Fairness in refugee determination

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I. INTRODUCTION

SIGNATORIES TO THE REFUGEE CONVENTION have committed themselves not to return a refugee to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.¹ Nonetheless, forcible return or refoulement can and does happen.

Violation of the commitment not to return a refugee to a country where his life or freedom will be threatened can happen indirectly as well as directly. It can happen by enforced misery in the country of asylum through prolonged imprisonment, or denial of any means of subsistence.² Imposition of a visa requirement that denies the person fleeing persecution the opportunity to leave his country of persecution, can have the same effect as returning that person to the country.³

Moreover, forced return can happen through unfairness in the refugee determination system. An unfair system will lead to inaccurate results. Genuine refugees will have their claims rejected. Unfairness in refugee determination systems is a general and widespread fault. Every system this paper examines is unfair in its refugee determination to a greater or lesser degree.

In order for a system to be accurate it is not enough for the system to be fair in most respects. Even if it is only unfair in one respect, that single failing can lead to a wrong conclusion and refoulement.

Most of the countries examined in this paper do not have the death penalty. Yet for a refugee wrongly rejected and returned to the country he has fled, death may be the result. Therefore, the potential consequences of an error in refugee determination require the highest standards for the determination systems. However, none of the systems

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1 Article 33, Convention Relating to the Status of Refugees.
2 D. Matas, "The Plight of Refugee Claimants" (1985), 4 Refuge (No. 4).
comes close to the protection offered to an accused criminal, where the potential harm from error is a good deal less.

The unfairness that refugee systems manifest is not just sloppiness. It has five basic causes: one political, one economic, one administrative, one circumstantial, and one numerical.

The political cause of unfairness emanates from this problem: determining that a person is a refugee means determining that the person has a well-founded fear of persecution perpetrated by a foreign government. But asylum countries are reluctant to determine their friends to be human rights violators. This reluctance is likely to manifest itself when the foreign affairs department of the asylum country becomes involved in refugee determination. The foreign affairs department of any country works towards improved relations with its allies. Consequently, a determination that an ally is a human rights violator is contrary to the other responsibilities of the department.

The economic cause of unfairness is the suspicion that refugees are actually economic immigrants attempting to circumvent immigration criteria. Many refugee claimants are from Third World Countries with standards of living inferior to those of the asylum country. Most refugee claimants would not qualify to enter or remain in the asylum country if they were not refugees. Enforcement officials in immigration are constantly coming across people trying to enter simply to take advantage of the better economy of the country. Thus, when immigration enforcement officials are part of the refugee determination process, they inevitably bring immigration considerations to bear in refugee determination.

The administrative cause of unfairness results from the administrator's desire to cut costs and to be expeditious. The care needed to assess properly a refugee claim requires procedures that may be slower, more time consuming, or more costly than the bureaucracy demands. Consequently, systems are set up with a view to efficiency, rather than with a view to fairness.

That is not to say that efficiency is unfair, or that the fairness is inefficient. Indeed, some of the systems examined are both unfair and inefficient. They produce the worst of both worlds. They are costly and time consuming. Moreover, they produce inaccurate results. Up to a certain point, efficiency is an element of fairness. Genuine refugees get no benefit from a slow expensive determination process. Beyond that point, a concern for efficiency can be harmful. The need for efficiency must be balanced against other needs because when efficiency is the sole concern, unfairness results.

The circumstantial cause of unfairness is that a wrongly rejected refugee claimant is not around to complain of unfairness. The claim-
ant has left the country and may have been forcibly returned to the country he fled. Under the U.N. Convention and domestic laws, a refugee in a country of asylum has a right not to be forcibly returned to the country of persecution. But a refugee outside a country of would-be asylum has no right to enter, neither by domestic laws nor by the U.N. Convention. Once the claimant has left, he has no standing to question the unfairness of the rejection.

Finally, the numerical cause of unfairness involves the sheer number of refugees in the world. There are millions of genuine refugees who would meet the refugee definition. Absorbing the millions of refugees is beyond the capacity of any one asylum country. Unfairly rejecting claimants as not being refugees is simply a way of controlling numbers. There is widespread concern that with a refugee determination system easily accessible and generous in spirit, each country would soon be flooded not with abusive refugee claimants, but with genuine refugees.

II. THE HISTORICAL CONTEXT

THERE ARE TWO historical events of major significance to the present international refugee structure. One is the Holocaust; the other is the Cold War. The Holocaust demonstrated the failure of voluntary, humanitarian resettlement refugee policies before and during World War II and the need for refugee norms or obligations.

The failure of the voluntary system was manifested at an international conference at Evian, France, in 1938. The governments of 32 nations formed an inter-governmental committee to assist refugees leaving Germany and Austria. However, the Evian system was unsuccessful because, although everyone was in favour of resettlement, no one was prepared to offer it. And no one was obliged to offer it.

Without legal recourse available to refugee claimants, anti-Semitic or anti-alien immigration officials prevented the good will of Evian from having concrete results. The Canadian Immigration Department, under Fred Blair was motivated by anti-Semitism by attempting to prevent every Jewish refugee from entering Canada. The U.S. State Department, under Breckenridge Lodge, Assistant Secretary for Special Problems, motivated by an anti-alien attitude, attempted everything it could to block entry of Jewish refugees to the U.S., including suppress-

5 Ibid. at 19.
6 D. Wyman, None Is Too Many: Canada and the Jews of Europe, 1933-1948, (Toronto: Lester and Orpen Dennys, 1986) at 158.
ing news of the Holocaust. In order to appease Arab leaders, Britain was determined to maintain quotas for Jews entering Palestine, which was under British mandate, at a miniscule figure. The British turned ship after ship of Jews away from Palestine.

If the Holocaust showed the need for obligations, the Cold War led to a desire for condemnation. Prior to the Nazi phenomenon, refugees had been described as people who no longer enjoyed the protection of their governments. Nazism led to attempts to define refugees in terms that judged the government of the countries from which the refugees were fleeing. For example, the 1938 Geneva conference excluded as refugees people who left for "purely personal convenience." In other words, refugees were only people forced to leave by their government. The 1943 Bermuda conference defined refugees as people who had to leave because of "danger to their lives or liberties."

With the collapse of Nazism, these judgmental definitions disappeared. The United Nations Relief and Rehabilitation Administration (UNRRA), established in 1943, was simply designed to assist displaced persons or victims of war. Its object was securing their repatriation or return.

This emphasis on repatriation quickly ran up against the problem of Ukrainians and Baltics who did not wish to return to Soviet rule. Humanitarianism mitigated this forced repatriation. One notable aspect of the International Refugee Organization (IRO), which replaced UNRRA in 1947, is that it allowed a person to refuse repatriation if he had been persecuted or feared persecution. This shift to resettlement was not just for the purpose of accommodating humanitarian demands; it was motivated by anti-Communism. It said and meant to say that the Communist regimes persecuted their peoples.

Eighteen states ratified the I.R.O. Convention between May 1947 and March 1949. Needless to say, the Eastern Europeans did not join in the I.R.O. because they did not wish to share in their own condemna-

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8 Nichols, supra, note 4 at 11.
9 Wyman, supra, note 7 at 158.
12 Melander, supra, note 10 at 3
13 Ibid. at 3-4.
tion. Several Western countries did not join because they were not ready to condemn the Eastern European bloc openly.

The United Nations Convention on Refugees, signed in 1951, saw greater participation. The definition was more restrictive. To be a refugee, a person had to have a “well founded fear” of persecution. A simple fear of persecution was not enough. But the implied condemnation remained. Eastern European countries still did not sign. The West, by and large, did. One ironic exception was the United States: it had played a key role in drafting the refugee definition and pushing it through the U.N. General Assembly. But the U.S. did not sign because it displayed no interest in distinguishing between refugees and those fleeing Eastern Europe for economic reasons. The latter were excluded from the U.N. definition.

This system of resettlement and condemnation was meant to discredit the Eastern bloc by showing that its people were prepared to flee communism. They became tools for psychological warfare, conveying a message to those remaining. They could also be used to conduct sabotage, to engage in guerilla warfare, and to establish governments in exile. Defections removed people valuable to the Communist regimes.

The continuation of the Cold War and the Soviet invasion of Hungary of 1956 showed that the problem of refugees from Eastern Europe was not just a World War II phenomenon, but a continuing issue. The 1951 Convention had been restricted to refugees forced to flee because of events before 1951. In response to the realization that the refugee problem was a continuing one, a 1967 Protocol was signed that deleted the 1951 dateline. As of December 31, 1985, 97 countries had signed the Convention or Protocol, including the U.S. However, none of the Eastern European countries except Yugoslavia, has signed.

The explosion of Third World refugee problems presented the Western World with a dilemma that was not anticipated.

The post war period was a period of decolonization. Turbulence and civil war became part of the independence process of colonial peo-

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16 Ibid.
18 Loescher and Scanlan, supra, note 15 at 5.
19 Ibid. at 6.
20 Ibid. at 21.
21 G. S. Goodwin-Gill, The Refugee in International Law, (Oxford [Oxfordshire], Clarendon Press, 1983) at 304-5, for a list of the signatories as at December 31, 1982. This article draws generally on the Goodwin-Gill text.
ples. The West had little desire to condemn these newly independent governments for their political behaviour because these Third World governments were military allies, trading partners and ideological colleagues.

The problem of condemnation could be solved by expanding the refugee definition. That is what the Organization of African Unity has done. Its Convention of 1969 includes as refugees everyone who is compelled to leave by reason of external aggression, occupation, foreign domination, or events seriously disturbing public order.\textsuperscript{22} The notion of persecution is thereby side-stepped.

However, the West has not wanted to expand the refugee definition to increase refugee admissions. On the contrary, the larger than expected number of people who meet the current restrictive refugee definition has more than exhausted the Western willingness to absorb refugees. Nor is the West prepared to abandon the concept of obligation; the spectre of the Holocaust prevents it from doing that.

We are left therefore with refugee determination systems founded in obligation coupled with political reluctance, particularly to recognize and grant a right to Third World refugees to remain, similar to that which the Convention obligates signatories to recognize. The inevitable result is distortions. A lack of fairness in refugee determination procedures is one of these distortions. It is easier to accept the principle of protection and deny it in practice than to deny the principle.

III. REJECTIONS

\textbf{AS SHOWN ELSEWHERE} in this paper,\textsuperscript{23} the rejection rate for refugee claimants, particularly from Third World countries, is high. Immigration officials point to this high rate of rejection as proof that the refugee determination systems are being abused and that claimants are really economic immigrants hoping to buy some time in a country with a higher standard of living while their claims are being determined. However, there are three other equally plausible explanations for these high rejection rates.

One is that the claims, though ill founded, are not abusive. They are arguable claims, but not strong enough. Not every litigant who loses had no case, and the law is constantly dealing with hard cases where the losing party had a strong position.

\textsuperscript{22} \textit{Ibid.} at 280.
\textsuperscript{23} Section XVI, \textit{infra}. 
Another explanation stems from the restrictive nature of the refugee definition: not all refugees fall within it. The definition excludes people who flee because of invasion, civil wars, revolutions or political disturbances. These people may not have individual "well founded fears" of persecution. They are not, however, mere economic immigrants.

The Organization of African Unity Refugee Convention recognizes these people as refugees. Asylum countries have temporary humanitarian programmes directed towards nationals of particular countries that allow some people in this category to come forward as refugees. Because these programmes do not cover every refugee, a person displaced as a result of a political disturbance may claim refugee status and be rejected. He does not fall within the Convention definition, but he cannot be said to be abusing the system for economic reasons.

A final explanation for the high rate of failure of refugee claims is the failure of the refugee determination systems themselves. Genuine refugees are not being recognized for what they are. Unfairness in the system itself can lead to high rejection rates.

IV. STANDARDS OF FAIRNESS

FAIRNESS, NATURAL JUSTICE, fundamental justice, or due process are legal requirements in many countries. They also represent common sense notions. This paper proposes twelve standards of fairness a refugee system must meet in order to be considered generally fair.

1) Fairness means structural impartiality. To be fair the refugee system of a country must recognize refugees from all countries. It is unfair to offer asylum to refugees from some countries, but not from others. It is unfair to make it easy for claimants from some countries to get refugee status, but make it difficult for claimants from other countries to be recognized as refugees.

2) Fairness means there are safeguards in place where a claim is rejected because it is manifestly unfounded. Because the refugee determination process may be lengthy, and claimants may receive benefits while waiting for the determination, there is an incentive to claim, even if there is no basis for the claim. A speedy system for disposition of manifestly unfounded claims is sometimes put in place to deal with this abuse.

The UNHCR Executive Committee has said a claim must be rejected as manifestly unfounded only if it is "clearly fraudulent" or not related to criteria relating to refugee status as laid down in the Refugee

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24 See the OAU Convention definition.
Convention. It would be unfair to reject a claim as manifestly unfounded without safeguards in place to ensure that the claim is indeed manifestly unfounded.

3) Fairness requires access to counsel. Counsel can be of invaluable assistance in presenting a refugee claim because of the following factors: refugee claimants, who fear persecution by authorities in their own countries, are often reluctant to speak freely to the authorities of the country in which they seek asylum; details of victimization may be repressed, because they are painful to recall; claimants will be reluctant to say anything that will compromise and put in danger those they have left behind; the refugee procedures and refugee laws of asylum countries are often complex and intricate; and the official examining the claimant may not be well versed in refugee law or sensitive to the difficulties refugees face.

Because of those factors, counsel can be of invaluable assistance in presenting a refugee claim. When access to counsel is denied, it is unfair.

4) Fairness requires the right to know objections to the claim and have the opportunity to respond. The *Handbook on Procedures and Criteria for Determining Refugee Status* put out by the UNHCR in 1979 states, "While an initial interview should normally suffice to bring an applicant's claim to light, it may be necessary for the examiner to clarify any apparent inconsistencies, to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts." A judgment of the Supreme Court of Canada has said that fundamental justice requires that a claimant must know the case he has to meet. If an adverse decision is reached on the basis of apparent inconsistencies, or contradictions, without an opportunity to explain misrepresentations, the decision is unfair. The claimant may be readily able to explain if given the opportunity. He should have that opportunity. The absence of an opportunity to respond creates an even more acute problem where the decision maker takes extraneous information into account. The decision maker may view that information as contradicting the claim. If the decision is made without the applicant being told what the information is and without being given a chance to respond to it, an injustice has been perpetrated.

5) Fairness requires an oral hearing. A UNHCR executive committee conclusion recommends that applicants should be given a complete

25 Conclusion 30 (XXIV), para. (d).
26 Paragraph 199.
personal interview wherever possible by an official of the authority competent to determine refugee status.28

A refugee determination requires a judgment on credibility. Many refugee claims are, in fact, rejected as not credible. It is unfair to find a person is lying without ever seeing the person, assessing his demeanor and listening to the manner in which he speaks. It is particularly unfair when the person is a refugee claimant in an alien environment and he has to use the service of an interpreter.29

Systems without oral hearings sometimes have, instead, a refugee examination conducted by an officer who does not decide. A transcript or summary is then sent to the officials who decide the claim. In theory, this sort of system can allow a person to answer objections to his claim by having a re-examination. The deciding officials can give the examining officer the objections, and the examining officer can in turn present them to the claimant. The examining officer then gives the answers to the deciding officials.

However, this sort of re-examination is time consuming and cumbersome. The re-examination to answer objections might lead to another list of objections and another re-examination.

6) Fairness requires giving the refugee claimant the benefit of the doubt. The UNHCR Handbook says: "if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."30

A refugee claimant is unlikely to arrive with extensive documentation supporting his claim. Witnesses who could corroborate his story may still be in the home country, subject to persecution if they say anything. Many of the claimant's statements may not be susceptible of independent proof. It would be unfair to reject a claim where the claimant appears credible, simply because the claimant supplies no independent proof.

7) Fairness requires individual consideration of each case. Blanket rejections simply based on the country of origin or the group of which the claimant is a member, without consideration of the details of the claim, are unfair.

8) Fairness demands independence from the deciding authority. The deciding authority should be independent from the department of external affairs which may be reluctant to find that an ally is a human rights violator. The deciding authority should be independent from the

28 Conclusion 30 (XXXIV), para. (e)(i).
29 See W. Gunther Plaut, Refugee Determination in Canada: A Report to the Honourable Flora MacDonald, Minister of Employment and Immigration, (Ottawa: Minister of Supply and Services, 1985) at 32.
30 Paragraph 196.
department of immigration, which may have an inbred suspicion that
refugee claimants are economic immigrants in disguise. But the need
for independence of the deciding authority is different from where the
need for structural impartiality. Even where there is an independent
deciding authority, the system may allow nationals of some countries
access to the deciding authority. Others may not even be allowed to
make a claim. The refugee procedures may also be rigorous and stan-
dards invoked by the deciding authority difficult to meet. Yet nationals
of some countries may be presumed to be refugees without having to
go through the procedures or meet the standards.

Failure to consider cases individually results from a lack of inde-
pendence. However, it is not the only consequence. Where dependence
is on immigration officials, cases may be considered individually, but
considered from an immigration perspective.

9) Fairness requires a qualified examiner and a qualified decision-
maker. In countries where there is a split between the official who ex-
amines the claimant and the official who decides the claim, both must
be qualified. Where the two functions are combined into a task for a
single official, that official must be fully qualified. Where a claimant
has imposed on him an examiner or decision-maker who does not
know refugee law, is ignorant of conditions in the country from which
the claimant has fled, and is insensitive to the difficulties refugees face,
the claimant may be unfairly treated.

10) Fairness dictates an appeal or review. A UNHCR executive
committee conclusion recommends that “if the applicant is not recog-
nized, he should be given a reasonable time to appeal.” It also rec-
mends that the applicant be permitted to remain in the country pend-
ing the decision and the appeal unless the appeal is “clearly abusive.”
Even where the claim is manifestly unfounded, the UNHCR recom-
mends that an unsuccessful applicant should be enabled to have a neg-
ative decision reviewed before removal. The rationale is that a deci-
ding authority may have made a decision for the most obviously wrong
reasons; unless there is a right of appeal or review, the error goes un-
corrected.

11) Fairness demands that reasons be given for a negative determi-
nation. Where there is a right of review or appeal, that right is of lim-
ited value if the original decision to reject is given without reasons.

Reasons must be more than just stock phrases or conclusions. They
should manifest reasoning. They should relate refugee law to the

31 Conclusion 8 (XXXVIII) paragraphs (e) (vi) and (vii).
32 Conclusion 30 (XXXIV) para (e)(iii).
claim, deal with the substantial points raised, and relate the facts to the conclusion.

12) Fairness involves systemic impartiality. It goes without saying that the refugee determination system should not discriminate against people on the basis of race, religion, nationality, membership in a particular social group or political opinion. A well founded fear of persecution on those grounds is the very basis of a refugee claim.

Discrimination may be structural or systemic. There may be an express intent to discriminate. On the other hand, discrimination may be visible only by effect.

Even where there is no express discrimination, a refugee determination system that discriminates by effect is unfair. If the statistics show that it is easier for one race or one nationality to get refugee status than another, all other things being equal, then the system is open to question.

Systemic discrimination is a sign or symptom of one of the other failings. Where there is lack of independence, or failure to consider cases individually, systemic discrimination is almost certain to occur. Tests for systemic discrimination here, as elsewhere, are tests of the proper working of the system. When the figures show discrimination, it means some element of the system is generating discrimination.

That completes the list. It is a list that was not meant to be exhaustive. There are other criteria for fairness that could be added, such as adequate translation or proper notice requirements. What is significant about this list is that all the systems examined fail to meet one or other of these criteria. This list is a list of common failings.

International law does not require compliance with these twelve criteria of fairness. What it does require, for signatories to the Refugee Convention and Protocol, is compliance with the obligation not to return a refugee to a country where his life or freedom would be threatened. If these standards of fairness are met, it is likely that the obligation not to forcibly return will also be met. However, where the standards are not met, the international obligation not to return forcibly will almost certainly not be met.

V. STRUCTURAL IMPARTIALITY

STRUCTURAL DISCRIMINATION occurs when refugees from some countries are allowed access to the refugee determination system, but others are not. It also occurs when refugee claimants from some countries are required to pass through the refugee determination system but refugees from other countries are recognized as refugees without even having to jump over the established procedural hurdles.
If the refugee determination system is fair, those claimants who are required to go through the system cannot complain even though they have additional procedural burdens. Nonetheless, they will, in the end, be recognized as refugees. The advantage received by those who escape the determination system is that those who are not refugees may still be recognized as refugees.

Where refugee determination is unfair, the situation is different. Here, genuine refugees who have to go through the system may be rejected. Only refugee claimants who do not have to go through the discrimination system are certain to be recognized as refugees.

It is impossible to say, just by looking at structural discrimination alone, whether the structure is fair or unfair to refugees. The fairness of the determination procedure itself is also relevant. A faulty system is unfair to claimants even in the absence of structural discrimination. Structural discrimination adds to the unfairness.

In Belgium, the government has recognized large groups of Chileans and Indochinese as refugees. The recognition procedure has been simplified. Refugee status is granted to the group as a whole on the assumption that each individual is a refugee. The applicant does not have to convince the authorities on the merits of his individual case.33

The Canadian system is rife with special preferences to refugee claimants from certain countries. Claimants from the Eastern European countries34 and Indochina35 are allowed entry without having to establish a well founded fear of persecution. All they have to show is that they are outside of their country of citizenship, unable or unwilling to return, outside Canada, and are able to become successfully established in Canada. Claimants from four Latin American countries36 and from Poland are also freed from meeting the refugee definition. They are even freed from the requirement of flight, of applying from outside their country of citizenship.37 All they must show is that they are in the country of citizenship, that they have been subjected to penal control for expression of free thought or exercise of civil rights and that they will be able to become successfully established in Canada.

Claimants in these Canadian designated classes are all outside of Canada. What is involved is a combination of determination and re-

34 Canada Gazette, Part II, (1985) at 1576.
36 Chile, Uruguay, Guatemala and El Salvador.
37 Supra, note 35 at 4086.
settlement. There is a first determination of whether the person comes within the designated class. Then if the claim succeeds, the claimant is resettled. Whether a person is recognized as a refugee or as a member of a designated class, his status in Canada is the same. Refugees in Canada who have no other country of refuge are given Minister’s Permits and processed for landing. Members of designated classes are admitted as landed immigrants.

The Refugee Convention contains what is now an anachronistic option: allowing signatories to stipulate that only refugees from Europe may benefit from the Convention and Protocol. It is anachronistic because the Convention was drafted at a time when refugees from Eastern Europe were the main refugee problem the world faced. European refugees are now only a small part of the world refugee outflow. Italy has continued to take advantage of this option. On occasion, Italy has admitted non-European refugees for resettlement, but there is no general right granted to non-European refugees to claim refugee status in Italy. The Italian constitution of 1947 grants aliens denied their democratic liberties the right of asylum. However, there are no procedures established for aliens to realize that constitutional right. Non-European refugee claimants are referred to the UNHCR representative in Italy. If the UNHCR representative recognizes them to be refugees they are permitted to remain, pending resettlement in another country.

The United States from 1965 to 1980 had a conditional entry system. The system allowed those who feared persecution to enter the U.S., subject to numerical regulations, provided they were from any Communist country or from the Middle East. Other refugee claimants had to show they would be subject to persecution. Fear of persecution was not enough.

Under the 1980 Refugee Act the Immigration and Naturalization Service (INS) Central Office has issued operating instructions setting out a procedure for immediate action cases. Nationals of fifteen nations, all Communist, are on this list. State Department interim guidelines for the processing of refugee applications asks consular offi-

38 Asylum in Europe, 3rd Edition (1983) at 217. This article draws generally on this work.
40 Note on Procedures for the Determination of Refugee Status Under International Instruments, A/A C. 96/INF. 152/Rev. 5 at 14. This article draws generally on the U.N. Note on Procedures.
44 Operating Instructions, s.208.8(a)(3).
cers to inform the Department immediately of asylum requests for nationals of these nations.45

VI. MANIFESTLY UNFOUNDED CLAIMS

CANADA HAS A two level decision system. At the first level, the Refugee Status Advisory Committee (R.S.A.C.) does not consider the transcripts of manifestly unfounded claims, but only summaries of the claims prepared by staff. The Task Force on Immigration Practices in its November, 1981 reported titled The Refugee Status Determination Process criticized the screening of manifestly unfounded claims. The guidelines for screening out manifestly unfounded claims did not reflect the refugee definitions. As well, claims were screened out on the basis of credibility, making it almost impossible for the R.S.A.C., relying on summaries alone, to assess credibility.46 The Task Force recommended against screening. Nonetheless, it continues for claims from countries deemed not to be refugee-producing.47

The French Government rejected prescreening, but not without having first proposed it. The Government proposed a manifestly unfounded claims system. In a draft circular the police were authorized to deny the granting of a receipt for a permanent residence request if the refugee claim was bound to be rejected.48 The draft aroused opposition and the circular, as when finally published, did not contain this proposal. The police were instructed to grant a temporary stay to all refugee claimants.49

The Federal Republic of Germany uses the concept of manifestly unfounded claims at the first level of determination by the Federal Agency after a decision is made. If a claim is rejected as manifestly unfounded, the claimant is served with a deportation order at the same time as the decision on his claim. The claimant may appeal the order to an Administrative Court judge in a summary proceeding. A further appeal is not permitted.

For claims the Federal Agency rejects, but does not categorize as manifestly unfounded, the claimant is told he must leave. He is given a deportation order only in the event of non-compliance. The claim-

45 Interim Guidelines, s.4(b).
49 Circulaire du 17 mai, 1985, Recueil Dalloz Sirez at 310.
vant may apply for a full review by a panel of Administrative Court Judges. From there he can go to the Administrative Court of Appeal with leave.

Sweden uses a manifestly unfounded claims system as a threshold requirement. If the aliens police, who interview the claimant, and the Immigration Board, who usually do nothing more than talk to interviewing policemen by phone, find the claim to be manifestly unfounded, that is the end of the matter. The claimant is expelled. In its 1983 Report, “Guidelines for Immigration Policy”, a Swedish Committee on Immigration and Immigrant Policy, recommended that the Immigration Board publish a code of regulations, including guidelines regarding when a claim is manifestly unfounded.

Switzerland has a similar system for port of entry or border claimants. The border guard who interviews normally has a telephone discussion with the Federal Police Office. If the Federal Police Officer considers the claim manifestly unfounded, the claimant will be refused entry to the country.

As well, for Swiss in-land claimants, an oral hearing can be denied for manifestly unfounded claims. A claim is considered manifestly unfounded if the country of origin respects human rights. But whether a country respects human rights may be a matter of dispute. A person may have an individualized well founded fear of persecution, even in a country that generally respects human rights. Also, the Refugee Convention does not cease to apply to someone from a country that used to violate human rights but now respects human rights, where there are compelling reasons arising out of the previous persecution for refusing to return.

None of the systems has in its laws the UNHCR safeguards proposed for manifestly unfounded claims. None states that a claim can be considered manifestly unfounded only if the claim is clearly fraudulent or not related to refugee criteria.

VII. ACCESS TO COUNSEL

THE LACK OF ACCESS TO COUNSEL is a problem at early administrative stages of proceedings. Once a refugee claim gets to court or to quasi-judicial proceedings, access to counsel is usually not a problem.

In Belgium, claimants are denied access to counsel at the initial interview. The interview is for the purpose of determining the admissibility of the application. Admissibility depends, inter alia, on whether

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50 Loi sur L'asile, Art. 16(5).
51 Ordonnance sur L'asile, art. 7(a)(d).
52 Ibid., art. 1C (5).
the claimant has made his claim promptly on arrival in Belgium. On occasion, the Aliens Office interview does inquire into the nature of the claim, though it has nothing to do with the admissibility determination. The results of this inquiry are available to the refugee decision maker, the UNHCR representative in Belgium.

In Canada claimants are denied access to counsel at the port of entry. The Immigration Manual states, "It shall be [Immigration] Commission policy not to permit counsel at [port of entry] examinations." The 1981 Task Force Report recommended that a claimant should have access to counsel immediately upon indicating his intention to ask for refugee status, and should be informed of this right. Although the port of entry interview is not a formal part of the refugee determination process, anything said at the initial interview is accessible to the Refugee Status Advisory Committee and may be used in evaluating the claim. Information with respect to the refugee process may be withheld. Allegations have been made of threats of immediate deportation.

In Sweden a claimant is not entitled to counsel when determining whether his claim is manifestly unfounded. It is only if he passes this initial hurdle and if his reasons for requesting status are not considered to be manifestly unfounded that he becomes entitled to the assistance of legal counsel. In Switzerland, as in Sweden, there is no access to counsel at the border during the determination of whether the claim is manifestly unfounded. In 1980, some members of Parliament proposed that where the manifestly unfounded determination is made at the border, claimants should be granted a right to counsel. The proposal was defeated.

In the United Kingdom, counsel is allowed to attend the refugee interview, but is not allowed to participate. Counsel can ask the interviewer to put specific questions to the claimant, but can ask no questions of the claimant himself.

VIII. AN OPPORTUNITY TO RESPOND

A COMMON CAUSE for denying the opportunity to respond is consideration of foreign affairs reports. Often the decision making authority will consult the reports of the Department of External Affairs about human rights violations in the country of the claimant. The claimant does not get a chance to see these reports or to comment on their accuracy.

53 Canadian Immigration Commission Manual, Immigration Enforcement s.11(3).
54 Supra, note 46 at 21.
Another cause of denial for an opportunity to respond is the fragmentation of the determination system. One official interviews but another decides. The claimant can respond to the interviewing official but he has no opportunity to respond to the deciding official.

Canada has such a fragmented system. At the first level of determination, a senior immigration officer interviews and the Minister, on the advice of the Refugee Status Advisor Committee, decides. The claimant has no opportunity to respond to objections from the Minister or the R.S.A.C. before a determination is made.

The claimant may not comment on additional information the Minister considers before reaching his or her decision. In interpreting the Immigration Act, the Federal Court of Appeal has said that "the Minister may consider and base his/her decision on any evidence or material obtained from any source, without having to give a chance to the claimant to respond to that evidence."

A judgment of the Supreme Court of Canada has said of the Canadian statutory scheme that the R.S.A.C. acts as a decision-making body isolated from the person whose status it is adjusting, and applies policies and makes use of information to which the refugee claimants themselves have no access. The judgment continued that the courts could not import into the duty of fairness owed refugee claimants procedural constraints on the Committee's operation which are incompatible with the decision making scheme set up by Parliament.

In France, the failure of Office Français de Protection des Refugiés at Apatrides (OFPRA) to present objections to the claimant and give an opportunity to respond is shown by the high reversal rate on appeal, as well as by the high rate of revocation of the original decision once an appeal is launched. On appeal, the Commission reversed OFPRA in 12% of cases in 1982. As well, OFPRA revoked its own decision in 13% of the cases in 1982, once an appeal was filed. The reason for this high reversal rate is that it is only after rejection that the claimant finds out the objections to his claim and has a chance to respond. Many of the responses are obviously satisfactory to the authorities and allow them to change their decisions immediately.

56 Immigration Act, S.C. 1976, c.52, s.45.
59 Singh, supra, note 27 at 42, 43 per Wilson J.
The Federal Republic of Germany also has a fragmented system. Before the present law, enacted in 1982, came into force, thousands of claims were denied without an interview by the Federal Refugee Agency on the basis of a statement given by the claimant to the local authorities. The 1982 law guarantees an interview by the Federal Agency. Now at the first level of determination, one Federal Agency officer interviews, and another decides. The deciding authority considers information not communicated to the claimant. The Federal Agency consults Foreign Ministry reports before arriving at a decision.

The Swedish system suffers from fragmentation, as well. If the claimant convinces the authorities his claim is not manifestly unfounded, then he is interviewed in detail by the Aliens Police. The Immigration Board decides the claim on the basis of the report of the interview. The Board considers other information without giving the claimant an opportunity to comment. The Board considers human rights information from the Swedish Ministry of Foreign Affairs in arriving at its decision.

Although the Swiss system for claims not considered manifestly unfounded does not suffer from this split, the manifestly unfounded determination does. For border claims, the border guards interview. The Federal Office of Police, which decides, may speak with the applicant by phone or in person. That is not, however, the normal procedure. For inland manifestly unfounded claims, the cantonal authority interviews, the federal police decide, without interviewing the claimant themselves.

The United Kingdom manifests a split for all claims. An Immigration Officer interviews; the Home Office decides. The claimant has no opportunity to correct an error of the deciding authority. The interview report of the Immigration Office is not submitted to the claimant for correction. The deciding authority considers other information without informing the claimant. The Refugee Unit in the Home Office consults information supplied by the U.K. Foreign Office.

In the United States, the decision maker must obtain an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the U.S. State Department before arriving at a decision. The primary source of BHRHA human rights information is internal to the State Department itself. The U.S. State Department publishes

61 Loi sur L'asile Art. 15(2).
62 Art. II(1), Art. 16(5).
63 Immigration Rules (U.K.), s.73.
64 8 C.F.R., s.208.7.
annually a volume of human rights country analysis. The BHRHA does not restrict itself to this volume, but considers other State Department human rights information as well.

In theory, since the BHRHA gives only advisory opinions and does not decide, and if the opinion were detailed and reasoned, the claimant would have an opportunity to respond to objections to his claim before a decision was reached. In practice, the BHRHA opinions are conclusory documents, showing little or nothing of the reasoning or sources on which the conclusions are based. The deciding authorities customarily regard the BHRHA recommendations as dispositive.

A claimant who seeks asylum before the institution of exclusion or deportation proceedings is interviewed by an immigration officer. Someone else, such as the district director, after receiving a BHRHA opinion, then decides. For a claimant who seeks asylum after the institution of exclusion or deportation proceedings, an immigration judge both hears the claimant, and after receiving a BHRHA opinion, decides.

Although the legal structure is different, the practical reality is much the same as in the other countries examined in this section. In effect, because of the deference given to BHRHA opinions, the immigration judges only interview and the BHRHA decides.

IX. ORAL HEARINGS

COUNTRIES WITH FRAGMENTED DETERMINATION systems obviously do not have oral hearings. But if a second level of determination is offered, an oral hearing might be guaranteed at the second level. However, that is usually not the case.

Formerly in Canada, statute provided for an oral hearing at the Immigration Appeal Board only if, on a written application, the claimant showed that the claim could be established at an oral hearing. But the Supreme Court of Canada declared the statutory provision as an unconstitutional denial of fundamental justice and a denial of the Bill of Rights requirement of a fair hearing. It ordered an oral hearing in every case before the Board. It said that before the hearing

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66 8 C.F.R., s.208.6.
67 Ibid., s.208.8.
68 Ibid., s.208.6, s.208.10.
69 Supra, note 56.
70 Supra, note 27.
a claimant is entitled to discovery of the Minister's case, but it has not
elaborated on what that requirement of discovery entails. Presumably it
means that the claimant is entitled to an examination for discovery of
the Minister's representative before the I.A.B. hears the case. The Court
acknowledged that some of the information upon which the Minister's
case would be based might be subject to Crown privilege. However, the
judgment warned that the courts are able to give the applicant relief if
the Minister attempts to make an overly broad assertion of the privi-
lege.

In France, where the system is not split between a person inter-
viewing and a person deciding, there may still be decisions without
oral hearings. First, a claimant applies to OFPRA by filling out a form.
OFPRA may reject the claimant on consideration of the form without
an interview, or OFPRA may request an interview. It will always grant
a claimant's request for an interview. However, not all claimants, even
all refused claimants, are interviewed.

At the appellate level, the Commission will question the alien and
does not provide interpreters. But an alien who does not understand
the proceedings and is not offered an interpreter is effectively denied
an oral hearing.

In the F.R.G., when the claim is not considered to be manifestly
unfounded, and a full review is granted, the Administrative Court has
the power to request that the claimant appear before the Court for
questioning. There have been an increasing number of determinations
based solely on a written report.

The Swedish Aliens Act of 1980 does not provide for a right to an
oral hearing. An oral hearing may be granted on request, but the re-
quest is seldom granted. Appeals are administrative only, to the Immi-
gations and Equality Division of the Minister of Labour. The claimant
may be reinterviewed by the Aliens Police, but that is all.

In the U.K., for refusals to extend permission to enter beyond the
time originally granted and for deportation, there is a two-tiered appeal
system. The issue of asylum may arise in the appeals. For those who
claim asylum after temporary admission to the U.K., the rules provide
"A person may apply for asylum in the U.K. on the ground that, if he
were required to leave, he would have to go to a country to which he is
unwilling to go owing to a well founded fear of being persecuted for
reasons of race, religion, nationality, membership of a particular social
group or political opinion." For those who are subject to deportation
proceedings, the rules provide that a deportation order will not be

71 Ibid. at 65.
72 H.C. 169, para. 134.
made where the only country to which the person can be removed is one to which he is unwilling to go for fear of persecution by reason of race, religion, nationality, membership of a particular group or political opinion.\textsuperscript{73}

In these appeals, the immigration adjudicator and the Immigration Appeals Tribunal do not merely defer to a governmental determination on refugee status. They make their own determinations.\textsuperscript{74}

However, there is no right to an oral hearing at either level of appeal. At the first appeal level, an immigration adjudicator may determine the appeal without a hearing if he or she is satisfied that no matter arises on the appeal other than an objection by the appellant to removal to a particular country. He must also be of the opinion that matters put forward in writing in support of the appeal do not warrant a hearing.\textsuperscript{75}

At the second level, the Immigration Appeals Tribunal hears refugee appeals with leave of either the adjudicator or the Tribunal.\textsuperscript{76} The rules require the appellate authority to dispose of the application for leave without a hearing unless the authority to whom the application is made considers that special circumstance render a hearing desirable.\textsuperscript{77} Unless the claim is obviously unfounded or the applicant has had an oral hearing before the adjudicator, the English Court of Appeal has rejected the submission that in every case where asylum is claimed there are "special circumstances" justifying an oral hearing on the application for leave.\textsuperscript{78} If leave is granted, there is normally an oral hearing.\textsuperscript{79}

\section*{X. Benefit of the Doubt}

Despite the need and the UNHCR Executive Committee recommendation that claimants be given the benefit of the doubt, it is quite common to see the benefit of the doubt denied to claimants. In Canada the Immigration Task Force in 1981 recommended that the Minister of Immigration instruct the Refugee Status Advisory Committee to give claimants the benefit of the doubt, when the R.S.A.C. was applying the

\textsuperscript{73} H.C. 169, para. 165.
\textsuperscript{75} \textit{Immigration Appeals (Procedure) Rules}, S.I. /72-1684 as amended by S.I. /82-1026, s.12(d).
\textsuperscript{76} \textit{Ibid.}, s.14(2)(b).
\textsuperscript{77} \textit{Ibid.}, s.16.
\textsuperscript{78} \textit{Supra}, note 74.
\textsuperscript{79} \textit{Supra}, note 75, s.20.
refugee definition and when it was assessing credibility. The Minister accepted the recommendation and issued the instructions in 1982.

The Immigration Appeal Board, by statute, was instructed to grant an oral hearing when it considered that on a hearing a claim could be established. The exact wording was: “Where the Board receives an application, ... it shall forthwith consider the application and if, on the basis of such consideration, it is of the opinion that there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established, it shall allow the application to proceed, and in any other case it shall refuse to allow the application to proceed and shall thereupon determine that the person is not a Convention Refugee.” The Federal Court of Appeal interpreted that requirement to mean that “the applicant does not have the benefit of the doubt; on the contrary, the doubt must be resolved against him.” Of the statutory test, the Supreme Court of Canada in 1980 said that the board must allow the claim to proceed only if the board was of the view “that it is more likely than not” the claim will be established at the hearing.

In 1985 the Supreme Court of Canada struck down the system of application for oral hearings as unconstitutional. It ordered an oral hearing in every case. The Court said the statute was of force and effect to the extent of its inconsistency with the principles of fundamental justice. Also, the power to allow hearings to proceed to cases in which the Board is of the opinion that the applicant for re-determination is more likely than not to succeed upon a hearing of his claim is inconsistent with the principles of fundamental justice. The Parliament of Canada has now passed legislation removing that power from the Board. By statute as well as by the constitution there must be an oral hearing in every case. The statute now reads “Where the Board receives an application ..., it shall hold a hearing to determine the application, ... and shall afford the applicant and the Minister a reasonable opportunity to be heard.”

The Swedish government Committee on Immigration and Immigrant Policy recommended in 1983, that “doubtful cases be treated generously.” It proposed guidelines for the Immigration Board, and rec-

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80 Supra, note 46 at 12 and 16.
81 Speech to the National Symposium on Refugee Determination, February 20, 1982.
82 Immigration Act, S.C. 1976-77, c.52, s.71(1).
85 Singh, supra, note 27.
86 Bill C-55, s.5; s.16 passed Oct. 21, 1987.
ommended that the asylum applicant be given the benefit of the doubt. There is no such guideline now.

In the United Kingdom the normal civil standard was used. The claimant had to establish on a balance of probabilities that his claim was well founded. He had to show that it was more probable that he would be persecuted.88 As well, he must discharge the burden of showing that no country, other than the one in which he fears persecution, will accept him.89

If the claimant appeals and wishes to give details he did not give at his original interview, the appellate authority will frequently conclude that the details are suspect,90 There are few successful appeals.91

U.K. appellate authorities have been criticized for failure to appreciate the difficulties claimants have in providing evidence. They do not recognize that a person may have discharged the burden of proof even though there are gaps in the evidence that would justify dismissal of another type of appeal. Several commentators have argued that the test of balance of probabilities is inappropriate.

Instead, the test the House of Lords applied for fugitive offenders should be used in asylum cases.92 A fugitive offender in the U.K. must not be returned for trial if the offender might, on return, be punished by reason of his race, religion, nationality or political opinion. The House of Lords has said that to determine the likelihood of punishment, the test of balance of probabilities is inappropriate. The Court should not ignore the possibility of danger merely because the odds on its happening are fractionally less than even. Instead, the test should be that there was a "reasonable chance," "substantial grounds of thinking," or "a serious possibility" that the person might be punished. The lesser degree of likelihood is appropriate because of the gravity of consequences of error.93 In December 1987 the House of Lords accepted the analogy with fugitive offenders and held that for refugee claimants, too, this lesser degree of likelihood is appropriate.94

88 Supra, note 74 at 127.
89 Secretary of State for Home Department v. Two Citizens of Chile, [1977] Imm. A.R. 36.
91 Grant and Martin, supra, note 55 at 331.
92 Ibid. at 332.
In the United States, the burden of proof is on the applicant to establish that he comes within the refugee definition. For withholding of deportation, the U.S. Supreme Court has said a person must demonstrate a clear probability that his life or freedom would be threatened if he was returned to the country from which he fled. The Court assumed without deciding that the standard of proof for asylum requests is more generous than for deportation withholding requests. This is contrasted with the U.S. Court of Appeals which in some cases has held that there is no difference between the two standards. In other cases, the Court has held that the asylum standard is indeed more generous. The Supreme Court finally decided in March 1987 that the asylum standard is more generous. It is not necessary to establish a clear probability of persecution. A reasonable possibility is enough.

The Select Commission on Immigration and Refugee Policy in its 1981 Report contrasted the ease with which a person belonging to a group qualified for refugee status and who applied outside the country with the difficulties faced by those claiming status inside the U.S. It was found that those claiming outside, members of a qualified group, are accorded a strong presumption of eligibility.

However, those claiming inside the U.S. have to bear an individualized burden of proof. The report calls the procedures "excessively rigorous." The Immigration and Naturalization Service may require the applicant to produce documentary evidence and eye witnesses to substantiate his/her claim. According to one district director, if the clear probability standard were used all the time no one would be given asylum.

The Commission recommended that a presumption be granted to those who belong to groups qualified for refugee status. It proposed that group profiles should be developed and used in assessing individual claims.

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95 C.F.R., s.208.5.
101 Ibid. at 169.
XI. INDIVIDUAL CONSIDERATION

REQUIRING THAT EACH CASE be given individual consideration is different from requiring that a person establish that he/she was singled out for persecution before refugee status can be granted. Each claim must be assessed individually. Once that assessment takes place, a claim cannot be rejected simply because a large number of others could also legitimately fear the same persecution. In Sweden the appeal authority, the Immigration and Equality division of the Ministry of Labour, has been criticized for not considering the facts of the cases. Different decisions have been made for identical fact situations.

In the United States, the BHRHA advisory opinions are often mass-produced form letters containing standardized explanations. In some cases, these were issued within a few days of receipt of factually complex claims containing extensive documentation.

XII. INDEPENDENCE

LACK OF INDEPENDENCE is a universal problem. Virtually every country has its immigration department or its external affairs department involved in the refugee determination process. Some have both.

Belgium generates a unique concern about independence, based on its unique system. In Belgium it is the UNHCR representative who decides refugee claims. Critics have claimed that the independence of the representative is compromised because of the dependence of the UNHCR on governments for financial support and cooperation. In many cases, these governments are governments of countries from which claimants are fleeing.

In Canada, the Refugee Status Advisory Committee (R.S.A.C.) used to consist of members equally from private life, the Department of Immigration, and the Department of External Affairs. All were part time, with departmental people maintaining regular departmental responsibility. The Immigration Task Force Report recommended that members of the R.S.A.C. should sever their ties with the Departments of Immigration and External Affairs.103 The Minister of Employment and Immigration announced in 1982, in reaction to the Report, that departmental appointees would be required to serve full time and be free of departmental responsibilities during the term of their appoint-

ments.\textsuperscript{104} There is not the total separation recommended by the Task Force.

In France, the Director of the Office Francais de Protection des Refugies et Apatrides is a career foreign service officer appointed by the Minister of Foreign Affairs.\textsuperscript{105} OFPRA officers serve under one year contracts at the pleasure of the Director. OFPRA is overseen by a council comprised of representatives from a number of government ministries.\textsuperscript{106} In practice OFPRA is considered independent from government, but the potential for interference is there. Government officials state that they will occasionally call OFPRA to seek expedition or delay in the processing of a claim.

In the F.R.G., the Minister of the Interior appoints the director of the Federal Agency that decides. Agency interviewers and decision makers may be appointed for one year terms. It is claimed that if the one year appointees do not follow government policy, they can be removed. Civil servants hoping to advance their careers may have difficulty ignoring the Minister's political stand.

In Sweden, the Immigration Board is headed by an executive committee composed primarily of members of Parliament appointed by the government. The Board is autonomous from the Swedish Government. Instead, it is answerable to its executive committee. The Director General of the Board is chairman of the executive committee. The government tries to keep the committee membership politically balanced. The Board itself consists of civil servants handling all immigration matters. Appeal is through other civil servants to the Minister of Labour.

In Switzerland, the decision maker is the Federal Police Office.\textsuperscript{107} The Office is the immigration enforcement branch of the government.

In the United Kingdom, both the interview and the decision are done by officers within the Immigration and Nationality Department of the Home Office. The Department has an overall immigration enforcement responsibility.

In the United States, an advisory opinion comes from the Department of State. Both interviews and decisions for claimants who apply for asylum before the commencement of deportation or exclusion hearings, are done by officials of the Immigration and Nationalization Service. Until 1983, Immigration judges, who hear and decide claims for those who apply in deportation or exclusion hearings were, until

\textsuperscript{104} Speech to the National Symposium on Refugee Determination, February 20, 1982, at 16.
\textsuperscript{105} Le Decret No. 53-377 du 2 mai, 1953, Art. 1 Recueil Dalloz at 158.
\textsuperscript{106} Art. 9-14.
\textsuperscript{107} Loi Sur L'asile, Oct. 5, 1979, Art. 11(1).
1983, appointed by the I.N.S. Since 1983, however, the I.N.S. power to appoint has ceased. Appointments are made by the Department of Justice. However, the bulk of the Immigration judges now on the bench are I.N.S. appointees, appointed before 1983, because when the appointment system changed, the I.N.S. appointees were not expected to resign.

XIII. QUALIFICATIONS

FOR MOST COUNTRIES, refugee interviewers have little training and knowledge of human rights abroad is limited. Interviewers often mix refugee work with other work.

In Canada, the Senior Immigration Officers (SIOs) who interview claimants do not specialize in refugee matters. At one time SIOs used to make recommendations on the claims, but this practice stopped due to complaints that the SIOs were not qualified to do so.108

Likewise, the Immigration Appeal Board is not a specialized body. It deals with all immigration matters, not just refugee matters. The Ministerial Task Force recommended that the Board create specialized panels to deal with refugee claims,109 but that recommendation has not been implemented. The Task Force noted that the Board is frequently faced with inadequate background country information.110

In France, there is a lack of structured training programmes for OFPRA officers. OFPRA has no documentation centre of its own. OFPRA officers are not as well-informed about human rights developments abroad as they could be.

In Germany, most Federal Agency refugee claimant interviewers have no special qualifications. They are given training sessions after they have begun work.

In Sweden, except in the large cities, the interviewing officer is not a full time specialist in refugee cases. The Aliens Police has little knowledge of human rights conditions in origin countries.

In Switzerland, again, except in the major cities, interviewing officers do not specialize in refugee cases. The officers have little knowledge of the political situation in countries of origin and no systematic access to country information.

In the United Kingdom, the local officer who interviews is not a refugee specialist. He is normally a junior officer who will not necessarily have any training or knowledge about refugee law or human rights violations abroad. Interpreters are often not used. Questions that

108 Supra, note 46 at 34.
109 Ibid. at 72.
110 Ibid. at 73.
are relevant in assessing the usual immigrant are covered thoroughly. Questions relevant to refugee status are given cursory treatment. For the officer who decides, there is no formal training programme.

In the United States, I.N.S. officers have no specialized refugee training, nor do they specialize in refugee work. The examiners have a low level of knowledge of human rights situations in the countries of origin. Immigration judges receive no training in international refugee law or techniques of asylum adjudication. Their knowledge of international matters is limited.

XIV. APPEAL

Despite the seriousness of the refugee decision, there are countries that deny appeals to claimants. Belgium is one of them. The logic behind Belgium's denial is that the refugee decision is made by an international official, the UNHCR representative in Belgium. Such a decision is outside the competence of the Belgian courts. The UNHCR representative has the authority to reopen a case and seek the advice of UNHCR headquarters.

In Sweden there is an appeal, but it is entirely administrative. There is no access to the courts. Appeal is to the Immigration and Equality Division of the Ministry of Labour. A claimant at the border whose claim is determined to be manifestly unfounded can be expelled even if he has submitted an appeal.

In Switzerland, there is an administrative appeal system to the Federal Department of Justice and Police, but there is no appeal to the courts.

In the United Kingdom, port of entry claimants cannot appeal. The Immigration Act provides that a person is not entitled to appeal against a refusal of leave to enter, so long as he is in the United Kingdom unless given prior entry clearance. An appeal abroad is of little use to the claimant. Even if a claimant on appeal is recognized as a refugee, it means nothing since a refugee abroad does not have a right to enter.

Those who entered illegally cannot appeal denials of refugee status, and an illegal immigrant can be removed from the U.K. without a deportation order. All that is necessary is a direction for removal. The

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111 Supra, note 90.
112 Loi sur L'asile, Art. 11(2), Art. 47(2).
113 The Immigration Act (U.K.), c.77, Part II, s.13(3).
114 Secretary of State for the Home Department v. X (A Chilean Citizen) (1978), Imm. A.R. 73.
115 Supra, note 113, s51(1) and Schedule II, para. 9. See I.A. MacDonald, Immigration Law and Practice in the United Kingdom (London: Butterworths, 1983) at 276.
claimant may appeal the decision that he is illegal, but only after he has
left the country.\textsuperscript{116} He cannot, in this appeal, raise the issue of refugee
status.\textsuperscript{117}

Finally, a claimant convicted of an offence punishable by impris-
onment, and recommended for deportation by the court, has no power
to appeal a negative refugee determination within the immigration
appeals system.\textsuperscript{118} He does have a right to appeal his conviction and
sentence within the criminal courts system. However, on that appeal,
he cannot raise his refugee claim.\textsuperscript{119} As well, he does have a right to
appeal, within the immigration appeals system, a direction that he be
removed to a particular destination.\textsuperscript{120} However, on that appeal he can
only argue that he should be removed to another country, not that he
can stay. If there is no other country that will take him, he has no argu-
ment at all.\textsuperscript{121}

In the U.K., overstaying is an offence punishable with imprison-
ment.\textsuperscript{122} So, if a claimant overstays, he will lose his right to appeal his
refugee claim should the Crown choose to prosecute him for the over-
stay.

In the case of port of entry refusal, the British courts have said that
judicial review is available, because the right of appeal is useless.\textsuperscript{123}
Presumably the courts would also consider available judicial review of
refusals of claims made by illegal entrants or by those recommended
for deportation by a criminal court judge as part of sentencing for an
offence. Judicial review requires leave of the court. There is no re-
ported case of leave ever having been granted to a refugee claimant.

It is unlikely such leave would be given. The Court of Appeal has
said: "the courts are not concerned with the political systems which
operate in other countries. The court has no knowledge of those mat-
ters over and above that which is common knowledge; and that may be
wrong. It would be undesirable for this court or any other court to ex-
press views about regimes which exist outside the U.K."\textsuperscript{124}

\textsuperscript{116} \textit{Supra}, note 113, s.16(2).
\textsuperscript{117} \textit{Ibid.}, s.16(1),(3) and MacDonald, \textit{supra}, note 115.
\textsuperscript{118} \textit{Supra}, note 113, ss. 3(6), 6(1) and 15.
\textsuperscript{120} \textit{Supra}, note 113, s.17.
\textsuperscript{121} \textit{R. v. I.A.T., ex parte Murugandarajah} (1983), Imm. A.R. 141.
\textsuperscript{122} \textit{Supra}, note 113, s.24(6)(i).
\textsuperscript{123} \textit{R. v. Chief Immigration Officer Gatwick Airport, ex parte Kharrazi}, [1980] 1
\textsuperscript{124} \textit{Supra}, note 119 at 1373 (W.L.R.).
XV. REASONS

ALTHOUGH SOMETIMES no reasons are given, a more significant problem is that only scanty, limited reasons are given. In Belgium, the UNHCR representative gives no reason for a negative decision. Nor does the claimant or his lawyer have complete access to the file on which the decision was based.

But in Canada, the Immigration Task Force criticized as inadequate the reasons of the Minister for refusing a refugee claim. The reasons often consist of merely a few sentences. They do not always deal with the substantial points that have been raised. They seldom relate the findings of fact upon which their conclusions are based. They are conclusions, rather than reasons.125

At the Immigration Appeal Board level, reasons are not automatic. The Board has the power to give reasons. At the request of the Minister or the claimant, it must give reasons.126 The problem with reasons on request is that it does not mesh with the review power of the Federal Court. A claimant can apply for review of denial of his claim by the I.A.B. to the Federal Court. However, the application must be filed with the Court within ten days of receipt of the judgment of the Board. There is no time, within the ten days, for the claimant to apply for and receive the reasons of the Board. As a result, the claimant must file for review before he sees the reasons, before he knows why he was refused. The claimant can apply for review in the absence of the reasons, but is ill-placed to do so. The reasons usually arrive before the application for review is actually heard.

The Immigration Task Force recommended that the I.A.B. give reasons for every negative refugee decision.127 The Law Reform Commission of Canada recommended that the time limit for applying for a review be ten days from the receipt of reasons rather than ten days from the date of the decision. As well, the claimant would have to request reasons within ten days of the decision.128

In France, a lack of notification of a decision by OFPRA within four months of filing the claim is considered an implicit rejection of the claim. The claimant is entitled to appeal from this implicit rejection. The appeal must be filed within one month of the four months ex-

125 Supra, note 46 at 53.
126 Supra, note 82, s.71(4).
127 Supra, note 46 at 74-5.
A person who is appealing without notification of a decision is even less able to argue his appeal than a person with a decision but no reasons. A claimant may await the decision, even if it takes more than four months, and then appeal.

In Sweden, negative decisions have only limited reasons. The applicant may be told only that he does not fulfill the criteria for refugee status. But he or she may not be told which criteria he does not fulfill. In Switzerland, Federal Police Office opinions are criticized for poor reasoning.

In the United Kingdom, the Home Office gives no reasons for refusal. An unfavourable decision simply states that the applicant has failed to show that he qualified for asylum. If the applicant has a right of appeal and does appeal, the Home Office will deliver an explanatory statement for the appeal. However, this statement often lacks detail.

In the United States, BHRHA advisory opinions are in practice, "yes" or "no" opinions. They say nothing about countries friendly to the U.S. because the State Department does not want to be in a position of admitting its support for a government involved in persecution. The opinions do not respond to the allegations made by the claimants.

XVI. SYSTEMIC BIAS

WHEN PROCEDURES ARE FAULTY, there is scope for bias. Proper procedures can prevent the exercise of bias. Unfair procedures lead to unfair results.

In Belgium, the government authorities are reported to have reached a tacit understanding with the UNHCR that Zairians are not to be recognized as refugees. Zaire is a former Belgian colony. Belgium, for political and economic reasons, does not want to incur the anger of the present Zaire regime. There is a presumption at the UNHCR in Belgium that Zairians are not bona fide refugees.

In France, changes in recognition rates have followed political shifts. Since Mitterand took power OFPRA is granting refugee status to a substantially higher percentage of Haitian claimants, up to 60% in 1981, and up to 90% in 1982.

In the F.R.G., critics have charged that there is selective restrictionism. There is a bias in favour of applicants from Eastern Europe and against applicants from countries such as Turkey and Pakistan. One of the principal targets of an upsurge in xenophobia has been non-Euro-

129 Le décret no. 53-377 du mai 1953, Art. 10; see also Asylum in Europe, supra, note 38 at 128.
130 Supra, note 55 at 330.
131 Supra, note 33 at 32.
pean seekers of political asylum. In 1980 the recognition rate for asylum applicants from Eastern Europe was 51.8%. For Asia it was 21.8%. For 1982, the figures were 40.8% for Eastern Europe and 3.8% for Asia.

In Sweden, the government has developed biases based on a claimant’s country of origin. For instance, it is difficult for a Turkish applicant to be granted refugee status. A Polish applicant, on the other hand, has a good chance.

In Switzerland, refugee protection organizations criticized the government for giving preferential treatment to applicants from Eastern Europe. The response of the government was not to increase the rate of recognition for non-East European applicants, but rather to drop dramatically the rate of recognition for East European applicants.

In the United States, ideology dominates asylum decision making. Grants of asylum to those who flee Communist dominated regimes are generous. Grants of asylum to those who flee regimes friendly to the U.S. are far less generous. For example, for fiscal year 1986 to December 1985 36% of Russians, and 52% of Ethiopians who filed political asylum claims with District Directors received it. On the other hand, only 3% of Guatemalans and 7% of Salvadorans who filed asylum claims with District Directors received it.

XVII. CONCLUSIONS

THIS PAPER IS AN ETIOLOGY more than a description. As a refugee lawyer in private practice in Canada, I meet genuine refugees who have come to Canada after having been refused refugee status elsewhere. I see genuine refugees refused refugee status in Canada. I have talked to refugee lawyers in other countries who see what I see, that genuine refugees are being denied status, not occasionally or accidentally, but wholesale and systematically. The purpose of this paper is to trace the causes of this general failure of refugee determination systems.

It is ironic that refugees fleeing persecution should face this universal denial of fairness in refugee determination systems. Refugees flee their home countries because they are victims of human rights violations. They seek protection in the countries of refuge because they believe they will find respect for human rights there.

The Convention signatories, by committing themselves to protect refugees, are committing themselves to respect human rights. Yet, denial of fairness is denial of a human right. The legal requirements of fairness, natural justice, fundamental justice, or due process that are found in the countries examined are often found in legislated or constitutionally entrenched statements of human rights. The Supreme
Court of Canada, for instance, invalidated the Canadian refugee determination procedure, with one judgment finding the procedure a violation of the duty to give a fair hearing, and another judgment finding the procedure a violation of the requirement of fundamental justice. The duty to give a fair hearing is part of the legislated Canadian Bill of Rights. The requirement of fundamental justice is part of the constitutionally entrenched Canadian Charter of Rights and Freedoms.

When a refugee faces an unfair determination process he faces a facet of the human rights violations he has been fleeing. His persecution at home may indeed have been denial of a fair trial. Signatories to the refugee Convention owe refugees fair determination systems not merely to prevent forcible return of refugees. Fair determination systems are needed to manifest the signatories' ostensible commitment to human rights.

A.V. Dicey, in his Introduction to the Study of the Law of the Constitution noted a distinction between the constitution of England and the constitution of most foreign countries. He said that there is, in the English constitution, an absence of those declarations or definitions of rights so dear to foreign constitutionalists. He contrasted the French constitution of 1791, with its proclamation of rights and liberties, to the English constitutions.

In France, during the French revolution, those proclaimed rights were completely non-existent. On the other hand, according to Dicey, in England there is an inseparable connection between the means of enforcing a right and the right to be enforced. Englishmen fixed their minds far more intently on providing remedies for the enforcement of particular rights than upon any declaration of rights.

It is ironic reading Dicey today and comparing the refugee determination systems of the United Kingdom and France. The French system, though not ideal, offers far better procedural protections than the British. The French grant an oral hearing on request. There is also a right of appeal. The British justify their system, with its absence of procedural protections, as flexible, as giving authorities a broad discretion to allow a claimant not meeting the refugee definition to remain.

Whether Dicey was fair in his comparisons of France and England or not, the point of principle he makes is a valid one. Rights without remedies are valueless. It is not enough to legislate the refugee definition. Unless fair procedures are established to determine refugee claims, genuine refugees will continue to be refused and forcibly returned to countries where their lives are in danger.