

# Compassion and Pragmatism in Refugee Law

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

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

## Conclusion

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

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## New Books:

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

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

Open wide the floodgates?

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

This is far from accurate.

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

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

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

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

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

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



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

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

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### Supreme Court of Canada Requiring Oral Hearings for Refugee Claims

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

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

## A New Inland Refugee Determination Procedure — A Challenge for Canada

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

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

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

The decision-makers on review, not having seen the claimant in person, cannot be expected to second-guess the initial determination regarding the claimant's credibility. Furthermore, justice would not be served if the centralized review had to piece together the claim when the record revealed that the legal representa-

tion or translation were inadequate. Therefore, where credibility or the adequacy of legal representation and translation are in doubt, the centralized review should have the authority to refer the matter to another local panel for a new oral hearing.

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

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

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