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Article abstract

The refugee determination process under the *Immigration Act, 1976* comprises many steps which have been the subject of judicial interpretation. An individual claiming to be a "Convention refugee" in Canada will first be examined under oath with regard to his claim. The Refugee Status Advisory Committee will study the transcript of this examination. After obtaining the advice of the Committee, the Minister of Employment and Immigration will determine whether or not the claimant is a "Convention refugee". Should this determination be negative, the person concerned will have the choice to apply to the Immigration Appeal Board for a redetermination of his claim. At this stage, the Board will grant an oral hearing to the applicant and render a decision thereafter if it is of the opinion that there are reasonable grounds to believe that he could prove that he is a "Convention refugee". If no oral hearing is granted, the Board will determine that the applicant is not a "Convention refugee". The Federal Court and the Supreme Court of Canada have had a considerable input in the interpretation of the provisions relating to this refugee determination process, including the wording of the definition of "Convention refugee". This paper limits itself to a review of the decisions rendered by these courts.

CHRONIQUE DE JURISPRUDENCE

Redetermination of a Claim to Be a Convention Refugee; A Review of the Jurisprudence*

by
ROGER CANTIN**

ABSTRACT

The refugee determination process under the Immigration Act, 1976 *comprises many steps which have been the subject of judicial interpretation. An individual claiming to be a "Convention refugee" in Canada will first be examined under oath with regard to his claim. The Refugee Status Advisory Committee will study the transcript of this examination. After obtaining the advice of the Committee, the Minister of Employment and Immigration will determine whether or not the claimant is a "Convention refugee". Should this determination be negative, the*

RÉSUMÉ

Le processus d'examen d'une « revendication » du statut de réfugié en vertu de la Loi sur l'immigration de 1976 *comporte un ensemble de règles de procédure qui ont fait l'objet d'interprétations jurisprudentielles. La personne qui revendique au Canada le statut de « réfugié au sens de la Convention » est d'abord interrogée sous serment. Le comité consultatif sur le statut de réfugié étudie cet interrogatoire. Après avoir obtenu l'avis du comité, le ministre de l'Emploi et de l'Immigration décide si la personne est un « réfugié au sens de la*

* It should be pointed out that at the time of writing this paper, the Supreme Court of Canada had heard argument in seven appeals by refugee claimants challenging provisions of the *Immigration Act, 1976* relating to the refugee determination process as being contrary to the *Canadian Charter of Rights and Freedoms*. The Court's decision is yet to be handed down.

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person concerned will have the choice to apply to the Immigration Appeal Board for a redetermination of his claim. At this stage, the Board will grant an oral hearing to the applicant and render a decision thereafter if it is of the opinion that there are reasonable grounds to believe that he could prove that he is a ''Convention refugee''. If no oral hearing is granted, the Board will determine that the applicant is not a ''Convention refugee''. The Federal Court and the Supreme Court of Canada have had a considerable input in the interpretation of the provisions relating to this refugee determination process, including the wording of the definition of ''Convention refugee''. This paper limits itself to a review of the decisions rendered by these courts.

Convention ». Advenant une décision négative, cette personne peut présenter une demande de réexamen de sa « revendication » auprès de la Commission d'appel de l'immigration. À ce stade de la procédure, la Commission accordera une audition au demandeur, suite à laquelle elle rendra sa décision, si elle est d'avis qu'il existe des motifs raisonnables de croire que le demandeur pourrait vraisemblablement prouver qu'il est un « réfugié au sens de la Convention ». Si elle n'accorde pas d'audition, la Commission doit décider que le demandeur n'est pas un « réfugié au sens de la Convention ». La Cour fédérale ainsi que la Cour suprême du Canada ont eu l'occasion à maintes reprises d'interpréter les dispositions relatives à ce processus d'examen d'une « revendication » du statut de réfugié, y compris la définition de « réfugié au sens de la Convention ». Le présent article se limite à une revue des décisions rendues par ces tribunaux.

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INTRODUCTION

The *Immigration Act, 1976,*[1] which came into force on April 10th, 1978, contains many provisions relating to refugees. It incorporates the definition of "Convention refugee" from the Geneva Convention and Protocol.[2] The new procedures concerning refugee status have, since proclamation of the Act, been discussed and interpreted in various manners by a whole new body of case law.

Through the jurisprudence at the Federal Court and Supreme Court of Canada levels, this paper will summarize the different steps which may be involved in making a claim to be a Convention refugee. The procedure leading to the Minister's determination of a claim will be examined. In the event of an unfavourable determination by the Minister, the

1. *Immigration Act, 1976*, S.C. 1976-77, c. 52.

2. *Id.*, ss. 2(1), (2); *United Nations Convention Relating to the Status of Refugees*, HCR/INF/29/Rev. 4, chapter 1, article 1, paragraph A(2). It should be noted however that this convention as well as other conventions relating to civil rights are not part of the domestic law of Canada and as such, do not confer any additional legal rights on individuals. They may possibly be relied on as aids to interpretation through paragraph 3(g) of the *Immigration Act, 1976, Ibid.* See *Re Vincent and M.E.I.*, (1983) 148 D.L.R. (3d) 385 (F.C.A.), leave to appeal granted on December 19, 1983. See also *M.E.I.* v. *Hudnik*, [1980] 1 F.C. 180 (C.A.); *Re Naredo and M.E.I.*, (1981) 130 D.L.R. (3d) 752 (F.C.A.).

person concerned may then apply to the Immigration Appeal Board for a redetermination of his claim. The proceedings before the Board will therefore also be examined with a view to setting out the proper tests which it may apply when making a decision on whether or not to give an applicant the opportunity to be heard with respect to his claim. The paper will also review the wording of the definition of "Convention refugee" contained in the Act.

I. STEPS LEADING TO THE APPLICATION FOR REDETERMINATION

1) Requirement that claim to refugee status be made during inquiry

Before dealing with sections 70 and 71 *per se*, it is useful to outline the different steps that may eventually lead to an application for redetermination. At the inquiry of an adjudicator following a report that a person does not have or has lost status to be in Canada,[3] that individual may claim to be a Convention refugee.[4] It has to be pointed out that the only legal way for an individual to claim refugee status within Canada is to be the subject of an inquiry and make the claim during the course of that inquiry. This was reaffirmed recently by the Federal Court of Appeal[5]:

> It remains, however, that the right to claim Convention refugee status and to have the claim determined by the Minister is limited by the *Immigration Act, 1976* to a claim which is made during an inquiry. This limitation is imposed as part of a legislative scheme established by Parliament acting within its legislative competence: [. . .][6]

It also appears that if an inquiry is completed and a deportation order issued, it is then too late to claim refugee status. Moreover, the adjudicator is under no obligation to reopen an inquiry to permit a claim for refugee status to be made:

> [. . .] until the law is amended so as to permit applications for refugee status to be made outside an inquiry, the Court cannot so direct, nor can any fault be found with the decision of the adjudication officer to refuse to apply section 35 of the Act to reopen the inquiry. This is a discretionary section and the application of it is an administrative matter, permitting the reopening to receive "additional evidence or testimony". The desire to now apply for refugee status is not "additional evidence or testimony" [. . .][7]

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3. *Immigration Act, 1976, supra*, note 1, ss. 20, 27.
4. *Id.*, s. 45.
5. *Re Vincent and M.E.I., supra*, note 2. See also *M.E.I.* v. *Hudnik, supra*, note 2.
6. *Re Vincent and M.E.I., supra*, note 2, 389.
7. *Dosanjh, Kewal and M.E.I.*, (F.C.T.D., no. T-683-83), Walsh, March 25, 1983.

2) Examination under oath by senior immigration officer

When a claim to refugee status is made during an inquiry, the presiding adjudicator will first determine whether a removal order or departure notice would have been made or issued if it had not been for the claim. If he concludes in the affirmative,[8] he will then adjourn the inquiry and the claimant will be examined under oath by a senior immigration officer, with respect to his claim.[9] At this stage, the proceedings are neither judicial nor quasi-judicial, but purely administrative.[10] The limits of the examination under oath are well described in the *Saraos*[11] case:

> The examination under oath made pursuant to subsection 45(1) is merely an examination of the person claiming to be a refugee. It is not an inquiry on the validity of the claim. The senior immigration officer conducting the examination acts irregularly, therefore, if he does more than examine the claimant. For example, he cannot examine a person other than the claimant; neither can he produce documents in order to refute the claimant's assertions.[12]

Throughout the whole process of determination of a claim to be a Convention refugee, the examination under oath of the applicant will play a major role. The question arises as to what remedies the claimant may seek in order to correct irregularities which may have occurred at his examination. This issue was dealt with in *Re Singh (Kashmir) and M.E.I.*[13] where the applicant was denied his right to counsel[14] during a portion of his examination under oath. In that case, Mr. Justice Thurlow suggested that any irregularities or defects in the course of the proceedings leading up to the Minister's determination may be attacked by way of an application to the Federal Court, Trial Division,[15] for *certiorari* to quash the

8. Speaking of the adjudicator's conclusion at this point, Justice Thurlow in *Ferrow* v. *M.E.I.*, [1983] 1 F.C. 679 (C.A.), states at page 688: "[. . .], the determination so made is, in my view, nothing more than an expression of opinion and will not be a decision that is open to review under s. 28 until it is implemented by the making of a deportation order. As I see it, the determination is not at present binding on anyone." Moreover, in *Re Gill and M.E.I.*, (1983) 144 D.L.R. (3d) 480 (C.A.), it is stated that when the adjudicator adjourns the inquiry pursuant to subsection 45(1), he does not and should not decide which of the two orders should be made but is only required to conclude that one or the other should be made.

9. *Immigration Act, 1976, supra,* note 1, subsection 45(1).

10. See *Brempong* v. *M.E.I.*, [1981] 1 F.C. 211 (C.A.).

11. *Saraos* v. *M.E.I.*, [1982] 1 F.C. 304 (C.A.).

12. *Id.*, 307. This would not appear to prevent the applicant from calling witnesses at the examination under oath. In this regard, see *Satiacum and M.E.I.*, (F.C.T.D., no. T-555-84), Walsh, March 30, 1984, 10.

13. *Re Singh (Kashmir) and M.E.I.*, (1983) 3 D.L.R. (4th) 452 (F.C.A.); this decision was followed in *Dhaliwal, Malkiat Singh and M.E.I.*, (F.C.A., no. A-772-83), Urie, Stone, Lalande, December 15, 1983.

14. *Immigration Act, 1976, supra,* note 1, subsection 45(6).

15. *Federal Court Act,* R.S.C. 1970 (2nd Supp.), c. 10, section 18.

said determination. If successful, the applicant would be entitled to a new examination under oath. However, Mr. Justice Thurlow added that if the applicant chooses to apply to the Board for a redetermination of his claim, he has the opportunity through his declaration under oath,[16] to make such representations as he deems relevant to his application. These representations include "any facts in support of his claim which may not have been included or may have been incompletely or inadequately included in the transcript of his examination before a senior immigration officer".[17] The applicant, in choosing this course of action, could not, however, obtain from the Board redress in respect of irregularities in the conduct of his examination or in the procedure leading to the Minister's determination. The reasoning concerning the applicant's right to counsel followed:

> The rights of a person claiming refugee status to counsel and to compliance with subsection 45(6) are his own. They are capable of being waived by him. If they have been denied he may have an avenue for redress by *certiorari* to quash the Minister's determination. But if instead of or in addition to such a procedure he takes the course of applying to the Immigration Appeal Board for redetermination of his claim he must, in my opinion, do so on the terms prescribed by the statute and *he cannot expect from such a proceeding any relief that the Immigration Appeal Board is not authorized by the statute to give*. If he applies to the Board he will have to put before it the transcript of his examination, whatever the defects in the conduct of the examination may have been. He will of course have his opportunity to include in his declaration whatever further or other information he thinks may advance his case. But when that has been done and the matter comes before the Board for consideration he must also accept and recognize that *the only question the Board is authorized to consider on his application is not whether he has been properly examined before the Minister made his determination* but whether in the Board's opinion, on the information in the transcript and declaration, there are reasonable grounds to believe that the applicant's claim for Convention refugee status could, upon the hearing of the application, be established. In answering that question, *defects in the examination procedure of the kind here in question in my opinion are irrelevant. Nor is the Board authorized to give any relief in respect to them.*[18]

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16. *Immigration Act, 1976, supra,* note 1, subsection 70(2).

17. *Re Singh (Kashmir) and M.E.I., supra,* note 13, 457.

18. *Id.*, 464-65. According to Mr. Justice Thurlow, the Board could possibly deal with a redetermination otherwise than as directed by subsection 71(1) of the Act in a case where "what occurred at the examination was so fundamentally erroneous as to be a basis for treating the Minister's determination as a nullity [. . .]". In such a case, the Board could quash or refuse to entertain the application on the ground that there had been no Minister's determination. This was the case in *Re Singh (Daljit) and M.E.I.*, (1983) 3 D.L.R. (4th) 479 (F.C.A.), where the majority of the Court set aside the Board's decision on the basis of improper and damaging credibility comments made by the senior immigration officer presiding over the examination under oath. The Board was clearly told it should have dealt with the redetermination application *otherwise* than as directed by subsection 71(1) of the Act in that it should have refused to entertain the application on

(emphasis added)

Mr. Justice Stone agreed with the reasons given by the Chief Justice and also appeared to be of the opinion that an application for redetermination to the Board may in fact amount to a waiver of the irregularities which occurred at the examination under oath:

> Although I would agree that the Applicant cannot be taken to have waived the irregularity while the examination was being conducted, he may be taken to have done so by making application to the Immigration Appeal Board for redetermination of his claim on the basis of the transcript of that examination and the content of his statutory declaration. *The application to the Board was an entirely fresh proceeding.*[19]
> (emphasis added)

3) Minister's determination

The claim and the transcript of the examination under oath will then be referred to the Minister for determination and a copy of the said transcript will also be forwarded to the claimant.[20] The Minister will in turn refer these same documents to the Refugee Status Advisory Committee for advice.[21] After obtaining the advice of the Committee, the Minister will determine whether the claimant is or not a Convention refugee.[22] The Minister's determination is not required to be carried out in a quasi-judicial manner[23] and it appears that he may "consider and base his decision on

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the ground that there had been no valid Minister's determination. Such a decision by the Board could leave the applicant in a rather uncomfortable situation since according to the *Saraos* decision (*supra*, note 11), the Board cannot annul the Minister's determination otherwise than by making its own determination. This particular area of the jurisprudence is still nebulous at this time.

19. *Re Singh (Kashmir) and M.E.I.*, *supra*, note 13, 465. See however the recent decision in *Grewal, Narinder Singh and M.E.I.*, (F.C.T.D., no. T-669-84), Muldoon, April 25, 1984, for possible problems of interpretation.

20. *Immigration Act, 1976*, *supra*, note 1, subsections 45(2), (3); in *Singh (Cheema), Jagdishar and M.E.I.*, (F.C.A., no. A-487-83), Heald, Mahoney, Lalande, October 26, 1983, the provisions of subsection 45(3) had not been complied with. The Board's decision was set aside and the matter referred back to it for redetermination. The applicant was entitled to file another declaration under oath pursuant to subsection 70(2) of the Act.

21. *Immigration Act, 1976*, *supra*, note 1, subsection 45(4), section 48.

22. *Id.*, subsection 45(4). See *The Refugee status determination process, Report of the Task Force on Immigration Practices and Procedures established by the Honourable Lloyd Axworthy, Minister of Employment and Immigration in September, 1980*, 132 pages, p. 51: "Although, in fact, the RSAC effectively decides the vast majority of refugee claims, in law it merely advises the Minister. It is the Minister who is authorized by the Immigration Act to make the determination of refugee status."

23. See *Brempong* v. *M.E.I.*, *supra*, note 10. See also *Saraos* v. *M.E.I*, *supra*, note 11.

any evidence or material, obtained from any source, without having to give a chance to the claimant to respond to that evidence.''[24] The Federal Court of Appeal is without jurisdiction to review the Minister's determination pursuant to section 28 of the *Federal Court Act*.[25] One recent decision[26] suggests that the Trial Division could possibly quash the said determination *via* a Writ of *Certiorari* if there had been irregularities at the examination under oath, whether or not these irregularities were of such a character as to render the Minister's determination utterly void. It is however doubtful that the Trial Division can force the Minister to give reasons for his determination.[27]

Whatever the determination is, the Minister will inform the senior immigration officer and the person concerned.[28] If the claimant is determined not to be a Convention refugee, he may then apply to the Immigration Appeal Board for a redetermination of his claim that he is a Convention refugee.[29] This application *shall* be made within fifteen days after he is informed of the decision of the Minister.[30] It seems that the declaration under oath which accompanies the application does not have to be filed within fifteen days, as long as it is filed with the Board before it forms an opinion under subsection 71(1) of the Act.[31]

II. APPLICATION FOR REDETERMINATION

At this point, the proceedings before the Board become judicial in nature[32] and involve two steps which are outlined in section 71 of the Act:

> 71.(1) Where the Board receives an application referred to in subsection 70(2), 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.

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24. *Saraos* v. *M.E.I., supra,* note 11, 307-308.

25. See *Brempong* v. *M.E.I., supra,* note 10.

26. *Re Singh (Kashmir) and M.E.I., supra,* note 13. See however *Grewal, Narinder Singh and M.E.I., supra,* note 19.

27. *Brempong* v. *M.E.I., supra,* note 10.

28. *Immigration Act, 1976, supra,* note 1, subsection 45(5).

29. *Id.,* section 70.

30. *Immigration Appeal Board Rules, (Convention refugees), 1981,* SOR/81-420, rules 19-20; *Immigration Regulations, 1978,* SOR/78-172, as amended, section 40(1). If no such application is made, the initial inquiry will be resumed and the adjudicator presiding ''shall make the removal order or issue the departure notice that would have been made or issued but for that person's claim that he was a Convention refugee'' (*Immigration Act, 1976, supra,* note 1, sections 32(6), 46).

31. See *infra,* pages .

32. See *Saraos* v. *M.E.I., supra,* note 11.

(2) Where pursuant to subsection (1) the Board allows an application to proceed, it shall notify the Minister of the time and place where the application is to be heard and afford the Minister a reasonable opportunity to be heard.

(3) Where the Board has made its determination as to whether or not a person is a Convention refugee, it shall, in writing, inform the Minister and the applicant of its decision.

(4) The Board may, and at the request of the applicant or the Minister shall, give reasons for its determination.
(emphasis added)

Evidence which may be considered

1) Subsection 70(2) of the Act

a) GENERAL

First, the Board will make a decision on whether or not to allow the applicant's claim to proceed to a hearing. The documentary evidence which the Board will consider *shall be filed by the applicant pursuant to subsection 70(2)*[33] which reads as follows:

70.(2) Where an application is made to the Board pursuant to subsection (1), the application shall be accompanied by a copy of the transcript of the examination under oath referred to in subsection 45(1) and shall contain or be accompanied by a declaration of the applicant under oath setting out

(a) the nature of the basis of the application;

(b) a statement in reasonable detail of the facts on which the application is based;

(c) a summary in reasonable detail of the information and evidence intended to be offered at the hearing; and

(d) such other representations as the applicant deems relevant to the application.

The above quoted section was dealt with extensively in the *Saraos*[34] case and three factual situations were outlined:

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33. In *Joseph, Godfrey Keith and M.M.I.*, (F.C.A., no. A-947-82), Pratte, Heald, Clement, July 11, 1983, the Federal Court of Appeal stated, at p. 4 of its decision, that "[. . .], a senior immigration officer presiding over an examination under oath of an applicant has no part to play in the transmission of documents to the Immigration Appeal Board if that applicant later files an application for redetermination under section 70. Under subsection 70(2), the documents to be considered by the Board in making a determination under subsection 71(1) are to be filed by the applicant himself with his application to the Board." See however *infra*, note 39.

34. *Saraos* v. *M.E.I.*, *supra*, note 11.

> 1. The fact that the Board has considered evidence other than the documents mentioned in subsection 70(2) *certainly does not affect the validity of the Board's decision if the evidence in question is in no way prejudicial to the applicant*. To set aside a decision of the Board on such a ground would be a futile exercise.
>
> 2. The validity of the Board's decision *is not affected either, in my view, even if the evidence is prejudicial to the applicant, when the applicant himself has either asked or agreed that the Board take that evidence into consideration*. It those circumstances, an applicant cannot complain that the Board acted on his request or consent.
>
> 3. The Board's decision *should be set aside however, if the evidence is prejudicial to the applicant and was considered by the Board without his consent*.[35] (emphasis added)

This was an important change in the Federal Court's jurisprudence; it used to be that the Immigration Appeal Board had to base its decision solely on the documents mentioned in subsection 70(2).[36] It now appears that when the applicant has consented to the introduction of evidence into the record, the Board will not be forbidden from considering this evidence.[37] The Board, therefore, at the first stage of the redetermination process, has to consider all the evidence offered by the claimant (or filed with his consent) including the evidence intended to be offered at the hearing, if hearing there should be.[38] Similarly, the evidence introduced at the examination under oath becomes an integral part of the said examination and, as such, must be sent forward to the Board and considered by it in reaching its decision. Otherwise, the Federal Court may well refer the matter back

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35. *Id.*, 309. On evidence prejudicial to the applicant see also *Torres* v. *M.E.I.*, [1983] 2 F.C. 81 (C.A.); *Singh, Dalvir and M.E.I.*, (F.C.A., no. A-148-83), Stone, Ryan, Hyde, November 18, 1983. In *Sivanesalingam, Muthulingam and M.E.I.*, (F.C.A., no. A-940-83), Thurlow, Mahoney, Hugessen, January 11, 1984, the applicant had a statement of his claim to be a refugee in his possession at the examination under oath but refused to file it because he was afraid there might be some mistakes since it had not been translated to him. Nevertheless, it was filed as an exhibit *without the applicant's consent*. The Federal Court set aside the Board's decision, partly because the document in question should not have been before the Board.

36. For instance see *Tapia* v. *M.E.I.*, [1979] 2 F.C. 468 (C.A.); *Fuentes Leiva and M.E.I.*, (F.C.A., no. A-251-79), Heald, Ryan, Kelly, July 24, 1979; *Brannson* v. *M.E.I.*, (1980) 36 N.R. 315 (F.C.A.); *Colima* v. *M.E.I.*, (1981) 36 N.R. 313 (F.C.A.).

37. In *Ali* v. *M.E.I.*, (1981) 42 N.R. 332 (F.C.A.), the reasoning of the *Saraos* (*supra*, note 11) decision was reaffirmed and the *Brannson* and *Colima* decisions, *ibid.*, were not followed. See also *Torres* and *Singh, Dalvir* (*supra*, note 35).

38. *Immigration Act, 1976, supra*, note 1, subsection 70(2)(c). The evidence has to be considered as a whole: see *Quezada* v. *M.E.I.*, (1979) 30 N.R. 603 (F.C.A.); *Toro* v. *M.E.I.*, [1981] 1 F.C. 652 (C.A.); see also *Re Inzunza and M.E.I.*, (1979) 103 D.L.R. (3d) 105 (F.C.A.), 108: "The Board, in arriving at its decision, disregarded some of the evidence that was properly before it, and in so doing, it erred in law." It should also be noted that newspaper articles which are submitted have evidentiary value and must also be considered by the Board in reaching its decision: in this regard, see *Re Saddo and I.A.B. et al.*, (1982) 126 D.L.R. (3d) 764 (F.C.A.).

to the Board.[39] The Board's obligation to consider all the evidence however, does not mean that it has to state in its reasons every bit of evidence which was adduced.[40]

It is interesting to note that the Board, when it makes a decision on an application for redetermination, should not take into account the fact that the individual might be inadmissible under another section of the Act:

> The Board seems to imply that the question of refugee status may be academic in this case because of the likelihood that the applicant would be inadmissible pursuant to another section of the Act. It is my opinion that such a view represents an erroneous perception of the Board's powers under the *Immigration Act, 1976*, S.C. 1976-77, c. 52. The Board has no jurisdiction, in this factual situation, to determine whether this applicant falls within any of the inadmissible classes set out in the Act nor does it have any power to exercise the authority set out in section 55. The Board's powers are restricted, in this case, to a determination of refugee status as that status is defined in subsection 2(1) of the Act.[41]

In the same scheme, there is no incompatibility in law between claiming refugee status and seeking lawful permission to come into Canada to establish permanent residence.[42]

b) Requirement to file declaration under oath

Could the Board properly consider an application for redetermination if it is not accompanied by the declaration under oath prescribed by subsection 70(2) of the Act? In the *Bashir*[43] decision, the Federal Court, Trial Division, came to this conclusion:

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39. In *Singh, Mohinder and M.E.I.*, (F.C.A., no. A-207-82), Urie, Kelly, McQuaid, November 5, 1982, an exhibit (a letter from the applicant's brother) was not forwarded to the Board. In *Ananthapillai and M.E.I.*, (F.C.A., no. A-901-82), Pratte, Heald, Marceau, September 23, 1983, written submissions filed with the senior immigration officer following the examination under oath were not forwarded to the Board. Note that the issue of who has to forward these documents to the Board appears not to have been resolved clearly by the Federal Court of Appeal. In this regard the decision in *Joseph, Godfrey Keith and M.M.I., supra,* note 33, is not easily distinguished from the above two cases.

40. "[The Board's] reasons are not to be read microscopically; it is enough if they show a grasp of the issues that are raised [. . .] and of the evidence addressed to them, without detailed reference.": *Boulis* v. *M.M.I.*, [1974] S.C.R. 875, 885; cited in Christopher J. WYDRZYNSKI, "Refugees and the Immigration Act", (1979) 25 *McGill L. J.* 155, 167. See also *Hilario* v. *M.M.I.*, [1978] 1 F.C. 697 (C.A.).

41. *Cepeda-Welden* v. *Immigration Appeal Board*, [1983] 1 F.C. 143 (C.A.), 144.

42. *Teklehaimanot* v. *I.A.B. et al.*, (F.C.A., no. A-730-79), Pratte, Le Dain, Lalande, September 8, 1980.

43. *Bashir* v. *I.A.B.*, [1982] 1 F.C. 704 (T.D.).

> [. . .] the requirement that the application be accompanied by the declaration under oath is merely directory. There is no valid reason whatever why an applicant ought not be permitted to submit as much or as little of the prescribed supporting material as he or she chooses with the application provided it is submitted in time. Given the nature of the decision to be made pursuant to subsection 71(1), any deficiency in the material cannot possibly offend the legislative scheme, whatever its effect on the applicant's prospects of success.[44]

However, the Federal Court of Appeal dealt with the same issue in *Singh (Hardev)* v. *M.E.I.*[45] and as a result, restricted *Bashir* in what appeared to be a liberal interpretation of sections 70 and 71. It is useful to cite part of the reasons of Justices Urie and MacKay, which explain why subsection 70(2) is *mandatory* rather than merely directory:

> URIE J. :
>
> *If s-s. 70(2) is construed as merely being directory and not mandatory, the Board would have before it, at the option of the applicant, only the favourable material and not the unfavourable for the purpose of determining whether or not to permit the matter to proceed. Its ability to make a proper decision on all the material would as a consequence be limited and it would be deprived of the ability to carry out its statutory mandate.* The scheme for redetermination of the Minister's decision surely does not contemplate such a limitation of the Board's powers.
>
> [. . .]
>
> *But the extent to which the applicant chooses to provide the information required by paragraphs (a) to (d) inclusive is solely within his province.* If he chooses not to inform the Board of the nature of the basis of his claim as required by paragraph (a), he runs the risk of the Board not correctly ascertaining what that basis is. If he chooses not to make the further representation permitted by paragraph (d) or provides none of the information permitted to be supplied by paragraphs (b) and (c), relying only on the transcript of the examination under oath, for example, he risks an unsatisfactory result from his point of view.
>
> MACKAY D. J. :
>
> I am of the view that while it might be said that some of the provisions of the section as to the content of the declaration might be characterized as being directory, *the provision for filing his declaration under oath with his application for redetermination is mandatory.*
>
> If the provision of the statute as to having the declaration of the applicant accompany his application for redetermination of his claim to refugee status is in the discretion of the applicant, *the word "may" not "shall" would have been used in subsection 70(2) of the statute.*
>
> I can find no provision in the statute or rules that would enable the Board to waive or dispense with the filing of the applicant's declaration under oath

44. *Id.*, 709.
45. *Singh (Hardev)* v. *M.E.I.*, [1982] 2 F.C. 785 (C.A.).

> or to proceed with the consideration of the application for redetermination without having the applicant's declaration before them.
>
> *The onus is on the applicant, in making his application for redetermination of his claim, to comply with the provisions of the statute. If he fails to do so, he cannot complain if his application is dismissed.*[46]
> (emphasis added)

One other significant point in *Singh (Hardev)* is the statement of Mr. Justice Urie to the effect that "If the declaration (under oath) is received before the Board concludes its consideration of the application then, whether receipt with or after the filing of the application, it must be considered".[47] This implies that the declaration under oath described in subsection 70(2) of the Act does not have to be filed with the application for redetermination and could be filed more than 15 days after the claimant is informed by the Minister that he is not a Convention refugee and as long as the Board has not dismissed the application for want of perfection.[48] The recent Federal Court decision in *Gill, Lakhbir Singh*[49] held that the Board had jurisdiction to make a determination under section 71 of the Act even though the applicant had filed his declaration under oath with the Refugee Status Advisory Committee, thus prior to the Minister's determination and before his application to the Board pursuant to subsection 70(1) of the Act.

One other point worth mentioning is the requirement of subsection 70(2) of the Act that the declaration which accompanies the application for redetermination be "under oath". The Federal Court of

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46. *Id.*, 796-798. The Federal Court of Appeal followed *Singh (Hardev)* in *I.A.B. and Bains, Santokh Singh*, (F.C.A., no. A-1439-83), Heald, Mahoney, Marceau, February 8, 1984, and allowed the appeal from *Bains* v. *I.A.B.*, [1984] 1 W.W.R. 133 (F.C.T.D.), which itself had followed *Bashir, supra*, note 43. It should be noted that the Federal Court of Appeal in *Singh, Sukhwinder and M.E.I.*, (F.C.A., no. A-287-83), Thurlow, Mahoney, Cowan, October 13, 1983, set aside the Board's decision which refused to permit the application for redetermination to proceed for lack of perfection because no declaration under oath accompanied the application. However, the only reason for setting aside the Board's decision was that the Court was not convinced that the said declaration was not received by the immigration officer. The immigration officer had accepted an application for redetermination but had written the words "accepted without prejudice" on the form IAB 91 (Rev. FEB/81). This notation was not explained and the Board was therefore directed "to receive evidence as to whether or not the declaration was delivered to the immigration officer, to make a finding of fact on that question and, thereafter, deal with the application for redetermination accordingly". See also *Singh, Ajit and M.E.I.*, (F.C.A., no. A-688-83), Heald, Mahoney, Hyde, December 7, 1983.

47. *Singh (Hardev)* v. *M.E.I., supra*, note 45, 797.

48. The question arises as to whether the same reasoning could be applied to a transcript of the examination under oath filed after 15 days, when the application itself was made within the prescribed time. Other possible implications of Justice Urie's comments will have to be clarified by the Courts.

49. *Gill, Lakhbir Singh and M.E.I.*, (F.C.A., no. A-1066-83), Heald, Mahoney, Marceau, February 7, 1984.

Appeal[50] recently set aside a Board's decision which had refused to allow an application for redetermination to proceed on the basis that no declaration *under oath* accompanied the said application. The record before the Board indicated that the immigration officer had acknowledged service of a declaration *under oath*. There was indeed a declaration on record signed by the applicant but it was not under oath. Mr. Justice Urie referred the matter back to the Board and held that the Board could not refuse the application for lack of perfection "on the basis that the oversight by the senior immigration officer resulting in his failure to sign the Applicant's statutory declaration which he was competent to receive and sign *and did receive*, did not vitiate the application for redetermination".[51]

2) Judicial notice

Another question which arises with respect to evidence is the extent to which the Board can take judicial notice of facts and events. The *Maslej*[52] case is a landmark in this matter:

> The second ground of attack by applicant's counsel is based on the inclusion of the following words by the quorum of the Board in their reasons for judgment:
>
> > It is common knowledge that in Poland there are thousands upon thousands of Poles of Ukranian origin and surely all these Ukranians are not in danger of being persecuted.
>
> This submission can be disposed of shortly by the observation that no tribunal can approach a problem with its collective mind blank and devoid of any of the knowledge of a general nature which has been acquired in common with other members of the general public, through the respective lifetimes of its members, including, perhaps most importantly, that acquired from time to time in carrying out their statutory duties. In our view, the statement made in the Board's reasons for judgment, of which the applicant complains, falls within that category.[53]

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50. *Mukherjee, Somnath and M.E.I.*, (F.C.A., no. A-1356-83), Urie, Ryan, Hugessen, March 14, 1984. Read however *Singh, Satnam and M.E.I.*, (F.C.A., no. 84-A-42), Urie, April 2, 1984 in conjunction with the Board's decision no. 83-10192.

51. *Mukherjee, Id.* It remains to be seen if the Federal Court would rule the same way in a case where an immigration officer, acknowledging service of an application delivered by a third party and accompanied by a declaration not under oath, would sign a written statement to this effect and indicate therein that it was impossible for him to have the applicant declare the contents of his declaration in front of him.

52. *Maslej* v. *M.M.I.*, [1977] 1 F.C. 194 (C.A.).

53. *Id.*, 197-198. See also *Olguin* v. *M.E.I.*, [1981] 2 F.C. 801 (C.A.), where the Federal Court, applying the principal of the *Maslej* case, said at page 803: "[. . .] the knowledge of the Board concerning the necessity for a passport applicant in Chile to obtain a good conduct certificate is in the category of general knowledge acquired by the Board from time to time in carrying out its statutory duties [. . .]". In *Kumar Verman, Surinder and I.A.B. et al.*, (F.C.A., no. A-481-83), Le Dain, Marceau, Hugessen, October 27, 1983,

The Federal Court, however, has drawn limits to the notion of judicial notice and it will not hesitate to set aside a decision of the Board which is based on information prejudicial to the applicant and which is not contained in the record. This is especially true at the first stage of the redetermination process where the applicant is not given an opportunity to be heard.[54] If the Board does not allow a claim to proceed because it doubts the credibility of the applicant based on some general knowledge it has concerning social conditions in a country, *this may amount to a breach of the rules of natural justice*. The Board, is such situations, is in fact refusing to give the applicant an opportunity to respond to the information used against him. The applicant would have this opportunity if such evidence were adduced at a hearing. In *Permaul,*[55] the Board had in front of it uncontradicted evidence that the applicant had been beaten, imprisoned and her life threatened by members of the ruling party in Guyana. She had also been raped violently by four members of that party. However, the Board refused to allow the claim to proceed on the basis that the facts provided by the claimant "could be attributed to deterioration in law and order rather than to political harassment". The Federal Court set aside this decision in these terms:

> In dismissing the applicant's claim for refugee status, the Board said that: "The existence of racial violence in Guyana is common knowledge" and that: "[. . .] the serious incidents recounted by the applicant [. . .] and her violent rape in 1976, from the facts provided, could be attributed to deterioration in law and order rather than to political harassment". *Thus it appears that the Board chose to doubt the credibility of the applicant's sworn statements based on some general knowledge which it claims to have concerning racial violence in Guyana.* This information was not contained in either the applicant's declaration under oath or the transcript of the applicant's examination under oath by a Senior Immigration Officer pursuant to subsection 45(1) of the *Immigration Act, 1976. As such, it is information other than the documents mentioned in subsection 70(2) of the Act and the Board is not entitled to consider such information in making its determination under subsection 71(1).*[1] Furthermore, it is not the kind of information of which judicial notice could be taken in Court proceedings, nor is it of a general character well known both to the Board and to the general public.[2] Where, as here, that information is relied on by the Board to the prejudice of the applicant, it is a denial of natural justice to refuse to give the applicant an opportunity to respond as would be the case if evidence were adduced at a hearing.
> (emphasis added)

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the Federal Court of Appeal expressed the opinion that "the Board could take judicial or official notice of the political facts referred to in its reasons for decision, [. . .]". For a survey of the state of the doctrine of judicial notice in Canada, see Allan R. FLANZ, "Judicial Notice", (1980) 18 *Alta. L. Rev.*, 471.

54. *Immigration Act, 1976, supra,* note 1, subsection 71(1).

55. *Permaul, Christolene and M.E.I.*, (F.C.A., no. A-576-83), Thurlow, Heald, McQuaid, November 24, 1983.

1. See *Saraos* v. *M.E.I.*, [1982] 1 F.C. 304 (C.A.).
2. Compare *Gonzalez Galindo* v. *M.E.I.*, [1981] 2 F.C. 781. See also *Maslej* v. *M.M.I.*, [1977] 1 F.C. 194.[56]

Mr. Justice Thurlow stated in his concurring reasons that "[. . .] the Immigration Appeal Board is not entitled to take judicial notice of what it considers conditions may be in a foreign country [. . .] to discount the applicant's statements [. . .]". This may be interpreted as a new approach of restriction with regard to judicial notice. It thus appears that the Federal Court of Appeal may now be implicitly reconsidering its earlier decision in *Maslej*.

III. DECIDING WHETHER OR NOT TO ALLOW THE CLAIM TO PROCEED

1) The words of the definition of Convention refugee

When a person claims to be a Convention refugee, the Board, in deciding whether or not to allow the claim to proceed to a hearing, has to look at subsection 71(1) of the Act together with the definition of Convention refugee in section 2 of the Act. That is to say that the Board has to form an opinion as to whether or not the claimant could probably establish at a hearing that he falls within the following definition:

> "Convention refugee" means any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> (a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country, or
>
> (b) not having a country of nationality, is outside the country of his former habitual residence and is unable or, by reason of such fear, is unwilling to return to that country;

The words of this definition have been interpreted many times by the Federal Court and the Supreme Court of Canada. It is useful to examine

56. *Id.*, Mr. Justice Heald's reasons. See also *Gonzalez* v. *M.E.I.*, [1981] 2 F.C. 781 (C.A.), on the limitations of judicial notice when natural justice is affected; in this case, the Board relied on information obtained in other hearings. The Federal Court distinguished it from the *Maslej* case and stated at page 782: "If the kind of information used in this case, *which appears to be of a type which an applicant might well be in a position to contest,* is to be relied upon by the Board in a hearing pursuant to subsection 71(2) of the *Immigration Act, 1976,* S.C. 1976-77, c. 52, natural justice requires that the applicant be entitled to respond to it just as he would to evidence adduced at the hearing." (emphasis added). See also the dissenting reasons of the Chief Justice in *Singh, Swaran and M.E.I.*, (F.C.A., no. A-1346-83), Heald, Pratte, Thurlow, March 12, 1984.

the definition before outlining the "tests" which should or should not be used by the Board when it decides whether or not to allow a refugee claim to proceed.

a) Well-founded fear of persecution

Perhaps the most important words are "well-founded fear of persecution". It has been decided that the Board had to ask itself whether the evidence disclosed a likely case of a well-founded fear of persecution for one of the reasons mentioned in the above definition.[57] Fear is in itself subjective but whether it is well-founded is objective:

> He may as a subjective matter, fear persecution if he is returned to his homeland but his fear must be assessed objectively in order to determine if there is a foundation for it.[58]

Persecution against a person might imply that there is discrimination but the opposite is not necessarily true.[59] Although evidence of past persecution is an important factor in establishing a claim, the absence of that element will not be fatal by itself:

> [. . .] in order to support a finding that an applicant is a Convention refugee, the evidence must not necessarily show that he "has suffered or would suffer

57. *Oyarzo* v. *M.E.I.*, [1982] 2 F.C. 779 (C.A.). Note that the persecutor is not necessarily the state concerned or one of its agents. See *Rajudeen and M.E.I.*, (F.C.A., no. A-1779-83), Heald, Hugessen, Stone, July 4, 1984, in particular p. 2 of Mr. Justice Stone's reasons: "To my mind, in order to satisfy the definition the persecution complained of must have been committed or been condoned by the state itself and consist either of conduct directed by the state toward the individual or in it knowingly tolerating the behaviour of private citizens, or refusing or being unable to protect the individual from such behaviour."

58. *Kwiatkowsky* v. *M.E.I.*, [1982] 2 S.C.R. 856, 862. A similar view is found in the *Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* Office of the United Nations High Commissioner for refugees, Geneva, September 1979, pp. 11-12: "To the elements of fear — a state of mind and a subjective condition — is added the qualification 'well-founded'. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration."

59. *Kwiatkowsky, Id.*, 863: "There is no doubt that the Board found as a fact that, while there was evidence to support *discrimination* against the appellant because of his religious beliefs, there was no evidence on which he could reasonably found a fear of *persecution* on grounds of his religious beliefs or political opinions. These were findings which it was open to the Board to make on the material before it."

> persecution''; what the evidence must show is that the applicant has good grounds for fearing persecution for one of the reasons specified in the Act.[60]

In the same scheme, one does not have to be arrested or deprived of his liberty to be persecuted:

> [. . .] the Board in stating that the applicant ''was never arrested or persecuted . . .'' appears to infer that ''arrest'' is an essential element to ''persecution''. [. . .] the Board attaches significance to the fact that the security forces had ample opportunity between 1974 and 1979 to arrest the applicant if they so wished. In my view, the Board's reasons imply that it defined ''persecution'' as necessarily requiring deprivation of the applicant's liberty. If this is so, then the Board erred in law, in my view, in applying such a restrictive definition.[61]

b) Nationality

The most common reasons invoked for fear of persecution are nationality, membership in a particular social group and political opinion. As far as nationality goes, one case which should be kept in mind is *Hurt* v. *M.M.I.*[62] where the individual claiming to be a Convention refugee *from Poland* had lived in West Germany for a number of years on temporary visas. The Board, however, asked itself if the appellant was a refugee from West Germany and concluded negatively. The Federal Court of Appeal allowed the application to review and referred the matter back to the Board for redetermination; the Board had made an error in law because the appellant had not lost his Polish nationality which was acquired by birth.

c) Membership in a particular social group

Fear of persecution because of ''membership in a particular social group'' is still a somewhat grey area where the meaning of ''social group'' is not clear. One author has commented on decisions at the Board level on this subject and came to this conclusion:

> The only relevant social group under the Canadian interpretation of the definition is thus one that both expresses political opinions and is persecuted directly by government institutions.[63]

In the *Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, it is said that a ''particular social group''

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60. *Seifu, Eshetu and M.E.I.*, (F.C.A., no. A-277-82), Pratte, Le Dain, Hyde, January 12, 1983.
61. *Oyarzo* v. *M.E.I.*, *supra*, note 57, 782.
62. *Hurt* v. *M.M.I.*, [1978] 2 F.C. 340 (C.A.).
63. Christopher J. WYDRZYNSKI, *loc. cit.*, *supra*, note 40, 181.

> [. . .] normally comprises persons of similar background, habits or social status. *A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds*, i.e. race, religion or nationality.
>
> Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.
>
> *Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status*. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.[64]
>
> (emphasis added)

In the *Astudillo*[65] case the question was raised as to whether or not a member of a family group could be considered as a member of a "social group". The Court seemed to doubt that this was possible but refrained from giving a definite opinion. However, it did conclude that a "Sports Club", within the facts of that particular case, was indeed a "social group" as the term is used in the definition of Convention refugee.

d) POLITICAL OPINION

In many instances, an individual making a claim to be a refugee because of his membership in a social group will also invoke fear of persecution because of "political opinion". It is widely accepted that "political opinion" may be taken as meaning "political activities" when the circumstances warrant it. Indeed, a person will usually become involved in political activities to a certain degree before a political label is put on him/her by the authorities.[66] Within the test of subsection 71(1) of the

64. *Supra*, note 58, p. 19.

65. *Astudillo* v. *M.E.I.*, (1979) 31 N.R. 121 (F.C.A.).

66. However, a line has to be drawn where an individual commits an act of criminal nature because of his political opinions and is then prosecuted for this act. In *Musial* v. *M.E.I.*, [1982] 1 F.C. 290 (C.A.), at page 294: "A person who is punished for having violated an ordinary law of general application, is punished for the offence he has committed, not for the political opinions that may have induced him to commit it. In my opinion, therefore, the Board was right in assuming that a person who has violated the laws of his country of origin by evading ordinary military service, and who merely fears prosecution and punishment for that offence in accordance with those laws, cannot be said to fear persecution for his political opinions even if he was prompted to commit that offence by his political beliefs." See also *Re Naredo and M.E.I.*, *supra*, note 2. A distinction has to be made where the applicant claims refugee status for one of the reasons mentioned in the Act and may also have committed serious crimes. It would appear that if his fear of persecution does not flow from these crimes, then this fact "must not be taken into consideration in determining whether he is a Convention refugee within the meaning of the *Immigration Act*, 1976" (see *Giraud, St. Gardien and M.E.I.*, (F.C.A., no. A-1080-82), Pratte, Stone, Culliton, September 30, 1983.

Act, which will be addressed in the following pages, there is a test to meet with regard to political activities. In the *Inzunza* case, that test has been outlined as follows:

> [. . .], I do not deal with the allegation that the Board erred in its interpretation of "political activities", other than to say that the crucial test in this regard should not be whether the Board considers that the applicant engaged in political activities but whether the ruling government of the country from which he claims to be a refugee considers his conduct to have been styled as political activity.[67]

Although there are no decisions dealing specifically with this point, it would also appear that a minimum political involvement does not necessarily imply that the individual concerned cannot possibly have a well-founded fear of persecution. This is especially true when there is evidence pointing to a well-founded fear.[68]

2) Applying the proper test

What is the test which the Board should apply when it decides whether or not to allow a claim for refugee status to proceed to a hearing before it? Many cases dealt with this particular issue over the years until the Supreme Court was asked to give its opinion in 1982.[69] The key words of subsection 71(1) of the Act are "[. . .] if [. . .] there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established, it [the Board] shall allow the application to proceed, [. . .]". It was made clear in the *Kwiatkowsky* case that the words "could" and "reasonable grounds" imported the notion of balance of probabilities. This conclusion was arrived at through the French version of subsection 71(1) which reads in part as follows:

> 71.(1) [...], la demande suivra son cours au cas où la Commission estime que le demandeur pourra *vraisemblablement* en établir le bien-fondé à l'audition; [...][70] (emphasis added)

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67. *Re Inzunza and M.E.I.*, *supra*, note 38, 109. It can be noted that Justice Pratte in *Jerez-Spring* v. *I.A.B.*, [1981] 2 F.C. 527 (C.A.), insisted that this test was only an *obiter dictum* and as such, "should not be accorded the weight of a rule of law which the Board must apply everytime it has to resolve a claim for refugee status". Nevertheless, the Federal Court has adopted this test over and over so that it probably is a rule of law now. For instance, see *Astudillo* v. *M.E.I.*, *supra*, note 65; *Oyarzo* v. *M.E.I.*, *supra*, note 57.

68. See *Gonzalez* v. *M.E.I.*, *supra*, note 56.

69. *Kwiatkowsky* v. *M.E.I.*, *supra*, note 58.

70. *Id.*, 863-864: "The French version does, however, shed some light on the problem through the use of the word ‹vraisemblablement›. I think this makes it clear the legislature had probabilities in mind rather than possibilities."

Accordingly, the test to be applied under subsection 71(1) can be formulated in many ways. Here are a few examples:

— [. . .] to put it in the words used by Mr. Justice Urie in *Lugano**, the Board must allow a claim to proceed if it is of the view that "it is more likely than not, that the applicant will be able to establish his claim at the hearing".[71]

— [. . .] the issue is whether the Board is able to form the affirmative opinion that the application is likely to succeed upon a full hearing; if it is unable to form such an opinion it must refuse to allow the application to proceed.[72]

— [. . .] the proper test is whether there exist reasonable grounds to believe that it is more likely than not that, on a balance of probability the applicant can prove his status as a refugee at a full hearing of the Board.[73]

— [. . .] the duty of the Board under subsection 71(1) is to determine on the basis of the material before it whether in its decision, there are reasonable grounds to believe that the claim could, upon the hearing of the application, be established [. . .][74]

Here are some examples of tests which were found to be improper under subsection 71(1):

— [. . .] the Board said that "on the face of the record there appears no reasonable likelihood that he will be persecuted for any reason". In so stating, the Board clearly put to itself the wrong test of whether or not the application for redetermination should be permitted to proceed.[75]

— In our view the Immigration Appeal Board erred in stating "the Board does not consider this application would succeed if allowed to proceed".[76]

— Mr. Justice Pratte clearly rejected the test advanced by counsel for the appellant, namely that all claims that appear to the Board "to be seriously arguable" should be allowed to proceed. I think he was correct in rejecting

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71. *Kwiatkowski* v. *I.A.B.*, (F.C.A., no. A-722-79), page 3 of Justice Pratte's reasons; reported in (1980) 34 N.R. 237 (F.C.A.); affirmed by the Supreme Court of Canada, *supra,* note 58. **Lugano* v. *M.M.I.*, [1976] 2 F.C. 438 (C.A.).

72. *Kwiatkowski* v. *I.A.B., Id.*, page 3 of Justice Le Dain's reasons.

73. *Vargas, Heriberto Jose Clavijo and M.E.I.*, (F.C.A., no. A-171-80), Heald, MacKay, Kelly, October 8, 1980. In *Re Salvatierra and M.E.I.*, (1979) 99 D.L.R. (3d) 525 (F.C.A.), Mr. Justice Pratte stated at page 528: "In my view, section 71(1) requires the Board to refuse to allow the application to proceed not only when the Board is of opinion that there are no reasonable grounds to believe that the claim could be established but, also, when things are so evenly balanced that the Board cannot form an opinion on that point. In other words, under section 71(1), as I read it, the applicant does not have the benefit of the doubt; on the contrary, the doubt must be resolved against him." Accordingly, when "things are so evenly balanced", the claimant has not discharged his burden of proof and therefore, he must fail. This quote was mentioned in *Kwiatkowsky* v. *M.E.I.*, *supra,* note 58, but the Supreme Court did not find it necessary to comment on it.

74. *Murugesu, Saam Yagasampanthar* v. *I.A.B.*, (F.C.A., no. A-720-82), Pratte, Ryan, Lalande, December 16, 1982.

75. *Kimbudi* v. *M.E.I.*, (1982) 40 N.R. 566 (F.C.A.).

76. *Vargas and M.E.I., supra,* note 73.

that test on the ground that it is irreconcilable with the statutory language, particularly the French version.[77]

— [. . .] the expression "will be able" without qualification imports a higher test than a mere balance of probabilities, it does not square with the test in *Lugano** and in my opinion would have to be rejected.[78]

— We are all of the opinion that the Immigration Appeal Board erred in stating:

> "Having examined all the evidence the Board decides that there is nothing to lead to the conclusion that Har Prit Pall Singh is a Convention refugee as defined in the *Immigration Act, 1976* [. . .]"[79]

— The Board applied the wrong test when it stated: "Has the claimant a well founded fear of persecution as defined in the Convention? In my opinion, he did not establish that fact neither in his affidavit nor during his examination."[80]

— Having examined the evidence the Board concludes that the claim of Mr. Persaud to be a Convention refugee is not well founded and refuses to allow the application to proceed.[81]

— A further point to be noted is that *the question* which the Immigration Appeal Board is to consider when dealing with the claimant's application for redetermination *is not whether it is established by the material accompanying the application that the claimant is indeed a Convention refugee.* Rather it is whether in the Board's opinion there are reasonable grounds to believe that the claim could, upon a hearing, be established.[82]

— First, after reviewing the evidence, though not in any great detail, the Board said:

> "The Board is therefore of the opinion that the applicant did not prove that he has a well-founded fear of persecution if he were to return to Turkey. In reviewing all the evidence, the Board finds that there are not reasonable grounds to believe that the claim could be established upon the hearing of the application. The Board therefore refuses to allow the claim to proceed and determines that Mr. Aram Ovakimoglu is not a Convention refugee."

There is no question that the first sentence in the above quotation is a misstatement of the burden imposed on an applicant for redetermination of his refugee claim at the stage of the proceedings envisaged by subsection 71(1) of the *Immigration Act, 1976*. At this stage the applicant is not required *to prove* anything. Rather the Board is required to form an opinion as to whether or not there are reasonable grounds to believe that a claim *could,* upon a hearing be established bearing in mind the

77. *Kwiatkowsky* v. *M.E.I., supra,* note 58, 864. Similarly the Board can dispose of a claim without a hearing even though the material before it may establish that the claim is not frivolous. See *infra,* note 111.

78. *Id.,* 864-65. **Lugano* v. *M.M.I., supra,* note 71.

79. *Singh, Har Prit Pall and M.E.I.,* (F.C.A., no. A-274-82), Urie, Ryan, Kelly, December 2, 1982, 1.

80. *Sivanesalingam, Muthulingam and M.E.I., supra,* note 35.

81. *Persaud, Narine and M.E.I.,* (F.C.A., no. A-97-82), Urie, Ryan, Kelly, December 2, 1982.

82. *Re Singh (Kashmir) and M.E.I., supra,* note 13, 457.

> definition of "Convention refugee" contained in section 2 of the Act. This does not involve proof by any one.[83]

The words used in the formulation of the test are very important and a decision of the Immigration Appeal Board may well be set aside by the Federal Court if the wrong test is used. Just as important is the principle that "not only must justice be done but it must appear to be done".[84] This means not only must the Board formulate the right test when it forms an opinion under subsection 71(1) of the Act, but it must also appear throughout the totality of its decision that the Board properly understood and did in fact apply the right test. For example, in *Ovakimoglu,*[85] the Board had used two different tests to form the opinion on whether or not to allow the applicant's claim to proceed. One of those tests was improper. The question before the Federal Court was whether or not the Board's application of the correct test had the effect of rectifying its earlier misstatement of the test. Mr. Justice Urie wrote the reasons for the Court and in his words:

> In the case at bar, I am not satisfied that the reference by the Board to a test which appears to impose on the Applicant the requirement that he *prove* his well-founded fear of persecution at the subsection 71(1) stage of the application for redetermination, was cured by the Board's subsequent recitation of the proper test to be applied to that stage.[86]

3) Assessing the applicant's credibility

The major difficulty with subsection 71(1) is the fact that the Board has to make a decision by relying on the documents mentioned in subsection 70(2), to the exclusion of oral testimony. This creates a hard task with regard to the assessment of the applicant's credibility. In the *Salvatierra*[87] decision, the applicant challenged a decision of the Immigration Appeal Board on the basis that the latter did not have the power to assess his credibility at that stage and ought to have assumed under subsection 71(1) that the facts alleged by the applicant in support of his claim were true. The Federal Court rejected this argument in these words at page 528:

> In order to form this affirmative opinion that the claim could be established, it is clearly not sufficient for the Board to form the view that the facts alleged

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83. *Ovakimoglu, Aram and M.E.I.*, (F.C.A., no. A-247-83), Heald, Urie, Lalande, October 27, 1983.

84. See dissenting reasons of Mr. Justice Pigeon in *Ernewein* v. *M.E.I.*, [1980] 1 S.C.R. 639, 659.

85. *Ovakimoglu, Aram and M.E.I., supra,* note 83.

86. *Id.*, 4-5. To the same effect, see *Kimbudi* v. *M.E.I., supra,* note 75.

87. *Re Salvatierra and M.E.I., supra,* note 73.

> by the applicant would, if proven, make him a refugee; it is also necessary for the Board to be of the opinion that those allegations of facts could be proven, an opinion that the Board cannot possibly entertain if it honestly believes those allegations to be untrue. In my view, section 71(1) not only permits but requires that the Board take into account all circumstances that may reveal the truthfulness or falsity of the allegations of facts made by the applicant. Contrary to what was submitted by counsel for the applicant, I do not see, in that interpretation of that section, anything that contravenes the *Canadian Bill of Rights*.
>
> The applicant's second argument was that, in any event, there was no evidence supporting the finding of the Board that the applicant's allegations were not credible.
>
> That argument must, also, in my view, be rejected. Section 71(1) does not require the Board to make any findings but merely to form an opinion in the light of its experience as well as of the material before it.

However, the Federal Court also said in footnote 4 of that judgment that the Board "[. . .] should be aware of the danger and difficulty of assessing the credibility of a witness on the basis of written material particularly when that written evidence has been given through an interpreter". Later, in the *Maldonado*[88] decision:

> It is my opinion that the Board acted arbitrarily in choosing without valid reasons, to doubt the applicant's credibility concerning the sworn statements made by him and referred to *supra*. *When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness*. On this record, I am unable to discover valid reasons for the Board doubting the truth of the applicant's allegations above referred to.[89]
> (emphasis added)

Apparent contradictions between statements made by the applicant at his examination under oath or in his declaration will not constitute a strong basis for an adverse finding of credibility. For instance, in the *Ramsarran*[90] case, the applicant stated in his declaration under oath that he had made his intention to claim refugee status known to the immigration authorities upon arrival in Canada. However, he indicated in his examination under oath that he had made a claim to refugee status at an immigration inquiry

88. *Maldonado* v. *M.E.I.*, [1980] 2 F.C. 302 (C.A.).

89. *Id.*, 305. See also *Brar, Iqbaljit Singh and M.E.I.*, (F.C.A., no. A-1213-82), Mahoney, Stone, Lalande, September 22, 1983, where the Board's decision was set aside and the matter "referred back to the Board for reconsideration on the basis that there is no foundation on the record for the Board's express finding that the applicant is not credible". Equally true is the fact that the Federal Court of Appeal will not interfere with the Board's assessment of credibility if there is evidence on which the Board could make the particular finding; see *Abdurahaman, Farah Shire and M.E.I.*, (F.C.A., no. A-1127-82), Stone, Ryan, Hyde, November 18, 1983.

90. *Ramsarran, Naresh Persaud and M.E.I.*, (F.C.A., no. A-674-83), Pratte, Le Dain, Marceau, January 25, 1984.

approximately one month after his arrival. The Board doubted the credibility of the applicant *inter alia* because of this contradiction and refused to allow his application to proceed for a number of reasons. The Federal Court set aside the Board's decision on the basis that the evidence did not support the findings of contradiction on which the Board's conclusion as to credibility was based.

If the Board does not allow a claim to proceed under subsection 71(1) and therefore determines that the applicant is not a Convention refugee, the matter will be referred back to an adjudicator for him to make a removal order or issue a departure notice.[91] However, the applicant may at that point ask the Federal Court of Appeal to review the decision of the Board.[92] On the other hand, if the Board allows the claim to proceed, there will be a full hearing where the parties will be able to present oral evidence.[93]

Bearing in mind that the Board at this stage has already rendered a decision to the effect that there were reasonable grounds to believe that a claim to be a Convention refugee could (probably) be established, the applicant will *now have to prove* that his claim is well-founded. In other words, the applicant, being outside his country of nationality or outside the country of his former habitual residence if he does not have a country of nationality, will have to satisfy the Board 1) that he *has* a well-founded fear of persecution for one of the reasons mentioned in the definition of Convention refugee and 2) that he is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country.[94] The applicant and the witnesses he might call to give testimony on his behalf will be cross-examined by the other party. Credibility of those people will play a major role in proving a genuine refugee claim. The evidence taken as a whole will help assessing the credibility. In *Raymond* v. *Township of Bosanquet:*[95]

> The question presented is not one of mere credibility — and by that I understand not merely the appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory — in a word, the trustworthiness of their testimony, which may

91. *Immigration Act, 1976, supra,* note 1, subsection 46(2).

92. *Federal Court Act, supra,* note 15, section 28.

93. *Immigration Act, 1976, supra,* note 1, section 71. *Immigration Appeal Board Rules (Convention refugees), 1981, supra,* note 30, rule 23.

94. See *Rajudeen and M.E.I., supra,* note 57. In *Re Naredo and M.E.I., supra,* note 2, 753, it was decided that the Board "erred in imposing on this applicant and his wife the requirement that they would be subject to persecution since the statutory definition required only that they establish 'a well-founded fear of persecution'. The test imposed by the Board is a higher and more stringent test than that imposed by the statute."

95. *Raymond* v. *Township of Bosanquet,* (1919) 59 S.C.R. 452.

> have depended very largely on their demeanour in the witness box and their manner in giving evidence; [. . .][96]

In *Faryna* v. *Chorny*,[97] the British Columbia Court of Appeal, after emphasizing all the elements which had to be considered to evaluate credibility, stated:

> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness.[98]

The rule which obliges a party to produce the best evidence available applies before the Immigration Appeal Board although the rules of evidence are more flexible than in ordinary courts. This is due largely to the particular nature of the cases which the Immigration Appeal Board deals with:

> In my view, therefore, the Board was clearly wrong in holding, as it did, that there was no evidence that he is known to the Angolan authorities. While the evidence to which I have referred *may be characterized as self-serving, it is difficult for me to conceive what evidence would be available to him in Canada which would not suffer from that characterization.*[99]
> (emphasis added)

IV. CONSEQUENCES OF REDETERMINATION

If the Board, after careful consideration of all the evidence, determines the applicant not to be a Convention refugee, the latter may then choose to make an application to the Federal Court of Appeal seeking

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96. *Id.*, 460.

97. *Faryna* v. *Chorny*, (1952) 2 D.L.R. (3d) 354 (B.C.C.A.); cited in *Phillips* v. *Ford Motor Co. of Canada Ltd.*, (1971) 18 D.L.R. (3d) 641 (Ont. C.A.), 649. On the subject of discrediting a witness see *R.* v. *Gun Ying*, (1930) 3 D.L.R. (3d) 925 (Ont. S.C., A. Div.), 926: "In discrediting a witness every judicial officer owes it to the witness and also to an appellate court to state his reasons. This the convicting magistrate has not done. Evidence under oath, until shaken, is entitled to some weight, and it cannot be swept away simply by the trial judge saying he disbelieves a witness. In this case the evidence of the accused is uncontradicted and is entitled to some weight."

98. *Id.*, 356.

99. *Kimbudi* v. *M.E.I.*, *supra*, note 75, 567. Subsection 65(2)(c) of the *Immigration Act, 1976, supra*, note 1, reads: "65. The Board [. . .] (2) [. . .] may [. . .] (c) during a hearing, receive such additional evidence as it may consider credible or trustworthy and necessary for dealing with the subject-matter before it." Note that the Board must refrain from treating submissions of counsel as evidence and making an adverse finding of credibility on the basis of those submissions. In this regard, see *Forbes and M.E.I.*, (F.C.A., no. A-1213-83), Le Dain, Stone, Lalande, May 9, 1984. On the subject of evidence before administrative tribunals, see Patrice GARANT, « La preuve devant les tribunaux administratifs et quasi-judiciaires », (1980) 21 *C. de D.* 825.

to have the decision set aside and the matter referred back to the Board.[100] However, such application has no direct effect on the initial inquiry at which the applicant claimed refugee status. This inquiry will be resumed[101] when the Board informs the Minister of its decision that the person concerned is not a Convention refugee. The adjudicator presiding at the resumption of this inquiry "shall make the removal order or issue the departure notice that would have been made or issued but for that person's claim that he was a Convention refugee".[102] On the other hand, if the Board determines that the applicant is a Convention refugee, the matter will then be referred back to "the adjudicator who was presiding at the inquiry" (where he initially claimed to be a Convention refugee) or to "any other adjudicator, who shall determine whether or not that person is a person described in subsection 4(2)"[103] of the Act:

> 4.(2) Subject to any other Act of Parliament, a Canadian citizen, a permanent resident and a Convention refugee *while lawfully in Canada* have a right to remain in Canada except where

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100. *Federal Court Act, supra,* note 15, section 28. This section applies because a redetermination is not an appeal; *Astudillo* v. *M.E.I., supra,* note 65. Thus section 84 of the *Immigration Act, 1976* does not apply in the case of a redetermination. In *Sidhu, Ranjit Singh and M.M.I.,* (F.C.A., no. 83-A-381), Thurlow, Heald, Mahoney, December 1, 1983, the Federal Court dismissed an application for an order granting leave to appeal, on the basis that it had no jurisdiction to entertain an appeal from a refugee redetermination.

101. There is no provision in the *Federal Court Act* to the effect that a section 28 application automatically prohibits the adjudicator from resuming the initial inquiry at which the individual had claimed refugee status. Moreover, the inquiry proceedings are separate from the Board's decision and are not under review at this stage. In *Jairaj, Critty and R. G. Smith, Adjudicator and M.E.I.,* (F.C.T.D., no. 169-84), Addy, January 31, 1984, the applicant, after filing a section 28 application to quash a decision of the Board whereby he had been determined not to be a Convention refugee, applied to the Trial Division for a Writ of Prohibition to prevent the adjudicator from resuming the initial inquiry. Mr. Justice Addy dismissed the motion and held that "There is nothing in the Act *(Immigration Act)* which says that an enquiry is to be adjourned or delayed pending the hearing of the application before the Federal Court of Canada. *Prohibition must be based on a clear, legal right to the remedy.*" (emphasis added)

102. *Immigration Act, 1976, supra,* note 1, sections 32(6), 46(2)(b). There is no appeal from a removal order unless the individual falls under section 72(2)(b) of the Act. However, if section 72(2)(b) does not apply in his case, he may still ask the Federal Court to review the adjudicator's decision under section 28 of the *Federal Court Act* (See *Dindayal, Bissoon D. and M.E.I.,* (F.C.A., no. A-1159-82), Heald, Lalande, McQuaid, August 17, 1983. The *Immigration Act, 1976* does not provide a procedure whereby an individual can appeal a departure notice. However, a section 28 application would be appropriate to have such a notice reviewed by the Federal Court.

103. *Immigration Act, 1976, supra,* note 1, section 47. In *Pincheira* v. *Attorney General of Canada,* [1980] 2 F.C. 265 (C.A.), the applicant was given refugee status and issued a permit under section 37 of the Act. At the resumed inquiry, the adjudicator simply ignored the provisions set out in sections 47 and 4(2) of the Act and held that the individual was described in subsection 32(1) of the Act. Accordingly, he terminated the inquiry and allowed the applicant to remain in Canada. Mr. Justice Pratte, considering that the end result was the same, found that the adjudicator acted correctly.

> [. . .]
> (b) in the case of a Convention refugee, it is established that that person is a person described in paragraph 19(1)(c), (d), (e), (f) or (g) or 27(1)(c) or (d) or 27(2)(c) or a person who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of
> (i) more than six months has been imposed, or
> (ii) five years or more may be imposed.
> (emphasis added)

If the adjudicator determines that the individual is a Convention refugee who falls within the ambit of subsection 4(2), "he shall, notwithstanding any other provision of this Act of the regulations, allow that person to remain in Canada".[104]

The words "while lawfully in Canada" found in subsection 4(2) are very significant. A Convention refugee will have a right to remain in Canada only if his presence in Canada is lawful. This will not be the case unless he has been issued a Ministerial permit pursuant to section 37 of the Act. In *Boun-Leua* v. *M.E.I.*[105] the applicant was determined by the Minister to be a Convention refugee. The inquiry was resumed and the adjudicator found that the applicant was not lawfully in Canada by virtue of the fact that he had remained therein after ceasing to be a visitor. The adjudicator issued a departure notice to the applicant on the basis that he did not meet the requirements of subsection 4(2) of the Act. Counsel's main argument in front of the Federal Court was that a claimant found to be a Convention refugee is automatically accorded lawful status in Canada and this status subsists as long as he does not fall within the exceptions enumerated in subsection 4(2)(b) of the Act. Therefore, according to counsel, the applicant was lawfully in Canada and entitled to remain under subsection 47(3) of the Act. Mr. Justice Urie rejected this argument:

> A Convention refugee, [. . .], is not given the right to reside permanently in Canada nor, by being designated such, is he given the right to remain in Canada for a specific period of time. [. . .]. The duration of his stay, as a Convention refugee, can only be fixed by a Ministerial permit issued pursuant to s. 37 of the Act. If no such permit is issued then, if he is within an inadmissible class, he may be the subject of a removal or deportation order.
> [. . .]
> In my view, therefore, applicant counsel's submission that the determination by the Minister that his client was a Convention refugee gave him the right to remain in Canada must fail.[106]

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104. *Immigration Act, 1976, supra,* note 1, subsection 47(3).

105. *Boun-Leua* v. *M.E.I.*, [1981] 1 F.C. 259 (C.A.).

106. *Id.*, 263-64. Note that the reasoning of *Boun-Leua* was followed in *M.E.I.* v. *Dmitrovic*, (F.C.A., no. A-45-81), Thurlow, Heald, Verchere, February 8, 1983. In this latter case, the Federal Court allowed the appeal from the Board's decision which held that an individual determined to be a Convention refugee could not be deported pursuant to subsection 4(2) of the Act on the ground that he was an overstaying visitor.

Once it is established that a Convention refugee is "lawfully in Canada", the adjudicator presiding over the inquiry will allow him to remain in Canada unless he falls within the exceptions of subsection 4(2)(b), in which case "he shall make the removal order[107] or issue the departure notice,[108] as the case may be".[109] Essentially, a Convention refugee will fall within those exceptions if he is considered a threat to the security or the public order of Canada or if he has been convicted of an offence under any Act of Parliament for which a term of imprisonment of more than six months has been imposed or for which five years or more may be imposed.

CONCLUSION

In conclusion, we wish to point out that the provisions of the *Immigration Act, 1976* relating to the refugee determination process have been challenged under the *Canadian Charter of Rights and Freedoms*. In *Re Singh (Sukhwant),*[110] it was alleged that subsection 71(1) of the Act constituted a breach of section 7 of the Charter which reads:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Board had disposed of the applicant's claim to refugee status without allowing it to proceed to a full hearing. Counsel argued that the Board's decision had in effect deprived the applicant of the right to life, liberty and security of the person and that, as a consequence, such a decision had to be made in accordance with the principles of fundamental justice which, in the circumstances[111] of this case, required that the applicant be

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107. From that order lies an appeal to the Immigration Appeal Board under subsection 72(2)(a) of the Act. However, note that the appellant will not have access to the Board's jurisdiction in equity if he falls under subsection 72(3) of the Act. If a section 83 certificate is filed against the appellant, the Board "shall dismiss" his appeal in equity pursuant to subsection 72(2)(d) of the Act.

108. There is no appeal from a departure notice. However, the Federal Court of Appeal may review and set aside such a notice if an application under section 28 of the *Federal Court Act* is made. This was the case in *Boun-Leua, supra,* note 105.

109. *Immigration Act, 1976, supra,* note 1, subsection 47(2); it has to be understood from this subsection that a Convention refugee "is not a Convention refugee described in subsection 4(2)" if he is not "lawfully in Canada" or if, although being "lawfully in Canada", he falls under subsection 4(2)(b).

110. *Re Singh (Sukhwant) and M.E.I.*, (1983) 144 D.L.R. (3d) 766 (F.C.A.); motion for leave to appeal dismissed by the Supreme Court of Canada on May 17, 1983.

111. The circumstances of the case were that the applicant argued that his claim was not frivolous and that he was therefore entitled to a hearing. This contention was rejected on the basis of the *Kwiatkowsky* case, *supra,* note 58.

given the opportunity to be heard orally by the Board.[112] The Federal Court rejected the argument and construed section 7 of the Charter narrowly:

> The decision of the Board did not have the effect of depriving the applicant of his right to life, liberty and security of the person. If the applicant is deprived of any of those rights after his return to his own country, that will be as a result of the acts of the authorities or of other persons of that country, not as a direct result of the decision of the Board. In our view, the deprivation of rights referred to in section 7 refers to a deprivation of rights by Canadian authorities applying Canadian laws.[113]

Subsequently, on April 30th and May 1st 1984, the Supreme Court of Canada heard argument in a group of seven appeals[114] which dealt with the very same issue. The attack was specifically directed at sections 45, 70 and 71 of the *Immigration Act, 1976* and the absence of a guarantee to an oral hearing for refugee claimants was criticized vigorously. Undoubtedly, the Supreme Court will have to reconsider its pre-Charter decision in *Kwiatkowsky*[115] in light of those new arguments. The decision is awaited with great anticipation for it may have a tremendous impact on the refugee determination process as it now exists.

112. *Re Singh (Sukhwant), Id.*, note 110, 767-68.

113. *Id.*, 768. The Court followed this reasoning in *Re Vincent and M.E.I., supra,* note 2, and even appeared to extend its application to section 12 of the Charter.

114. *Indrani* v. *M.E.I.*, (S.C.C., no. 18-235); *Singh Mann, Paramjit* v. *M.E.I.*, (S.C.C., no. 17-952); *Singh, Kewal* v. *M.E.I.*, (S.C.C., no. 17-898); *Singh Thandi, Sadhu* v. *M.E.I.*, (S.C.C., no. 17-997); *Singh, Harbhajan* v. *M.E.I.*, (S.C.C., no. 18-209); *Singh Gill, Charanjit* v. *M.E.I.*, (S.C.C., no. 18-207); *Singh, Satnam* v. *M.E.I.*, (S.C.C., no. 17-904).

115. *Kwiatkowsky* v. *M.E.I.*, *supra,* note 58.

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