

Immigration offices and visa officers should be set up immediately in all the East European states.

9. Financing additional officers

Since there are budget constraints which are quite understandable, three practices should be introduced to save money in the overall immigration program to allow funds to be re-allocated to Eastern Europe. Locals should be hired at local rates of pay as support staff. Secondly, real rather than official exchange rates should be used in obtaining monies to run local external affairs offices. Thirdly, the immigration system should be operated as a user-pay system so that visa and other charges pay for the operation of the system.

10. A study

Consideration should be given to a study of Poles who previously resettled in Canada, particularly the success of resettlement, the costs of private versus public sponsorship, the rate of repayment of transportation loans and the number of defaults, the role of ethnic organizations in facilitating such movements and its objectives. The point of such a study would not only be to clarify a number of facts which are in dispute, but to bring all facts in the open so that misperceptions could be avoided.

Implementation

1. Publication

It was agreed that the Report of the Symposium should be published in *Refuge.*

2. Distribution

It was agreed that the Report of the Symposium should be distributed to participants who would be free to use it as they see fit.

3. Government

It was agreed the Report should be sent to the Government with the suggestion that the Government convene an official meeting with representatives from East European ethnic groups, and the recommendations of the Report be used as an agenda for a consultation.

New Publication

The English version of the *International Thesaurus of Refugee Terminology* (Dordrech: Martinus Nijhoff Publishers, 1989) has been published under the auspices of the International Refugee Documentation Network with the help of a grant from Ottawa's International Development Research Centre.

This first volume of an ambitious multilingual project was prepared by Jean Aitchison, Coordinator of the Refugee Thesaurus Working Group.

As the introduction aptly indicates, it is expected that the thesaurus will contribute to the performance of the International Refugee Documentation Network by improving the speed and consistency of indexing and easing the intellectual effort of searching by controlling synonyms, and displaying broader, narrower and related terms needed to extend or refine a search. With the thesaurus there should be a higher rate of recall of the relevant documents in the databases or documentation files and more effective prevention of the retrieval of unwanted items.

The thesaurus is to be published in three separate volumes, corresponding to the three languages being used, English, French and Spanish. The English edition is issued first followed by the French and Spanish editions, produced respectively by Documentation Réfugiés (Paris) and Latin American Information Center on Migration (Santiago de Chile). The English edition was slightly modified to meet equivalence difficulties in the other two languages.

While the thesaurus is intended primarily for use by organizations which are active in documentation work concerning refugees, in particular the current and future members of the International Refugee Documentation Network, it will also serve well a wide spectrum of other users. Because of its multilingual context, and the specific inclusion of French/English/ Spanish and Spanish/ English/French indexes, the *Inter-national Thesaurus of Refugee Terminology* will also prove an invaluable tool to interpreters and translators dealing with refugee-related matters.

A spartan desktop publishing effort, the *International Thesaurus of Refugee Terminology* will definitely prove its worth as a reference book. It is to be hoped that its versatility will allow it to keep pace in future editions with the growing development of new terms as witnessed for example during the day-to-day proceedings of Canada's own refugee determination process.

The thesaurus is available in Canada and the US from Kluwer Academic Publishers, 101 Philip Drive, Norwell, MA 02061, USA.

The Self-Exiled Class

by David Matas

Events in Eastern Europe are forcing the West to rethink a whole range of policies. The Cold War froze into a fixed configuration a wide panorama of Western policies — not just in defense and international affairs, not just in economics, but in immigration as well.

Now that the Cold War has thawed, that Eastern Europe is drawing aside the Iron Curtain, that the Berlin wall has ceased to be a barrier, the West has to re-examine the policies that were generated by the Cold War.

The West has been slow to react to what is going on in Eastern Europe, and, within the West, Canada has been one of the slowest.

Though the underlying facts that led to current policies have changed, the policies continue. Some of this continuation may simply be caution because of uncertainty of the lasting nature of the changes.

However, where caution is the explanation, that caution is misplaced. We in the West cannot remain indifferent to what is happening in Eastern Europe.

The changes are positive changes. The developments are ones we in the West would want to encourage. By remaining fixed in old policy stands waiting to see if the changes will last, we are doing nothing to help the changes last. If we really want to see the East change, the West must change itself.

Another explanation is bureaucratic inertia, the comfort of old ways. Once a policy is in place, laws are passed, officers are appointed to administer it, forms are printed, instructions are issued, the path of least resistance is just to carry on. The people who administer a policy may have fogotten why it was instituted. They may have never known in the first place.

The options that were canvassed and rejected at the time a policy decision was made drop from sight. Laws and policies do not come with explanations.

The self-exiled class was there not just to protect those victimized by exit controls, but to allow immigration from Eastern Europe, by circumventing exit controls.

When these policies date from decades past, the reasons for them become matters of historical research, rather than common knowledge.

There are also vested interests. Although the Cold War was not in the public interest, many individuals benefitted from it. Their vested interests are a political voice, a pressure group to carry on with these out of date policies.

All that is true of the self-exiled class. The self-exiled class is a class within our immigration law that is a carryover from the Cold War. Structurally, it appears ideologically neutral. A person falls within the self-exiled class if he is from a country in a list chosen by Cabinet. He must be outside that country, outside of Canada, and able to demonstrate he can successfully establish in Canada. Successful establishment can be done by sponsorship by a corporation or a group of five or more individuals.

What makes the class ideologically explicit is the countries that have been designated. The countries on the list are Albania, Romania, the GDR, Czechoslavakia, Bulgaria, Hungary, Poland, and the USSR. All the countries behind the disintegrating Iron Curtain are there. And no others are. Since the class was first instituted other countries have shown up on the list briefly, from time to time. Cuba was there for a while. So was Haiti. But only the Soviet-dominated Eastern Europe countries were on the list from the start till the present.

Yugoslavia, which historically has been as Communist and as repressive as the rest of Eastern Europe, but has not been Soviet dominated, is not on the list. A person who is in Yugoslavia cannot apply to come to Canada as part of the self-exiled class. But a person from Yugoslavia, outside of Yugoslavia, also cannot come to Canada as part of the self-exiled class.

The self-exiled class is one group under the designated class category of the Immigration Act which provides for the admission of that designated

class in accordance with Canada's humanitarian tradition with respect to the displaced and persecuted. In other words, people from Eastern European countries in the list to qualify for self-exiled status *and* outside of Eastern Europe are considered displaced and persecuted.

The self-exiled class is not unique. But it is virtually unique. There is one other designated class like it — the Indochinese designated class. This class, like the self-exiled class, is a class of people outside listed countries, outside of Canada and able to demonstrate they can successfully establish in Canada. The countries in this class are Cambodia, Laos and Vietnam, again all Communist countries.

Why does the self-exiled class exist? What was the logic behind its establishment? It cannot be just that Eastern Europeans were displaced and persecuted. Regretfully, displacement and persecution are not unique to Eastern Europe and South East Asia. They exist in many more places besides.

There are two alternative explanations I can suggest for the existence of the self-exiled class. One is policy. The other is politics. The political explanation is anti-Communism. Calling anyone who leaves Eastern Europe persecuted is a form of condemnation of governments of the countries of Eastern Europe. It is an attempt to discredit these governments. It extracts valued manpower from these countries, weakening their economies.

Yugoslavia is excluded from the class precisely because it is not now and was not Soviet-dominated. Since Soviet Communism was the enemy, it was only the Soviets and their satellites that Canada wished to condemn as persecutors.

Much the same can be said of the Indochinese designated class. Canada does not even recognize the current government of Cambodia. China, which is every bit as repressive as Indochina, is not on the list because Canada has come, politically, to accept the government in China. The desire to discredit and condemn is not as deep and fervent.

The policy explanation is a desire to provide relief from severe exit controls. One feature of totalitarian Communist governments is that leaving the country without permission is a crime. The right to leave any country, including one's own, is a fundamental human right. It is a right that has been systematically violated in Eastern Europe. People who may have been in no danger of persecution before departure become subject to persecution simply because they have left without permission. A person who has left, without permission, a country with severe exit controls becomes by that very fact a presumptive refugee.

> ... the rationale for the inclusion of many of the countries of Eastern Europe in the self-exiled class has disappeared.

The name of the class suggests this rationale. A person who leaves without permission a country with severe exit controls is self-exiled. He knows that once he has left he cannot return, except to persecution. He has nowhere else to go.

The desire to provide relief from exit controls is not just humanitarian in nature. There is an immigration component built into the policy. Although refugees and immigrants are conceptually distinct, the Government of Canada jumbles the two together, particularly for refugees seeking resettlement from abroad.

A person from a country with severe exit controls cannot immigrate to Canada in the normal way. The person must first leave his or her country for some other reason than a desire to immigrate to Canada and then seek immigration to Canada from a third country. Once Eastern Europe had severe exit controls, if Canada were to have any immigration at all from Eastern Europe, something like the self-exiled class was necessary. The self-exiled class was there not just to protect those victimized by exit controls, but to allow immigration from Eastern Europe, by circumventing exit controls.

For the purpose of deciding what to do now with the self-exiled class, it does not really matter which of these rationales is the real one, the better one. No matter which purpose is the proper one, the reality is that both are out of date. Because of glasnost and perestroika, the disintegration of the Iron Curtain and the ending of the Cold War, the rationale for the self-exiled class has disappeared. Or, at the very least, the rationale for the inclusion of many of the countries of Eastern Europe in the self-exiled class has disappeared.

There is no reason to suggest that Romania* or Albania should be removed from the self-exiled class. But for every other member of the class, one has to ask why they are still there.

Hungary and Poland have no exit controls. A Hungarian law passed by the legislature on September 26, 1989 to take effect on January 1, 1990, says "It is the fundamental right of Hungarian citizens to choose their place of residence freely, to emigrate

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* This article was written before the events that led to the fall of Ceaucescu and the subsequent political opening in Romania took place. (ed. note)

from Hungary ...." Not free to leave are those in possession of state secrets of special importance to the national defense. They must give up their jobs in which they have learned of the secrets, and wait three years. Also not free to leave are those on trial for serious crimes, or under a suspended sentence, and those who avoid taxes.

The Czech government announced on November 14, 1989 that Czechs would no longer need exit visas to travel to the West. East Germany has relaxed its exit rules. The Supreme Soviet legislature gave preliminary approval to a bill on November 13, 1989, that allows emigration for almost anyone who has entry permission from another country, no outstanding alimony obligations, criminal charges or recent knowledge of state secrets. The law formalizes changes that have been put in practice already.

These changes do not remove all impediments to travel from Eastern Europe. The Czech government has prevented the travel of prominent dissidents by confiscating passports. Eastern Europeans may also have so little foreign currency that leaving is impractical.

However, the danger that used to exist simply from leaving without permission has, by and large, gone. And with it has gone the reason for the existence of the self-exiled class.

Yet, instead of the Government of Canada's decreasing admissions from the class, it is moving in exactly the opposite direction. The Government of Canada is increasing government sponsored admissions to Canada from the self-exiled class.

Admission to Canada of refugees and members of the designated class comes through government sponsorship and private sponsorship.

Private sponsorship is numerically unlimited. It is limited only by the willingness and capacity of the private sector to sponsor and the willingness of the Government to recognize sponsored candidates as refugees.

Government sponsorship, on the other hand, is strictly limited. Each year the Government sets quotas, overall around the world, by region, and locally by visa office.

The latest levels report was presented to Parliament by the Minister of Employment and Immigration on October 18, 1989. The report noted an increase in the government-assisted refugee allocation for Eastern Europe to 3,500 from 3,400. Although the levels report calls the allocation a refugee allocation, the allocation includes people from the self-exiled class whether they meet the refugee definition or not.

The reason for the increase? According to the levels report it is that the relaxation of exit countries from Eastern Europe has resulted in an increased number of Eastern Europeans seeking third country resettlement. In other words because the reason for the class is disappearing, the Government will increase sponsorship from the class.

The Government is trading off real refugees for people who may not meet the refugee defintion at all.

The response is not only illogical. It is imposing hardship on real refugees. The overall government-assisted planned refugee allocation remained the same from 1989 to 1990 at 13,000. When one category goes up, another goes down. For 1990, the categories that went down are refugees from Latin America, from 3,400 to 3,000 and from the Middle East and West Asia, from 1,800 to 1,700. People from Latin America and the Middle East within the government quota are real refugees, who have to meet the refugee definition. There is nothing like the self-exiled class for Latin America or the Middle East. The Government is trading off real refugees for people who may not meet the refugee defintion at all.

The ending of exit controls does not mean that there are no longer refugees from Eastern Europe. The Communist party remains in power everywhere. In Poland, Solidarity has the Premier's office and several Cabinet posts. But the police, the military, the presidency are still Communist. In Hungary, the Communist party has changed its name. But many of the people in positions of power remain the same. Repression has lifted. But it has, by no means, disappeared.

The United Sates, for Eastern Europe, has gone from one extreme to another.

Originally the US had something like the self-exiled class for Soviets alone, presuming them to be refugees once they had left the Soviet Union, and provided for their resettlement in the US. In September, 1988 the US started imposing refugee screening on these Soviet exiles. Those who did not meet the refugee definition were denied entry to the US.

In September of this year, the US announced that Soviet refugees must apply in the American embassy in Moscow. They could no longer apply, as they had in the past, in Rome and Vienna. The change will have the effect of cutting down the numbers of those who can qualify as refugees.

Refugees cannot feel secure in telling their stories in the country of persecution.

As well, refugee assistance groups who have assisted Soviet claimants in Rome and Vienna have not been allowed to do similar work in the Soviet Union. Before the policy

change the denial rate of Soviet claimants in Moscow was 54 per cent, and in Rome, 20 per cent.

The Americans have a government refugee quota, as does Canada. But there is nothing equivalent to Canadian private sponsorship. So, once the US quota is filled, no more refugees can enter. Even for those who have a well founded fear of persecution, if they are beyond US quota numbers, the US will not offer protection.

For Hungarians and Poles seeking US protection the situation is even more difficult. The current US position is that it will not consider Poles or Hungarians for refugee resettlement unless they face immediate threats to their lives, have relatives in the US or have exceptionally strong ties to the US.

Poles and Hungarians are presumed not to be refugees. For Poles and Hungarian that US position was announced on November 21, 1989. That shift, I believe, goes too far. It ignores the reality of repression that continues to exist, albeit not as systematically as before, in Eastern Europe.

Canada's response to the refugee situation in Eastern Europe has been essentially political. The Government has welcomed refugees from Eastern Europe, easily and freely, not just for humanitarian reasons but as well because it was a form of discrediting, of undermining Eastern European regimes.

There is a danger that when the response shifts, the shift will be equally political. I believe the West should do what it can to encourage the changes in Eastern Europe that are occurring. But that should not mean denying protection to real refugees.

Because finding a person to be a refugee means finding that the person has a well-founded fear of persecution, a refugee determination is a persecution determination. Deciding a person is a refugee means deciding his government is persecuting him. A refugee determination is a form of criticism, a discrediting of the government of the country fled.

Now that repression in Eastern Europe is lifting, there is a temptation to avoid criticism.

When matters are getting better, criticism allows Communist reactionaries to argue that no change will satisfy the West. Criticism undercuts the reformers who are the agents for change.

Politically, it may make sense to emphasize the positive in Eastern European developments, rather than focus on negative vestiges of the past that continue.

Refugees should not, however, be held hostage to this sort of politics. Real refugees should be recognized as such even if the implications of the recognition is a criticism of a regime that, politically, the Government of Canada wishes to encourage.

A refugee determination is a form of criticism, a discrediting of the government of the country fled.

Keeping the self-exiled class is not necesary to maintain protection for refugees from Eastern Europe. Protection could continue as long as those leaving Eastern Europe are eligible to apply under the standard Canadian refugee resettlement procedures.

I do not suggest Canada decrease admissions from Eastern Europe. Indeed there may be justification for increasing admissions.

It is ironic that the greatest recent Eastern European outflow, from East Germany, is not even eligible under the self-exiled class. West Germany considers East Germans in West Germany as West German nationals. Because these East Germans, once they enter West Germany, become West German nationals, they are not eligible to apply under the self-exiled class.

There was a lot of fanfare recently when the German Canadian Congress signed a sponsorship umbrella agreement with the Canadian Government, allowing the Congress to sponsor East Germans within the self-exiled class. That agreement may, however, mean little if the self-exiled class continues in its present form. The bulk of the East Germans who left for West Germany are simply not eligible.

Those leaving Poland, Hungary, the Soviet Union, the GDR, Czechoslavakia and Bulgaria should not be presumed to be refugees simply because they have left their home countries.

These countries should be removed from the self-exiled class. Denying the presumption that those leaving most Eastern European countries should be presumed to be refugees still leaves open the question of how to handle admissions from Eastern Europe. In any case, any increase in the welcome Canada offers to East Europeans should not be at the expense of those fleeing a well founded fear of persecution.

David Matas *is chair of the Working Group on Overseas Protection of the Canadian Council for Refugees. The remarks contained in this article were presented to the Canadian Council for Refugees in Montreal on November 25, 1989. David Matas is also the author, together with Ilana Simon, of* Closing the Doors: The Failure of Refugee Protection in Canada *(Toronto: Summerhill Press, 1990).*

A Continuing Growth in Refugee Claims

The Immigration and Refugee Board (IRB) received nearly half as many claims during the first quarter of 1990 as it did during all of 1989.

In its first quarterly report, the IRB revealed that it received 5,987 cases from January 1 to March 31. This compared with 13,537 claims for all of 1989.

Rates of acceptance at the full hearing stage have dropped significantly for a number of countries (particularly Eastern European countries, reflecting the rapidly changing domestic conditions there). But in the case of the six largest source countries (Sri Lanka, Somalia, China, Iran, El Salvador and Lebanon) these rates have remained at over 70 per cent. For three of them (Iran, Somalia and Sri Lanka), they remain at over 90 per cent.

In spite of the Board's increasing productivity (the month of March was the best in IRB history, with 735 full hearings completed) the new backlog or "frontlog" has continued to grow. IRB Chairman Gordon Fairweather anticipates further improvements based on additional streamlining methods in dealing with claims.

The Chairman recalled that the IRB, which began operations on January 1, 1989, was structured to process an expected 18,000 Convention refugee claimants annually. But he noted that a striking increase in claims has taken place since the last quarter of 1989, which could push the 1990 caseload to 40,000 claims.

During the first quarter of 1990, considering both initial and full hearings in the two-stage process, 2,082 (34.8 per cent of claims initiated but a full 81.8 per cent of decisions rendered at the full hearing stage) of claimants have been granted refugee status, while 655 (10.9 per cent of claims initiated) either were not eligible of lacked credible basis, or were not found to be Convention refugees by the Board. An additional 110 (1.8 per cent of claims initiated) have withdrawn of abandoned their claims.

Of the 5, 987 claims for refugee status in this quarter there were 5,820 decisions rendered. Significantly enough, only 193 claims (3.3 per cent of decisions rendered) were rejected at the initial stage (10 were deemed ineligible and 183 lacked a credible basis). Fifty-nine others were withdrawn by claimants while another 108 cases are under short adjournments or postponements.

Of the 5,627 claims moving forward to full hearings 51 were subsequently abandoned or withdrawn. Decisions are pending in 1,828 cases, 677 are under short adjournments or postponements, and 527 are scheduled for the coming weeks.

The 10 claimants who were found to be ineligible at the initial hearing were from Afghanistan 4, Bangladesh 1, Malaysia 1, Peru 1, Poland 1, Switzerland 1 and Thailand 1.

The 183 claimants who were found not to have credible basis at the initial hearing were from Algeria 2, Angola 1, Argentina 14, Bangladesh 1, Bulgaria 3, Chile 1, China 1, Colombia 1, Congo 1, Costa Rica 1, Czechoslovakia 9, Dominica 5, Ecuador 2, Egypt 1, El Salvador 3, Fiji 1, France 2, Ghana 6, Greece 1, Grenada 7, Guatemala 3, Guinea 1, Guyana 3, Hong Kong 1, India 5, Israel 1, Jamaica 7, Kenya 6, Lebanon 3, Malaysia 1, Mexico 4, Nigeria 2, Pakistan 3, Panama 2, Poland 29, Portugal 1, Romania 2, Seychelles 1, Sri Lanka 2, St. Vincent 1, Sudan 2, Syria 2, Trinidad & Tobago 11, Uganda 1, Uruguay 2, USA 6, USSR 2, Venezuela 5, Yugoslavia 8 and not stated 3.

The 2,082 claimants who were confirmed at the full hearing level were from Afghanistan 5, Albania 1, Algeria 2, Argentina 3, Bangladesh 8, Benin 1, Bulgaria 1, Chile 6, China 88, Comoros 1, Cuba 3, Czechoslovakia 12, El Salvador 145, Ethiopia 46, Ghana 4, Guatemala 41, Guyana 1, Haiti 3, Honduras 10, Hungary 1, Iran 221, Iraq 17, Israel 1, Jordan 3, Kenya 11, Kuwait 1, Lebanon 296, Liberia 1, Libya 3, Mali 2, Mexico 1, Nicaragua 24, Pakistan 40, Panama 2, Peru 15, Philippines 2, Poland 14, Portugal 1, Romania 10, Saudi Arabia 1, Senegal 1, Seychelles 6, Somalia 587, South Africa 6, Sri Lanka 380, Sudan 26, Syria 7, Uganda 3, Uruguay 3, USSR 1, Venezuela 2, Yugoslavia 4 and Zaire 8.

The 462 claimants who were denied at the full hearing level were from Afghanistan 1, Algeria 1, Argentina 2, Bangladesh 4, Bulgaria 1, Chile 2, China 31, Costa Rica 1, Cuba 2, Czechoslovakia 61, Ecuador 2, El Salvador 48, Ethiopia 2, Ghana 9, Guatemala 5, Haiti 3, Honduras 2, Hungary 2, India 4, Iran 18, Iraq 1, Jordan 2, Kenya 5, Lebanon 94, Liberia 1, Mexico 1, Nicaragua 13, Nigeria 2, Pakistan 3, Panama 4, Paraguay 1, Peru 7, Poland 20, Romania 2, Sierra Leone 1, Somalia 33, South Africa 1, Sri Lanka 42, Sudan 5, Syria 5, Uganda 2, Uruguay 1, USSR 1, Vietnam 1, Yemen South 1, Yugoslavia 8, Zaire 3 and Zambia 1.

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Refugee Policy: A Comparison of Canada and the USA

International Conference
Sunday, May 27 - Wednesday, May 30, 1990
Glendon College Campus, York University

The Centre for Refugee Studies, York University and the Refugee Policy Group, Washington DC, are convening an international conference to compare Canadian and US refugee policy.

Those participating in the conference include academics, policy makers and representatives from non-governmental organizations in both the United States and Canada. Topics to be discussed will include:

Monday May 28th:

Session I:	US And Canadian Refugee Policy: Future Challenges
Session II:	Foundations of Canadian and US Refugee Policy
Session III:	Foreign and Defence Policy: The Impact on Refugee Policy
Session IV:	Issues and Perspectives on Overseas Assistance
Session V:	US and Canadian Admissions Policy

Tuesday May 29th:

Session VI:	Refugee Resettlement
Session VII:	Refugee Mental Health
Session VIII:	Legal Framework
Session IX:	Refugee Determination Procedures

Wednesday May 30th:

Presentation of Workshops

Plenary Session (restricted to policy makers and paper writers to reflect on the results of the workshops and presentations)

Also on Wednesday at the main campus of York University

A Bridging Day

A practical, hands on, all day session for those interested in learning to shelve and computerize documents. Guest speakers will discuss a variety of topics, from "The Importance of Sharing Information: How to Start" to "Breaking out of the Mystery of Computers: How to Do."

For further information about the conference please contact Ann Watson at the Centre for Refugee Studies, 234 Administrative Studies Building, York University, 4700 Keele Street, North York, Ontario, Canada M3J 1P3.