THE REFUGEE BACKLOG CLEARANCE PROGRAM OF 1988: A CRITICAL EXAMINATION OF CANADA'S REFUGEE DETERMINATION SYSTEM

by

J.S. Mangat

B.A., Punjab University
LL.B., Punjab University

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The Refugee Backlog Clearance Program of 1988: A Critical Examination of Canada's Refugee Determination System

Author: Jas Mangat
(signature)

(name)

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(date)

APPROVAL

Name: J. S. Mangat

Degree: Master of Arts

Title of Thesis: The Refugee Backlog Clearance Program of 1988: A Critical Examination of Canada's Refugee Determination System

Examining Committee:

Chair: Dr. Peggy Meyer

Dr. Michael Howard
Professor
Senior Supervisor

Dr. Laurent Dobuzinskis
Associate Professor
Supervisor

Dr. Don Devoretz
Associate Professor
Economics

Date Approved: 7/11/95

ABSTRACT

The Canadian government's response to the backlog of refugee claimants that sought to avail themselves of Canada's protection in the late 1980's was the Refugee Backlog Clearance Program of 1988. By any reasonable standard of evaluation, this program must be viewed as an abject failure. The roots of its failure lie in the history of Canada's immigration and refugee policies as well as in the misjudgment and motivation of those responsible for its conception and implementation. This thesis attempts to measure the cost of this failure, in both human and financial terms, through an examination of the structure of the program combined with the author's firsthand view of its actual functioning and the effect it had on those who were left literally at its mercy, the claimants themselves. In the end, it is apparent that the government of the time formulated a policy that tragically failed to service the interests of either the claimants or the Canadian public.

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I N T R O D U C T I O N

I.

Canada is a country that owes its existence to the fact of immigration. Its vast borders have been defined by the historical settlement of North America. Perhaps no country can be said to be more thoroughly constituted by its immigrant history than Canada. Thus, it is plausible to assert that Canada's immigration policy can be seen as a reflection of its core values and beliefs. To understand Canada and Canadians, it may be necessary to understand and examine our beliefs, attitudes and actions with regard to the persistent fact of immigration.

It is all but a self-evident truth that in this dawn of a new millennium, the formulation of immigration policy has become increasingly difficult for countries in the developed world. With wide-ranging transportation and migration becoming increasingly within the grasp of those in the developed world, countries like Canada are faced with the challenge of formulating immigration policy that must straddle an often diverging set of considerations.

In this thesis, I will attempt to address these issues by focusing on the Canadian government's response to a policy problem that has its initial roots in the aftermath of the Second World War and its consequent effects on behaviour of the Allied nations. How to deal with those often desperate people who seek refuge and asylum from the governments of their native land has become a central preoccupation of policy-makers in the advanced industrialized

world. In this area, Canada has been integrally involved in the effort to establish international standards to govern individual states' law and policy with regard to refugees. An examination of Canada's reactions and responses to international migration trends is thus potentially instructive in understanding how other countries may or may not address a problem that promises to grow in its political, social and economic importance in coming decades. Further, such an inquiry should shed light on how the Canadian government formulates and implements its policy and how this process may be strengthened in the field of immigration as well as in other policy areas.

Specifically, I will examine the Canadian government's recent performance in the area of refugee determination policy by focusing on its effort to cope with a sudden surge in the number of refugee claimants seeking to avail themselves of Canada's protection. In the late-1980's, this surge led to a backlog in the processing of claims which, in turn, led to a specific program, administered by what became known as the Refugee Backlog Unit, to eliminate the accumulated unprocessed or partially processed claims.

It will be my central claim that the Canadian government's response to the rapidly increasing number of refugee claimants coming to Canada in the mid-and late-1980's was flawed and misguided from a number of perspectives. Firstly, basing its actions on the behaviour of past governments in the area of immigration, the government set off in the wrong direction in

terms of both law and policy. It attempted to establish elaborate legal structures to address a problem that needed prompt resolution based on both political and humanitarian considerations. Further, it failed politically to properly balance the cost of the response to the problem against its possible benefit to either the Canadian public or the refugee claimants themselves. Secondly, operating under a flawed legal framework, the responsible government department and personnel were unable to execute their mandate in a way that met the relevant political and humanitarian considerations. I will support these claims through an in-depth examination of the refugee determination process based on both objective empirical data and my own professional experience in this area. Moreover, I will use the behaviour of a specific ethnic group that found themselves entangled in Canada's refugee determination system, Indo-Fijians, to demonstrate the validity of my claims and conclusions.

I hope to demonstrate that, in the end, the government spent almost 200 million dollars on a program that devolved into little more than a convoluted rubber-stamping process. Considering the number of claimants that were actually removed by the backlog program, the cost can only be viewed as a wasteful use of taxpayers' money and a flagrant abuse of the voters' trust by the government.

II.

Before undertaking a study of this sort, one must first situate it within the growing body of literature known as public policy studies, or public policy analysis, which has emerged in the last several decades. This effort at orientation is necessary as a means of justifying at or least laying bare, one's choice of method, perspective and criteria for examining and evaluating policy initiatives and outcomes. Given the unavoidably value-laden and normative character of any attempt at evaluating the success or failure of any given policy initiative, the more transparent the process, the better. Thus, the need to make explicit one's first principles.

To this end, one might begin by defining the general area under consideration. In this study, we are concerned with a specific instance of public policy. William Jenkins has defined public policy as "a set of interrelated decisions taken by a political actor or group of actors concerning the selection of goals and the means of achieving them within a specified situation where those decisions should, in principle, be within the power of those actors to achieve."[1] Alternatively, James Anderson has formulated the following concise definition of public policy: "A purposive course of action followed by an actor or set of actors in dealing with a problem or matter of concern."[2] Both of these definitions characterize public policy as a purposive, goal-oriented activity, which fits the

circumstances of the example of public policy under consideration here. Indeed, it is the specific and limited purpose of the Refugee Backlog Program which makes it amenable to a thorough evaluation.

Approaches to the study of public policy have proliferated with the growth of the discipline of policy science. Michael Howlett and M. Ramesh have recently provided us with a useful summary of the various approaches employed by policy analysts.[3]

They categorize the approaches as based on either deductive or inductive theories, meaning that they can be broadly characterized as proceeding from either "top down" (deductive) or "bottom up" (inductive) assumptions. Where deductive theories begin with a limited number of general assumptions that are then applied universally to the political phenomena under examination, inductive theories begin by focusing on accumulated observations and studies of political phenomena from which they then attempt to draw generalizations and conclusions.[4]

Howlett and Ramesh further categorize approaches to public policy studies by dividing them according to their fundamental unit of analysis. For instance, those theories that use the individual as the fundamental unit of analysis include public choice theory (deductive) and welfare economics (inductive). Those approaches that focus primarily on group actors include Marxism (deductive), pluralism and corporatism (both inductive). And finally, those theories that have as their fundamental unit of analysis institutions include neo-institutionalism (deductive)

and statism (inductive).[5]

Howlett and Ramesh conclude that none of the above theories is alone able to provide a complete picture of the policy-making and implementing process; each has its flaws.[6] They recommend instead an approach that encompasses an examination of the full range of actors and factors affecting the formulation of policy.[7] Thus, in undertaking this study, I have not tried to tailor my observations or mode of analysis to fit the contours of any one theoretical approach. Rather, I have pursued an approach suited to the specific problems and policy under consideration. My approach will be largely inductive, devoid for the most part of any overarching theoretical assumptions. However, my general approach could perhaps be characterized as coming within the neo-institutionalist school, as my fundamental unit of analysis through most of this study will be the various bureaucratic institutions of the state, specifically within the Immigration department. Moreover, I proceed, in part, from the assumption that the state, in this case the Canadian government, is a, if not the, crucial actor in the development and implementation of Canadian immigration and refugee policy.

This assumption would seem appropriate in this case for a number of reasons. First, unlike many other areas in which the government formulates and implements policy, from health care to agriculture to transportation to finance, immigration has a rather limited category of non-state actors that can exert

influence on the policy-making process. The primary targets of the policy are a class of individuals who, by definition, are formally excluded from the political process. That is, immigrants, or more precisely, potential immigrants, have few avenues through which they might legitimately influence the immigration policy of the country to which they seek entry. Thus, when examining the process at the individual and group levels of analysis, one would seem to be limited to either studying the behaviour of the immigrants themselves and their motivations for seeking admittance to Canada or examining the various interest groups that act to pressure the government to pursue policies they believe to be in the best interest of potential immigrants or society as a whole. Neither of these approaches would seem likely to give a full and accurate picture of how immigration policy is formulated and implemented. Rather, it would seem most fruitful to look at the various institutions of the state to find the most revealing indications of how immigration policy is developed and how it functions once it has been put in place.

Unlike much of public policy analysis which is openly prescriptive and concerned with how a given policy should be designed and what impact it is likely to have, here we are concerned chiefly with examining the results of a specific policy and how and why it was implemented. Thus, I will be focusing on the different types of impact the Refugee Backlog Clearance Program had on its various targets. With regard to this

important element in policy analysis, Leslie A. Pal has, in a recent study, classified the of policy impact into four categories: direct impact, political impact, economic impact and social impact.[8] He points out that "judging policy success ... depends on the kind of impact being examined."[9] Upon the conclusion of this study, I will undertake to assess the government's policy dealing with the refugee backlog in light of each of the four types of impact it will have been seen to have.

But before one can understand and assess the policies pursued by the Canadian government in response to the unprecedented number of refugee claimants in the 1980's, the political and legal context within which these policies were formulated and pursued must be established. Thus, I will begin this paper with a brief look at the history of Canada's immigration policy focusing on the traditional place of refugees within it.

C H A P T E R I:

P O L I T I C A L A N D L E G A L
H I S T O R Y A N D C O N T E X T

POLITICAL HISTORY AND CONTEXT

I.

Since the emergence of the European-based concept of sovereign states, it has become a matter of established political theory and practice that such states, being independent and self-governing, have the ability to determine who can and cannot become members of their community. Yet, in the particular case of those seeking asylum, it is axiomatic that such persons are granted membership to the community they seek the protection of based on their own needs and circumstances rather than because they are needed by the community. Thus, refugee determination policy can never be governed solely by considerations of economics and self-interest. It must have at its foundation an interpretation of the moral obligation arising from humanitarian beliefs and values.

After the Second World War, an effort was made by the Allied nations to establish an international structure of law to maintain peace and collective security. This effort culminated, of course, in the United Nations and the various institutions and international agencies it spawned. In an effort to directly address the unprecedented horrors of World War II, the U.N. negotiated a series of conventions concerning war and its effects and consequences. In the aftermath of the Holocaust and the dreadfully inadequate response of Western nations to Jews fleeing Nazi persecution, it seemed particularly pressing that international standards be implemented to govern individual

states' policy regarding those seeking asylum and refuge. This is the historical dynamic that led to the negotiating of the 1951 **United Nations Convention relating to the Status of Refugees**[1] which entered into force on April 22, 1954 and which continues to provide the universal standard from which individual states' refugee determination policies are derived. Initially, limited to events pre-dating its signing and confined in application to European refugees, the Convention was not given permanent and global application until 1967 with the **Protocol on the Convention Definition.**[2] Canada, for its part, did not become a formal signatory to the Convention and its Protocol until 1969.

Prior to 1969, Canada's response to refugees in Western Europe took place against the backdrop of the Cold War. Canada was unwilling to sign the U.N. Convention in 1951 because at that time refugees were viewed as individuals fleeing persecution to whom a country gave temporary asylum, whereas Canada saw itself as a country of permanent re-settlement for immigrants. Canada, in the tradition of the Western sovereign state, wanted control over who came into the country.

II.

Traditionally, Canada's laws and policy with regard to refugee status and asylum, and its immigration policy generally, have been derived from an uneasy and tenuous compromise among three primary factors:

1) The promotion of economic objectives.

2) Concern for maintaining strategic and ideological

alliances.

3) A commitment to international human rights protection.[3] This set of considerations has often led to refugee law that is highly selective in its operation, with Canada retaining the prerogative to select refugee claimants rather than the other way around.[4]

The promotion of economic objectives has long been at the center of Canadian immigration policy. Given the vastness of its geographical territory and its relatively small population, Canada has traditionally relied on immigration to provide it with new citizens possessing money, skills and experience. Immigrants have always been necessary to further the development of our economy and the cultivation of our land. Canada has thus taken the view that its tempering of internationalist concern for refugees with a healthy injection of political and economic realism has been the critical link in maintaining public support for large-scale refugee re-settlement and has thus served the interests of both Canada and the refugees themselves.[5]

The rationale for this immigration-based refugee law is rooted in history. While refugee law did not evolve as a subject of specific concern in Canada until after World War II, Canada has a long tradition of admitting immigrants in search of re-settlement. Until the middle of the twentieth century, Canada really had no law or policy specifically oriented to the admission of refugees. Rather, refugees were admitted as part of

the general immigration scheme.[6]

The second influence on the character of refugee law in Canada systems from Canada's desire to live up to its obligations as a member of the post-war Western alliance. As noted above, the human displacement caused by the Second World War and the resultant international pressure to facilitate migration, forced Canada along with other Western nations, to confront the refugee phenomenon explicitly. The government, however, maintained its focus on domestic economic interests by specifically seeking out the most adaptable European refugees from among those in need of re-settlement. The Canadian response to the European refugee crisis included the Sponsored Labour Movement, the Close Relatives Scheme, and the admission to Canada of orphan children under the sponsorship of domestic ethnic and religious groups. All refugees under these schemes were capable of ready assimilation in Canada, and could reasonably be expected to make few demands on national resources. As a stark contrast, Canada refused to admit any of the "hard core" European refugee population who were, by definition, those most in need of safe haven and re-settlement. The government erected a constitutional and regulatory barrier which effectively insured that only productive and healthy refugees were allowed into Canada.[7]

The third major influence on Canadian refugee policy has been Canada's desire to assume the role of international middle power, and, specifically, its determination to play a leadership role in the international human rights community.[8]

Casting a dark shadow over all these factors has been a political, ideological and even racial bias that has been an unstated, but often potent, influence determining Canada's immigration and refugee policy. Reg Whitaker has observed that by "erect[ing] a detailed framework of ideology and political criteria for selection and exclusion" during the post-war years, Canada "insisted that it wish[ed] to keep out certain ideas and certain beliefs, just as it wish[ed] to keep out certain contagious diseases."[9] Thus, in the name of combatting totalitarianism, Canada enacted "what must be termed quasi-totalitarian controls over the entry of persons of different political ideology."[10] Further, racism, especially anti-Semitism, has a long history in shaping Canada's immigration and refugee policy with, for example, the then-prime minister and key civil servants being morally culpable for so few Jews finding sanctuary from Nazi oppression in Canada during and after World War II.[11] When Canada began to take European migrants as part of a special movement between 1947 and 1952, less than ten per cent were Jews.[12] Similar sentiments played a major role in the admission of members of the Chinese and other non-white communities. The change to a more open, non-discriminatory policy, with regard to race and ideology, has been gradual and, in some cases, perhaps incomplete.

III.

In the post-war period leading up to its signing in 1969 of the Convention relating to the Status of Refugees and its

Protocol, Canada's refugee policy was largely determined by ad hoc responses to temporary crises related to the Cold War struggle. For example, the 1956 invasion of Hungary by the Soviet Union led to quick and resolute action by the Canadian government to provide sanctuary to refugees seeking to escape communism. J.W. Pickersgill, the minister of immigration at the time, played a prominent role, setting up a special Hungarian immigration branch and personally flying to Vienna to oversee the admittance process. This type of initiative became a model in the evolution of Canada's refugee policy. It combined humanitarian considerations with criticism of the behaviour of the Soviet Union while at the same time helping to promote Canadian economic interests.[13]

When Canada finally signed the U.N. Convention on refugees and its Protocol, thereby ensuring it had an obligation to refugees in accordance with international law, it had yet to incorporate this fact into domestic law. However, the change in the Canadian attitude towards immigration had already been reflected by the relatively liberal immigration act passed in 1967. This new act ensured a non-discriminatory policy towards immigrants with respect to race, religion and national origin.[14] New guidelines for the acceptance of refugees into Canada were published by the Immigration department in 1970. These guidelines incorporated the provisions of the Refugee Convention and a more liberal immigration criteria.[15] As a result of this new Canadian refugee policy, Canada took in

several hundred Tibetans who had fled the persecution of Chinese communists in 1970. In 1972 and 1973, Canada took in more than 7,000 Ugandian Asians who had been forced to flee by Idi Amin's repressive, anti-Asian policies. Here, Canada was responding to an appeal by Britain to share the burden and thus was acting based on considerations of both foreign policy and humanitarianism. Again, in 1973, Canada accepted more than 7,000 Chilean refugees who had fled from the dictatorship of General Augusto Pinochet. In addition, during this period, large numbers of American resisters of the Vietnam War were accepted through analogous programs. Humanitarianism and Canadian self-interest intersected to dictate Canadian refugee policy in this period.[16]

Prior to 1974, Canadian immigration policy adhered to the principle that refugees would only have their claim considered outside their country of origin. The basic factors dictating this policy were:

1) An External Affairs policy against allowing Canadian embassies to be used as sanctuary;
2) The problem of separating normal immigrants from refugees in genuine need of protection;
3) The role of Canadian ambassadors and High Commissioners, foreign policy considerations, and ideology.[17]

However, on November 20, 1974, in an unprecedented move, the Canadian cabinet authorized the admission of up to 100 Chilean political prisoners who were technically not refugees since they

were not outside their country of origin. At the same time, the target figure for other special programs was raised from 1,000 to 5,000. This policy was expanded further to designate the source of refugees to include anywhere in South America.[18]

In another exceptional example from this period, Canada agreed to accept 5,000 Vietnamese refugees as a result of the United States' withdrawal from Vietnam and the subsequent fall of Saigon. Here, Canadian actions were motivated at least in part by anti-communist ideology and an obligation to demonstrate token solidarity with the United States.[19]

Further influencing events at this time with respect to immigration and refugee policy was the fact that then-Prime Minister Pierre Trudeau was in the process of making an effort to raise Canada's image abroad as an international mediator and peacekeeper. Foreign policy, including the intake of refugees, was governed by Canada's national interest, its international aspirations, as well as economic nationalism and a concern for social justice. It was during Trudeau's first term that Canada finally became a signatory, in 1969, to the U.N. Convention on refugees and its Protocol. Yet, at this time, refugee policy was still pursued on an ad hoc basis without a formal process to determine admissions policy.

LEGAL HISTORY OF CANADIAN REFUGEE POLICY

I.

It was not until 1973 that the Canadian government first established a legal basis for refugee admissions into Canada with

amendments to the jurisdiction of the Immigration Appeal Board. The amendments applied only to refugee claims made from within Canada and permitted the Immigration Appeal Board to quash a deportation order in so far as it was determined that there were "reasonable facts for believing that the person concerned was a refugee protected by the [U.N.] Convention."[20] The procedure established by this enactment proved an inadequate means of implementing Canada's obligation under the refugee Convention for two reasons. First, it was wholly within the board's discretion to grant or withhold landing in any particular case. Thus, there was no guarantee that refugees would in fact receive protection from Canada. Second, because the refugee claim could only be raised on appeal rather than at the immigration inquiry itself, those persons whose cases did not proceed beyond the initial hearing had no means of vindicating their claims to refugee status.

It was because of these and other deficiencies in Canada's immigration law that the government decided to undertake a critical and comprehensive review of its policy in this area from 1973 to 1975, culminating in the 1976 Immigration Act. This Act represents a landmark in the evolution of Canada's immigration and refugee policies. It explicitly affirmed a liberal view of immigration designed to promote family unification, non-discrimination, Canada's demographic, economic and political goals, and a humanitarian concern for refugees.[21] The Act authorizes the minister responsible for immigration to set a

target level for immigration on an annual basis.[22] This level is to be determined after consultation with the provinces concerning demographic needs and labour market considerations, and with such other persons, organizations and institutions as the minister deems appropriate. [23] The Act thus reflects the government's desire to promote a planned and demographic immigration policy.

In order to facilitate the achievement of these goals, the Act divides potential immigrants into four broad classes:

1) Family Class, i.e., those immigrants with spouses or other close relatives who are Canadian citizens or permanent residents;

2) Convention Refugee and Humanitarian Class, i.e., those applicants who satisfy the requirements of the U.N. Convention definition of refugee;

3) Independent Class, i.e., those immigrants who apply based on their special qualifications ranging from job experience and Canadian investment potential to Canadian relatives outside the Family Class;

4) Special Class, i.e., those immigrants who do not fall within the Convention refugee definition but whose admission, on order of the Governor-in Council, would be in keeping with Canada's humanitarian tradition.[24]

"Status" is a key concept under the 1976 Immigration Act. Every individual who seeks to enter or remain in Canada must do so in relation to a particular legal status which is accorded to

the individual by the Act. For example, the Act recognizes such statuses as citizen, Indian, permanent resident, Convention refugee, immigrant and visitor.[25]

Thus, with the 1976 Act and its 1978 Regulations, Canada's refugee policy was given a permanent legal foundation. For the first time, Canada recognized the need for a formal process for the determination and admission of refugees on a continuing, rather than ad hoc, basis. And refugees were no longer dependent on relief given only on humanitarian and compassionate grounds but instead were accorded legal rights throughout the course of the determination procedure. One of the objectives set out in the Act was "To fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted." (subsection 3[g]). As indicated by the use of the term "Convention" in the legislation, the Act derived its definition of refugee from the 1951 U.N. Convention. As a result, the wording found in the legislation is virtually identical to that in the Convention with refugee being defined as a person having a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion" by his own government, or if having no nationality, by the government of the country that was his former habitual residence.[26]

The 1976 Act and its Regulations also authorized four distinct approaches to the re-settlement of refugees in Canada.

Along with a procedure for applying abroad to a Canadian consulate or embassy as is done in the case of other classes of immigrants, an in-land refugee determination system was established based on the Convention definition of a refugee for the examination of persons seeking protection from within Canada or at a Canadian port of entry. Moreover, a procedure was established based on the precedent set in the case of Indo-Chinese refugees fleeing Vietnam in the mid-1970's. The government agreed to permit Canadian organizations and groups of individuals to sponsor privately the admission of Convention refugees as "designated class" members from abroad. In such cases where this type of private sponsorship was undertaken, the applicants did not need to demonstrate the ability to become successfully established in Canada, as they would have if applying under normal procedures to a Canadian consulate or embassy abroad. Finally, the government established the Special Measures Landing programs which were directed to the needs of certain new refugees physically present in Canada who were unwilling to return to their country of origin due to war or severe political instability. Such persons were granted a stay of deportation and an employment authorization and were generally eligible for landing in Canada as permanent residents under relaxed admission criteria.[27]

Between 1980 and 1987, the designated classes sub-category accounted for the majority of refugee landings in Canada. Along with the Indo-Chinese designated class, the government

established two others: the self-exiled persons, and political prisoners and oppressed persons designated classes.[28]

Under the Special Measures Landing programs Canada admitted refugees from countries such as El Salvador, Iran, Lebanon, Sri Lanka, Guatemala, Ethiopia, Somalia, Ghana, and China. During this period, the admission of refugees under these programs accounted for between twenty-five and ten per cent of Canada's refugee and humanitarian intake with as many as 5,000 refugees a year admitted under this sub-category.[29]

By the late 1980's, however, the volume of refugees seeking admission to Canada had overwhelmed the determination system and the government attempted to cut back on Special Measures Landings.[30] While these various programs contributed to the creation of a refugee backlog by 1988, there were other aggravating factors as well.

The creation of the backlog was also attributable to the fact that "the additional resources necessary to handle [the increased volume] were not anticipated when the 1976 Act was implemented." [31] The refugee determinations system was too time-consuming and contained too many cumbersome steps during the process. "The effect of the increased number of claimants and the significant delays in processing led to a system that was not capable of adjudicating claims in a timely manner. This delay in determining the outcome of claimants' status further contributed to another problem that the system had to face -- frivolous claims."[32] In addition, claims from countries labelled as non-

refugee producing countries kept on rising in the 1980's.

Statistics show that in the 1980's the determination system was subject to some abuse. The lengthy and inefficient determination procedure combined with the lack of adequate resources to deal with the increased number of claimants contributed to the overloading of the determination process and its subsequent collapse.[33]

II.

By 1988, it was apparent that the refugee determination system established by the 1976 Act and its Regulations was unable to handle the volume of claims that Immigration Canada was receiving. The reasons for the creation of the backlog will be explored in-depth in the next chapter. In the remainder of this chapter I will outline the legal framework that was established in response to the backlog through amendments to the Immigration Act. It is this general framework that was to be employed in the effort to resolve the backlog claims when the clearance program was announced in late 1988.

The government's initial response to the chronically overloaded refugee determination system was a legislative overhaul. On July 21, 1988, royal assent was given to the legislation originally introduced in Parliament as Bill C-55. The refugee determination system as it existed prior to Bill C-55 had "virtually no controls on access, i.e., almost anyone [could] make a refugee claim and remain in Canada until it [was]

adjudicated." [34] As a result, there had been an increase in the number of in-land refugee claims from 8,400 in 1985 to 18,000 in 1986, to 25,000 claims in 1987. To add to this problem, a significant number of the refugee claims were manifestly unfounded, involving economic migrants from countries such as Portugal, Brazil, and Turkey.

Thus, the intention of Bill C-55 when it was first proposed in 1987, was to radically overhaul Canada's in-land refugee determination system and introduce new controls governing the access of asylum-seekers to the system. This bill envisioned changing the old system by controlling access and not allowing all claimants to remain in Canada until their cases were decided. As well, it introduced what was intended to be a speedy determination system.[35]

Among the provisions of Bill C-55 was a measure meant to discourage repeat claims. Thus, the bill provides that a person who has been excluded or rejected at any level of the claim process and who returns to Canada within 90 days of such a decision shall not be eligible to make a second claim.[36] The only exception to this provision was in the case of those claimants who are excluded on the basis of an existing safe third country but who either cannot be removed to that country or have been refused permission to lawfully remain there.[37]

Also in Bill C-55 was a provision to prohibit the making of late refugee claims at inquiry as a means of avoiding removal action. Only if the person concerned makes clear his or her

intention to claim refugee status at the outset will the request be entertained.[38] Further, the legislation contained a provision meant to exclude certified security risks and other criminally inadmissible individuals from gaining access to the refugee determination process for a full hearing of their claims.[39]

One of the more controversial, although ultimately un-utilized, provisions of the bill was a proposal to authorize the Governor-in-Council to prescribe a list of safe third countries for the purposes of excluding refugee claimants coming from such countries. While this provision was never implemented, it was greeted with a great deal of protest by those who felt that the countries appearing on any such list would not accord as full and fair a hearing to claimants as they would receive under the Canadian determination system.[40]

The determination procedure set up under Bill C-55 is dominated by a new body, created by the legislation, known as the Immigration and Refugee Board. The board is divided into three divisions: the Convention Refugee Determination Division (CRDD), the Immigration Appeal Division (IAD) and Adjudication Division (AD). The former hears refugee claims and its members also sit with adjudicators to decide questions of access to the determination system. Board members are appointed and serve at the pleasure of the government. The CRDD is not a court of record, instead members have the same powers as commissioners under part one of the Inquiries Act. The IAD replaced the

previous Immigration Appeal Board and, unlike the CRDD, is a court of record. The Adjudication Division is responsible for immigration inquiries and is the forum in which removal orders are issued.[41]

Under Bill C-55, access to the refugee determination system was controlled by a two-stage screening process held before a presiding official of the Immigration Department, an adjudicator and a member of the new Refugee Division.[42] The Act states that "the adjudicator and the member shall determine whether the claimant is eligible to have the claim determined by the Refugee Division; and if either the adjudicator or the member or both determine that the claimant is so eligible, they shall determine that the claimant has a credible basis for the claim."[43]

At the first stage, claimants were to be denied access to the determination system if they are not eligible to make a claim. Claimants ineligible to have their cases heard include those accepted as refugees by other countries, those returnable to a safe third country, those under existing removal order, those already determined to lack a credible basis for their claim, or those who are otherwise ineligible for admission to Canada because of criminal convictions in Canada or elsewhere or because they pose a danger to the public of Canada.[44]

Those claimants who are deemed eligible then proceed to the second stage to determine if their claim has a credible basis. At this stage, the adjudicator and Board member are instructed to determine the credible basis of the claim before them based on

the trustworthiness of evidence adduced at the inquiry considering the human rights record of the country the claimant is said to be fearing persecution from and the disposition of other claims made against that same country.[45]

Claimants found to lack a credible basis for their claim are to be returned to their country of origin or to any other country that will receive them. A claimant who is denied access to the system may apply to the Federal Court for leave to apply for judicial review. Pending the Court's decision, the claimant is subject to deportation.

Claimants found eligible and to have a credible basis for their claim were then referred to the Refugee Division for a full oral hearing under the procedure set out in Bill C-55. The proceedings are to be in camera before two members of the Refugee Division as well as being informal, expeditious and less adversarial than the screening process. Both the claimant and the Minister are granted a right to counsel. The Refugee Division may use information it considers credible and trustworthy as well as opinions derived from specialized knowledge in reaching its decision provided that it first informs the Minister and the claimant of its sources and gives them the opportunity to respond.[46]

It is important to note that a significant factor in shaping all of the stages of the refugee determination process outlined here was the Supreme Court's finding, in 1985, that the determination procedure set up by the 1976 Act was

unconstitutional under the Charter of Rights and Freedoms. In **Singh v. Minister of Employment and Immigration,**[47] the Court found that the lack of a guarantee of an oral hearing for those in Canada claiming Convention refugee status constituted a violation of section 7 of the Charter which guarantees "[e]veryone ... 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." Writing for the majority, Justice Wilson explained that, under the previous determination procedure, "a refugee claimant may never have the opportunity to make an effective challenge to the information or policies which underlie the Minister's decision to reject his claim"[48] and therefore, to accord with the principles of fundamental justice, a claimant must, at some point in the proceedings, have such an opportunity in the form of an oral hearing before the determination board.

The new legislation also contained provisions for the revoking of Convention Refugee status on application by the Minister and determined by a panel of three Board members. This procedure was to be used in cases where the claimant employed fraudulent means or misrepresentation to obtain Convention refugee status. Further, an individual whose claim was refused by the Refugee Division was given the option of applying to the Federal Court for leave to appeal the decision. In such cases, unlike appeals against screening decisions, deportation could not take place until the Court had made a decision. There were to be

no appeals from the Federal Court's decision.[49]

As one might expect from this review of the determination procedure, this process did not prove as quick and efficient as was planned by the Immigration Department. Moreover, other cracks soon began to appear in the system. What follows is a short review of further changes that have been made to Canadian refugee law since the passing of Bill C-55 and during the period of the backlog clearance program.

III.

A second piece of refugee legislation, known as the Deterrents and Detention Bill, or Bill C-84, was introduced shortly after Bill C-55. The catalyst for this action was the arrival of boats containing Turkish and Sikh illegal immigrants who subsequently claimed refugee status.[50] The intent of C-84, which was passed along with C-55 in July 1988, was "to enable the Government to act immediately to prevent further abuse of the refugee determination system in Canada."[51] It was "designed to dovetail with Bill C-55" and its purpose was to strike at the source of the abuse by establishing tough deterrents to stop the increasing number of illegal aliens posing as refugees from entering Canada.[52] The bill was also designed to protect genuine refugees, preserve public support for refugee programs and to deter "those who wish to profit by breaking our laws" and "those who abuse our generosity."[53] While C-55 was designed to speed up the refugee determination system within Canada, C-84 was designed to prevent fraudulent refugee claims from being made

in Canada by deterring the entry of fraudulent claimants into this country.

To this end, C-84 contained provisions relating to the punishment of smugglers of undocumented aliens and the removal, without access to the refugee determination process, of those individuals deemed to be security threats by the Minister in concurrence with a Federal Court judge.[54]

These measures provided a means for speedy removal of security threats, preventing such individuals from abusing the refugee determination procedure. However, legal developments since the Singh decision have made it increasingly difficult to remove individuals rapidly or prohibit their access to the refugee determination system. Together, Bills C-55 and C-84 constitute the government's revision of Canada's determination system and provide a clear statement of Canada's refugee policy.[55]

By late 1992, after the backlog clearance program had for the most part run its course, the government introduced a wide-ranging revision of the Immigration Act known as Bill C-86. Although this legislation is not directly relevant to the present discussion because of its chronology, it is worth noting that the refugee determination system was once again revised in an effort, perhaps, to repair the legal structure responsible for the

ultimate failure of the clearance program. Bill C-86, which came into effect in early 1993, establishes the right of Convention refugees to remain in Canada. As well, it further streamlines the determination procedure by assigning the eligibility stage of the screening process to a Senior Immigration Officer (SIO) and eliminating the credible basis stage of the process altogether. As such, once a SIO has determined a claimant is eligible to make a claim, his case is referred directly to the CRDD for an oral hearing before two Board members. Bill C-86 also establishes that, at such a hearing, the claimant must be given a reasonable opportunity to present evidence, question witnesses, and make representations.[56]

Thus, we see that Canada's refugee law and policy have come a long way from 1973 to the recent passage of Bill C-86. The respective governments of these years have sought to incorporate Canada's obligations under the 1951 U.N. Convention and its Protocol into a legislative framework meant to establish a refugee determination system which is intended to fulfil Canada's domestic goals and international obligations as well as help the persecuted and displaced. Yet, the legislation still seems very cumbersome with a determination system that involves too many steps resulting in claims that take too long and are too expensive to process. As well, removals remain difficult to execute. In what follows, we will explore the functioning of this system as it was modified to deal with the backlog that had accumulated.

C H A P T E R II:

CONSTITUTION OF THE BACKLOG

I.

In this chapter, an attempt will be made to examine the internal and external factors responsible for the creation of the 1988 refugee backlog, the number of claimants in the backlog and their breakdown on the basis of country of origin. Further, we will examine the categorization of claimants' files by the Immigration department. Finally, this chapter critically examines the government's position and policy regarding the backlog and its clearance and the reaction to it of the non-governmental agencies and individuals interested in the fate of claimants in the backlog.

There were a number of external and internal factors which led to the 1988 refugee backlog in Canada. Primary, among these were: 1) In the 1980s, the number of refugee claims began to mount in the Western world because of legitimate refugee pressures around the globe; 2) It had become generally known around the world that the Canadian refugee determination system was unduly cumbersome and it offered opportunities to come to Canada and remain here for a lengthy period which could not be attained through normal immigration channels.[1] The backlog of refugee claimants started building under the Liberal government of Pierre Trudeau in the early 1980's and it continued rising during the reign of the Conservatives and Brian Mulroney until it became so huge that the Mulroney government decided to address the problem by bringing in a special program -- "The Backlog Clearance Program, 1988."

Table 2.1. NUMBER OF CLAIMS MADE FROM WITHIN CANADA.[2]

YEAR	NUMBER OF CLAIMS
1980	1,600
1981	3,450
1982	6,100
1984	7,100
1986	18,000
1987	25,000
1988	34,353

Prior to the spiralling increase in the number of claims in 1980's, the number of claims per year was low and the system then devised was administratively adequate for the job. However, there was repeated criticism of the system for its failure to give claimants an oral hearing. Although Canada had signed the 1951 Convention on refugees (and its Protocol) in 1969, procedures for determining claims to Convention refugee status made within Canada remained informal and discretionary until the current Immigration Act came into effect in 1978.[3]. However, under this Act, the system designed to process refugee claims was

too time consuming, with too many ineffective and unnecessary steps to be followed. As Gerald Dirks notes in his recent study of Canada's immigration policy in the 1980's, the refugee determination system in existence prior to Bill C-55 gave virtually unlimited access to claimants, bogus or otherwise, along with an automatic right to appeal to the Immigration Appeal Board.[4]. Thus, by the late 1980's, a dramatic increase in claims combined with significant abuse of the system by bogus claimants to generate an urgent need for meaningful reform.[5] Moreover, the Refugee Status Advisory Committee (RSAC) set up under this Act to rule on claims was ultimately found unconstitutional because it did not guarantee an oral hearing to claimants. Statistics compiled in the 1983 Report on Delays, showed that a within Canada, or "in-land", refugee claim in Ontario had some eight steps with twenty-four stages and it took a total of 1282 days to complete. Following chart shows various stages and delays in claim processing:

Table 2.2. STAGES AND DELAYS IN CLAIM PROCESSING.[6]

Nature of Process	**Average time to process**	**Time req'd in Ont/Que**
Stage 1-2. Process Begins Inquiry Opened and Adjourned	30 working days	57/70 days
Stage 2-3. Inquiry opened and Adjourned; Examination under Oath.	20 working days	76/60 days

Stage 3-4. Transcript typed; Examination under oath	10 working days	37/06 days
Stage 4-5. Transcript Typed; Examined by Counsel	---	---
Stage 5-6. Transcript Examined by Counsel-Claim Received by RSAC.	7 working days	41/00 days
Stage 6-10. Claim Reviewed by RSAC-Returned to RSAC.	221 working days	---
Stage 11-13. Received by SRC-Returned to RSAC.	100 days	---
Stage 15-16. Application for Redetermination Signed-Received by IAB.	10 working days	5 0 days
Stage 16-18. Application for Redetermination Received by IAB:		
(a) Application dismissed:	24.5 days	---
(b) Claim decided by IAB:	367 days	---
Stage 19-20. SIO Notified of IAB's decision-Inquiry resumed.	20 working days	21/50 days
Stage 21-22. Section 28 Application received by Federal Court-Case decided by Court.	193 days	---
Stage 23-24. Parties notified of decision	10 working days	56/15 days

Another factor which contributed to this already complex situation was the lack of available resources for the determination of claims in a timely fashion. A study completed in 1983 by the Program Policy Development Division of the Immigration department

brought out the fact that, "the additional resources necessary to handle [the increased volume] were not anticipated when the [1976] Act was implemented ...."[7]

As the refugee determination system started clogging, the number of frivolous claims started increasing. This created a two-fold problem: the attitude within the determination system gradually turned against acceptance of claims while the non-governmental agencies or refugee advocate groups started criticizing the determination system for a biased attitude towards refugees.

Table 2.3. DECLINE IN ACCEPTANCE RATE.[8]

YEAR	CLAIMS DECIDED	CLAIMS ACCEPTED	PERCENTAGE
1983	2,667	1,003	38%
1985	3,988	1,102	28%
Apr/1987 to Feb/1988	5,545	1,204	21%

Frivolous claims, and/or the increased number of claims from non-refugee producing countries added a new dimension to the already collapsing Refugee Determination System within Canada. In 1981 and 1982, claimants from India made up 40.3 per cent and 37.9 per cent respectively of all claims in Canada. In 1983 to 1985, claimants from Guyana increased from sixty-nine in 1983 to 1,177 in 1985, although the acceptance rate of Guyanese claimants remained only 4.72 per cent, during January 1983 to March 1984, based upon all decided claims and 7.64 per cent during April 1984 to March 1985. Similarly, from 1986 to 1988, Portugal and Turkey

yielded large number of refugee claimants in Canada producing 29.6 per cent of all claims under the Fast Track Process implemented in May 1986. During the period of May 1986 to March 1987, these countries were responsible for 1,915 and 1,922 claims respectively.[9] Refugee claims from Trinidad and Tobago soared to 14,000 during 1988 which later became a part of the Refugee Backlog.[10] Further, 1987 and 1988 also saw a sudden influx of refugee claimants from countries like Fiji and Poland.[11] In addition, the flow of refugee claimants from B-1 list countries continued, with some of these countries showing increased numbers of claimants.

The list of B-1 countries was prepared in an attempt to provide for the faster resolution of refugee claims. The government announced that since it was not Canadian policy to remove individuals to countries with repressive regimes or where civil war or social unrest existed, the government would automatically issue Minister's Permits to claimants from such states pending the outcome of the refugee claim. The following countries were initially placed on this list:

Table 2.4. **B-1 LIST OF COUNTRIES.[12]**

Afghanistan	Sri Lanka
Albania	Soviet Union
Bulgaria	Vietnam
Cuba	North Korea
Czechoslovakia	People's Republic of China
Cambodia	Romania
Iran	El Salvador
Laos	East Germany
Lebanon	Guatemala

As the above discussion indicates, there were many factors responsible for the creation of the refugee backlog. Inefficient and lengthy determination procedures, lack of adequate resources, abuse of the system by bogus claimants, the residual claims of the old system, long-term illegal aliens and the influx of recent arrivals who claimed refugee status in Canada were among these factors.

II.

On December 28, 1988, Barbara McDougall, Minister of Immigration, announced the creation of a revised refugee determination system, the Backlog Clearance Program, to clear the claims pending under the old system prior to January 1, 1989. She announced that there were approximately 85,000 cases in the backlog.[13] The Immigration department subsequently estimated that there were approximately 100,000 refugee claimants in the backlog but the Canadian media disputed Immigration department figures and estimated that the backlog actually contained approximately 132,000 claimants.[14]

Howard Adelman, in his study, **The Post-War Development of Canadian Refugee Policy**, gives the following breakdown of the backlog:

Table 2.5. BACKLOG BREAKDOWN (December 28, 1988).[15]

Region	Country	Persons	
Mid-East:	Iran	9,217	
	Lebanon	3,715	
	Turkey	2,626	
	Total		15,558
Far East:	People's Republic of China	2,485	2,485
South Asia/Pacific:	Bangladesh	1,276	
	Fiji	2,599	
	India	3,963	
	Pakistan	1,984	
	Sri Lanka	11,045	
	Total		20,867
	Total Mid-East Asia		38,910
Africa:	Ethiopia	690	
	Ghana	5,130	
	Somalia	2,613	
	Total		8,433
Latin America/ Caribbean:	Argentina	1,757	
	Brazil	2,447	
	Chile	2,596	
	El Salvador	7,933	
	Guatemala	2,992	
	Guyana	1,130	
	Haiti	1,349	
	Honduras	1,616	
	Jamaica	2,600	
	Mexico	745	
	Nicaragua	3,732	
	Panama	2,055	
	Peru	766	
	Trinidad and Tobago	14,787	
	Total		46,505
Eastern Europe:	Poland	1,656	
	Yugoslavia	1,219	
	Total		2,875
Western Europe:	Portugal	5,745	5,745
USA & Others:	USA	807	
	Others	18,052	
	Total		18,859
Grand Total			121,327

All claimants in the backlog were categorized into the following four groups:

1) Claimants longest in the determination process. This group included some unsuccessful applicants from the 1986 administrative review but for the most part this group comprised of claimants who had arrived in Canada after May, 1986 and had completed their examination under oath.[16] In addition, in this group, were claimants who had not applied under the 1986 administrative review but nevertheless were proceeding with their claims. The number of claimants in this group, in accordance with the department figures, was approximately 9,553 claimants as of December 31st, 1988.[17]

2) This group was comprised mainly of persons who had arrived from the B-1, or former B-1 list of countries designated as non-removeables and were on Minister's Permit. Included in this category were in-status claimants who had completed their examination under oath prior to January 1989.[18]

3) This group was comprised of claimants who had arrived in Canada between December 1987 and March 1988. The first step of the immigration inquiry had been completed but these claimants had not had their examination under oath completed.[19]

4) This group was comprised of claimants who had entered Canada recently, between March and December 1988. In most of these cases, no examination under oath had been held.[20] A

majority of the claimants in this group were from non-refugee producing countries.[21]

The basis of the policy to categorize claimants in the backlog into four groups reflected the original intention of the policy- makers that all cases be dealt with on a first-come, first-serve basis. But as became evident from various press reports, non-governmental agencies involved in refugee matters accused the department of arbitrarily bypassing their own guidelines and giving priority to those claimants in group four. The reason given for such arbitrary action by the department was that the refugee unit decided to process suspected bogus refugees in order to deport them first. Table 2.6 outlines the categorization of each type of backlog file.

Table 2.6. HOW THE FILES WERE CATEGORIZED.[22]

GROUP	DESCRIPTION
1)	- a transcript of the examination under oath.
2)	- a note indicating the person's intent to claim refugee status before Jan. 1, 1989. - a copy of a Minister's permit issued to a person from a "former B-1" country. - cases where an examination under oath was completed before January 1989 as a result of an in-status claim. - in-status claims from Group 4.
3)	- an indication that the person's inquiry was adjourned so that an examination under oath could be held. - nothing further on file regarding the examination under oath.
4)	- a note indicating the person's intent to claim refugee status before Jan. 1, 1989. - no inquiry opened or adjourned.

As a result of the collapse of the refugee determination system, the ever-growing claimant backlog, inadequate resources, and the cumbersome procedures involved in the determination process, the government had no option but to bring in a new refugee determination system.[23] New urgency was also added due

to the hostile media coverage of the arrival of 174 Sikh refugees on the shores of Nova Scotia in 1987. The question for the government was how to tackle the claimants in the refugee stream. The government started designing a new system and, in approximately two and a half years, completed the task. Three successive Immigration Ministers oversaw the preparation of the new refugee system.

The new structure was to establish a more streamlined process which would provide for greater efficiency and minimize bogus claims. The Government stressed that the new system was designed to expedite the determination process by reducing determination steps, but, at the same time, preserving fairness and due process. [24]

On December 20, 1988, the Minister of Immigration elaborated on the Government's position regarding the backlog: "[I]n rejecting a general amnesty, or any relaxation of the Immigration selection criteria, we are mindful of the fact that while abuse of the refugee claim system has been taking place, thousands of others who wish to become part of Canadian society respect our Immigration laws".[25] It was assumed that a significant portion of the backlog were claimants with bogus or frivolous claims. They were perceived as queue jumpers seeking an easier method of Immigration into Canada. The Minister added, "I want to state categorically that removals will take place. Removals are the legislated process by which Canada enforces its Immigration Act."[26] Intention of the government was to implement a new

refugee processing system, and it wanted to tackle the backlog of refugee cases in a manner whereby bogus claimants were weeded out. At the same time, the government wanted to send a message to the world that the Canadian borders were not open to abusers and that Canada was in full control of its immigration policy.

Initially, the government intended to hear claimants first, followed by humanitarian and compassionate grounds considerations, when necessary. However, by the time the program had been implemented the rules were changed. Instead of the refugee hearings being followed by humanitarian and compassionate considerations, the new procedures allowed for an assessment of humanitarian and compassionate considerations before a hearing was held. It was seen as necessary to avoid costly and time-consuming hearing processes by eliminating the statement under oath.

The government attempted to use the refugee backlog review process to create a further deterrent, by sending a signal to future refugee claimants that Canada would not tolerate determination process abuses. At the same time, the government wished to convey to the international community that Canada was a humane society, that its doors were open for genuine refugees.

III.

The belief on the part of Government was that it had achieved a major gain by giving the electorate the perception that Canada would maintain control over its borders and that the Government had restored order to the refugee determination

procedure. The December 1988, government's attitude towards the refugee problem was easy to understand but the problem was extremely complex.

The present immigration minister, Sergio Marchi, who was a Member of Parliament, and was immigration critic for the official opposition at the time the backlog clearance program was announced, called the plan of the government a "quick, dirty way to fix the backlog."[27] He further added, "I am somewhat astounded and secondly, offended, that they would be considering such a mass exodus [of refugees]."[28] The federal Liberals called for an administrative review of cases in the refugee backlog, in which rules would be temporarily relaxed to allow people with good health and security records to gain permanent residence in Canada.[29] Two years after the commencement of the backlog clearance program, only about one-third of the cases had been settled and only 200 fraudulent claimants had actually been removed from Canada. The estimated cost of the program had jumped from 100 million dollars to 179 million dollars (Cdn) and the deadline for completing the program had been extended to the fall of 1991. The assistant deputy chairman (Backlog Division) of the Immigrat and Refugee Board, Firod Kharas told Southam News that the pace of the program "is still as a turtle". He further said, "it would be difficult to extend the program beyond next year" since by then the "families of people in the backlog would have been separated for far too many years".[30]

Many of those working with the refugee claimants in the

backlog -- lawyers, social workers, consultants, the church groups -- drew the public's attention to the effects of the backlog on the people in it. The Canadian Council of Churches criticized the program in very strong terms. It claimed that it was taking so long to decide the fate of at least 100,000 refugee claimants that the families were breaking up, people were sliding into depression and some were even trying to kill themselves. "The pattern of systematic abuse of the backlog claimants may be a mis-guided attempt to safeguard the integrity of the Canadian immigration system, or it may simply be a harsh form of deterrence," said the council, which represents most of Canada's Christian denominations.[31] It further stated, "it is causing untold human misery and is an administrative system causing cruel, inhuman and degrading treatment."[32] Seventy-six per cent of those claimants in the backlog surveyed said they were concerned for the safety of their family members left behind, while seventy per cent said they were suffering depression. About nineteen per cent of those in Canada said that they have had suicidal thoughts or feelings.[33] One study conducted in November 1990, noted that "the impact of delays on the Montreal-area refugee claimants showed that more than half of them experienced physical problems relating to stress ...." [34] The study concluded that "separation from family members, feelings of uncertainty and a lack of control over one's future were the three most common causes of claimants' psychological problems such as depression, anxiety and suicidal tendencies."[35]

The immigration department and the director of the backlog clearance program took the position that there was no need for an amnesty considering the fact that an amnesty could not bring about any financial or other benefits. In contrast to the Government's objection, non-governmental organizations argued that an amnesty was necessary as well as beneficial for the quality of life shared by refugee claimants in the backlog. They pointed to the fact that apart from the tens of millions of dollars that would be saved, the human resources which were being spent on the backlog could be shifted over to the new determination system established in 1989. [36]

Although the backlog clearance was originally scheduled to be concluded by September 1991, it dragged on until June 1993 and, in some cases, beyond. Immigration Minister Barbara McDougall initially said, when she announced the special program, it would take just two years to clean up the overloaded refugee system. But after a year, in the beginning of December 1990, only 3,358 refugee claimants had gone through the hearings. Just sixty-one of those were rejected and thirty-four had been deported. Another 858 people had left voluntarily.[37]

The program, indeed, was going at a very slow pace and its estimated cost had jumped way beyond the original estimation of 100 million dollars. As noted above, this delay and slow pace was causing suicidal tendencies, depression, loneliness and uncertainty to many refugee claimants. The traumatic situation suffered by the claimants in the backlog drew the attention of

the individuals and non-governmental agencies interested in their fate. The government was severely criticized for showing heartlessness with regard to the fate of the claimants.

Thus, the Convention Refugee Backlog Clearance Program of 1988 was necessitated by the collapse of the refugee determination process in Canada. The government realized the need for a new refugee determination system. While a new system was being designed, it was important to clear more than a hundred thousand refugee claimants from the backlog. There were two alternatives for the government: either undertake a simple review of the cases and allow those claimants in the backlog who met medical and criminality check requirements to acquire Canadian permanent residency or find another way to deal with the backlog. The government, on December 28, 1988, announced the backlog clearance program, thereby rejecting the first alternative, which would have amounted to a general amnesty. The government was not willing to bring in any relaxation of the immigration selection criteria. The idea was to send a signal to the world that Canada was in control of its borders.

At the time the government announced the program, it estimated that it would cost taxpayers about 100 million dollars and a time frame of two years to clear the backlog; later, both of these estimates proved wrong. The program was perceived by the government as one which would be approved by the electorate, yet it was criticized by the Liberal opposition and those working with refugee claimants. Church groups criticized the program as

an expensive experiment based upon political expediency as well as a traumatic experience for the claimants in the backlog. All told, the backlog clearance program must be viewed as an abject failure.

In what follows, I will try to discover the root causes of this failure by examining the functioning of the program in detail.

C H A P T E R III:

S E T T I N G U P T H E M A C H I N E R Y

I.

The clearance of the 1988 refugee backlog was an enormous task requiring the setting up of an elaborate machinery. In this chapter, I will examine the mechanics of this machinery as well as the roles of the various agencies involved in the backlog clearance program. Further, I will explore the method of demarcating files for the clearance process and the scheme of processes and stages designed to clear the backlog.

II.

The backlog process was announced on December 28, 1988, with Bill C-55, containing the new refugee determination system, coming into effect on January 1, 1989. Thus, the deadline for making applications under the old system was December 31, 1988. There were rumours of an amnesty or some other type of administrative review. This had caused an unprecedented surge in the number of people entering Canada to make applications for refugee status prior to the deadline. By the end of 1988, there were at least 100,000 applications pending under the old system, perhaps as many as 125,000, although the government preferred the figure of 85,000.[1]

In December 1988, the government appointed Brian Dougall as director of the refugee backlog program. He was responsible for developing a program and process that complied with the federal cabinet's mandate which directed that the 85,000 or so refugee claimants be dealt with through a credible basis review of their claims. He also had responsibility for the implementation of the

humanitarian and compassionate aspect of the process. His directorate at the national headquarters consisted of two divisions, Program Development and the Refugee Backlog Review Unit.

Before we can understand how the backlog claims and files were managed, it may be fruitful to appreciate what agencies were involved in the backlog clearance system. The following is a list of the major offices taking part in the clearance program:

1) **Backlog Canada Immigration Centres (BCIC)**: they were the sections of Employment and Immigration Centres responsible for processing refugee claims in the backlog. They were located in Vancouver, Mississauga, Toronto and Montreal.

2) **Canada Immigration Centres (CIC)**: they could process refugee claims in the backlog in regions which had no BCIC.

3) **Refugee Backlog Review Unit (RBRU)**: this was situated at Employment and Immigration's national headquarters and was responsible for reviewing all cases where an examination under oath had been completed; in such cases, it screened to determine if a credible basis for the claim existed and if the person was eligible for an oral hearing under the transitional provisions.

4) **Immigration and Refugee Board (IRB)**: as noted in Chapter One, the two divisions of this new board, the Convention Refugee Determination Division (CRDD) and the Immigration Appeal Division (IAD), were ultimately responsible for determining if a claimant qualified as a Convention refugee.[2]

Simply put, the backlog was managed by the CICs in

conjunction with the IRB. However, the reality of the management of the program was a good deal more complicated than this. In terms of the officials involved in the management of the backlog program, at the top, the Minister of Immigration delegated his or her authority to the chairman of the IRB and the deputy Minister of Immigration. While the IRB chairman supervised the CRDD and IAD, the national headquarters associate deputy minister was responsible for the various CICs. The associate deputy minister was in charge of regional offices and gave directions in formulating immigration policy and managing immigration operations.[3] It should be noted also that the IRB is a separate body which reports directly to the Minister of Immigration.

With regard to the management of national headquarters (NHQ), it was organized as follows:

1) The national headquarters associate deputy minister (ADM) had managing power over the adjudication director general (ADG), the immigration policy executive director (IPED), and the immigration operations executive director (IOED).[4]

2) The ADG was responsible for managing the four regions: i) Quebec/Atlantic provinces, ii) Ontario (except Mississauga), iii) Mississauga, and iv) the Western Region.[5]

3) The IPED was responsible for strategic planning, policy development, refugee affairs, and federal-provincial relations.[6]

4) The IOED was responsible for case management, immigrant

and visitor programs, settlement, support services, and enforcement.[7]

As well as managing the four regions, the ADM had control over immigration operations which included the function of enforcement. At NHQ, the enforcement branch was subdivided into five areas: i) port of entry; ii) case presentation and appeals; iii) backlog clearance; iv) investigation, detention and removal; and v) operational intelligence and security.

The backlog clearance subdivision consisted of two units: 1) the Refugee Backlog Review Unit (RBRU), and 2) the Backlog Program Development and Co-ordination Unit (BPDCU).[8] The RBRU reviewed the transcripts under oath of group one claimants and made recommendations on the credible basis of a claim to a panel. It also reviewed backlog cases prior to removal and made recommendations on humanitarian and compassionate grounds to a ministerial delegate.[9] The BPDCU developed processes and procedures to clear the backlog of refugee claimants, co-ordinated the design of data and monitoring systems, and was responsible for the design and delivery of training and the development of planning and scheduling to ensure that the backlog was cleared as scheduled.[10]

Backlog files were managed by the Case Management Branch (CMB). The CMB directed the development of strategies and procedures for the management and co-ordination of individual cases, including those which might have affected security, involved criminality or had serious public policy implications.

In the backlog clearance process, it provided direction in sensitive cases involving ministerial removal orders and the removal of Convention refugees.

III.

There were three stages involved in the refugee backlog clearance process as designed by the government: 1) initiating the process; 2) deciding which claimants met the requirements to be accepted as Convention refugees; and 3) implementing the decision.[11] When the backlog procedures first came into effect, the CICs sent information on group one cases to the RBRU at national headquarters. In the meantime, the CICs sorted other cases into one of the three other group classifications.

In the case of group one claimants, the RBRU was to make sure the person was eligible for a panel hearing under the transitional provisions that had been established. If the person was ineligible, the RBRU informed the CIC. For those who were eligible, the RBRU screened the claim for credibility. If the claimant was screened and found not credible, the RBRU sent the CIC a completed "Credible Basis Form -- Negative (A2)". In such cases, the CIC began stage two by conducting an initial humanitarian and compassionate review. If screened to have a credible basis, the RBRU prepared a summary and a recommendation and filled in the first half of the "Credible Basis Form -- Positive (A1)", and a Case Presenting Officer (CPO) reviewed the information. If the CPO agreed with the screening, he or she

formed an opinion on behalf of the Minister. The information then went to an adjudicator and IRB member who determined for themselves whether the claim had credible basis and signed the second half of the A1 form. The RBRU then sent the signed A1 form to a CIC which then began stage two by assessing the eligibility of the claimant to apply for landing under the Refugee Claimant Designated Class (RCDC) regulations. In sum, the stage one review of group one files resulted in two possible findings: either eligible or ineligible for processing under the transitional provisions.

If the RBRU determined claimants in group one to be not eligible for being processed under the transitional provisions, it would inform the CIC. The CIC would then send the file to the responsible enforcement unit and these cases would not get to stage two.

In stage two, it was decided who would stay and who would leave. Various factors were considered at this stage. Depending on the particular circumstances of a case, the factors to be considered included: 1) eligibility to apply for landing under the RCDC regulations; 2) humanitarian and compassionate grounds; and 3) the credibility of the claim, whether the person was a Convention refugee, and the ability of the person to meet statutory requirements for landing.

If group one claimants were found credible by the RBRU in stage one, there were two possible starting points in stage two depending on the claimant's eligibility to apply for landing

under the RCDC regulations. If the claimant was eligible to apply, he or she was allowed to do so and was assessed against the statutory requirements. If the claimant was not eligible to apply, the case was started with an initial humanitarian and compassionate review.

Since the credibility of the claim had already been determined, there was no requirement for a second panel decision. Therefore, if no humanitarian and compassionate grounds were found at the initial review, or if the person failed to meet statutory requirements after a favourable initial humanitarian and compassionate review and a Minister's Permit was therefore not issued, the claim proceeded next to a CRDD hearing. If the claim was successful at the CRDD hearing, then the claimant proceeded on to acquire Convention refugee status. If the claim was unsuccessful at the CRDD hearing, the process resumed and the claim would pass through the regular reviews until a decision was reached.

If at stage one the claim had been found not credible, there was only one starting point at stage two: an initial humanitarian and compassionate review. However, the determination of the RBRU with regard to humanitarian and compassionate grounds was not binding on the adjudicator and IRB member at stage two. Thus, all the regular reviews were still included in these cases. In addition, persons who were not from "scheduled countries" had the option of voluntary departure if the initial humanitarian and compassionate review did not find grounds for an application for

landing. The sequence and number of reviews conducted in each case would depend on the results at each stage. However, it should be noted that it was only possible to go to a CRDD hearing if the claim had first been found credible.

Claimants in group two were in Canada on Minister's Permits. In their case, no inquiry had yet been initiated. Thus, their claims started with initial humanitarian and compassionate reviews. Since the credibility of the claim had not yet been determined by an adjudicator and IRB member, all of the regular reviews were included in the process. Once again, persons who were not from "scheduled countries" had the option of voluntary departure if they failed their initial humanitarian and compassionate review.

In addition to the regular review processes, there were two additional possible reviews which applied to those who already had Minister's permits. First, it was asked if there were grounds for a section 27 report for previous violations of immigration law. Second, it was asked whether the Minister's Permit should be cancelled. If there were grounds for a section 27 report, an inquiry was scheduled to determine if the person should be allowed to stay in Canada. Once again, all the regular reviews were applicable and the claimant could only go to a CRDD hearing if the claim was found credible.

For group three claimants, an inquiry had been opened and adjourned, but no examination under oath had been completed since adjournment. Claimants in this group could only start with an

initial humanitarian and compassionate review. Once again, all regular reviews were available to the claimant as was the option of voluntary departure if the claimant was not from a "scheduled country". For group three claimants, stage two was identical to group one claimants whose claims were screened as not credible by the RBRU.

Persons in group four may or may not have been in Canada legally under visitor or student visas. While they had applied for refugee status or expressed their intention to apply, no inquiry had yet been opened. Their claims also started with initial humanitarian and compassionate reviews. From there, they proceeded on through the various stages and reviews in the same fashion as claimants in the other groups. In the case of those claimants who were "in status", they were processed in the same way as group two claimants. For the remaining claimants who were not "in status", an inquiry was opened. If the panel found the claim credible and, in the case of those believed to be eligible to apply for landing, the adjudicator was willing to adjourn the inquiry in response to a request from the claimant's representative and the CPO, the claimant was allowed to apply for landing. If this application was not successful, the inquiry was resumed so that the adjudicator could render his decision on the out-of-status claimant.[12]

The implementation of the final decision which was undertaken at stage three encompassed all files handled by the backlog clearance system. At this point in the process, one of

four decisions had been made at stage two and the person was either to be landed, allowed to remain on a Minister's Permit, allowed to take the voluntary departure option, or removed. The steps taken in implementing the decision made at stage two could involve: 1) informing the person in writing of the decision; 2) completing the procedures for the decision which was made; 3) updating the file and computer system; 4) informing other concerned parties of the successful implementation of the decision; and/or 5) closing the file. For those who were to be landed, the implementation of this decision could be done on the following grounds: 1) that there was found to be a credible basis for the claim; 2) that the claimant was accepted on humanitarian and compassionate grounds; or 3) that the claimant had been deemed a Convention refugee.

With regard to removals, the Immigration department adopted differing strategies and procedures in order to clear claimants in the four different groups. The following seven diagrams, numbered 3.1 through 3.7, illustrate further the processing procedures for each group.[13]

A review of the numerous and elaborate procedures involved in the processing of the various groups of backlog claimants helps us understand why the backlog program over shot its original target completion date by almost two years. Such time and expense might have been justified if the end result had been the exposure and removal of substantial numbers of fraudulent and bogus refugee claimants. Unfortunately, however, the program

did not produce such worthwhile results. Instead, it degenerated, as we will see, into little more than a very complicated, time-consuming, and expensive amnesty program.

Diagram 3.1:

Stage 1 Group 1

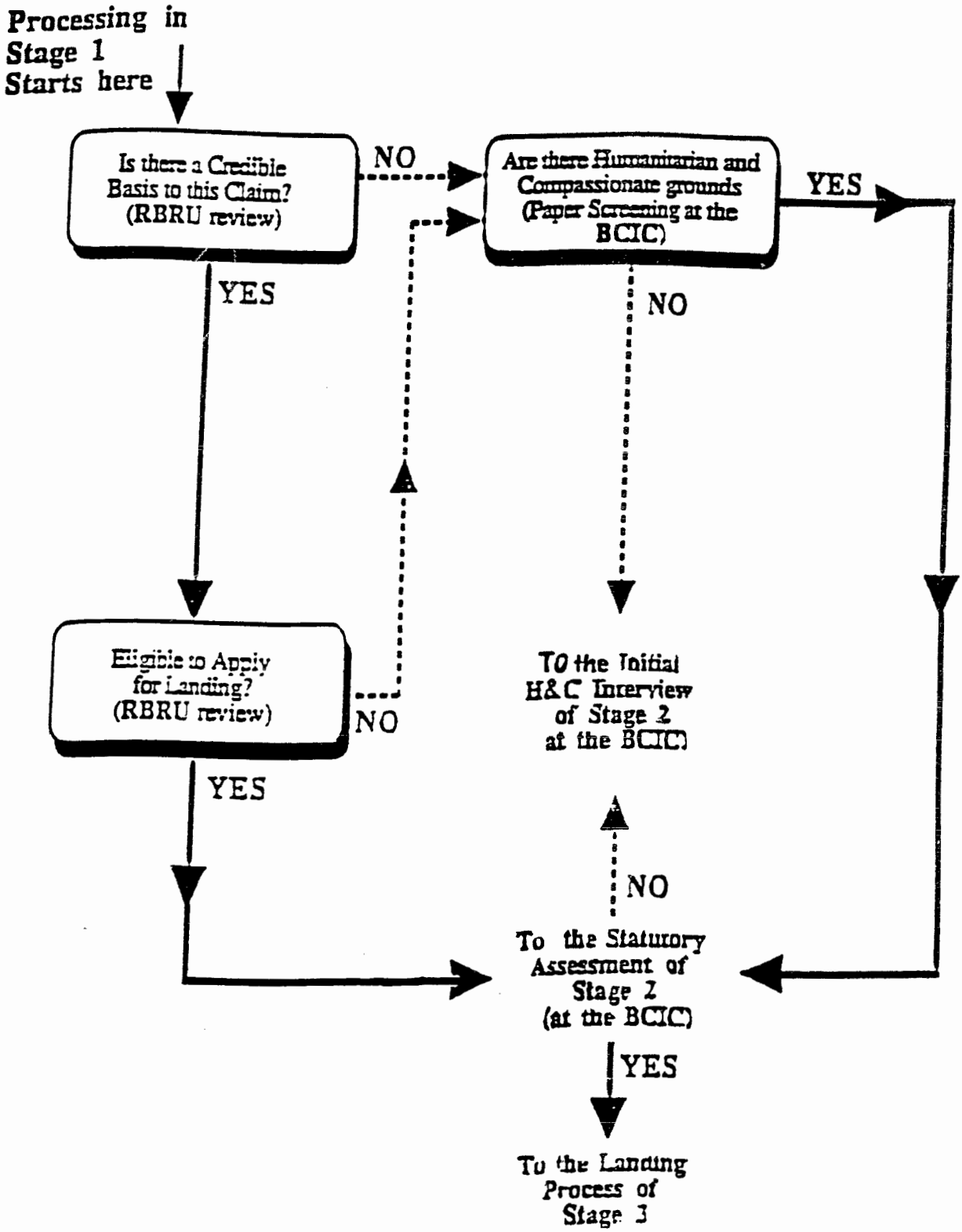


Diagram 3.2: **Stage 2, Group 1—Found Credible by the RBRU**

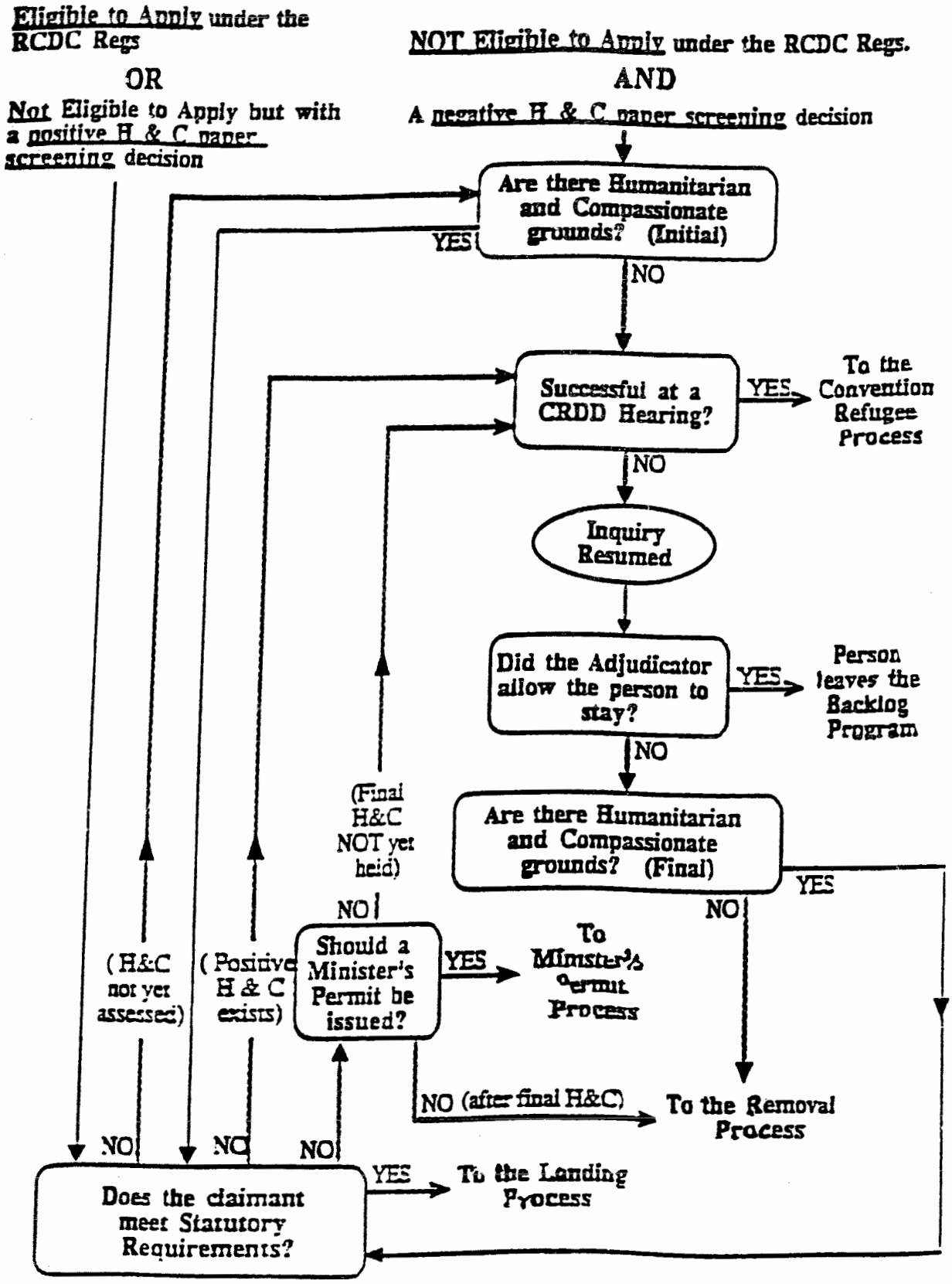


Diagram 3.3:

Group 1--Screened non-credible by RBRU

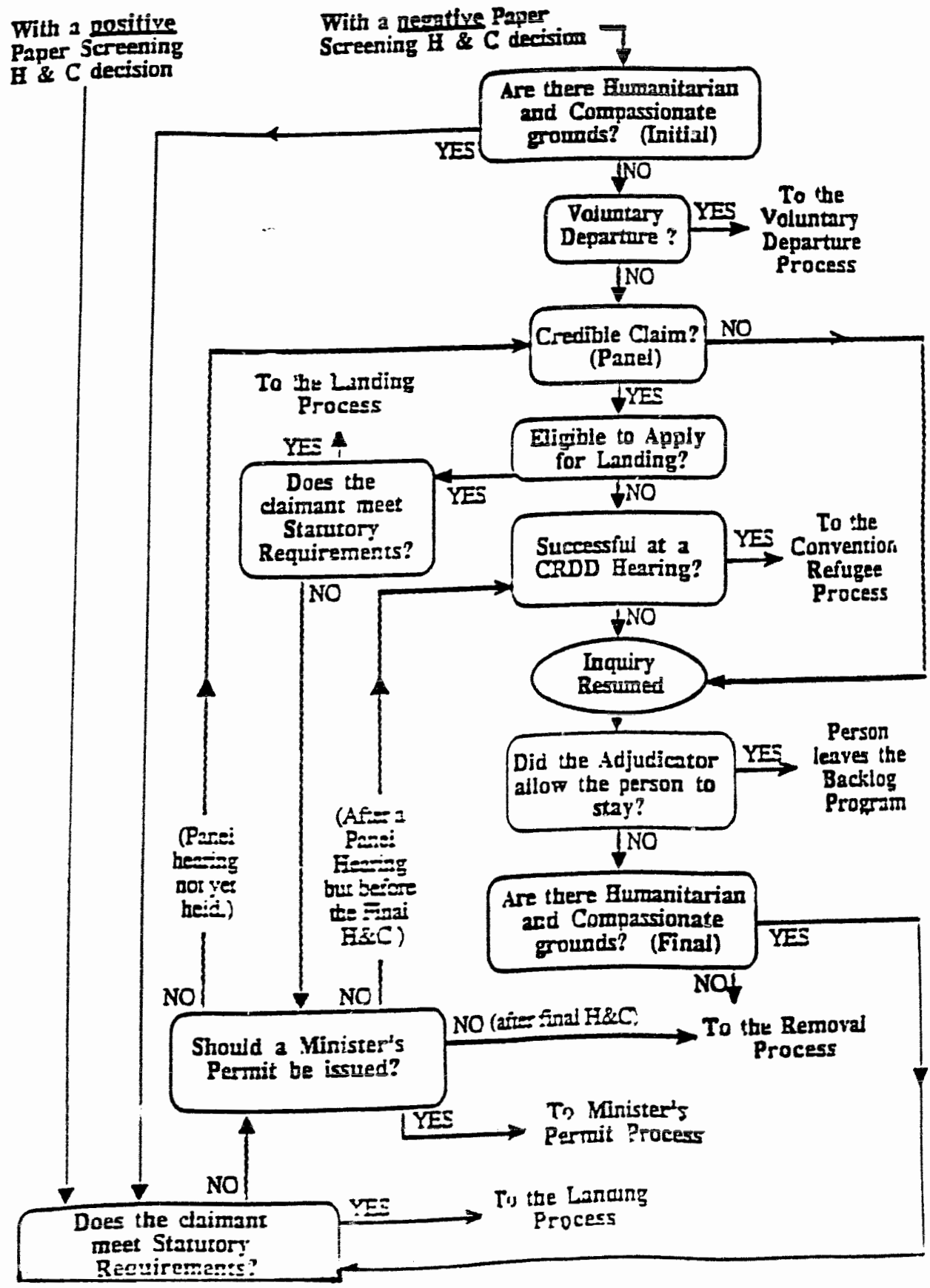


Diagram 3.4: **Stage 1 Groups 2, 3 and 4**

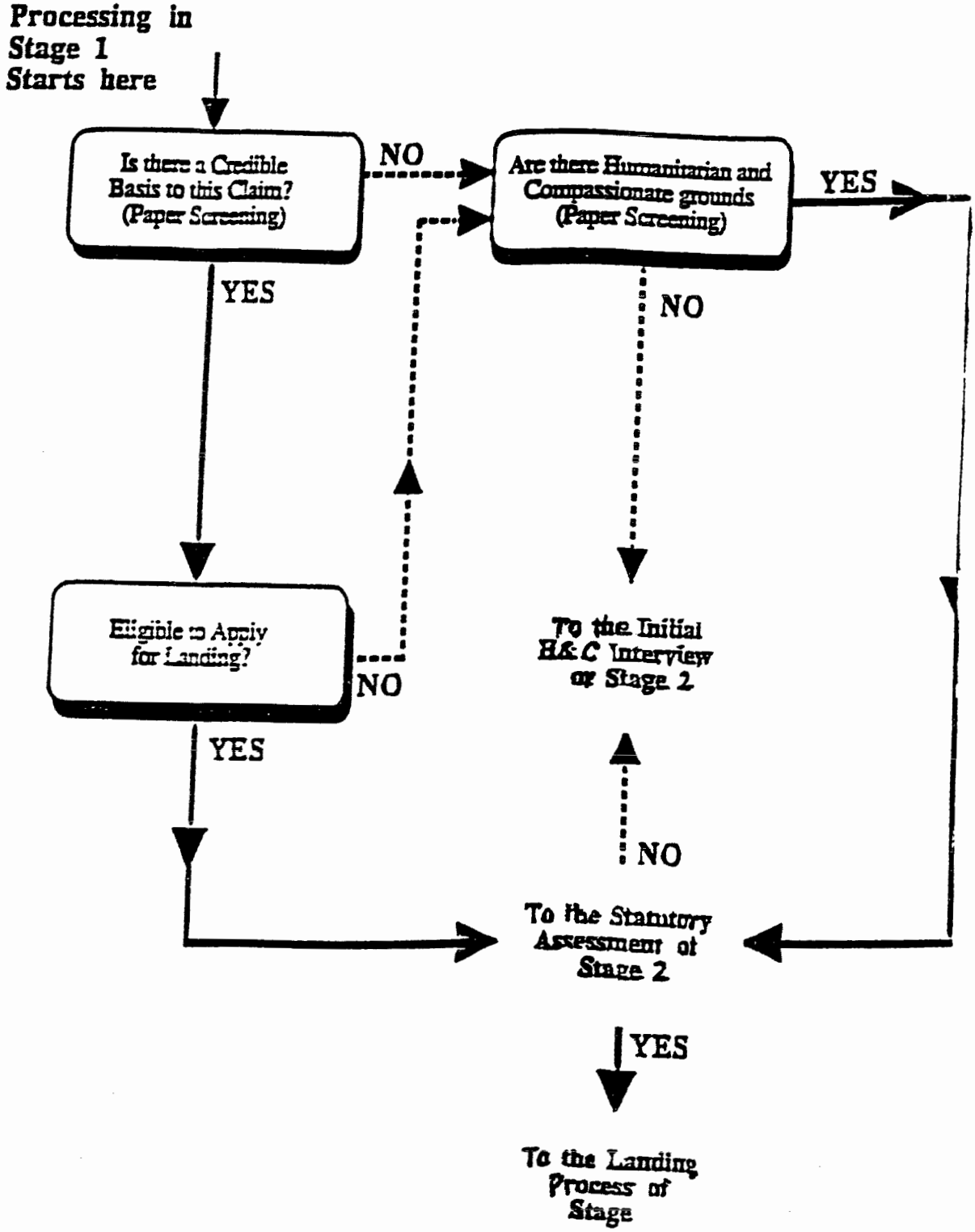


Diagram 3.5: **Group 2 - negative paper screening**

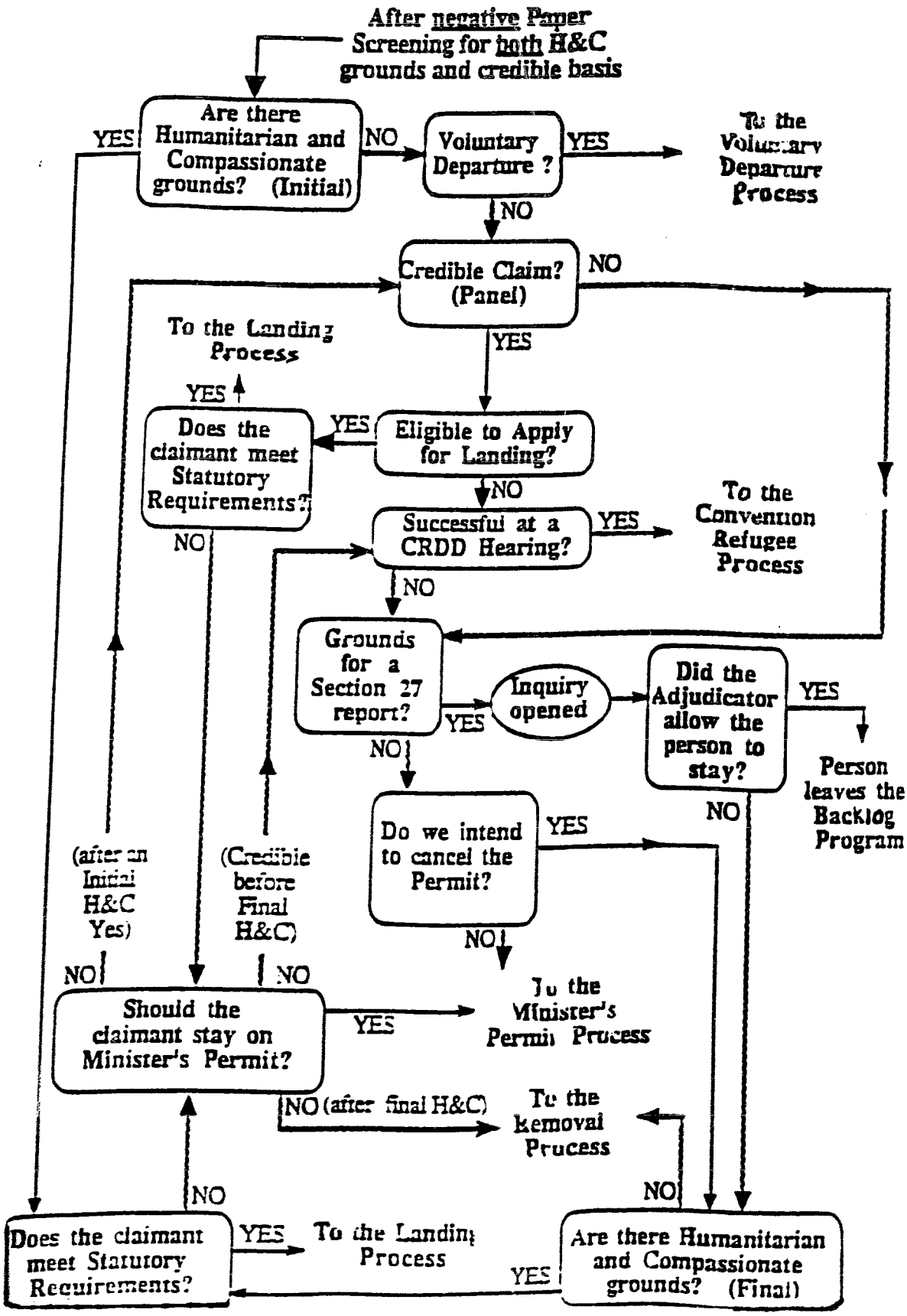


Diagram 3.6: **Group 3 with negative paper screening**

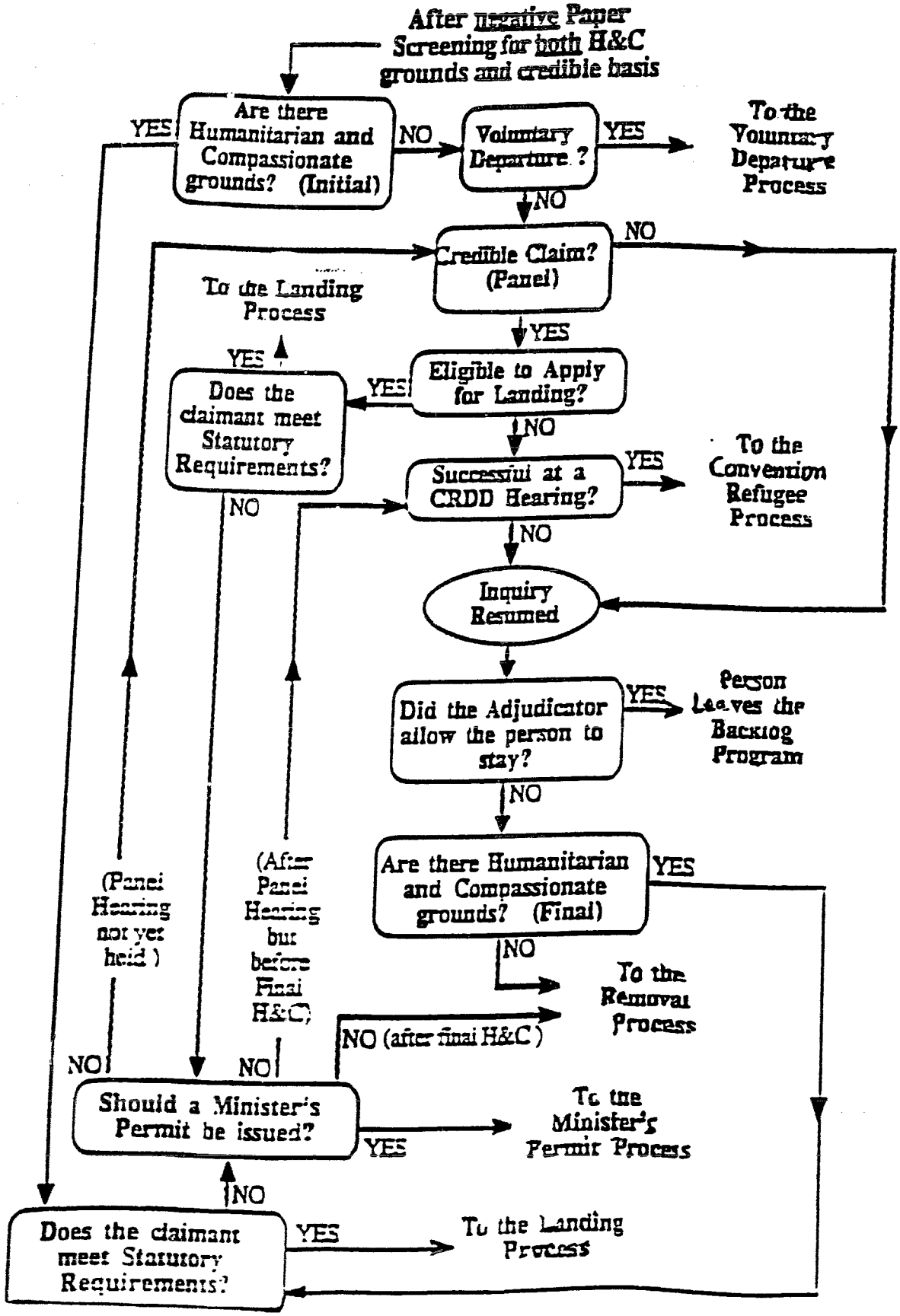
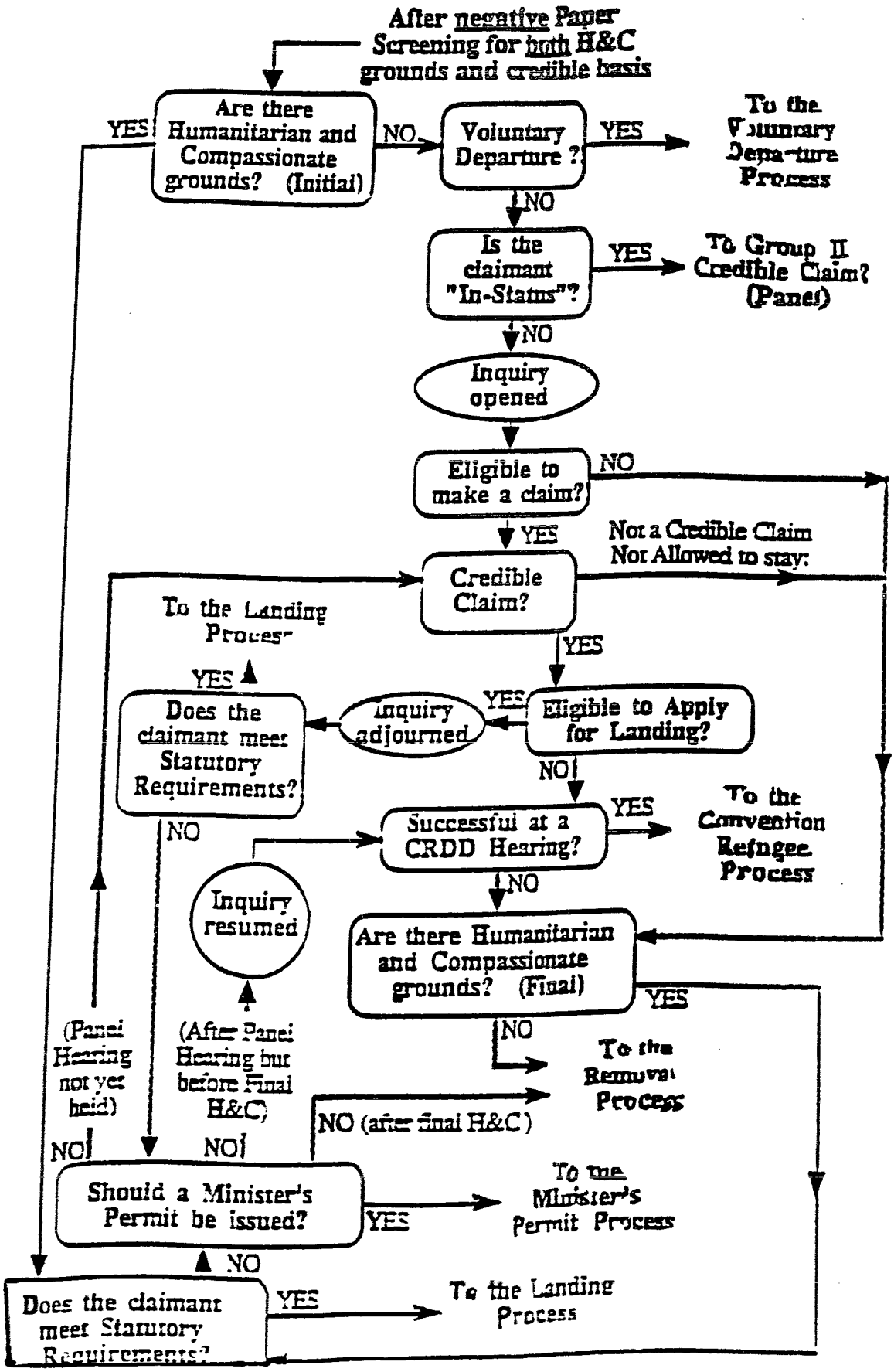


Diagram 3.7: **Group 4 with negative paper screening**



C H A P T E R I V:

A C T U A L F U N C T I O N I N G O F T H E B A C K L O G P R O G R A M

I.

The Backlog Clearance Program did not function as it was intended to. The elaborate administrative and judicial scheme devised by the government failed to produce the desired results. What it did produce was a fair amount of confusion, delay, frustration, and suffering for those who were subject to its determinations and involved in its administration.

This chapter will examine the actual functioning of the backlog program from a number of perspectives. As a participant in the process, the author has professional experience in the administration of this program. Here, I will share my insights, which admittedly do not constitute a definitive account of the functioning of the clearance program, but rather are first-hand observations of how the process proceeded. Moreover, I will support my observations with more objective and empirical evidence to support my conclusions.

Specifically, this chapter will review the parameters of the humanitarian and compassionate grounds reviews and credible basis tests and assess the attitudinal problems of participants in this program. As well, I will explore the possibility of bias among decision makers reflected in the treatment of counsel and claimants and the disparity of outcomes of claims in various regions of Canada. Finally, I will examine the time frames and costs incurred in the course of the completion of the program. But first, I will examine some of the statistics produced by the program as a means of judging its effectiveness.[1]

II.

Although the program was announced on December 28, 1988, the four new immigration centres to be established to process backlog cases in major metropolitan centres were not up and running until the summer of 1989. These centres were finally opened between July 4 and October 2, 1989 and the Immigration department established a target of September 1991 by which all cases were to be decided.

With a view to expedite the backlog clearance, a number of initiatives were undertaken to reduce the amount of credible basis hearings. The process incorporated an initial interview to establish any exceptional humanitarian and compassionate factors which would warrant acceptance. By June 15, 1993, out of 71,920 persons interviewed, 24,183 were accepted on humanitarian and compassionate grounds. A total of 11,987 persons took advantage of the voluntary departure program. They were provided with a letter of introduction to a visa officer to facilitate the process of applying abroad in the proper manner. Subsequently, a good number of those who took voluntary departure were able to come back to Canada. In September 1990, a paper-screening process was instituted. This, again, was meant to expedite the clearance of the backlog. A total of 9,439 cases were approved on credible basis grounds, and an additional 6,122 on humanitarian grounds.

By September 1992, a total of 14,000 persons had failed to

come forward for their interviews and hearings. Regularity amendments established December 11, 1992 as the last date that backlog claimants could come forward to be considered under this program. The backlog offices were finally closed on June 30, 1993. As of June 15, 1993, a total of 95,087 cases had been decided with an overall acceptance rate of sixty-five per cent. Approximately 20,000 persons left Canada voluntarily or were removed following negative decisions. There remained an additional 2,778 persons refused and in the removal stream. A total of 56,722 persons were granted permanent resident status and a further 4,990 were to be landed pending compliance with medical requirements and background checks.

As will become clear from the ensuing discussion, the program was a chaotic mess of bureaucratic bungling resulting in enormous human misery. Friction and a hostile environment substantially affected the actual functioning of the program.

III.

The Backlog Review Unit had to review 30,000 transcripts that were not dealt with under the old system. At the end of September 1990, only 100 remained. This unit had the responsibility to review and prepare recommendations to the Minister in respect of removal cases. This was known as the back end review. Of the 30,000 transcripts, about twenty per cent were found to have a credible basis and many others had credibility conceded on presentation of Personal Information Forms (PIFs). This paper review process started in September

1990. The back-end review of removals resulted in about eighteen per cent being accepted on humanitarian grounds. In this review, those found to have a credible basis were processed for landing. Those who went for credible basis hearings and were refused were reviewed again. Of those, since court decisions amplified the scope of humanitarian and compassionate considerations, twenty-two per cent had been successful. Prior to this change, only five per cent were successful. Those remaining could opt for voluntary departure which would ensure them interviews overseas with Canadian visa officers. Of the 85,000 cases, 51,058 had been opened and 44,713 interviews had been conducted; 6,497 had been accepted on humanitarian and compassionate grounds. The remainder of those interviewed had been sent for processing and many had accepted voluntary departure.

Those who went forward for credible basis hearings would have their hearings within six to eight weeks. Hearings in Toronto took longer than in other parts of the country because the case load in Ontario was heavier than elsewhere. Brian Dougall, the head of the program, alleged that the co-operation of counsel and consultants in Ontario was also not as good as in other parts of the country. A contested case in Toronto could last from four to six months with three to five adjournments. At the end of December 1990, Toronto, with a caseload of 31,048, had completed 2,994 credible basis hearings; whereas Quebec, with a caseload of 25,537 had completed 3,961 credible basis hearings.[2]

Toronto had a high no-show rate at initial interviews -- an average of between forty and fifty per cent in some weeks. This affected efficiency and production. It also had a high level of adjournments and this contributed to the low level of production. Mississauga's no-show rate was not as high as that of Toronto. Of the 20,092 cases allocated to the Mississauga office, from the 85,000 cases in the backlog, it had completed 3,262 credible basis hearings as of December 1990.[3]

Mr. Dougall claimed that forty-five per cent of adjournments were at the request of counsel. The claimants would appear with letters making these requests. Approximately seven to eight per cent of the adjournments were caused by the claimants while twenty-five to thirty per cent would be caused by want of time and the remainder for a variety of reasons. A remand system had been introduced which allowed parties to appear and agree on suitable dates.

Some aspects of the backlog program were started promptly and smoothly. By January 12, 1989, regulations were issued allowing for persons in the program to work without the normally required authorization.[4] There were three mail outs from January 1989 to August 1989 in which 30,000 employment forms were distributed. Within two months, the backlog unit was set up and officers were trained. By April 1989, a full scale review of the 30,000 transcripts had commenced. First draft procedures were out in April 1989 and, from this date, smaller offices had

started humanitarian reviews. Those persons who were in detention were given priority.[5]

Most of the 85,000 cases related to claimants who had arrived between May 1986 and December 1988. The previous administrative review had dealt with the backlog up to May 1986 and only a few hundred cases from it remained.[6] Various methods were introduced to expedite the processing of these 85,000 cases. One of the methods employed, as noted in Chapter Two, was to categorize the backlog claimants into four groups. Voluntary departures were being encouraged in respect to those who would qualify for selection abroad based on their experience in Canada. Through External Affairs, there had been co-ordination with visa officers abroad to process these claims as soon as possible.[7] As well, a number of initiatives had been undertaken to expedite credible basis hearings. More adjudicators and Case Presenting Officers (CPOs) were hired. A number of meetings were held to improve the scheduling of cases. A different process was introduced for credible basis hearings whereby the CPO would indicate areas of consent in the PIF and the panel would decide whether it agreed.[8]

Two procedures had been developed to assist dependents abroad. One was to ensure Minister's permits if the visa officer abroad considered the dependents to be in danger. The second was to consider their cases on humanitarian grounds because of the length of time of the separation involved. Refugees were encouraged to approach the Immigration department to make such

requests. A third procedure was put in place in October 1990 involving sending a telex abroad where there was a positive decision so that the dependents could be processed concurrently with the successful claimants. Over 1,000 telexes were sent but few were considered because visa officers found that the vast majority of dependents were not in danger.

A sample study of refugees indicated that forty-eight per cent had been waiting for approximately two years, thirty-seven per cent for three years, and thirteen per cent for more than four years. The vast majority felt their lives had improved in Canada. But the wait for confirmed legal status in Canada affected refugee families in a variety of negative ways. For example, in Quebec, refugee families reported great anguish over the separation from family members. The consequences on the mental and physical health of refugees were axio-depressive and post-traumatic psychological symptoms such as depression (forty-six per cent), anxiety (fifty per cent), and recall phenomenon including nightmares and painful memories (fifty-two per cent). Somatic symptoms experienced included fatigue, headaches, gastric ulcers, hypertension, and cardiac problems (fifty-two per cent). These worsened in response to the tension generated by wait.[9]

The programs designed to facilitate the re-unification of families were impeded due to the typically low morale of the immigration and visa officers responsible for processing applications and their often negative attitude toward claimants. As well, contrary to Mr. Dougall's assertions, very little

information was available to claimants about these programs.

IV.

As noted above, humanitarian and compassionate review procedures were brought in to the refugee determination process to determine if a claimant could be landed because of the existence of the following conditions in his or her case: 1) whether there existed any humanitarian and compassionate grounds due to the personal circumstances of a claimant relating to any undue hardship that would be caused by his or her departure from Canada; 2) whether there existed any "refugee-like situations", even though the claimant did not strictly meet the criteria of the Convention refugee definition; or 3) whether there was anything in a particular case that would put a person at risk should that person be deported.[10]

Guidelines were promulgated by the Immigration Minister providing criteria for humanitarian and compassionate decisions. Initially, headquarters assigned the humanitarian and compassionate reviews to the case management branch. This branch set up a review process for cases that were refused by the board. They received basic documentation, PIFs, reasons for the negative decision and other material. Officers in the case management branch reviewed all of this material to decide if there was anything in a particular case that would put a person at risk. Just as in the CRDD determination procedure, case management's process looked at the facts and merits of a particular case. These guidelines were followed into 1990 until

new ones were announced by the Minister. Under the new guidelines, the parameters of the exercise of discretion were spelled out requiring officers' discretionary recommendations to be informed by the advice of any senior officials from which they would have reason to believe they could benefit. Furthermore, a definition of humanitarian and compassionate grounds was provided under which such grounds were in existence. When a person's circumstances would lead to him or her being subject to unusual, undeserved or disproportionate hardship. The humanitarian and compassionate review was designed as a case by case response whereby officers were expected to consider carefully all aspects of a situation, use their best judgment, and make an informed recommendation.[11]

Officers were given examples to help them in identifying situations that may warrant a humanitarian and compassionate response. These examples were classified under three categories: 1) situations involving family; 2) severe sanctions or inhumane treatment in country of origin; 3) public policy situations. The last category was to encompass situations involving everything from claimants with Canadian spouses to cases involving the Canadian national interest.[12] In practice, these guidelines were often harshly applied by reviewing officers. The Federal Court of Canada determined in **Ken Yhap v. Canada** (1990),[13] that the application of discretion should be unfettered. Subsequently, thousands of letters were sent to applicants for re-interviews. However, the end result was often the same as it

was prior to the Court's decision.

The humanitarian and compassionate reviews available to claimants were of two types: front-end and back-end reviews. The front-end review was conducted by an immigration officer. These reviews were often assigned to junior officers with sometimes inadequate training. On the basis of my observation, officers often adopted the attitude that their role and duty was to send the claimants back to their country of origin. Thus, the reviews were conducted in a somewhat hostile environment and most decisions were negative. After the **Ken Yhap** decision giving the reviewing officers unfettered discretion, there was little change in officers' approach to the reviews with some taking a more hardened attitude toward claimants.

The back end, or post-claim, review was commission-initiated and conducted at the originating hearing office of a CIC. This review was conducted after a negative decision had been rendered and prior to the time when a removal order or departure notice was effective. The purpose of the review was to assess whether the individual would likely be subjected to "unduly harsh or inhumane treatment if returned to his or her country of origin" and decision-making discretion laid with the Hearings CIC manager.[14] Materials considered included details on current country conditions, the reasons for the negative decision, the PIF, case file information, and submissions from counsel, if received on a timely basis. Moreover, there was a pre-removal review conducted when removal was imminent with discretion laying

with the Detention and Removals CIC manager.

At any time during the determination process an application for review on humanitarian and compassionate grounds could be made. This was a client-initiated review and provided a mechanism for landing an applicant from within Canada. The Immigration department was not obligated to recommend special relief to the Governor-in-Council if the subject was inadmissible on criminal, medical or security grounds.

The non-governmental agencies interested in the cause of refugees, lawyers, consultants, and the refugees themselves were critical of the arbitrariness and lack of understanding of many reviewing officers. This criticism was often reported in the media. On the other hand, immigration officials involved in the reviews saw them as a source of friction, confusion and frustration because of the misunderstandings involved in the interactions among personnel in the department and those representing the claimants.

V.

As outlined in Chapter One, under Bill C-55, before a potential Convention refugee's claim could be heard by the CRDD, the applicant had to establish that there was a credible basis for his or her claim. Interpretation of the "credible basis" test -- under which the adjudicator and board member were to consider all evidence adduced at inquiry, including the human rights record of the country claimed against and the disposition of other cases originating from that country -- has been governed

by a number of court decisions over the years. In **Noor v. Canada** (1990),[15] the Quebec Court of Appeals argued that, in applying the test, a particular adjudicator and board member "should have acted as a 'threshold tribunal'... they misconstrued the meaning of 'credible basis'.... A credible basis of claim is established if the adjudicator or member is of the opinion that there is 'any' credible or trustworthy evidence on which the Refugee Division 'might' determine a claimant to be a Convention refugee. If so, the adjudicator or the member 'shall' determine that the claimant has a credible basis for the claim. A claim can only be found to have 'no credible basis' at the first level if it lacks any basis."[16]

But in **Abdulhakim Sheikh v. Canada** (1990),[17] the Federal Court departed from the reasoning in **Noor**: "A first-level panel is to make its own assessment of the credibility of the evidence before it. It has to be of the opinion that there is credible or trustworthy evidence of the applicant's claim. The concept of credible evidence is not the same as that of the credibility of the applicant. However, even without disbelieving every word an applicant has uttered, a first-level panel may reasonably find him so lacking in credibility that it concludes that there is no credible evidence relevant to his claim, on which a second level panel could uphold that claim. A first-level panel's conclusion that there is no credible basis for any element of the refugee claim is sufficient to dispose of the claim because an applicant has to establish that all of the elements of the Convention

refugee definition are verified in his case."[18]

The Federal Court clearly defined the two-fold nature of the test in **Sloley v. Canada** (1990),[19]: First, it must be determined if there is any credible evidence and, if there is, might the CRDD, after a full hearing, determine the applicant to be a Convention refugee. Further court decisions elaborated on this attempt to demarcate the boundaries of the test, finding that there must be some informed, credible evidence touching on each of the necessary elements of the claim as well as a determination that, acting on the evidence found to be credible or trustworthy, the CRDD might reasonably conclude in the applicant's favour. Moreover, jurisprudence in this area has established that at the credible basis stage, the tribunal is not to make findings of fact but is limited to determining the existence of credible or trustworthy evidence on each of the necessary elements of the claim; thus, the weighing of evidence or applying a "balance of probabilities" test are beyond the jurisdiction of the tribunal. Although the tribunal could draw certain negative inferences if the very credibility of the claimant's evidence was in question, it must decide in favour of the claimant if certain positive factors supporting the credible basis of the claim remained. Thus the primary function of the tribunal came to be defined as the weeding out of manifestly bogus claims.[20]

A review of various decisions of the credible basis panels can be revealing. Many of these panels applied the test wrongly,

either by weighing the evidence or by applying a balance of probabilities test. The threshold of proof in the credible basis test was to have been extremely low. As we have seen, the panel just had to find if there were any positive factors which supported the credible basis of the claim. If there existed any such factors, then the duty of the panel was to determine if, on the basis of such factors, the CRDD could find the fear of persecution to be well-founded, not that it would, as had been done by many panels in the past. With the court decisions of 1990 and '91 and the definition of the legal parameters of the credible basis test, this tendency was eventually reversed.

VI.

It was my observation that the refugee backlog clearance program often functioned in a very hostile environment. Friction, confusion and frustration were often the reigning forces which shaped the attitude of many of the participants in the process. There was an air of harshness and distress in some of the clearance offices.

Generally, there was a lack of co-ordination and low-morale among the immigration officers responsible for backlog clearance. The manager of each office had been given an agenda, namely, to finish cases assigned to his office on time and within budget. The manager, in turn, would hold periodic meetings with the staff to convey that message to them which in turn would affect and

shape the attitude of the staff. Adding to the tension was the limited availability of resources to each office. Therefore, each manager, clerk, immigration officer and CPO had to contend with and work within a realm of pressure. This was a prime factor generating harshness and arbitrariness towards many claimants who became innocent victims of the system.

In spite of limited resources, each backlog immigration centre, ambitious to carry out its mandate, would usually book almost double the cases the office had the facilities to hear on any given day. The explanation was the need to compensate for counsel-initiated adjournments. The result was that many cases were dealt with on standby basis. However, counsel and the client had to attend in order to avoid the sanction of failing to appear which was a ground for inadmissibility for landing even if a person was found to have a credible basis for his or her claim. So virtually every day many cases had to be re-scheduled and counsel and clients were obligated to wait for hours. This created friction between counsels and the department and also contributed to the frustration of the claimants.

Humanitarian and compassionate reviews were often conducted by immigration officers who were overly conscious that they were part of the enforcement machinery of the department and thus conducted their hearings in the manner of a prosecutor in a criminal case. Examinations of the claimants were often slanted with a view to discredit and use statements from these reviews during the ensuing credible basis hearing of the claim.

The department functioned, on occasion, in a conspiratorial manner with the RCMP and police organizations of other countries. For instance, in at least one case, the department successfully attempted to hide certain documents from the claimant which the department had received from the police in India. In spite of the fact that an immigration officer accompanied by an interpreter had interviewed this claimant in the presence of his supervisor in his factory office and had shown him the documents the department had received from India, a subsequent Access to Information request did not turn up these documents which had become missing from his file. Later, during the hearing, the CPO admitted that there was an investigation but stated that no documents relating to the investigation were in the file. In this case, the department conceded credible basis, in the author's view, to avoid further embarrassment.[21] Such incidents as these caused the integrity of the humanitarian and compassionate reviews to be undermined.

In the case of credible basis hearings, the differences in levels of integrity, compassion and bias among decision-makers showed up very clearly in the determinations that were made and the way the proceedings were conducted by adjudicators and board members. A reasonable apprehension of bias could be inferred from the attitude and decisions of board members, while adjudicators in their decisions expressed a more humane and compassionate attitude towards claimants with little evidence of bias. Most of the adjudicators exhibited a high level of

integrity.

There were numerous reasons for differences in the performance of adjudicators and board members. While adjudicators had a sense of security about their jobs as government officials, board members were political appointees on contract. Most of the board members saw their role governed by an attempt to return sanity to the refugee determination system. With little experience or training in law or refugee matters, many of these board members had difficulty even comprehending the legal arguments and concepts advanced by counsel. Also, many of the members were ill-informed about the hostile conditions in existence in certain refugee-producing countries. On the basis of my own observation of the conduct of the board members during refugee hearings, another particular problem was the bias many members showed against certain races, communities and traditions. This became apparent from their questioning of claimants. In some instances, reason for the biased attitude could be traced to the background of a certain member. For example, a member who had fully participated in the movement against turbans in the RCMP sat on the board and decided cases of Sikh refugee claimants from India. Similarly, a head of the umbrella Hindu organization, Vishwa Hindu Prishad -- an organization vehemently opposed to Sikh aspirations in the Punjab and designed to promote the rights of Hindus the world over -- sat on the board and made decisions in the cases of Sikh refugee claimants from India. This anecdotal evidence of bias is supported by statistics which

show disparities in the acceptance rate of claimants in different regions of Canada. For example, Quebec had a higher rate of acceptance for non-whites than did other regions of the country. This may be indicative of a degree of racial bias in existence in different regions of the country.

In contrast to board members, adjudicators did not owe any loyalty to politicians for their jobs. Most were either experienced or fully trained in immigration law or had legal education in their backgrounds. Thus, they were able to apply the law in a more even-handed, sensible, and less biased manner, giving claimants a fairer hearing. However, their role in the refugee determination process ended, under Bill C-55, with the credible basis test; and it is worth noting that since then, with the passage of Bill C-86, the entire process is handled by board members without the input of adjudicators.

The treatment of counsel by immigration officials in the refugee determination process was also a factor impeding the proper functioning of the backlog program. For example, at humanitarian and compassionate review hearings, the counsel was usually limited to spectator status. Very rarely was the counsel allowed to either intervene or make statements on behalf of a client. If counsel attempted to do so the interviewing officer would often bluntly state that the counsel was attending the interview at the invitation of the Minister and could be asked to leave. In several instances, this situation created problems, with the frustrated counsel either directing the client not to

answer particular questions by the interviewing officer or asking the client to leave the interview before its completion. The author witnessed many such examples including cases where counsel was asked to leave the interview booth by the examining officer. On the basis of my own personal experience and the experience of other counsel with whom I had the opportunity to discuss various issues relating to the Backlog Clearance Program, complaints to higher management levels about the arbitrary conduct of immigration officers went unheard. This gives rise to suspicion that the conduct of these officers was being directed by their superiors.

Among the other problems that existed were the overcrowding of the backlog clearance offices, with inadequate facilities for claimants and counsel to confer. Despite the hostility of CPO's and board members toward claimants, they exhibited a cordial and accommodating attitude toward counsel. However, the director of the backlog program, Mr. Dougall, accused counsels of intentionally impeding the program by adjourning cases and using other tactics to delay the proceedings. His evidence to this effect was given in CRDD No. 69, No. T90-2606.

Two of the key factors VII in judging the success of the backlog program, both in retrospect and according to those originally responsible for devising and implementing it, are the considerations of cost and time. The proponents of the program originally sold it as a fast and efficient way of dealing with the refugee backlog. Thus, to judge it on its performance in

these areas is to utilize the criteria established by its very authors. (See Backgrounder to B. McDougall's announcement dated December 28, 1988.)

In December 1988, when the backlog program was announced by Immigration Minister Barbara McDougall, the government estimated that it would spend 100 million dollars over two years to clear the 85,000 claims that had accumulated since 1986. The Immigration department estimated that about 65,000 claimants would be allowed to stay while about 20,000 would be deported. The initial expenditure of 100 million dollars was based on the belief that there were 85,000 claimants in the backlog, when in fact the actual number was closer to 125,000. The target date for the clearance of the backlog was established as September 1991.

By the first week of October 1991, the new Immigration Minister, Bernard Valcourt, was announcing that the clearance of the backlog would be delayed by at least fifteen more months. The reasons cited by the Minister for the extension were the increased number of estimated claimants in the backlog, no shows, and staff turnover. By August 1991, approximately 58,400 cases had been decided with 38,100 (sixty-five per cent) deemed genuine refugees and provisionally accepted for permanent residence in Canada. Some 16,200 were ordered removed or had chosen to leave Canada voluntarily. Arrest warrants had been issued for the remaining 4,100. At the end of August 1991, only 661 bogus refugee claimants had actually been removed while 1,963 claimants

were awaiting finalization of removal arrangements and 2,355 had been issued departure notices. In addition, 9,277 claimants had left Canada voluntarily.

By the end of September 1991, the cost of the program had also been revised upward to an estimated 179 million dollars. By this time, expenditures on the program already amounted to 138 million dollars. Regularity amendments established December 11, 1992 as the last date that backlog claimants could come forward to be considered under the program. Any claimants who came forward subsequent to this date would be processed in accordance with the refugee determination procedure in place at that time. The backlog clearance offices closed their doors on June 30, 1993. A very marginal number of undecided cases still lingered on and were handled by the facilities of the CICs already in place to process claims under the new refugee determination system.

Although the total approved budget for the backlog clearance program was 179.5 million dollars, any honest method of calculating its total cost must consider the following additional factors: 1) Welfare received by claimants in the refugee backlog while they waited for authorization to work; 2) The cost to the government of providing medical treatment to the claimants; 3) The costs of other services provided by governmental and non-governmental organizations to the claimants (ex. social costs, in terms of resources required in order to provide treatment and facilities to victims of depression and other conditions prompted

by the backlog); 4) The loss of revenue to the government incurred by the delay in claimants becoming productive members of society.

A survey of more than two hundred files of the offices of West Coast Immigration Consultants Ltd. shows that a conservative estimated cost, based on the factors outlined in the previous paragraph, is as follows:

Cost as per gov't figures, as reported in the Final Report: $161 Million - 18.7 million, revenue generated by the Cost Recovery Program, in millions:	$ 1 4 2.30
Cost of social assistance, medical and other costs, as per the above factors: $5,000 per claimant x 125,000 claimants (on average of one year's worth of welfare, medical costs and other benefits added) in millions:	$ 6 2 5.00
Total estimated cost in millions:	$ 7 6 7.30

Thus, the total cost of the program must be seen as enormous. In order to calculate the actual cost of the removals that did take place, one must look at the number of claimants who were actually removed. According to the National Backlog Clearance Statistics issued June 15, 1993, a total of 7,394 persons were in the removal stream. But the figures presented in the government's statistics are misleading. The question must be whether claimants in the removal stream were in fact ever removed. The answer must be a qualified "No". The author is still counsel in many such cases where the claimant is still in Canada and in the immigration system. According to the final backlog clearance report of June 1993, there were still 2,778 persons in the removal stream. Therefore, only about 4,616

persons might have been removed, although many of these definitely were not. Nevertheless, even if we use the liberal figure of 5,000 actual removals (a figure that is almost assuredly higher than the actual number of removals), the cost incurred to remove each person can be calculated as follows. With the actual estimated cost of the backlog program calculated as $767.30 million, divided by the 5,000 actual estimated removals, the cost per person removed comes to approximately $150,000.

Thus, the Backlog Clearance Program does not find any justification in view of its initial goals and actual achievement. It became a very expensive mistake with Canadian taxpayers paying for a policy formulated by a shortsighted government acting on considerations of political expediency. The government could have removed almost as many backlog claimants as it did through a simple process of screening claimants under relaxed admission criteria.

The result would have been the same, since many who took voluntary departure also returned, although their lives in Canada were disrupted and their establishment here delayed. The approach based on relaxed admission criteria would have saved the taxpayers almost three quarters of a billion dollars and the backlog claimants themselves would have been spared unwarranted depression and trauma. As it stands, the backlog exercise neither secured Canadian borders from the entry of illegal aliens nor restored sanity to the refugee determination system in

Canada. Instead, it provided us with an example of perhaps unprecedented waste and misjudgment in the formulation and administration of immigration policy and a demonstration of how not to design and implement a refugee determination system.

C H A P T E R V

A S T U D Y O F T H E E C O N O M I C B E H A V I O U R O F A N E T H N I C G R O U P I N T H E B A C K L O G:

I N D O - F I J I A N S

I.

As we saw in Chapter Two, the refugee backlog that had accumulated by 1988 was comprised of a wide variety of ethnic and racial groups fleeing from numerous different countries. This chapter will provide a study of the economic behaviour of the Indo-Fijians in the backlog. Specifically, I will examine the reasons responsible for the influx of Indo-Fijian refugee claimants into Canada during 1987 and 1988, their socio-economic background, and their cultural and economic adaptation after arrival in Canada. Moreover, this study looks at the reception of these claimants by the host community, the legal and socio-economic processes and constraints they were subjected to, and their settlement in Canada. By so doing, I hope to put a human face on the frustration, confusion, and delays that were suffered by those in the backlog clearance program, thereby further illustrating its failure to live up to a proper humanitarian standard in the way it dealt with those in desperate need.

II.

There were approximately 2,599 Indo-Fijians in the backlog.[1] The majority of them entered Canada between May 14, 1987, the date of the first coup in Fiji, and December 1987, when the Canadian government imposed a visa requirement on visitors from Fiji. A very negligible number of Indo-Fijians in the backlog were claimants who entered Canada either before or after this eight- month period.

Fiji witnessed two coups in 1987, on May 14 and September

25. In the general election held on April 14, 1987, the Coalition, formed by the Fiji Labour Party and The National Federation Party, defeated the Alliance Party which had been in power since Fiji's independence in 1970 and was run at the behest of native Fijian high chiefs. The Coalition had brought a large number of Indo-Fijians to power and threatened the chiefs' self-assumed divine right to govern Fiji. The Coalition government of Dr. Timoci Bavadra had threatened to lay charges against corrupt government officials. Also, the gold mining companies, owned mostly by foreign interests, feared nationalization by the new government. It was against this political background that Sitiveni Rabuka, third-ranking official of the Fijian army, staged a coup by arresting Prime Minister Bavadra and his Council of Ministers along with other prominent political leaders on the pretext that the coming into power of Indo-Fijian politicians had threatened the interests of native Fijians.[2]

The coup was followed by very well-orchestrated riots. The targets of the riots were Fijians of Indian descent. Prisoners were let out of jail by Rabuka himself and they proceeded to beat Indian men, women and children. Some Indo-Fijian women were raped as a result of the riots. Properties owned by Indo-Fijians were destroyed, shops were broken into. Rabuka, a Methodist lay preacher, made no secret of his intentions to impose Christian rule on Fiji. Anti-Indo-Fijian elements, specifically, members of the Taukei Movement, declared that Fiji should be for Fijians

and Indians should be put in concentration camps and then deported. All high-ranking administrative officials in the government who were of Indian origin were dismissed. The native Fijian police and army committed numerous human rights violations against Indo-Fijians. The Indian population of Fiji had never experienced such a situation in the past. A shock wave spread among Indo-Fijians and they started leaving for any country they perceived to be safe and offering the possibility of refuge.

The second coup, on September 25, 1987, accelerated the departure of the frightened Indo-Fijians. It had been brought about by the fact that Prime Minister Bavadra, along with a former prime minister of long-standing, and the Governor-General, had attempted together with Rabuka to work out a deal to bring democracy back to Fiji. The plan had been to form a government of national unity with a representative cabinet presided over by the Governor-General. But as soon as Rabuka realized that the deal did not leave him with much power, he promptly arrested Dr. Bavadra and staged the second coup. This lead to the expulsion of Fiji from the Commonwealth. As a result of this coup, attacks against Indo-Fijian men, women, children, and their property intensified again. Concerned about their own future and that of their children, a majority of the Indo-Fijians who could afford it, or who had relatives abroad who could help them, attempted to leave Fiji. In short, Indo-Fijians seemed to typify the class of persecuted peoples for whom the U.N. Convention on refugees, and

thus Canadian refugee law, were designed to assist and protect.

The Indo-Fijians affected most by the aftermath of the coups were from the main urban centres such as Suva, Lautoka, Ba, Labasa, Sigatoka, and Tavua. As a result, the majority of the refugee claimants who made it to Canada were middle class professionals, skilled workers, or business people who had become the subject of native Fijian jealousy and therefore had become targets for severe discrimination, harassment, and attacks by native Fijians.[3] Table 5.1 reveals that seventy per cent of the Fijian claimants were either professionals, business people, or persons who had some sort of skill.

Table 5.1. **PROFESSIONS OF INDO-FIJIAN CLAIMANTS.**[4]

PROFESSION	NUMBER
University Professors	1
Teachers	5
Accountants	2
Clerks and Sales Persons	25
Press Reporters and Media Persons	2
Bank Workers	2
Other Skilled Workers	26
Business Persons	10
Unskilled Labours	27
Total	100

Thus, the claimants who left Fiji were for the most part those who either had their own financial resources to buy a

ticket and leave or had assistance available from Canadian relatives. A survey of one hundred claimants revealed that, prior to leaving Fiji, almost every one of them owned a house, eighty per cent owned one or more vehicles for personal transportation, forty per cent owned a television, one hundred per cent owned a radio, and ninety-five per cent stated that they were leading fairly decent and comfortable lives. All the claimants surveyed stated that they had sufficient money for clothes, food, medical amenities, and annual holidays. As well, ninety-five per cent stated that they had a peaceful family life and that they felt they lived according to a more traditional Indian value system, less exposed to the Western socio-economic system that they found once they arrived in Canada.[5]

Despite their relatively secure financial status in Fiji, most of these same claimants arrived in Canada almost penniless. Prior to the coup, a visitor going out of Fiji was allowed to take up to 2,000 Fijian dollars. After the coup, there was a clamp down, as the Rabuka government imposed strict monetary controls in order to stop the swift drain on money reserves. Moreover, the claimants leaving Fiji were scared of being searched at the port of embarkation and stopped by soldiers. They left it to relatives and friends to take care of their properties and departed with a very limited amount of clothes and jewellery.[6]

III.

Initially, the Fijian refugee claimants were extended a warm welcome by their Canadian relatives and countrymen, but this war lasted for a short period of time. About a month after the first coup, the massive scale of the influx of claimants made Canadian Fijians disinterested in them, with the exception of very close relatives and friends. In addition to a lack of funds, many claimants had arrived in Canada with the additional baggage of deep emotional scars from being raped, tortured, imprisoned or having seen their properties destroyed.

Table 5.2 provides a general classification of the re-settlement needs typical of newly arrived refugee claimants, as interpreted by Robert R. Heipel.[7]

Table 5.2. **REFUGEE RE-SETTLEMENT CONCERNS.**[8]

Basic Living Necessities	Economic Adaptation	Cultural Adaptation
* housing	* employment	* language training
* clothing	* retraining	* cultural learning
* furniture	* credential recognition	* emotional and psychological

	support
* living allowance	* language training
* food	
* health care	* awareness of social programs

In the case of basic living necessities, the host society is normally expected to provide the refugees with the necessities for operating a household within the normal comforts enjoyed in that society. In Canadian cities, such financial assistance is the responsibility, at the federal level, of the Immigrant Settlement and Adaptation Program (ISAP) which has been funded by the Immigration department since 1975.[9] In the case of Indo-Fijians, initial living accommodation was provided by friends or family members who were settled in Canada. But in many cases, the warm welcome accorded these new arrivals degenerated into a sad situation of exploitation. Claimants were often employed illegally as domestic workers by their hosts and told not to contact authorities or make waves because it could lead to their deportation from Canada. Since the new arrivals did not understand Canadian society and the legal system, they for the most part kept silent and endured. Most Fijian claimants did not accept social assistance because they were told by their relatives and friends that going on welfare could work against them in the event that the Immigration department decided to

declare a special program or general amnesty with regard to refugee claimants. Thus, in many cases the children of claimants could not attend school and they were without medical assistance.[10]

With regard to cultural adaptation, refugees are generally in daily contact with members of the host culture; thus, the newcomer is expected to quickly gain a knowledge of the language, values, morals and excepted behaviour of the host society.[11] Indo-Fijians imposed very little adaptation costs on Canadian society. Their own organizations, such as Shiv Mander, the Fiji Canada Association, and the Canadian Committee for Democratic Rights in Fiji provided limited assistance to the newcomers in the area of cultural adaptation by holding orientation meetings and providing shelter, counselling and some financial help. In addition, many of the relatives and friends who had provided the newcomers with accommodations and basic necessities also provided them with some orientation with regard to language and Canadian customs, values and social behaviour. The overwhelming majority of Indo-Fijians could speak and understand the English language and thus imposed little burden on Canadian society with regard to this vitally important skill. Fiji is a country that has experienced a great deal of tourism from the West and is therefore superficially familiar with Western culture. The cultural shock that did occur for the Fijian claimants involved the more personal and private aspects of the two cultures such as the differing roles of women in Canadian and Fijian society.

In the area of economic adaptation, it has been noted that the Indo-Fijians in the backlog came from the active work force in Fiji. Although seventy per cent of them were professionals or skilled workers, most were willing to adjust to the new environment by accepting jobs which required lower skill and paid lower wages. These new arrivals were readily accepted by the Canadian work force and little public money was spent on their training and adjustment to the Canadian job market.

IV.

The backlog program came to act as an impediment to the settlement process of the Indo-Fijian refugee claimants. The majority of them had either left their jobs, closed their businesses, or otherwise abandoned their native employment. Wrong information was provided to many of them by their relatives, friends, and some unscrupulous agents who told them that a general amnesty for refugee claimants in Canada was around the corner. They were told that if they waited two or three months they would receive landed immigrant status. This, however, did not happen. As a result, families were split since some members had stayed back in Fiji while some got stuck in the backlog in Canada. The wait was long and their situation grew worse. Despite this, almost none of the claimants from Fiji were receiving welfare in Canada as of December 1987.

As the backlog grew, the prospects for these claimants' cases being settled promptly faded and the host relatives and friends often forced the claimants out of their homes.[12] With

the Fijian Canadian community being relatively small, word spread fast and this gave rise to a progressively hostile attitude on the part of Canadian hosts towards these claimants. The claimants had little money and no authorization to work in Canada. Thus, eventually they had no option but to turn to social assistance or, in some cases, to work illegally in menial jobs. The claimants who took these jobs were poorly paid and maltreated and had to work in constant fear of being arrested by immigration authorities.

The procedure for obtaining work authorization at that time provided that a work permit would be issued at the second stage of the hearings process. However, by the middle of 1988, only about twenty per cent of the total number of Fijian claimants in the backlog had gone through the second hearing stage and were able to obtain permission to work. Soon after they were granted permission, these claimants were able to find jobs as they were not choosy and willing to adjust. The biggest hurdle they faced was that, in most cases, their educational and skill abilities were not readily recognized by the local Canadian employers. However, with employment they experienced limited economic freedom and were motivated to move from the shelter provided by their hosts to obtain their own living quarters.[13]

By January 12, 1989, the government had announced a new program that gave permission to work to every claimant in the backlog. After this change was introduced, Fijian claimants were, on average, able to find work within thirty days. Table

5.3 demonstrates the willingness, adjustability, and acceptability of the Indo-Fijian claimants in the backlog to the Canadian job market.

Table 5.3. OCCUPATIONAL TRANSITION OF INDO-FIJIANS.[14]

PROFESSION OR SKILL IN FIJI	NUMBER	EDUCATION LEVEL	JOB FOUND WITHIN 30 DAYS OF	NUMBER	NATURE OF JOB IN CANADA
Charter Accountant	1	C.A.	Yes	1	Janitorial
Reporter (Fiji Times)	1	Diploma in Journalism	Yes	1	Journalism
Reporter (Fiji Times)	1	Graduation Experience in Journalism	Yes	1	Sales-Jewellery store
Customs officer	1	Graduation	Yes	1	Truck Driver
Mechanics	5	Diploma in venicle repair	Yes	4 1	Mechanic helper General Labour
Law Clerks	4	Grade 12 Diploma	Yes	2 1 1	Clerk Dishwasher Janitorial
Clerk-Sales	20	Grade 12 Diploma	Yes	2 14 2 2	Pizza Factory Production Worker Janitorial Nurses Aide Cashier
Barbers	2	Professional Barber	Yes	2	Janitorial
Butcher	1	Butcher	Yes	1	Butcher
Nurse	1	Professional Nurse	Yes	1	Dishwasher
Cooks	3	Grade 8 to 12	Yes	2 1	Cook Dishwasher
Labourers Farmers	25	Grade 2 to 10	Yes	5 20	Janitor Labour
Businessmen	15	Grade 8 to 12	Yes	8 7	Business Labour
Teachers	5	University degree	Yes	2 1 2	Janitorial Business Labour
Policemen	3	Grade 12	Yes	1 1 1	Janitorial Taxi Driver Factory worker
Govt. Servants	10	Grade 12 and University deg.	Yes	3 7	Clerks Labourers
Taxi Drivers	2	Grade 8 and 10	Yes	2	Janitorial
Total	100			100	

Thus, after receiving work permits in January 1989, most of the Indo-Fijians in the backlog were able to enter the Canadian work force in some capacity or another, making adjustments as dictated by necessity. By the time the backlog program was originally supposed to be completed in late 1991, most of these claimants had fully established themselves. They had assimilated into Canadian society and accepted many of the local customs and lifestyles. Economically, they had acquired independence and become contributing members of Canadian society. For example, fifty per cent owned their own cars and one hundred per cent owned television sets.[15]

The survey of one hundred Indo-Fijians in the backlog also revealed that by the time the backlog ended, the average combined income of a husband and wife was between $30,000 and $35,000 a year. Virtually all of these claimants were able to work and had permanent jobs or owned their own businesses in which one or more Canadians were employed.

The ability of the Indo-Fijians claimants in the backlog to establish themselves in Canada without first becoming dependent on social assistance is substantially borne out by other studies. For instance, Susanna Lui-Gurr's paper, "The B.C. Experience with Immigrants and Welfare Dependency"[16] confirms that "the number of refugee cases on income assistance appear[ed] small" during the period (Summer of 1989) from which data were drawn.[17] Her

"multinominal logit regression analysis"(!) notwithstanding, Lui-Gurr concludes that "the small proportion of BC immigrants on welfare indicate that the welfare or immigration policies in effect in 1989 did not lead to the extraordinary burden that is often characterized in the press."[18]

As discussed above, the destination of Indo-Fijian claimants in Canada was dictated by where their settlement would be most convenient. As Vancouver had a large Indo-Fijian population, it became the area where approximately half the claimants settled. Table 5.4 provides a breakdown of where these claimants settled in Canada.

Table 5.4. **PLACE OF SETTLEMENT FOR INDO-FIJIAN CLAIMANTS.**[19]

Vancouver	1,400
Calgary	280
Edmonton	420
Toronto	400
Winnipeg, Halifax and Montreal	99
Total	2,599

Although Canadian immigration authorities claimed that the backlog clearance program had been almost completed by the end of December 1992, the Immigration department's own statistics indicate that, as of December 31, 1992, only just over half of the Indo-Fijian claimants -- 1,295 -- had their cases completed

or settled.[20] The settled cases included those accepted as a result of a paper-screening for humanitarian and compassionate grounds and initial humanitarian and compassionate grounds interviews. It also includes those found to have a credible basis in their panel hearings, those found not credible, those who withdrew their claims, and those who were found credible by CICs. According to this data, 393 were found not to have a credible basis for their claims.[21] This can be misleading, however, as in many cases spouses opted to get their claims processed separately. Indeed, in some instances, even the children opted to get their claims processed separate and apart from their parents. If one spouse failed, the other then had two options: either to leave Canada voluntarily or to have his or her claim processed separately. Thus, if the second case was successful, the first spouse who had failed could then also stay in Canada. Similarly, those who withdrew their cases often did so because they had married a Canadian who could then apply for their landing on humanitarian and compassionate grounds. In any event, at the end of 1992, many cases were still pending.[22]

Based on the same government data, it is apparent that approximately 1,600 Indo-Fijian claimants plus their spouses and children were allowed to apply for landing as a result either of their having been found to have a credible basis for their claim or because of various humanitarian and compassionate grounds procedures in place in the backlog program. About fifty per cent of those who failed in their claims were able to stay in Canada

because their spouses succeeded in their claims. This amounts to another 400 claimants. Approximately ten per cent, or 250, of the Indo-Fijian backlog claimants took voluntary departure. Almost ninety-five per cent of those were allowed to come back to Canada. This brings the number of those who lost their claims, either in the credible basis screening or on the basis of humanitarian and compassionate grounds, to be a very small percentage of the total Indo-Fijian claims in the backlog. Many of the failed claimants who were single married Canadian permanent residents or citizens and were thus able to subsequently make in-Canada applications for permanent residence.[23] Some of the others went underground while still others slipped into the United States. All told, the government sent back a very negligible number of the Indo-Fijian claimants in the backlog. Few claimants were ordered deported since, on one basis or another, the vast majority of them were able to stay in Canada.

V.

Right from the beginning, immigration authorities attempted to encourage Indo-Fijians to go back, that is, to take voluntary departure and then apply to emigrate in the normal manner. They attempted to assure claimants in the backlog that, if they had a proper job offer, certification from certain individuals of good behaviour while in Canada, a reference letter from an employer, a criminal clearance certificate from Canada and from Fiji, and medical clearance, they would be allowed to emigrate to Canada.

A major meeting was held in Vancouver in the fall of 1989 to explain the government's voluntary departure program. The Immigration department especially brought in T. Rayan, the head of the Canadian Immigration section of the visa office in Sydney, Australia, which has jurisdiction over applicants from Fiji, to address a gathering of 600 people in order to convince them that voluntary departure was the best option for them. Because of the suffering they had experienced in Fiji and the traumatic delays they had endured in the processing of their claims in Canada, the Indo-Fijians were very sceptical of the government's assurances with regard to voluntary departure. Thus, the voluntary departure program, which was planned by authorities to swiftly get rid of the Vancouver backlog, failed miserably. A full half of the total claimants in the backlog in Vancouver were Indo-Fijians.[24]

The majority of claimants in Vancouver passed their credible basis test and headed towards landing. Throughout Canada, despite the government assurances, only a very small number of claimants opted to leave Canada and take advantage of the voluntary departure program. Of those who did, a majority were allowed to return, although, in the case of Fijians, there was a wait of four to ten months in Fiji.

Immigration department officials responsible for policy formation had failed to appreciate that the threshold to meet the credible basis test was extremely low. On the basis of my own observation, in the beginning, they attempted to contest each and

every case in the hope that this would lead to the deportation of all Fijian claimants. However, as the Federal Court defined the parameters of the credible basis test, the department's hopes to deport Indo-Fijians started to fade.

The department was motivated to contest these claims and also push the voluntary departure as a means of fulfilling the mandate imposed on them by the Minister of Immigration which had included a specific time frame and budget constraints. In the case of Indo-Fijians, the final outcome of the backlog clearance program was astounding with approximately ninety-five per cent of claimants managing to stay in Canada, either through credible basis hearings, humanitarian and compassionate grounds interviews, or through the voluntary departure procedure. A very small percentage of the Fijian claimants were either deported or not allowed to come back after voluntary departure. Of these, many were either criminally or medically inadmissible under s. 19 of the Immigration Act.[25] The government could have achieved this result by a simple screening process, avoiding the expense of the backlog clearance program and the unnecessary suffering of claimants.

Thus, in view of the fact that the Indo-Fijian claimants in the backlog had fled Fiji due to genuine fear of persecution and the vast majority of them ended up staying in Canada anyway, there was hardly justification on the part of the government for putting these desperate people, including small children, through

the seemingly endless maze of the backlog clearance and voluntary departure programs. Their social and economic adaptation made them welcome entrants into the Canadian community. However, their experience reflects the fact that they became victims of political and bureaucratic bungling.

S U M M A R Y A N D C O N C L U S I O N

I.

I began this thesis by noting how integral immigration has been in Canada's history and growth as an independent state. In many ways, our immigration policy must be seen as a reflection of our core values and beliefs as a nation. I also noted the increasing importance of refugee policy as a component of immigration law in the modern world. The late-twentieth century has seen a spread in political instability and ethnic conflict in the developing world, producing larger numbers of stateless and persecuted peoples than the world has seen since World War II. As well, the advancement of communications and transportation technology has encouraged and enabled those in the developing world to seek a better life beyond their native borders. As a result, advanced industrialized countries such as Canada face increasing pressure to provide safe haven to the hundreds of thousands of displaced people around the globe.

A consequence of these combined factors was, as we have seen, the refugee backlog of the late 1980's. The Canadian government's response to this problem, the Refugee Backlog Clearance Program of 1988, was, as we have also seen, an utter failure by any reasonable standard of evaluation.

From one perspective, this tragic policy failure can be seen as an unavoidable result of the international pressures outlined above, which obviously were beyond the control of the Canadian, or, for that matter, any single government. From this perspective, Canada was dealt a hand with which it was bound to

lose, the only question being the scale of the defeat.

But, from what we have seen in the preceding chapters, it is difficult not to recognize the areas in which the government demonstrated inexcusable misjudgment and incompetence. Thus, the roots of the failure of the backlog program can be traced to the history of Canada's immigration and refugee law and policy. Although a participant in the negotiation of the 1951 U.N. Convention on refugees, Canada did not become a signatory to the Convention and its Protocol until 1969. This fact is reflected in the slow and halting development of Canada's immigration and refugee policy, with a formal statutory refugee determination procedure not established until the passage of the 1976 Immigration Act. Other legal and constitutional reforms, especially the entrenchment of the Charter of Rights and Freedoms in 1982, further altered the refugee determination system in ways the federal government had not foreseen. With the **Singh** decision coming in 1985, it wasn't until the latter half of the 1980's that the government was coming to terms with the need to establish a refugee determination process that respected the fundamental principles of justice and individual rights outlined in the nation's supreme legal document. Of course, by this time, it was not the government's only concern to accord full legal protections to refugee claimants since it was also facing the accumulation of a substantial refugee backlog that needed to be dealt with in an expeditious manner.

From the perspective of public policy analysis, it is

interesting to note the institutional sources of the different influences on the reform of Canada's refugee policy in the late 1980's and the impact they were ultimately to have. It is generally claimed in policy science literature that legislatures are more suited and able to carry out the policies they design than are courts or other adjudicative institutions. In comparing the implementation of legislative and judicial policies in the American context, Lawrence Baum has identified a number of mechanisms at the disposal of legislative and judicial institutions, to varying degrees, and their relative impact on the ability of these institutions to implement their polices.[1] He notes that with regard to these mechanisms -- such as the capacity to allocate resources, inflict sanctions, choose implementors and issue clear directives to implementors, as well as specify the form of the implementation process -- legislatures are generally better placed than judicial bodies to achieve their objectives.[2] Baum concludes that "[e]ven though legislative bodies make only limited use of their powers of control, these powers are so much greater than those of courts that a legislative advantage remains."[3]

Thus, applying these conclusions to the present study, one would expect that the primary legislative goal of the Refugee Backlog Program, namely, efficient processing of the backlog along with prompt and thorough removal of those making bogus claims, would have won out over the almost simultaneously imposed judicial goal embodied in **Singh**, namely, the establishment of a

guarantee of a full oral hearing for all those refugee claimants eligible to make a claim. Indeed, a review of Canadian public policy literature focusing on the impact of judicial rulings, especially those of the Supreme Court, published around the time of the Refugee Backlog Program and the establishment of the new refugee determination procedure reveals similar expectations. Both Michael Mandel and David Beatty, in their respective studies of the impact of the Charter of Rights and Freedoms and the Supreme Court's interpretation of it, analyzed the **Singh** decision and the government's response to it embodied in Bills C-55 and C-84.[4] Both commentators saw the new refugee determination procedure as an attempt by the government to limit access to the process by instituting screening mechanisms that would prevent many claimants from reaching the stage where their claim would be given a full oral hearing. Mandel and Beatty both argue that the eligibility and credibility stages of the procedure introduced under Bill C-55 would result in many claimants being unjustly excluded from the full refugee determination system.[5] Beatty notes that, "[i]n effect the Government has paid lip service to the Court's judgment in **Singh** by allowing refugee claimants to appear in person at the first two stages of the review process without giving them the substantial protections which a full hearing guarantees."[6] And Mandel concludes: "**Singh** dictated the **form** of our response. **There shall be hearings.** But this form could in no way contradict the substance: not more but rather less generosity in granting refugees admission to the

country."[7]

But, contrary to these expectations, this study has revealed that the refugee determination procedure established by Bill C-55 did little to screen out claimants, bogus or otherwise. In fact, as we have seen, the eligibility and credibility stages of the process became little more than rubber-stamping procedures that claimants were required to undertake on the way to an oral hearing or, as during the backlog, expedited landing. This resulted from a number of factors including the fact that the much maligned "safe third country" provision of the eligibility stage was never instituted making virtually all claimants eligible to proceed to the credibility stage. And, as we have seen, the credibility screening process was also rendered rather toothless by a number of Federal Court rulings laying out its proper, which is to say limited, scope.

The ultimate failure of the screening process devised under Bill C-55 is reflected in recent revisions of the refugee determination procedure, which have delegated the eligibility screening to a Senior Immigration Officer and abolished the credible basis screening altogether. Thus, it is intriguing to note the relative success the Supreme Court has enjoyed in having the principle it established -- oral hearings for refugee claimants -- generally win out over the legislative efforts made to limit the full refugee determination procedure to what were thought to be the most legitimate claimants.

In the end, it is not surprising that the almost

simultaneous announcement in late 1988 of the Refugee Backlog Clearance Program and implementation of the legislative overhaul of immigration law embodied by Bill C-55 led to Canada's refugee determination system working at cross-purposes with itself. The government was at this time trying to achieve the conflicting goals of establishing a procedure that accorded full legal protections to legitimate refugee claimants in Canada, and quickly resolving the enormous backlog of claimants that had developed. In this light, it is apparent that successive Canadian governments' procrastination in establishing a permanent and internationally adequate refugee determination procedure led to the policy failure of the late-1980's since the government had little experience or institutional memory to draw on in its attempt to reform the system. Indeed, as Gerald Dirks' recent study has shown, the Canadian government has experienced numerous difficulties in designing adequate policies to address a whole range of immigration issues.[8] Dirks finds that immigration policies, and those concerned with refugee determination especially, have proven to be uniquely vexing for successive governments of the 1980's and 90's.[9]

It is important to point out that, in the final analysis, the refugee backlog program must be viewed as a systematic failure rather than one based on poor administration or incompetent personnel. A cursory review of the structure of the backlog program, as laid out in Diagrams 3.1 through 3.7, reveals that, even under ideal conditions and assuming sufficient

and competent personnel, the program was destined to be inefficient and cumbersome in dealing with the resolution of claims and execution of removals.

That such an elaborate administrative machinery was constructed to address a policy problem that, according to the government of the day, required a prompt and decisive solution, suggests an inability on the part of policy-makers and implementors to act in a unified fashion to achieve stated political goals. This point is elaborated upon by Dirks, who describes the significant, perhaps decisive, input of career officials in "determining the shape of policy". [10] Moreover, Dirks finds there to be two competing outlooks within the immigration bureaucracy, whom he labels "facilitors and gatekeepers," who often conflict in their determination of the proper course for immigration policy. [11] Such a division would help explain the diverging purposes toward which the Immigration Department seemed to be working with the backlog program.

II.

Returning to the criteria mentioned in the introduction for assessing the success of a given policy, we are now in a position to evaluate the various forms of impact the Refugee Backlog Clearance Program had. Leslie Pal notes that, "[t]he most natural way to determine policy impact is to examine its intended target, or the direct impact...."[12] In this case, the claimants themselves must be seen as the primary targets of the

program since they were the population to which it directly applied. As Chapter Five illustrates, many of the backlog claimants were in genuine need of Canada's protection as well as having much to contribute to Canadian society But, because of the delay involved in the backlog program, Canada's protection and the claimants' contributions were both tragically postponed. An alternative approach to the backlog, such as an amnesty for the most obviously credible claimants such as the Indo-Fijians, would have prevented untold suffering on the part of the claimants, not to mention save hundreds of millions of dollars. Moreover, it would have allowed claimants such as the Indo-Fijians to quickly commence their new lives thereby adding to the economic, social, and cultural wealth of their adopted home, Canada. Thus, judging by its direct impact on the claimants, the backlog program must be seen as a regrettable failure.

The second criterion Pal suggests in evaluating a policy is its political impact.[13] Here, once again, the backlog program can be seen as nothing but an utter failure. Politically, the government had hoped, with the backlog program, to demonstrate firm control of Canada's borders by avoiding an amnesty. Moreover, they had hoped to establish a deterrent to bogus claimants by swiftly removing those claimants within Canada who were deemed ineligible or lacking in credibility. To their domestic audience, the government sought to make the political demonstration that its immigration policy was not being held hostage to international migration trends. Yet, none of these

objectives were achieved. In fact, perhaps the ultimate indictment of the administration of the backlog clearance program comes in the realization that, despite the enormous sums of money spent and the human cost inflicted on the claimants, the government failed in communicating the political message it sought to demonstrate by the program. Rather, the vast majority of the backlog claimants were allowed to stay in the end, and, because of the interminable delays in their processing, Canada's reputation as a country that allows endless stays in the course of immigration processing was further enhanced.

With regard to the third type of impact Pal cites, economic impact, the calculations provided in Chapter Four make it very difficult to defend the backlog program on grounds of efficiency or economic benefit.[14] Rather, the government spent upwards of 200 million dollars on a process that ultimately degenerated into interminable paper shuffling. The results of the program, in terms of actual removals, come far from justifying the resources devoted to it. Beyond that, it is worth noting that, unlike perhaps other areas of immigration policy, refugee policy cannot be properly evaluated on the basis of economic considerations alone.[15] As noted in the introduction, a country's refugee policy must be rooted ultimately in its citizens' collective moral and humanitarian sense of what they owe those beyond their borders seeking their protection.

The final type of impact Pal cites is social impact.[16] Here, once again, it is difficult to identify the positive impact

the backlog program had on Canadian society or immigrant communities. The delays and uncertainty it caused resulted in undue stress and anxiety for the claimants. Moreover, the ill-conceived and drawn out administration of the program reflected poorly on the ability of the Immigration department, and Canadian government as a whole, to implement policy in a competent fashion. Generally, the backlog program has most certainly contributed to furthering a cynical view of the government on the part of both the claimants themselves and the Canadian public as a whole.

The degree to which the backlog program must be viewed as a regrettable failure is amplified by the fact that the remedies to its faults were readily discussed and debated in policy circles at the time of its conception and implementation. A streamlined and efficient program to eliminate the backlog -- short of a general amnesty -- was well within the government's grasp in 1988, in policy, if not political, terms. But, as Sheikh N. Azaad has pointed out, instead of adopting a two tier approach that would have applied relaxed criteria to those claimants from refugee-producing countries and those who had been in Canada for an extended period of tome, thereby dealing expeditiously with approximately half the original backlog, the government chose to establish a program that, combined with the new refugee determination system brought in simultaneously, was meant to act as a deterrent to future potential claimants.[17] Given that a two tier approach could have saved considerable resources at the

outset which could have been directed toward the weeding out of bogus claims and facilitation of removals, it is arguable that the government judged the deterrent effect of competing approaches exactly wrong and that a selectively relaxed criteria program would have more likely produced the results by which the government was most politically motivated, which is just to say that the government's judgment with regard to the refugee backlog was not only gravely, but consistently and perversely, wrong.

In the final analysis, the refugee backlog clearance program must be viewed as more than a financial disaster or policy failure. In the end, it must be judged by the human cost it incurred and the potential it wasted. As such, it can show us the price that is to be paid, in human and financial terms, when a policy is pursued that does not reflect the values and humanity for which Canada is known around the world. And it should show us that the price is too high, that the human cost is too great.

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