Singh *v.* Minister of Employment and Immigration, [1985] 1 S.C.R. 177

Harbhajan Singh *Appellant*;

and

Minister of Employment and Immigration *Respondent*.

Sadhu Singh Thandi *Appellant*;

and

Minister of Employment and Immigration *Respondent*.

Paramjit Singh Mann *Appellant*;

and

Minister of Employment and Immigration *Respondent*.

Kewal Singh *Appellant*;

and

Minister of Employment and Immigration *Respondent*.

Charanjit Singh Gill *Appellant*;

and

Minister of Employment and Immigration *Respondent*.

Indrani *Appellant*;

and

Minister of Employment and Immigration *Respondent*.

Satnam Singh *Appellant*;

and

Minister of Employment and Immigration *Respondent*.

Federation of Canadian Sikh Societies and Canadian Council of Churches *Interveners*.

File Nos.: 18209, 17997, 17952, 17898, 18207, 18235, 17904.

1984: April 30, May 1; 1985: April 4.

Present: Dickson C.J. and Ritchie*, Beetz, Estey, McIntyre, Lamer and Wilson JJ.
*Ritchie J. took no part in the judgment.

on appeal from the federal court of appeal

Constitutional law -- Charter of Rights -- Fundamental justice -- Security of the person -- Immigration -- Convention refugee -- Whether procedures for determination of refugee status in accordance with principles of fundamental justice -- Whether refugee claimants entitled to the protection of s. 7 of the Charter -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 26, 32(1) -- Constitution Act, 1982, s. 52(1) -- Immigration Act, 1976, 1976-77 (Can.), c. 52, ss. 2, 45, 55, 70, 71.

Constitutional law -- Charter of Rights -- Remedies -- Court of competent jurisdiction -- Appeals from applications for judicial review under s. 28 of the Federal Court Act -- Remedial power under s. 24(1) of the Charter limited to decisions made on a judicial or quasi-judicial basis -- Canadian Charter of Rights and Freedoms, s. 24(1) -- Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, ss. 18, 28.

Civil rights -- Immigration -- Convention refugee -- Whether procedures for determination of refugee status in accordance with principles of fundamental justice -- Remedy -- Canadian Bill of Rights, R.S.C. 1970, App. III, ss. 1, 2(e) -- Canadian Charter of Rights and Freedoms, s. 26 -- Immigration Act, 1976, 1976-77 (Can.), c. 52, ss. 2, 71 -- Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 28.

Appellants claim Convention refugee status as defined in s. 2(1) of the *Immigration Act, 1976*. The Minister of Employment and Immigration, acting on the advice of the Refugee Status Advisory Committee, determined pursuant to s. 45 of the Act that none of the appellants was a Convention refugee. The Immigration Appeal Board, acting under s. 71(1) of the Act, denied the subsequent applications for redetermination of status and the Federal Court of Appeal refused applications, made under s. 28 of the *Federal Court Act*, for judicial review of those decisions. The Court considered whether the procedures for the adjudication of refugee status claims set out in the *Immigration Act, 1976* violate s. 7 of the *Canadian Charter of Rights and Freedoms* and s. 2(*e*) of the *Canadian Bill of Rights*.

Held: The appeals should be allowed.

Per Dickson C.J. and Lamer and Wilson JJ.: Appellants, in the determination of their claims, are entitled to assert the protection of s. 7 of the *Charter* which guarantees "everyone ... the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". The term "everyone" in s. 7 includes every person physically present in Canada and by virtue of such presence amenable to Canadian law. The phrase "security of the person" encompasses freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself. A Convention refugee has the right under s. 55 of the *Immigration Act, 1976* not to "... be removed from Canada to a country where his life or freedom would be threatened ...". The denial of such a right amounts to a deprivation of "security of the person" within the meaning of s. 7. Although appellants are not entitled at this stage to assert rights as Convention refugees, having regard to the potential consequences for them of a denial of that status if they are in fact persons with a "well-founded fear of persecution", they are entitled to fundamental justice in the adjudication of their status.

The procedure for determining refugee status claims established in the *Immigration Act, 1976* is inconsistent with the requirements of fundamental justice articulated in s. 7. At a minimum, the procedural scheme set up by the Act should provide the refugee claimant with an adequate opportunity to state his case and to know the case he has to meet. The administrative procedures, found in ss. 45 to 48 of the *Immigration Act, 1976*, require the Refugee Status Advisory Committee and the Minister to act fairly in carrying out their duties but do not envisage an opportunity for the refugee claimant to be heard other than through his claim and the transcript of his examination under oath. Further, the Act does not envisage the refugee claimant's being given an opportunity to comment on the advice the Refugee Status Advisory

Committee has given the Minister. Under section 71(1) of the Act, the Immigration Appeal Board must reject an application for redetermination unless it is of the opinion that it is more likely than not that the applicant will be able to succeed. An application, therefore, will usually be rejected before the refugee claimant has even had an opportunity to discover the Minister's case against him in the context of a hearing. Such procedures do not accord the refugee claimant fundamental justice and are incompatible with s. 7 of the *Charter*. Respondent failed to demonstrate that these procedures constitute a reasonable limit on the appellants' rights within the meaning of s. 1 of the *Charter*. Pursuant to s. 52(1) of the *Constitution Act, 1982*, s. 71(1) of the *Immigration Act, 1976* is, to the extent of the inconsistency with s. 7, of no force and effect.

Section 24(1) of the *Charter* grants broad remedial powers to "a court of competent jurisdiction". This phrase premises the existence of jurisdiction from a source external to the *Charter* itself. These are appeals from the Federal Court of Appeal on applications for judicial review under s. 28 of the *Federal Court Act*. Accordingly, this Court's jurisdiction is no greater than that of the Federal Court of Appeal and is limited to decisions made on a judicial or quasi-judicial basis. Only the decisions of the Immigration Appeal Board were therefore reviewable. All seven cases are remanded to the Board for a hearing on the merits in accordance with the principles of fundamental justice.

Cases Cited

The Queen v. Operation Dismantle Inc., [1983] 1 F.C. 745; *Collin v. Lussier*, [1983] 1 F.C. 218; *Prata v. Minister of Manpower and Immigration*, [1976]

1 S.C.R. 376; *Singh v. Minister of Employment and Immigration*, [1982] 2 F.C. 689; *Boun-Leua v. Minister of Employment and Immigration*, [1981] 1 F.C. 259; *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470; *Brempong v. Minister of Employment and Immigration*, [1981] 1 F.C. 211; *Ernewein v. Minister of Employment and Immigration*, [1980] 1 S.C.R. 639; *Hurt v. Minister of Manpower and Immigration*, [1978] 2 F.C. 340; *Mensah v. Minister of Employment and Immigration*, [1982] 1 F.C. 70; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Bates v. Lord Hailsham*, [1972] 1 W.L.R. 1373 (U.K.); *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Wieckowska v. Lanthier*, [1980] 1 F.C. 655; *Kwiatkowsky v. Minister of Employment and Immigration*, [1982] 2 S.C.R. 856, affirming (1980), 34 N.R. 237 (F.C.A.); *Lugano v. Minister of Manpower and Immigration*, [1976] 2 F.C. 438; *Alliance des Professeurs Catholiques de Montréal v. Quebec Labour Relations Board*, [1953] 2 S.C.R. 140; *Singh v. Minister of Employment and Immigration*, [1983] 2 F.C. 347; *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *Curr v. The Queen*, [1972] S.C.R. 889; *R. v. Berrie* (1975), 24 C.C.C. (2d) 66; *Rebrin v. Bird and Minister of Citizenship and Immigration*, [1961] S.C.R. 376; *Louie Yuet Sun v. The Queen*, [1961] S.C.R. 70; *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Mitchell v. The Queen*, [1976] 2 S.C.R. 570; *The Japanese Immigrant Case*, 189 U.S. 86 (1903); *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953); *Immigration and Naturalization Service v. Chadha*, 77 L Ed (2d) 317 (1983); *Duke v. The Queen*, [1972] S.C.R. 917; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Permaul v. Minister of Employment and Immigration*, F.C.A., No. A-576-83, November 24, 1983; *Saraos v. Minister of Employment and Immigration*, [1982] 1 F.C. 304; *Law Society of Upper Canada v.*

Skapinker, [1984] 1 S.C.R. 357; *City of Toronto v. Outdoor Neon Displays Ltd.*, [1960] S.C.R. 307; *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947), referred to.

Per Beetz, Estey and McIntyre JJ.: The procedures followed for determining Convention refugee status in these cases are in conflict with s. 2(*e*) of the *Canadian Bill of Rights*. Where a process which comes under the legislative authority of the Parliament involves the determination of "rights and obligations", this paragraph grants the right to "a fair hearing in accordance with the principles of fundamental justice". These principles do not impose an oral hearing in all cases. The procedural content required by fundamental justice in any given case depends on the nature of the legal rights at issue and on the severity of the consequences to the individuals concerned. With respect to the type of hearing warranted in the circumstances, threats to life or liberty by a foreign power are relevant.

Appellants' claims to refugee status have been denied without their being afforded a full oral hearing at a single stage of the proceedings before any of the bodies or officials empowered to adjudicate upon their claims on the merits. In order to comply with s. 2(*e*), such a hearing had to be held. Under the *Immigration Act, 1976*, a Convention refugee has the right to "remain" in Canada or, if a Minister's permit cannot be obtained, at least the right not to be removed to a country where life and freedom is threatened, and to re-enter Canada if no safe country is willing to accept him. These rights are of vital importance to the appellants. Moreover, where life or liberty may depend on findings of fact and credibility, the opportunity to make written submissions, even if coupled with an opportunity to reply in writing to allegations of fact and law against interest, is not sufficient.

This Court, in these appeals from applications for judicial review under s. 28 of the *Federal Court Act*, is only concerned with the determination made by the Immigration Appeal Board pursuant to s. 71(1) of the *Immigration Act, 1976*. This subsection, as drafted, is inconsistant with the holding of an oral hearing and, accordingly, in these cases, is incompatible with s. 2(*e*) of the *Canadian Bill of Rights*. This Court declared "inoperative" in these cases all the words of s. 71(1) following the words "Where the Board...consider the application". The Immigration Appeal Board, as a result, will hold hearings on the merits to decide the cases and, in doing so, shall take into account only the facts or materials specified in s. 70(2) of the Act.

Cases Cited

The Queen v. Drybones, [1970] S.C.R. 282, applied; *Ernewein v. Minister of Employment and Immigration*, [1980] 1 S.C.R. 639, considered; *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376; *Mitchell v. The Queen*, [1976] 2 S.C.R. 570, distinguished; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12; *Komo Construction Inc. v. Commission des relations de travail du Québec*, [1968] S.C.R. 172; *MacDonald v. The Queen*, [1977] 2 S.C.R. 665; *Kwiatkowski v. Minister of Employment and Immigration*, [1982] 2 S.C.R. 856, referred to.

Statutes and Regulations Cited

Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, 1960 (Can.), c. 44, s. 5(2).

Canada Evidence Act, 1980-81-82-83 (Can.), c. 111, Schedule III, s. 36.1.

Canadian Bill of Rights, R.S.C. 1970, App. III, ss. 1, 2(*e*).

Canadian Charter of Rights and Freedoms, ss. 1, 7, 24(1), 26, 32(1).

Constitution Act, 1982, s. 52(1).

Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, ss. 18, 28.

Immigration Act, 1976, 1976-77 (Can.), c. 52, ss. 2, 3*g*), 4, 5(1), 23, 27, 32, 37, 45 to 48, 55, 70, 71, 72.

United Nations Convention Relating to the Status of Refugees, chap. 1, art. 1, para. A(2).

Universal Declaration of Human Rights (1948), art. 25(1).

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Scharpf, Fritz W. "Judicial Review and the Political Question: A Functional Analysis" (1966), 75 *Yale L.J.* 517.

Tarnopolsky, Walter. *The Canadian Bill of Rights*, 2nd ed., Toronto, McClelland & Stewart, 1975.

APPEALS from judgments of the Federal Court of Appeal dismissing appellants' applications for judicial review of decisions of the Immigration Appeal

Board dismissing appellants' applications for redetermination of their refugee claims. Appeals allowed.

Ian Scott, Q.C., for the appellants Harbhajan Singh, Sadhu Singh Thandi, Paramjit Singh Mann, Kewal Singh, Charanjit Singh Gill and Indrani.

C. D. Coveney, for the appellant Satnam Singh.

E. A. Bowie, Q.C., and *Roslyn Levine*, for the respondent.

Mendel M. Green, Q.C., Barbara Jackman and *Donald Chiasson*, for the interveners.

JUDGMENT

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

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

The reasons of Dickson C.J. and Lamer and Wilson JJ. were delivered by

1. WILSON J.--The issue raised by these appeals is whether the procedures set out in the *Immigration Act, 1976*, 1976-77 (Can.), c. 52 as amended, for the adjudication of the claims of persons claiming refugee status in Canada deny such claimants rights they are entitled to assert under s. 7 of the *Canadian Charter of Rights and Freedoms*.

2. On February 16, 1984 the Court granted leave to appeal in these seven cases and they were consolidated for hearing on April 30, 1984. Six of the appellants were unrepresented by counsel when they made their applications for leave to appeal and counsel was appointed to represent them at the hearing of the appeal. The seventh appellant, Mr. Satnam Singh, was represented by his own counsel both at the hearing of the leave application and at the hearing of the appeal. The Court also had the benefit of a joint submission by counsel for two interveners, the Federation of Canadian Sikh Societies and the Canadian Council of Churches. During the hearing on April 30 and May 1, 1984 submissions by counsel were confined to the application of the *Canadian Charter of Rights and Freedoms*. On December 7, 1984 counsel were invited to make written submissions to the Court on the application of the *Canadian Bill of Rights*.

3. At the hearing of the appeals in April and May 1984 counsel took somewhat different approaches to the presentation of the issues but I think it is fair to say that in substance the appeals were argued on the basis that the Court should approach the appeals in three stages. First, the Court should decide whether refugee claimants physically present in Canada are entitled to the protection of s. 7 of the *Charter*. If the answer to this question is yes, then the Court should consider whether the relevant provisions of the *Immigration Act, 1976*, in particular s. 71(1), deny the appellants' rights under s. 7 of the *Charter*. Finally, if the Court answers the second

question in the affirmative, it should determine whether any limitation on the appellants' rights imposed by the Act is justified within the meaning of s. 1 of the *Charter*.

4. In the written submissions presented in December 1984 counsel considered whether the procedures for the adjudication of refugee status claims violated the *Canadian Bill of Rights*, in particular s. 2(*e*). There can be no doubt that this statute continues in full force and effect and that the rights conferred in it are expressly preserved by s. 26 of the *Charter*. However, since I believe that the present situation falls within the constitutional protection afforded by the *Canadian Charter of Rights and Freedoms*, I prefer to base my decision upon the *Charter*.

5. I think the suggestion of counsel that the appeals should be approached in three stages is a good one and I am adopting it in the analysis which follows. First, however, it is important to present the facts and the legislative context within which the appeals have arisen.

1. <u>The facts</u>

6. The facts and procedural history of the seven appeals have a great deal in common and it was because of these similarities that the Court felt it appropriate to consolidate the hearing. Each appellant, in accordance with the procedures set out in the *Immigration Act, 1976*, asserted a claim to Convention refugee status as defined in s. 2(1) of the Act. The Minister of Employment and Immigration, acting on the advice of the Refugee Status Advisory Committee, made determinations pursuant to s. 45 of the Act that none of the appellants was a Convention refugee. Each of the

appellants then made an application for redetermination of his or her refugee claim by the Immigration Appeal Board pursuant to s. 70 of the Act. In accordance with s. 71(1) of the Act the Immigration Appeal Board in each case refused to allow the application to proceed on the basis that it did not believe that there were "reasonable grounds to believe that a claim could, upon the hearing of the application, be established...". Each applicant then sought judicial review of the Board's decision pursuant to the provisions of s. 28 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10. These applications were denied by the Federal Court of Appeal.

7. So much for the similarities. There are a number of distinctions, both substantive and procedural, which can be drawn among the cases of the seven appellants. Six of the appellants are citizens of India who claim Convention refugee status on the basis of their fear of persecution by Indian authorities as a result of their political activities and beliefs, in particular their association with the Akali Dal party in that country. The seventh appellant, Ms. Indrani, is a citizen of Guyana who is of Indian extraction. Her claim to Convention refugee status is based on her fear of persecution on racial, religious and political grounds. Each appellant, in the course of his or her examination under oath pursuant to s. 45 of the Act, set out different facts in support of their refugee status claims. It is common ground that the Court is not concerned on these appeals with the merits of the individual claims made by the appellants.

8. The procedure whereby each appellant came to assert his or her refugee status claim also varies from case to case. Four of the appellants (Mr. Harbhajan Singh, Mr. Sadhu Singh Thandi, Mr. Charanjit Singh Gill and Mr. Satnam Singh) were refused admission into Canada at a port of entry. Inquiries were held pursuant to s. 23

of the Act to determine whether removal orders should be made against them and it was in the course of these inquiries that the appellants raised their claim to refugee status. In accordance with the procedures under s. 45, the s. 23 inquiries were continued until it was determined that removal orders should be made against the appellants. At that point the inquiries under s. 23 were adjourned and each appellant was examined under oath respecting his claim by a senior immigration officer pursuant to s. 45(1).

9. The other three appellants asserted their refugee claims in the course of inquiries conducted pursuant to s. 27(4) of the Act to determine whether they should be removed after having been admitted to Canada. One of the appellants, Mr. Paramjit Singh Mann, succeeded in eluding inquiry within the meaning of s. 27(2)(*f*) when he first came to Canada in July 1977. This came to the attention of immigration officials when he surrendered himself in November 1980 with the result that a s. 27 inquiry was held. Ms. Indrani came to Canada in October 1979 using a false passport and was granted visitor status until November 30, 1979. It eventually came to the attention of immigration officials that she was working illegally and in March 1981 she was arrested. On the basis of ss. 27(2)(*b*) and 27(2)(*g*) an inquiry was held during the course of which she asserted her refugee status claim. Finally, Mr. Kewal Singh came to Canada in November 1980 and was granted temporary status as a visitor. When his visitor status expired he surrendered himself to immigration authorities and, because he had ceased to be a visitor, an inquiry was held on the basis of s. 27(2)(*e*).

10. Inquiries under s. 27 differ from those under s. 23 principally in their effect; in the former case the outcome is liable to be the issuance of a deportation order or a departure notice pursuant to s. 32(6) whereas the latter is liable to lead to a

removal order pursuant to s. 32(5), the nature of the order being of significance in its effect on the person's right to return to Canada at some point in the future. The procedures for the determination of refugee status found in ss. 45 to 48 of the Act and the procedures for redetermination by the Immigration Appeal Board found in ss. 70 and 71 do not draw a significant distinction between inquiries held pursuant to s. 23 and those held pursuant to s. 27.

11. Counsel have presented these appeals on the basis that in terms of the application of the *Charter* the factual and procedural differences just adverted to have no significance. While I believe this to be the case I am also of the view that it is useful to bear the existence of such differences in mind, particularly as the scheme of the *Immigration Act, 1976* itself is being explored.

2. The Scheme of the *Immigration Act, 1976*

12. The appellants allege that the procedural mechanisms set out in the *Immigration Act, 1976*, as opposed to the application of those procedures to their particular cases, have deprived them of their rights under the *Charter*. It is important, therefore, to understand these provisions in the context of the Act as a whole. If, as a matter of statutory interpretation, the procedural fairness sought by the appellants is not excluded by the scheme of the Act, there is, of course, no basis for resort to the *Charter*. The issue may be resolved on other grounds. In *City of Toronto v. Outdoor Neon Displays Ltd.*, [1960] S.C.R. 307, at p. 314, this Court refused counsel's invitation to express an opinion as to the constitutional validity of a statute in a situation in which it was not necessary to the Court's decision to do so. I note as well that the United States Supreme Court has on many occasions articulated a policy of not

deciding constitutional issues in a context where it was not strictly necessary to do so: see *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947) at pp. 568-75, and cases cited therein. Accordingly, I believe that the Court should scrutinize closely:

(*a*) the rights which Convention refugees are accorded under the Act; and

(*b*) the procedures the Act sets out for adjudicating claims for refugee status

before turning to the application of the *Charter* in this context.

(a) *The Rights of Convention Refugees under the Immigration Act, 1976*

13. The appellants make no attempt to assert a constitutional right to enter and remain in Canada analogous to the right accorded to Canadian citizens by s. 6(1) of the *Charter*. Equally, at common law an alien has no right to enter or remain in Canada except by leave of the Crown: *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376. As Martland J. expressed the law in *Prata* at p. 380 "The right of aliens to enter and remain in Canada is governed by the *Immigration Act*" and s. 5(1) states that "No person, other than a person described in section 4, has a right to come into or remain in Canada".

14. However, the *Immigration Act, 1976* does provide Convention refugees with certain limited rights to enter and remain in Canada. The Act envisages the assertion of a refugee claim under s. 45 in the context of an inquiry, which presupposes that the refugee claimant is physically present in Canada and within the jurisdiction of the Canadian authorities. The Act and Regulations do envisage the resettlement in

Canada of refugees who are outside the country but the following observations are not made with reference to these individuals. When a person who is in Canada has been determined to be a Convention refugee, s. 47(1) requires the adjudicator to reconvene the inquiry held pursuant to s. 23 or s. 27 in order to determine whether the individual is a person described in s. 4(2) of the Act. Section 4(2) provides that a Convention refugee "while lawfully in Canada [has] a right to remain in Canada..." except where it is established that he or she falls into the category of criminal or subversive persons set out in s. 4(2)(*b*). If it is determined that the person is a Convention refugee described in s. 4(2), s. 47(3) requires the adjudicator to allow the person to remain in Canada notwithstanding any other provisions of the Act or Regulations.

15. The scope of the refugee's right to remain in Canada is made problematic by the existence in s. 4(2) of the phrase "while lawfully in Canada". Since it is a prerequisite to the holding of an examination under s. 45 that a refugee claimant be a person against whom a removal order or departure notice may be made (see *Singh v. Minister of Employment and Immigration*, [1982] 2 F.C. 689), it is apparent that nobody who is determined to be a Convention refugee will, in one sense, be lawfully in Canada. In practice this circularity is avoided by the issuance of a Minister's permit pursuant to s. 37 at the time a person is determined to be a Convention refugee, thus regularizing the individual's status for purposes of s. 4(2). The case of *Boun-Leua v. Minister of Employment and Immigration*, [1981] 1 F.C. 259, is illustrative of the difficulties which can arise where a Minister's permit is not issued.

16. In *Boun-Leua* the applicant was a stateless person who was born in Laos but had been granted refugee status in France and had taken up residence there. He came to Canada as a visitor in December 1978 and, when his visitor status expired in

January 1979, he surrendered himself to immigration officials and made a refugee claim. In due course it was determined that he was a Convention refugee but he was not issued a Minister's permit. At the resumption of the inquiry held pursuant to s. 47(1) the adjudicator determined that he was not a Convention refugee "lawfully in Canada" and she issued him a departure notice. The applicant sought judicial review of this decision pursuant to s. 28 of the *Federal Court Act*. Urie J., writing for the Federal Court of Appeal, dismissed the application. At pages 263-64 he made the following observations:

> A Convention refugee, on the other hand, is not given the right to reside permanently in Canada nor, by being designated such, is he given the right to remain in Canada for a specific period of time. Presumably his right to remain is dependent upon his continuing to be a refugee from the country of his nationality. If for any reason, he no longer can fulfil the requirements to be characterized as a Convention refugee, he is subject to a removal or deportation order. The duration of his stay, as a Convention refugee, can only be fixed by a Ministerial permit issued pursuant to section 37 of the Act. If no such permit issued then, if he is within an inadmis- sible class, he may be the subject of a removal or deportation order. The only rights accorded to a Convention refugee are first, not to be returned to a country where his life or freedom would be threatened, a right granted by virtue of section 55 of the Act, and, second, to be able to appeal a removal order or a deportation order made against him on a question of law or fact or of mixed law and fact and "on the ground that, having regard to the existence of compassionate or humanitarian considerations" he should not be removed from Canada (sections 72(2)(*a*) and (*b*) and 72(3)).

> From all of the above, I can only conclude that the determination by the Minister that a person is a Convention refugee does not, as urged by applicant's counsel, confer on that person a status of some undefined nature. It gives him only the rights to which I have previously alluded. In this case the applicant as a refugee admitted to France can return to France at least so long as his travel permit, issued by that country to him, is valid. France having found him to be a refugee, then Canada as a signatory to the United Nations Convention Relating to the Status of Refugees would find it difficult to determine that he was not a refugee. Whether or not such is the case is immaterial in this case. Since he can return to France, which is not the country of his nationality, or where his life or freedom would be threatened, there is no obligation on the Minister to permit him to remain in Canada. The applicant has no legal right to do so. In my view, therefore,

> applicant counsel's submission that the determination by the Minister that his client was a Convention refugee gave him the right to remain in Canada must fail.

17. Although I agree with Urie J.'s decision on the facts before him, I believe that his reasons may have placed the position of the Convention refugee under the Act too low. In addition to the important rights set out in ss. 55 and 72, it seems to me that a Convention refugee is entitled to require the Minister to exercise his discretion to give a permit under s. 37 fairly and in accordance with proper principles and, if the Minister fails to do so, the Convention refugee may have a right to take proceedings under s. 18(*a*) of the *Federal Court Act*: see *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470 at p. 479 (*per* Spence J.); *Brempong v. Minister of Employment and Immigration*, [1981] 1 F.C. 211.

18. In the *Boun-Leua* case, as Urie J. pointed out, the applicant was able to return to France where his life or liberty would not be threatened and it would not be inconsistent with Canada's obligations to refugees to require him to return there. On the other hand, s. 2(2) and s. 3(*g*) of the *Immigration Act, 1976* envisage that the Act will be administered in a way that fulfils Canada's international legal obligations. These provisions read as follows:

> **2.** ...
>
> (2) The term "Convention" in the expression "Convention refugee" refers to the United Nations Convention Relating to the Status of Refugees signed at Geneva on the 28th day of July, 1951 and includes the Protocol thereto signed at New York on the 31st day of January, 1967.
>
> **3.** It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered

> in such a manner as to promote the domestic and international interests of Canada recognizing the need
>
> ...
>
> (*g*) 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;

19. The Preamble to the Convention and Protocol provides:

> *Considering* that the Charter of the United Nations and the Universal Declaration of Human Rights approved on December 10 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.
>
> *Considering* that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,
>
> ...

The term "refugee" is defined in the Convention as follows:

> A. For the purposes of the present Convention, the term `refugee' shall apply to any person who:
>
> ...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

...

(United Nations Convention Relating to the Status of Refugees. HCR/INF/29/Rev. 2, Chap. 1, Article 1, paragraph A(2).)

20. I believe therefore that a Convention refugee who does not have a safe haven elsewhere is entitled to rely on this country's willingness to live up to the obligations it has undertaken as a signatory to the United Nations Convention Relating to the Status of Refugees: (see *Ernewein v. Minister of Employment and Immigration,* [1980] 1 S.C.R. 639 at pp. 657-62 (*per* Pigeon J. dissenting); *Hurt v. Minister of Manpower and Immigration,* [1978] 2 F.C. 340).

(b) *The Procedures for the Determination of Convention Refugee Status*

21. The term "Convention refugee" is defined in s. 2(1) of the Act as follows:

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

22. As noted above, the procedures for determination of whether an individual is a Convention refugee and for redetermination of claims by the Immigration Appeal Board are set out in ss. 45 to 48 and 70 to 71 respectively. Focussing first on the initial determination, s. 45 provides as follows:

> **45.** (1) Where, at any time during an inquiry, the person who is the subject of the inquiry claims that he is a Convention refugee, the inquiry shall be continued and, if it is determined that, but for the person's claim that he is a Convention refugee, a removal order or a departure notice would be made or issued with respect to that person, the inquiry shall be adjourned and that person shall be examined under oath by a senior immigration officer respecting his claim.
>
> (2) When a person who claims that he is a Convention refugee is examined under oath pursuant to subsection (1), his claim, together with a transcript of the examination with respect thereto, shall be referred to the Minister for determination.
>
> (3) A copy of the transcript of an examination under oath referred to in subsection (1) shall be forwarded to the person who claims that he is a Convention refugee.
>
> (4) Where a person's claim is referred to the Minister pursuant to subsection (2), the Minister shall refer the claim and the transcript of the examination under oath with respect thereto to the Refugee Status Advisory Committee established pursuant to section 48 for consideration and, after having obtained the advice of that Committee, shall determine whether or not the person is a Convention refugee.
>
> (5) When the Minister makes a determination with respect to a person's claim that he is a Convention refugee, the Minister shall thereupon in writing inform the senior immigration officer who conducted the examination under oath respecting the claim and the person who claimed to be a Convention refugee of his determination.
>
> (6) Every person with respect to whom an examination under oath is to be held pursuant to subsection (1) shall be informed that he has the right

> to obtain the services of a barrister or solicitor or other counsel and to be represented by any such counsel at his examination and shall be given a reasonable opportunity, if he so desires and at his own expense, to obtain such counsel.

It is difficult to characterize this procedure as a "hearing" in the traditional sense: see *Brempong*, *supra*, at pp. 217-18. As Urie J. noted in *Brempong* at p. 217, n. 7, the procedure is technically "non-adversarial" since only the claimant is entitled to be represented by counsel. Urie J. described the procedure as "purely administrative in nature" and this characterization was adopted by counsel for the respondent Minister in the course of argument on these appeals.

23. In *Mensah v. Minister of Employment and Immigration*, [1982] 1 F.C. 70, Pratte J. observed at p. 71 that by enacting s. 45 "Parliament did not intend to subject either the Minister or the Refugee Status Advisory Committee to the procedural duty of fairness invoked by the applicant". If Pratte J. intended by this statement to suggest that Parliament has excluded the duty of fairness articulated in this Court's decision in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, I believe that he must have been mistaken. In *Nicholson* at p. 324, Laskin C.J. expressly adopted the statement of Megarry J. in *Bates v. Lord Hailsham*, [1972] 1 W.L.R. 1373 (U.K.), at p. 1378 "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness". In other words, the mere classification of the Minister's duty under s. 45 as administrative does not eliminate the duty of fairness set out in *Nicholson*: see *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at p. 750 (*per* Estey J.); *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602 at pp. 623-24, 628-31 (*per* Dickson J., as he then was).

24. The existence of a duty of fairness does not, however, define its content. I believe, therefore, that Pratte J.'s observation in *Mensah* was intended to make the point that the duty of fairness imposed on the Minister in the context of s. 45 did not require the Minister to allow a refugee claimant to respond to the Minister's objections to his claim as counsel in that case had submitted. In his concurring reasons in *Martineau*, *supra,* Dickson J. (as he then was) observed at p. 630 that "The content of the principles of natural justice and fairness in application to the individual cases will vary according to the circumstances of each case . . .". As Estey J. pointed out in the *Inuit Tapirisat* case at p. 755: "It is always a question of construing the statutory scheme as a whole in order to see to what degree, if any, the legislator intended the principle [of procedural fairness] to apply".

25. Counsel for the respondent in this case submitted that the Act did not contemplate an oral hearing before the Minister or the Refugee Status Advisory Committee and that the Minister and the Committee were entitled to rely upon what he described as "the government's knowledge of world affairs" in rendering a decision. As I read s. 45, and in particular s. 45(4), these submissions appear to be correct. It is clear from s. 45(4) that the Act does not envisage an opportunity for the refugee claimant to be heard other than through his claim and the transcript of his examination under oath. Nor does the Act appear to envisage the refugee claimant's being given an opportunity to comment on the advice the Refugee Status Advisory Committee has given to the Minister. The insulation of the process is reinforced by the fact that the Minister is entitled under s. 123 of the Act to delegate his powers under s. 45 and in fact these powers are customarily delegated to the Registrar of the Refugee Status Advisory Committee: see *Wieckowska v. Lanthier*, [1980] 1 F.C. 655 at p. 656. In substance, therefore, it would appear that the Refugee Status Advisory Committee acts

as a decision-making body isolated from the persons whose status it is adjudicating and that it applies policies and makes use of information to which the refugee claimants themselves have no access. The Committee and the Minister have an obligation to act fairly in carrying out their duties in the sense that decisions cannot be made arbitrarily and they must make an effort to treat equivalent cases in equivalent fashion. I do not think, however, that the courts can import into the duty of fairness procedural constraints on the Committee's operation which are incompatible with the decision-making scheme set up by Parliament.

26. In any event, the Minister's exercise of his jurisdiction under s. 45 is not reviewable on these appeals. As Urie J. noted in the *Brempong* case, *supra*, judicial review under s. 28 of the *Federal Court Act* is unavailable with respect to "a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis . . .".Thus, despite *Nicholson's* tendency to eliminate the significance of the distinction between administrative and judicial or quasi-judicial functions for purposes of determining whether procedural fairness in decision-making is required, the *Federal Court Act* preserves the significance of the distinction for purposes of determining whether judicial review is available by means of *certiorari* under s. 18(*a*) or by way of review under s. 28: see *Martineau*, *supra*, at pp. 629 and 637. Since the appellants did not challenge the procedural fairness of the Minister's decision under s. 45 of the *Immigration Act, 1976* by the proper procedures, I do not believe that the Court has any jurisdiction on these appeals to review those decisions or the mechanisms by which they were taken except for purposes of developing a greater understanding of the procedural scheme of the Act with respect to refugee claims.

27. The refugee claimant's status, however, need not be conclusively determined by the Minister's decision on the advice of the Refugee Status Advisory Committee made pursuant to s. 45. Under s. 70(1) of the Act a person whose refugee claim has been refused by the Minister may, within a period prescribed in Regulation 40(1) as fifteen days from the time he is so informed, apply for a redetermination of his claim by the Immigration Appeal Board. Section 70(2) requires the refugee claimant to submit with such an application a copy of the transcript of the examination under oath which was conducted pursuant to s. 45(1) and a declaration under oath setting out the basis of the application, the facts upon which the appellant relies and the information and evidence the applicant intends to offer at a redetermination hearing. The applicant is also permitted pursuant to s. 70(2)(*d*) to set out in his declaration such other representations as he deems relevant to his application.

28. The Immigration Appeal Board's duties in considering an application for redetermination of a refugee status claim are set out in s. 71 which reads as follows:

> **71.** (1) Where the Board receives an application referred to in subsection 70(2), it shall forthwith consider the application and if, on the basis of such consideration, it is of the opinion that there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established, it shall allow the application to proceed, and in any other case it shall refuse to allow the application to proceed and shall thereupon determine that the person is not a Convention refugee.
>
> (2) Where pursuant to subsection (1) the Board allows an application to proceed, it shall notify the Minister of the time and place where the application is to be heard and afford the Minister a reasonable opportunity to be heard.
>
> (3) Where the Board has made its determination as to whether or not a person is a Convention refugee, it shall, in writing, inform the Minister and the applicant of its decision.

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

29. If the Board were to determine pursuant to s. 71(1) that the application should be allowed to proceed, the parties are all agreed that the hearing which would take place pursuant to s. 71(2) would be a quasi-judicial one to which full natural justice would apply. The Board is not, however, empowered by the terms of the statute to allow a redetermination hearing to proceed in every case. It may only do so if "it is of the opinion that there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established ...". In *Kwiatkowsky v. Minister of Employment and Immigration*, [1982] 2 S.C.R. 856, this Court interpreted those words as requiring the Board to allow the claim to proceed only if it is of the view that "it is more likely than not" that the applicant will be able to establish his claim at the hearing, following the test laid down by Urie J. in *Lugano v. Minister of Manpower and Immigration*, [1976] 2 F.C. 438.

30. In his concurring reasons for the Federal Court of Appeal's decision in *Kwiatkowsky* (1980), 34 N.R. 237, Le Dain J. made the following observation about the Immigration Appeal Board's authority under s. 71(1) at p. 240:

> This is a somewhat unusual authority to determine at a preliminary stage, not whether there is an arguable case, but whether there is a probability or likelihood of success, without knowing what a full hearing might add to the strength of the case. <u>It is an authority that gives rise to the understandable concern, but it is one that Parliament appears clearly to have conferred upon the board for reasons which it has judged sound.</u> In effect, it is an authority to determine the issue of refugee status upon a consideration of the examination under oath and the declaration under oath.

(Emphasis added.)

31. I agree with these remarks. The issue directly before this Court in *Kwiatkowsky* was not whether there had been a denial of natural justice but whether the Immigration Appeal Board had applied the wrong test in exercising its power under s. 71(1). It is implicit in the Court's decision, however, that the Act imposes limitations on the scope of the hearing afforded to refugee claimants which it is difficult to reconcile with the principles of natural justice: see *Ernewein v. Minister of Employment and Immigration, supra,* at pp. 659-60 (*per* Pigeon J. dissenting).

32. In *Alliance des Professeurs Catholiques de Montréal v. Quebec Labour Relations Board,* [1953] 2 S.C.R. 140, Rinfret C.J. expressed this Court's commitment to the interpretation of statutes in accordance with the principles of natural justice in the following terms at p. 154:

> [TRANSLATION] The rule that no one should be convicted or deprived of his rights without a hearing, and especially without even being informed that his rights would be in question, is a universal rule of equity, and the silence of a statute should not be relied on as a basis for ignoring it. In my opinion, there would have to be nothing less than an express statement by the legislator for this rule to be superseded: it applies to all courts and to all bodies required to make a decision that might have the effect of destroying a right enjoyed by an individual.

(Emphasis added.)

In the same case, at p. 166, Fauteux J. (as he then was) stated:

> [TRANSLATION] It is well established that application of the *audi alteram partem* rule implicitly underlies legislation giving administrative bodies functions of a judicial nature: see Maxwell, On Interpretation of Statutes, 9th ed., 368. The legislator is presumed to take this rule into consideration in enacting such statutes. For its application to be

> suspended, the statute must contain an express provision to this effect or an inference with equivalent effect.

(Emphasis added.)

In a number of subsequent cases including *Nicholson*, *supra*, this Court has come to the same conclusion: see Pue, *Natural Justice in Canada* (1981), at pp. 82-84. In the present instance, however, it seems to me that s. 71(1) is precisely the type of express provision which prevents the courts from reading the principles of natural justice into a statutory scheme for the adjudication of the rights of individuals.

33. The substance of the appellants' case, as I understand it, is that they did not have a fair opportunity to present their refugee status claims or to know the case they had to meet. I do not think there is any basis for suggesting that the procedures set out in the *Immigration Act, 1976* were not followed correctly in the adjudication of these individuals' claims. Nor do I believe that there is any basis for interpreting the relevant provisions of the *Immigration Act, 1976* in a way that provides a significantly greater degree of procedural fairness or natural justice than I have set out in the preceding discussion. The Act by its terms seems to preclude this. Accordingly, if the appellants are to succeed, I believe that it must be on the basis that the *Charter* requires the Court to override Parliament's decision to exclude the kind of procedural fairness sought by the appellants.

3. The Application of the *Charter*

(a) *Are the Appellants Entitled to the Protection of s. 7 of the Charter?*

34. Section 32(1)(*a*) of the *Charter* provides:

> **32.** (1) This Charter applies
>
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament...

Since immigration is clearly a matter falling within the authority of Parliament under s. 91(25) of the *Constitution Act, 1867*, the *Immigration Act, 1976* itself and the administration of it by the Canadian government are subject to the provisions of the *Charter*.

35. Section 7 of the *Charter* states that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Counsel for the appellants contrasts the use of the word "Everyone" in s. 7 with language used in other sections, for example, "Every citizen of Canada" in s. 3, "Every citizen of Canada and every person who has the status of a permanent resident of Canada" in s. 6(2) and "Citizens of Canada" in s. 23. He concludes that "Everyone" in s. 7 is intended to encompass a broader class of persons than citizens and permanent residents. Counsel for the Minister concedes that "everyone" is sufficiently broad to include the appellants in its compass and I am prepared to accept that the term includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law.

36. That premise being accepted, the question then becomes whether the rights the appellants seek to assert fall within the scope of s. 7. Counsel for the Minister does not concede this. He submits that the exclusion or removal of the appellants from

Canada would not infringe "the right to life, liberty and security of the person". He advances three main lines of argument in support of this submission.

37. The first may be described as a reliance on the "single right" theory articulated by Marceau J. in *The Queen v. Operation Dismantle Inc.*, [1983] 1 F.C. 745 at pp. 773-74. In counsel's submission, the words "the right to life, liberty and security of the person" form a single right with closely inter-related parts and this right relates to matters of death, arrest, detention, physical liberty and physical punishment of the person. Moreover, counsel says, s. 7 only protects persons against the deprivation of that type of right if the deprivation results from a violation of the principles of fundamental justice. This argument by itself does not advance the Minister's case very far since the appellants submit that, even on this restrictive interpretation of s. 7, their rights in relation to matters of death, arrest, detention, physical liberty and physical punishment are indeed affected. Counsel for the appellants took two different approaches in their attempt to demonstrate this.

38. Mr. Coveney, for the appellant Satnam Singh, and Ms. Jackman for the interveners who supported the position of the appellants, took the position that it was inherent in the definition of a Convention refugee that rejection of his right to stay in Canada would affect his right to life, liberty and security of the person in the sense articulated by counsel for the Minister. In other words, because a Convention refugee is, by definition, a person who has a "well-founded fear of persecution", the refusal to give him refuge exposes him to jeopardy of death, significant diminution of his physical liberty or physical punishment in his country of origin.

39. Mr. Scott, for the other six appellants, took a different approach. He noted that the Act empowers immigration officials physically to detain the appellants both for purposes of examination pursuant to s. 23 or s. 27 and for purposes of removal: see ss. 20(1), 23(3), 23(5), and 104 to 108. He argued that the detention of the appellants by Canadian immigration officials would itself deprive them of personal liberty in this country and it would be a violation of s. 7 to deprive them of this liberty except in accordance with the principles of fundamental justice.

40. Counsel for the Minister, Mr. Bowie, sought to counter both these arguments. With respect to the first argument, he took the position that s. 7 of the *Charter* affords individuals protection from the action of the legislatures and governments in Canada and its provinces and territories but that it affords no protection against the acts of other persons or foreign governments. He relied on the decision of Pratte J. in *Singh v. Minister of Employment and Immigration*, [1983] 2 F.C. 347, who said at p. 349:

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

With respect to the second line of argument, Mr. Bowie noted that the procedures for detention and removal of individuals under the Act were no different for those claiming refugee status than they were for any other individuals and he argued that those provisions were consistent with the principles of fundamental justice.

41. It seems to me that in attempting to decide whether the appellants have been deprived of the right to life, liberty and security of the person within the meaning of s. 7 of the *Charter*, we must begin by determining what rights the appellants have under the *Immigration Act, 1976*. As noted earlier, s. 5(1) of the Act excludes from persons other than those described in s. 4 the right to come into or remain in Canada. The appellants therefore do not have such a right. However, the Act does accord a Convention refugee certain rights which it does not provide to others, namely the right to a determination from the Minister based on proper principles as to whether a permit should issue entitling him to enter and remain in Canada (ss. 4(2) and 37); the right not to be returned to a country where his life or freedom would be threatened (s. 55); and the right to appeal a removal order or a deportation order made against him (ss. 72(2)(*a*), 72(2)(*b*) and 72(3)).

42. We must therefore ask ourselves whether the deprivation of these rights constitutes a deprivation of the right to life, liberty and security of the person within the meaning of s. 7 of the *Charter*. Even if we accept the "single right" theory advanced by counsel for the Minister in interpreting s. 7, I think we must recognize that the "right" which is articulated in s. 7 has three elements: life, liberty and security of the person. As I understand the "single right" theory, it is not suggested that there must be a deprivation of all three of these elements before an individual is deprived of his "right" under s. 7. In other words, I believe that it is consistent with the "single right" theory advanced by counsel to suggest that a deprivation of the appellants' "security of the person", for example, would constitute a deprivation of their "right" under s. 7, whether or not it can also be said that they have been deprived of their lives or liberty. Rather, as I understand it, the "single right" theory is advanced in support of a narrow construction of the words "life", "liberty" and "security of the person" as

different aspects of a single concept rather than as separate concepts each of which must be construed independently.

43. Certainly, it is true that the concepts of the right to life, the right to liberty, and the right to security of the person are capable of a broad range of meaning. The Fourteenth Amendment to the United States Constitution provides in part ". . . nor shall any State deprive any person of life, liberty, or property, without the due process of law . . . ". In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) at p. 572, Stewart J. articulated the notion of liberty as embodied in the Fourteenth Amendment in the following way:

> "While this Court has not attempted to define with exactness the liberty . . . guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, *e.g.*, *Bolling* v. *Sharpe*, 347 U.S. 497, 499-500; *Stanley* v. *Illinois*, 405 U.S. 645.

The "single right" theory advanced by counsel for the Minister would suggest that this conception of "liberty" is too broad to be employed in our interpretation of s. 7 of the *Charter*. Even if this submission is sound, however, it seems to me that it is incumbent upon the Court to give meaning to each of the elements, life, liberty and security of the person, which make up the "right" contained in s. 7.

44. To return to the facts before the Court, it will be recalled that a Convention refugee is by definition a person who has a well-founded fear of persecution in the country from which he is fleeing. In my view, to deprive him of the avenues open to him under the Act to escape from that fear of persecution must, at the least, *impair* his right to life, liberty and security of the person in the narrow sense advanced by counsel for the Minister. The question, however, is whether such an impairment constitutes a "deprivation" under s. 7.

45. It must be acknowledged, for example, that even if a Convention refugee's fear of persecution is a well-founded one, it does not automatically follow that he will be deprived of his life or his liberty if he is returned to his homeland. Can it be said that Canadian officials have deprived a Convention refugee of his right to life, liberty and security of the person if he is wrongfully returned to a country where death, imprisonment or another form of persecution *may* await him? There may be some merit in counsel's submission that closing off the avenues of escape provided by the Act does not *per se* deprive a Convention refugee of the right to life or to liberty. It may result in his being deprived of life or liberty by others, but it is not certain that this will happen.

46. I cannot, however, accept the submission of counsel for the Minister that the denial of the rights possessed by a Convention refugee under the Act does not constitute a deprivation of his security of the person. Like "liberty", the phrase "security of the person" is capable of a broad range of meaning. The phrase "security of the person" is found in s. 1(*a*) of the *Canadian Bill of Rights* and its interpretation in that context might have assisted us in its proper interpretation under the *Charter*. Unfortunately no clear meaning of the words emerges from the case law, although the

phrase has received some mention in cases such as *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at pp. 628-34 (*per* Laskin C.J. dissenting); *Curr v. The Queen*, [1972] S.C.R. 889; and *R. v. Berrie* (1975), 24 C.C.C. (2d) 66, at p. 70. The Law Reform Commission, in its Working Paper No. 26, *Medical Treatment and Criminal Law* (1980), suggested at p. 6 that:

> The right to security of the person means not only protection of one's physical integrity, but the provision of necessaries for its support.

The Commission went on to describe the provision of necessaries in terms of art. 25, para. 1 of the *Universal Declaration of Human Rights* (1948) which reads:

> Every one has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.

Commentators have advocated the adoption of a similarly broad conception of "security of the person" in the interpretation of s. 7 of the *Charter*: see Garant, "Fundamental Freedoms and Natural Justice", in Tarnopolsky and Beaudoin (eds.) *The Canadian Charter of Rights and Freedoms* (1982), at pp. 264-65, 271-74; Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (1983), at pp. 249-54.

47. For purposes of the present appeal it is not necessary, in my opinion, to consider whether such an expansive approach to "security of the person" in s. 7 of the *Charter* should be taken. It seems to me that even if one adopts the narrow approach advocated by counsel for the Minister, "security of the person" must encompass

freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself. I note particularly that a Convention refugee has the right under s. 55 of the Act no to "...be removed from Canada to a country where his life or freedom would be threatened...". In my view, the denial of such a right must amount to a deprivation of security of the person within the meaning of s. 7.

48. This approach receives support from at least one lower court decision applying s. 7 of the *Charter*. In *Collin v. Lussier*, [1983] 1 F.C. 218 (later dismissed on appeal [1985] 1 F.C. 124), the applicant before the Trial Division of the Federal Court applied for *certiorari* to quash a decision made by the respondent to have him transferred from a medium security to a maximum security prison. He argued that the transfer endangered his "security of the person" and since it was not made in accordance with the principles of fundamental justice, his rights under s. 7 had been infringed. At page 239, Décary J. stated:

> . . . such detention, by increasing the applicant's anxiety as to his state of health, is likely to make his illness worse and, by depriving him of access to adequate medical care, it is in fact an impairment of the security of his person.

It is noteworthy that the applicant had not demonstrated that his health had been impaired; he merely showed that it was likely that his health would be impaired. This was held to be sufficient to constitute a deprivation of the right to security of the person under the circumstances.

49. It must be recognized that the appellants are not at this stage entitled to assert rights as Convention refugees; their claim is that they are entitled to fundamental justice in the determination of whether they are Convention refugees or

not. From some of the cases dealing with the application of the *Canadian Bill of Rights* to the determination of the rights of individuals under immigration legislation it might be suggested that whatever procedures the legislation itself sets out for the determination of rights constitute "due process" for purposes of s. 1(*a*) and "fundamental justice" for purposes of s. 2(*e*) of the *Canadian Bill of Rights*: see *Prata v. Minister of Manpower and Immigration, supra,* at p. 383; *Rebrin v. Bird and Minister of Citizenship and Immigration,* [1961] S.C.R. 376, at pp. 381-83; *Louie Yuet Sun v. The Queen,* [1961] S.C.R. 70; Cf. *U.S. ex rel. Knauff v. Shaughnessy,* 338 U.S. 537 (1950), at p. 544. As Professor Tarnopolsky (as he then was) observed in his text *The Canadian Bill of Rights* (2nd ed. 1975) at p. 273:

> The courts have consistently held that immigration is a privilege, and not a right.

50. The creation of a dichotomy between privileges and rights played a significant role in narrowing the scope of the application of the *Canadian Bill of Rights,* as is apparent from the judgment of Martland J. in *Mitchell v. The Queen,* [1976] 2 S.C.R. 570. At page 588 Martland J. said:

> The appellant also relies upon s. 2(*e*) of the *Bill of Rights*, which provides that no law of Canada shall be construed or applied so as to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. In the *McCaud* case [[1965] 1 C.C.C. 168] Spence J., whose view was adopted unanimously on appeal, held that the provisions of s. 2(*e*) do not apply to the question of the revocation of parole under the provisions of the *Parole Act*.
>
> The appellant had no right to parole. He was granted parole as a matter of discretion by the Parole Board. He had no right to remain on parole. His parole was subject to revocation at the absolute discretion of the Board.

I do not think this kind of analysis is acceptable in relation to the *Charter*. It seems to me rather that the recent adoption of the *Charter* by Parliament and nine of the ten provinces as part of the Canadian constitutional framework has sent a clear message to the courts that the restrictive attitude which at times characterized their approach to the *Canadian Bill of Rights* ought to be re-examined. I am accordingly of the view that the approach taken by Laskin C.J. dissenting in *Mitchell* is to be preferred to that of the majority as we examine the question whether the *Charter* has any application to the adjudication of rights granted to an individual by statute.

51. In *Mitchell* the issue was whether the *Canadian Bill of Rights* required s. 16(1) of the *Parole Act* to be interpreted so as to require the Parole Board to provide a parolee with a fair hearing before revoking his parole. Laskin C.J. focussed on the consequences of the revocation of parole for the individual and concluded that parole could not be characterized as a "mere privilege" even although the parolee had no absolute right to be released from prison. He said at p. 585:

> Between them, s. 2(*c*)(i) and s. 2(*e*) [of the *Canadian Bill of Rights*] call for at least minimum procedural safeguards in parole administration where revocation is involved, despite what may be said about the confidentiality and sensitiveness of the parole system.

52. It seems to me that the appellants in this case have an even stronger argument to make than the appellant in *Mitchell*. At most Mr. Mitchell was entitled to a hearing from the Parole Board concerning the revocation of his parole and a decision from the Board based on proper considerations as to whether to continue his parole or not. He had no statutory right to the parole itself; rather he had a right to proper consideration of whether he was entitled to remain on parole. By way of contrast, if the appellants had been found to be Convention refugees as defined in s. 2(1) of the

Immigration Act, 1976 they would have been entitled as a matter of law to the incidents of that status provided for in the Act. Given the potential consequences for the appellants of a denial of that status if they are in fact persons with a "well-founded fear of persecution", it seems to me unthinkable that the *Charter* would not apply to entitle them to fundamental justice in the adjudication of their status.

53. Given this conclusion, it is perhaps unnecessary to address Mr. Scott's line of argument in detail. I must, however, acknowledge some reluctance to adopt his analogy from American law that persons who are inside the country are entitled to the protection of the *Charter* while those who are merely seeking entry to the country are not. In the first place, it should be noted that the presence in this country of four of the appellants who were refused entry when they arrived in Canada is due only to the fact that the Act provides for a mechanism for their release from detention. As Ms. Jackman pointed out, a rule which provided *Charter* protection to refugees who succeeded in entering the country but not to those who were seeking admission at a port of entry would be to reward those who sought to evade the operation of our immigration laws over those who presented their cases openly at the first available opportunity.

54. An equally serious objection, it seems to me, is that the American rule does not differentiate between the special status statutorily accorded to Convention refugees who are present in this country and the status of other individuals who are seeking to enter or remain in Canada. As I understand the American law, the constitutional protection of the Fifth and Fourteenth Amendments has long been available to aliens whom the government is seeking to remove from the United States (*The Japanese Immigrant Case*, 189 U.S. 86 (1903)) but such protection is not available to those

seeking entry which the government has decided to refuse (*U.S. ex. rel. Knauff v. Shaughnessy, supra*). The rationale of this distinction as articulated in *Knauff* and more fully in *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953) at p. 210, is that "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control". Seen in this sense, the deference which American courts have shown to the political branches of government in the field of immigration has been described as one aspect of the political questions doctrine: see Scharpf, "Judicial Review and the Political Question: A Functional Analysis" (1966), 75 *Yale L.J.* 517, at pp. 578-83.

55. Two observations about this approach will suffice for present purposes. The first is that recently the United States Supreme Court has been more reluctant to employ the political questions doctrine to provide the executive and legislative branches of government with an unreviewable authority over the regulation of aliens: see *Immigration and Naturalization Service v. Chadha*, 77 L Ed 2d 317 (1983), at pp. 338-40 (*per* Burger C.J.) Second, and more importantly, it seems to me that in the Canadian context Parliament has in the *Immigration Act, 1976* made many of the "political" determinations which American courts have been justifiably reluctant to attempt to get involved in themselves. On these appeals this Court is being asked by the appellants to accept that the substantive rights of Convention refugees have been determined by the *Immigration Act, 1976* itself and the Court need concern itself only with the question whether the procedural scheme set up by the Act for the determination of that status is consistent with the requirements of fundamental justice articulated in s. 7 of the *Charter*. I see no reason why the Court should limit itself in this inquiry or establish distinctions between classes of refugee claimants which are

not mandated by the Act itself. It is unnecessary for the Court to consider what it would do if it were asked to engage in a larger inquiry into the substantive rights conferred in the Act.

56. In summary, I am of the view that the rights which the appellants are seeking to assert are ones which entitle them to the protection of s. 7 of the *Charter*. It is necessary therefore to consider whether the procedures for the determination of refugee status as set out in the Act accord with fundamental justice.

(b) *Is Fundamental Justice Denied by the Procedures for the Determination of Convention Refugee Status set out in the Act?*

57. All counsel were agreed that at a minimum the concept of "fundamental justice" as it appears in s. 7 of the *Charter* includes the notion of procedural fairness articulated by Fauteux C.J. in *Duke v. The Queen*, [1972] S.C.R. 917. At page 923 he said:

> Under s. 2(*e*) of the *Bill of Rights* no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.

58. Do the procedures set out in the Act for the adjudication of refugee status claims meet this test of procedural fairness? Do they provide an adequate opportunity for a refugee claimant to state his case and know the case he has to meet? This seems to be the question we have to answer and, in approaching it, I am prepared to accept Mr. Bowie's submission that procedural fairness may demand different things in

different contexts: see *Martineau*, *supra*, at p. 630. Thus it is possible that an oral hearing before the decision-maker is not required in every case in which s. 7 of the *Charter* is called into play. However, I must confess to some difficulty in reconciling Mr. Bowie's argument that an oral hearing is not required in the context of this case with the interpretation he seeks to put on s. 7. If "the right to life, liberty and security of the person" is properly construed as relating only to matters such as death, physical liberty and physical punishment, it would seem on the surface at least that these are matters of such fundamental importance that procedural fairness would invariably require an oral hearing. I am prepared, nevertheless, to accept for present purposes that written submissions may be an adequate substitute for an oral hearing in appropriate circumstances.

59. I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person: see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-08 (*per* Ritchie J.) I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

60. As I have suggested, the absence of an oral hearing need not be inconsistent with fundamental justice in every case. My greatest concern about the

procedural scheme envisaged by ss. 45 to 48 and 70 and 71 of the *Immigration Act, 1976* is not, therefore, with the absence of an oral hearing in and of itself, but with the inadequacy of the opportunity the scheme provides for a refugee claimant to state his case and know the case he has to meet. Mr. Bowie argued that since the procedure under s. 45 was an administrative one, it was quite proper for the Minister and the Refugee Status Advisory Committee to take into account policy considerations and information about world affairs to which the refugee claimant had no opportunity to respond. However, in my view the proceedings before the Immigration Appeal Board were quasi-judicial and the Board was not entitled to rely on material outside the record which the refugee claimant himself submitted on his application for redetermination: see *Permaul v. Minister of Employment and Immigration* (unreported judgment of the Federal Court of Appeal, No. A-576-83, dated November 24, 1983); *Saraos v. Minister of Employment and Immigration*, [1982] 1 F.C. 304, at pp. 308-09. Mr. Bowie submitted that there was no case against the refugee claimant at that stage; it was merely his responsibility to make a written submission which demonstrated on the balance of probabilities that he would be able to establish his claim at a hearing. If the applicant failed to bring forward the requisite facts his claim would not be allowed to proceed, but there was nothing fundamentally unfair in this procedure.

61. It seems to me that the basic flaw in Mr. Bowie's characterization of the procedure under ss. 70 and 71 is his description of the procedure as non-adversarial. It is in fact highly adversarial but the adversary, the Minister, is waiting in the wings. What the Board has before it is a determination by the Minister based in part on information and policies to which the applicant has no means of access that the applicant for redetermination is not a Convention refugee. The applicant is entitled to submit whatever relevant material he wishes to the Board but he still faces the hurdle

of having to establish to the Board that on the balance of probabilities the Minister was wrong. Moreover, he must do this without any knowledge of the Minister's case beyond the rudimentary reasons which the Minister has decided to give him in rejecting his claim. It is this aspect of the procedures set out in the Act which I find impossible to reconcile with the requirements of "fundamental justice" as set out in s. 7 of the *Charter*.

62. It is perhaps worth noting that if the Immigration Appeal Board allows a redetermination hearing to proceed pursuant to s. 71(1), the Minister is entitled pursuant to s. 71(2) to notice of the time and place of the hearing and a reasonable opportunity to be heard. It seems to me that, as a matter of fundamental justice, a refugee claimant would be entitled to discovery of the Minister's case prior to such a hearing. It must be acknowledged, of course, that some of the information upon which the Minister's case would be based might be subject to Crown privilege. But the courts are well able to give the applicant relief if the Minister attempts to make an overly broad assertion of privilege: see *Canada Evidence Act*, 1980-81-82-83 (Can.), c. 111, Schedule III, s. 36.1.

63. Under the Act as it presently stands, however, 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. Because s. 71(1) requires the Immigration Appeal Board to reject an application for redetermination unless it is of the view that it is more likely than not that the applicant will be able to succeed, it is apparent that an application will usually be rejected before the refugee claimant has had an opportunity to discover the Minister's case against him in the context of a hearing. Indeed, given the fact that s. 71(1) resolves any doubt as to

whether or not there should be a hearing against the refugee claimant, I find it difficult to see how a successful challenge to the accuracy of the undisclosed information upon which the Minister's decision is based could ever be launched.

64. I am accordingly of the view that the procedures for determination of refugee status claims as set out in the *Immigration Act, 1976* do not accord refugee claimants fundamental justice in the adjudication of those claims and are thus incompatible with s. 7 of the *Charter*. It is therefore necessary to go forward to the third stage of the inquiry and determine whether the shortcomings of these procedures in relation to the standards set out by s. 7 constitute reasonable limits which can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Charter*.

(c) *Can the Procedures be Saved under s. 1 of the Charter?*

65. Section 1 of the *Charter* reads:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

It follows, accordingly, that if the limitations on the rights set out in the *Charter* meet the test articulated in s. 1, the *Charter* has not been violated and the Court's remedial powers thereunder are not called into play.

66. The question of the standards which the Court should use in applying s. 1 is, without a doubt, a question of enormous significance for the operation of the

Charter. If too low a threshold is set, the courts run the risk of emasculating the *Charter*. If too high a threshold is set, the courts run the risk of unjustifiably restricting government action. It is not a task to be entered upon lightly.

67. Unfortunately, counsel devoted relatively little time in the course of argument to the principles the Court should espouse in applying s. 1. This is certainly understandable given the complexity of the other issues which are in one sense preliminary to the application of s. 1. It is nevertheless to be regretted. A particular disappointment is the limited scope of the factual material brought forward by the respondent in support of the proposition that the *Immigration Act's* provisions constitute a "reasonable limit" on the appellants' rights. It must be acknowledged that counsel operated under considerable time pressure in the preparation of these appeals and I do not intend these remarks as a criticism of the presentation made to the Court by counsel which was, indeed, extremely valuable. On the other hand, I feel constrained to echo the observations made by Estey J. in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at p. 384, where he said:

> As experience accumulates, the law profession and the courts will develop standards and practices which will enable the parties to demonstrate their position under s. 1 and the courts to decide issues arising under that provision. May it only be said here, in the cause of being helpful to those who come forward in similar proceedings, that the record on the s. 1 issue was indeed minimal, and without more, would have made it difficult for a court to determine the issue as to whether a reasonable limit on a prescribed right had been demonstrably justified.

68. Mr. Bowie's submissions on behalf of the Minister with respect to s. 1 were that Canadian procedures with respect to the adjudication of refugee claims had received the approbation of the office of the United Nations High Commissioner for Refugees and that it was not uncommon in Commonwealth and Western European

countries for refugee claims to be adjudicated administratively without a right to appeal. He further argued that the Immigration Appeal Board was already subjected to a considerable strain in terms of the volume of cases which it was required to hear and that a requirement of an oral hearing in every case where an application for redetermination of a refugee claim has been made would constitute an unreasonable burden on the Board's resources.

69. One or two comments are in order respecting this approach to s. 1. It seems to me that it is important to bear in mind that the rights and freedoms set out in the *Charter* are fundamental to the political structure of Canada and are guaranteed by the *Charter* as part of the supreme law of our nation. I think that in determining whether a particular limitation is a reasonable limit prescribed by law which can be "demonstrably justified in a free and democratic society" it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*. The issue in the present case is not simply whether the procedures set out in the *Immigration Act, 1976* for the adjudication of refugee claims are reasonable; it is whether it is reasonable to deprive the appellants of the right to life, liberty and security of the person by adopting a system for the adjudication of refugee status claims which does not accord with the principles of fundamental justice.

70. Seen in this light I have considerable doubt that the type of utilitarian consideration brought forward by Mr. Bowie can constitute a justification for a limitation on the rights set out in the *Charter*. Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting

administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. Whatever standard of review eventually emerges under s. 1, it seems to me that the basis of the justification for the limitation of rights under s. 7 must be more compelling than any advanced in these appeals.

71. Moreover, I am not convinced in light of the submissions made by the appellants that the limitations on the rights of refugee claimants which are imposed by the adjudication procedures of the *Immigration Act, 1976* are reasonable even on the respondent's own terms. It is obvious that there is a considerable degree of dissatisfaction with the present system even on the part of those who administer it. In an address given in Toronto on October 25, 1980, Janet Scott, Q.C., the Chairman of the Immigration Appeal Board made the following remarks:

> There is no blinking at the fact that the sections dealing with the Board's jurisdiction in refugee redetermination are highly unsatisfactory. Leaving aside any consideration of natural justice, the system is extremely cumbersome, and when we enter into the sphere of natural justice, open to criticism as unjust.

72. In September 1980 the Minister of Employment and Immigration established a Task Force on Immigration Practices and Procedures and in November 1981 the Task Force issued a report entitled *The Refugee Status Determination Process*. The Task Force recommended wholesale changes in the procedures employed in the determination of refugee claims, including a recommendation that "A refugee

claimant should be entitled to a hearing in every case where the [Refugee Status Advisory Committee] is not prepared to make a positive recommendation on the basis of the transcript" (Report p. xvi). In its conclusion, the Task Force discussed the impact of its recommendation that an oral hearing be given in each case. At page 103 the Report states:

> In the end, then, the question is one of resources. Would the additional expenditures be warranted? How does one do a cost-benefit analysis where the "benefit" is to be found in vague concepts, such as "fairness" and "justice"? One approach may be to canvass other forms of adjudication by federal tribunals and compare the significance of their decisions and the kinds of hearings which they offer with those of the refugee determination process. Without referring to specific bodies or in any way denigrating the importance of their work, the impact of their decisions often pales in comparison to refugee determination. Yet they generally offer far more in the way of procedural fairness.

73. Even if the cost of compliance with fundamental justice is a factor to which the courts would give considerable weight, I am not satisfied that the Minister has demonstrated that this cost would be so prohibitive as to constitute a justification within the meaning of s. 1. Though it is tempting to make observations about what factors might give rise to justification under s. 1, and on the standards of review which should be applied with respect to s. 1, I think it would be unwise to do so. I therefore confine my observations on the application of s. 1 to those necessary for the disposition of the appeals.

74. To recapitulate, I am persuaded that the appellants are entitled to assert the protection of s. 7 of the *Charter* in the determination of their claims to Convention refugee status under the *Immigration Act, 1976*. I am further persuaded that the procedures under the Act as they were applied in these cases do not meet the requirements of fundamental justice under s. 7 and that accordingly the appellants'

rights under s. 7 were violated. Finally, I believe that the respondent has failed to demonstrate that the procedures set out in the Act constitute a reasonable limit on the appellants' rights within the meaning of s. 1 of the *Charter*. I would accordingly allow the appeals. In so doing I should, however, observe that the acceptance of certain submissions, particularly concerning the scope of s. 7 of the *Charter* in the context of these appeals, is not intended to be definitive of the scope of the section in other contexts. I do not by any means foreclose the possibility that s. 7 protects a wider range of interests than those involved in these appeals.

4. Remedies

75. I turn now to the issue of the remedy to which the appellants are entitled. Sections 24(1) of the *Charter* and 52(1) of the *Constitution Act, 1982* both apply. Section 52(1) requires a declaration that s. 71(1) of the *Immigration Act, 1976* is of no force and effect to the extent it is inconsistent with s. 7. The appellants who have suffered as a result of the application of an unconstitutional law to them are entitled under s. 24(1) to apply to a court of competent jurisdiction for "such remedy as the court considers appropriate and just in the circumstances". What remedy is available in the context of this case?

76. The Court's jurisdiction is invoked in two contexts. In the first, these are appeals from dismissals by the Federal Court of Appeal of applications for judicial review under s. 28 of the *Federal Court Act*. In this context the Court is limited to the powers the Federal Court is entitled to exercise pursuant to s. 28. In the other context, however, the Court's broad remedial powers under s. 24 of the *Charter* are invoked.

77. The significance of the limitation of the Court's judicial review power under s. 28 of the *Federal Court Act* is apparent from the decision of Urie J. in *Brempong v. Minister of Employment and Immigration, supra*. In that case, Urie J. observed that s. 28 provided the Federal Court of Appeal with supervisory powers only over decisions made on a "judicial or quasi-judicial basis" and that accordingly the Court had no jurisdiction to review what he characterized as an "administrative" decision by the Minister under s. 45 of the *Immigration Act, 1976*. The Board is a quasi-judicial body and without doubt its determinations are subject to review under s. 28. The question the Court faces, as I see it, is whether the broader remedial power which it possesses under s. 24(1) of the *Charter* entitles it to extend its review of possible violations of the *Charter* to the Ministerial determinations made pursuant to s. 45 of the *Immigration Act, 1976*. In my view it does not.

78. Section 24(1) of the *Charter* provides remedial powers to "a court of competent jurisdiction". As I understand this phrase, it premises the existence of jurisdiction from a source external to the *Charter* itself. This Court certainly has jurisdiction to review the decisions of the Immigration Appeal Board in these cases pursuant to s. 28 of the *Federal Court Act*. If the appeals originated as petitions for *certiorari* brought in the Trial Division of the Federal Court pursuant to s. 18 of the *Federal Court Act*, the Ministerial decisions made pursuant to s. 45 of the *Immigration Act, 1976* would be subject to review. In my view, however, any violations of the *Charter* which arose out of Ministerial decisions under s. 45 are not subject to review on these appeals because of the judicial limitations on the Federal Court of Appeal under s. 28 of the *Federal Court Act*. I would accordingly make no observations with respect to them or with respect to the question of whether or to what extent s. 45 of the

Immigration Act, 1976 is of no force and effect as a result of any inconsistency with the *Charter*.

79. Confining myself to the decisions of the Immigration Appeal Board which are under review, I would allow the appeals, set aside the decisions of the Federal Court of Appeal and of the Immigration Appeal Board and remand all seven cases for a hearing on the merits by the Board in accordance with the principles of fundamental justice articulated above. Since s. 71(1) of the *Immigration Act, 1976* which restricts the Board's power to allow hearings to proceed to cases in which it is of the opinion that the applicant for redetermination is more likely than not to succeed upon a hearing of his claim, is inconsistent with the principles of fundamental justice set out in s. 7 of the *Charter*, the appellants are also entitled to a declaration that s. 71(1) is of no force and effect to the extent of the inconsistency.

80. I would award costs on the application for leave to appeal and costs of the appeal to this Court to Mr. Satnam Singh on a solicitor-client basis. Costs in respect of the other six appellants shall be as prescribed by the Order of this Court dated February 16, 1984.

The reasons of Beetz, Estey and McIntyre were delivered by

81. BEETZ J.--The main issue which was argued when these appeals were heard on April 30 and May 1, 1984, was whether the procedures set out in the *Immigration Act, 1976*, 1976-77 (Can.), c. 52 as amended, for the adjudication of the claims of persons claiming refugee status in Canada, deny such claimants rights they are entitled to assert under s. 7 of the *Canadian Charter of Rights and Freedoms*. No submissions

were made at that time as to the possible application of the *Canadian Bill of Rights* to these appeals.

82. On December 7, 1984, the Deputy Registrar wrote to counsel to inform them that the members of the Court would like to have their submissions in writing on the application of the *Canadian Bill of Rights*. Counsel for all the parties and the interveners complied and counsel for the appellants replied, also in writing.

83. Like my colleague, Madame Justice Wilson, whose reasons for judgment I have had the advantage of reading, I conclude that these appeals ought to be allowed. But I do so on the basis of the *Canadian Bill of Rights*. I refrain from expressing any views on the question whether the *Canadian Charter of Rights and Freedoms* is applicable at all to the circumstances of these cases and more particularly, on the important question whether the *Charter* affords any protection against a deprivation or the threat of a deprivation of the right to life, liberty or security of the person by foreign governments.

84. Section 26 of the *Canadian Charter of Rights and Freedoms* should be kept in mind. It provides:

> **26.** The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

85. Thus, the *Canadian Bill of Rights* retains all its force and effect, together with the various provincial charters of rights. Because these constitutional or quasi-constitutional instruments are drafted differently, they are susceptible of

producing cumulative effects for the better protection of rights and freedoms. But this beneficial result will be lost if these instruments fall into neglect. It is particularly so where they contain provisions not to be found in the *Canadian Charter of Rights and Freedoms* and almost tailor-made for certain factual situations such as those in the cases at bar.

86. I refer to my colleague's account of the facts, the procedural history of the seven appeals and generally, to her quotation of the relevant provisions of the *Immigration Act, 1976*, and her description of the scheme of the Act.

87. The main issue, as I see it, is whether the procedures followed in these cases for the determination of Convention refugee status are in conflict with the *Canadian Bill of Rights* and more particularly with s. 2(*e*) thereof.

88. In order to understand the scheme of the *Immigration Act, 1976* it is necessary to refer to all the procedures for determination of whether an individual is a Convention refugee, including initial determination under ss. 45 to 48 of the Act and redetermination by the Immigration Appeal Board, under ss. 70 and 71. It should be emphasized however that, in these appeals, we are directly concerned only with redetermination made by the Immigration Appeal Board pursuant to s. 71(1) of the *Immigration Act, 1976*, whereby the Board ordered that the applications for redetermination of the claims be not allowed to proceed and determined that the applicants were not Convention refugees. The appellants have unsuccessfully applied to the Federal Court of Appeal pursuant to s. 28 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, to have these orders reviewed and set aside. But the advice given by the Refugee Status Advisory Committee and the initial determinations made by the

Minister pursuant to s. 45 of the Act have not been attacked and are not subject to review in these appeals from the decisions of the Federal Court of Appeal. I stress this because several submissions were made to us relating to alleged procedural shortcomings at the initial determination stage and relating as well to various means to remedy those shortcomings. Such remedies, whatever their merit, would not help the present appellants who have passed the initial determination stage. And, in any event, in an appeal from a decision of the Federal Court of Appeal on a s. 28 application to review, our jurisdiction, if we allow the appeal, is limited to rendering the decision which the Federal Court of Appeal ought to have rendered.

89. As I said earlier, the relevant provision of the *Canadian Bill of Rights* is s. 2(*e*) but it will also be convenient to quote s. 1:

> **1.** It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
>
> (*b*) the right of the individual to equality before the law and the protection of the law;
>
> (*c*) freedom of religion;
>
> (*d*) freedom of speech;

(*e*) freedom of assembly and association, and

(*f*) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it should operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

...

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

90. The main submissions made by Mr. Scott, of counsel for the first six appellants, are to a substantial extent supported by Mr. Coveney, of counsel for the seventh appellant, who took a slightly different approach. They read as follows:

2. The Appellants submit that either section 45 or 71 of the *Immigration Act* abrogates the right guaranteed by section 2(e) of the *Bill of Rights*, unless one of those sections is construed as requiring a full hearing before the Refugee Status Advisory Committee (RSAC), the Minister, or the Immigration Appeal Board, which hearings have not been held in any of these 6 cases.

3. The Appellants submit that two points must be established in order to show that a breach of section 2(e) has occurred:

1. that the Appellants' "rights and obligations" fall to be "determined" by the RSAC, the Minister and the Immigration Appeal Board; and

> 2. that the Appellants were not afforded a "fair hearing in accordance with the principles of fundamental justice" by any of these statutory authorities.

91. Mr. Scott then gives what seems to me an accurate summary of the legal rights given to Convention refugees in Canada by the *Immigration Act, 1976* and Regulations:

> 1. the "right to remain in Canada" if a Minister's Permit is obtained; or
>
> *Immigration Act*, s. 4(2).
>
> 2. if a Minister's Permit cannot be obtained, then:
>
> > (a) the right not to be removed to a country where life or freedom is threatened;
> >
> > *Immigration Act*, s. 55.
> >
> > (b) if removed from Canada, the right to re-enter if a safe country cannot be found; and
> >
> > *Immigration Act*, s. 14(1)(c).
> >
> > (c) the right to be considered under the criteria provided in the Regulations, for "employment authorization" while residing in Canada.
>
> *Regulations*, s. 19(3)(k), 20.

92. Mr. Scott then concludes on this first branch of his submission:

> 10. It is submitted that because Convention refugees enjoy these rights under Canadian law, a person who applies for refugee status under section 45 or 70 of the Act meets the first requirement for claiming the protection of "fundamental justice" under section 2(*e*) of the *Bill of Rights*, namely, that a law of Canada provides a procedure "for the determination of his rights".

93. In his written submissions, Mr. Bowie, of counsel for the Attorney General of Canada, makes a concession in the following terms:

> 2. The Attorney General of Canada does not dispute that the process of determining and redetermining refugee claims involves the determination of rights and obligations of the refugee claimants. It is only in that respect that his submissions with respect to section 2(*e*) of the *Bill of Rights* differ from his submissions with respect to section 7 of the *Canadian Charter of Rights and Freedoms*. It was submitted upon the hearing of these appeals that a denial of a claim to refugee status by the operation of Canadian law does not deprive the claimant of "the right to life, liberty and security of the person" guaranteed by section 7 of the *Charter*.

94. In his reply, Mr. Scott refers to the Attorney General's acknowledgment that the process of adjudicating refugee claims under the *Immigration Act, 1976* involves the determination of "rights and obligations". Mr. Scott then concludes:

> The remaining issue, therefore, is whether the procedures provided by the Act conform to the dictates of "fundamental justice".

95. In view of the last sentence in the Attorney General's acknowledgment quoted above, I am not absolutely clear whether or not it was conceded by the Attorney General that the "rights" referred to in s. 2(*e*) of the *Canadian Bill of Rights* are not the same rights or rights of the same nature as those which are enumerated in

s. 1, including "the right of the individual to life, liberty, security of the person... and the right not to be deprived thereof except by due process of law".

96. Be that as it may, it seems clear to me that the ambit of s. 2(*e*) is broader than the list of rights enumerated in s. 1 which are designated as "human rights and fundamental freedoms" whereas in s. 2(*e*), what is protected by the right to a fair hearing is the determination of one's "rights and obligations", whatever they are and whenever the determination process is one which comes under the legislative authority of the Parliament of Canada. It is true that the first part of s. 2 refers to "the rights or freedoms herein recognized and declared", but s. 2(*e*) does protect a right which is fundamental, namely "the right to a fair hearing in accordance with the principles of fundamental justice" for the determination of one's rights and obligations, fundamental or not. It is my view that, as was submitted by Mr. Coveney, it is possible to apply s. 2(*e*) without making reference to s. 1 and that the right guaranteed by s. 2(*e*) is in no way qualified by the "due process" concept mentioned in s. 1(*a*).

97. Accordingly, the process of determining and redetermining appellants' refugee claims involves the determination of rights and obligations for which the appellants have, under s. 2(*e*) of the *Canadian Bill of Rights*, the right to a fair hearing in accordance with the principles of fundamental justice. It follows also that this case is distinguishable from cases where a mere privilege was refused or revoked, such as *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, and *Mitchell v. The Queen*, [1976] 2 S.C.R. 570.

98. I therefore agree with the first branch of Mr. Scott's submission.

99. What remains to be decided is whether in the cases at bar, the appellants were afforded "a fair hearing in accordance with the principles of fundamental justice".

100. I have no doubt that they were not.

101. What the appellants are mainly justified of complaining about in my view is that their claims to refugee status have been finally denied without their having been afforded a full oral hearing at a single stage of the proceedings before any of the bodies or officials empowered to adjudicate upon their claim on the merits. They have actually been heard by the one official who has nothing to say in the matter, a senior immigration officer. But they have been heard neither by the Refugee Status Advisory Committee, who could advise the Minister, neither by the Minister, who had the power to decide and who dismissed their claim, nor by the Immigration Appeal Board which did not allow their application to proceed and which determined, finally, that they are not Convention refugees.

102. I do not wish to suggest that the principles of fundamental justice will impose an oral hearing in all cases. In *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 747, Estey J. speaking for the Court quoted Tucker L.J. in *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), at p. 118:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

103. The most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal rights at issue and the severity of the consequences to the individuals concerned. In the same *Inuit Tapirisat*

case, at the same page, Estey J. also quoted Lord Denning, M.R., in *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12 (C.A.), at p. 19:

> . . . that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.

104. In the cases at bar, the seven appellants have stated under oath the reasons for which they claim to be Convention refugees. A "Convention refugee" is defined in s. 2(1) of the *Immigration Act, 1976*:

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

105. The *Immigration Act, 1976* gives convention refugees the right to "remain" in Canada, or, if a Minister's Permit cannot be obtained, at least the right not to be removed to a country where life and freedom is threatened, and to re-enter Canada if no safe country is willing to accept them. The rights at issue in these cases are accordingly of vital importance for those concerned.

106. The first six appellants make the following submissions:

> 18. In the Appellants' submission the fact that the threat to life or freedom or physical security comes from a foreign state in refugee cases is irrelevant to the legal issue now before this Court under the *Canadian Bill of Rights*. In considering the application of section 7 of the *Charter* in these cases, it may be that the locus of the threat to life or liberty or security of the person is relevant, because in order to claim the protection of "fundamental justice" under the *Charter*, the Appellants must establish an infringement of the right to life or liberty or security of the person as guaranteed by section 7. Presumably, only a Canadian government can breach the *Charter of Rights and Freedoms*, including section 7. For this reason, at the hearing before this Court, the Appellants put their *Charter* case on the basis that the government of Canada infringed their liberty by arresting them and detaining them until "removal" from Canada could be effected.
>
> 19. Under section 2(*e*) of the *Bill of Rights*, however, the Appellants need not show that the Canadian government deprives them of their life, liberty or physical security. Rather, they need only show that their "rights" fall to be "determined" by federal law. In construing and applying the *Immigration Act* according to the terms of section 2(*e*) of the *Bill of Rights* therefore, threats to life or liberty by a foreign power are relevant ...

107. Again, I express no views as to the applicability of the *Canadian Charter of Rights and Freedoms*, but I otherwise agree with these submissions: threats to life or liberty by a foreign power are relevant, not with respect to the applicability of the *Canadian Bill of Rights*, but with respect to the type of hearing which is warranted in the circumstances. In my opinion, nothing will pass muster short of at least one full oral hearing before adjudication on the merits.

108. There are additional reasons why the appellants ought to have been given an oral hearing. They are mentioned in the following submission with which I agree:

> The Appellants submit that although "fundamental justice" will not require an oral hearing in every case, where life or liberty may depend on findings of fact and credibility, and it may in these cases, the opportunity to make written submissions, even if coupled with an opportunity to reply

in writing to allegations of fact and law against interest, would be insufficient.

109. Finally, I wish to quote part of the dissenting reasons written by Pigeon J. in *Ernewein v. Minister of Employment and Immigration*, [1980] 1 S.C.R. 639, at pp. 657 and following:

> It should at first be pointed out that the appellant's claim for refugee status was made under amendments to the *Immigration Appeal Board Act* (R.S.C. 1970, c. I-3, "the *Act*") enacted by the statute of 1973, 21-22 Eliz. II, c. 27, ss. 1 and 5. (The *Immigration Act, 1976* (25-26 Eliz. II, c. 52), although assented to August 5, 1977, was proclaimed in force on April 10, 1978.)
>
> The first mentioned amendment added to s. 2 of the *Act* the following definition:
>
> "Convention" means the United Nations Convention Relating to the Status of Refugees signed at Geneva on the twenty-eighth day of July, 1951 and includes any Protocol thereto ratified or acceded to by Canada;
>
> The other amendment replaced s. 11 by a new section, the relevant parts of which are as follows:
>
> > 11. (1) Subject to subsections (2) and (3), a person against whom an order of deportation is made under the *Immigration Act* may appeal to the Board on any ground of appeal that involves a question of law or fact or mixed law and fact, if, at the time that the order of deportation is made against him, he is
> >
> > ...
> >
> > (*c*) a person who claims he is a refugee protected by the Convention; or

...

(2) Where an appeal is made to the Board pursuant to subsection (1) and the right of appeal is based on a claim described in paragraph (1)(*c*) or (*d*), the notice of appeal to the Board shall contain or be accompanied by a declaration under oath setting out

(*a*) the nature of the claim;

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

(*c*) a summary in reasonable detail of the information and evidence intended to be offered in support of the claim upon the hearing of the appeal; and

(*d*) such other representations as the appellant deems relevant to the claim.

(3) Notwithstanding any provision of this Act, where the Board receives a notice of appeal and the appeal is based on a claim described in paragraph (1)(*c*) or (*d*), a quorum of the Board shall forthwith consider the declaration referred to in subsection (2) and, if on the basis of such consideration the Board is of the opinion that there are reasonable grounds to believe that the claim could, upon the hearing of the appeal, be established, it shall allow the appeal to proceed, and in any other case it shall refuse to allow the appeal to proceed and shall thereupon direct that the order of deportation be executed as soon as practicable.

...

In the present case no indication was given to the appellant of the reasons for which her claim to refugee status was denied and, in my view, this raises a very serious question. The Immigration Appeal Board is not an administrative agency but a "court of record" (s. 7, now s. 65). It must

therefore be subject to the rule that it is not enough that justice be done, it must appear to be done. It is also a well established principle that *audi alteram partem* is a rule of natural justice so firmly adopted by the common law that it applies to all those who fulfil judicial functions and it is not excluded by inference. See: *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board* [1953] 2 S.C.R. 140, per Rinfret C.J. at p. 154:

> [TRANSLATION] The rule that no one should be convicted or deprived of his rights without a hearing, and especially without even being informed that his rights would be in question, is a universal rule of equity, and the silence of a statute should not be relied on as a basis for ignoring it. In my opinion, there would have to be nothing less than an express statement by the legislator for this rule to be superseded: it applies to all courts and to all bodies required to make a decision that might have the effect of destroying a right enjoyed by an individual.

In *Komo Construction Inc. v. Labour Relations Board*, [1968] S.C.R. 172, this Court upheld a decision rendered without a hearing when the parties had been given the opportunity of submitting argument in writing and the Board had issued reasons. This is a very different situation from that which is presented in this case where there was no hearing and no reasons were given. In *MacDonald v. The Queen*, [1977] 2 S.C.R. 665, this Court upheld a conviction by special Court Martial although no reasons had been given but there had been a hearing. I know of no case where a judicial decision was upheld, where there was neither a hearing nor reasons given, so that nothing shows on what basis the decision was reached. It may be different when the decision is on a purely discretionary matter such as the granting of leave to appeal, but here the decision of the Board is an adjudication on appellant's entitlement to refugee status, a matter of right under the statute and the Convention, not a matter of discretion. In *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470, this Court accepted that where the statute provided for the issue of a special certificate by administrative decision this was to be taken as final and as excluding the *audi alteram partem* rule, but such is not the case with respect to the determination of refugee status. This was entrusted to a board which is a "court" and must act judicially as appears from such cases as *Leiba v. Minister of Manpower and Immigration*, [1972] S.C.R. 660.

I do, of course, appreciate that the validity of the Immigration Appeal Board "judgement" is not directly in question before this Court and that the decision challenged before us is the order of the Federal Court of Appeal denying leave to appeal. However, I feel it is essential for a proper appreciation of what is involved in the matter to consider fully the ultimate result, that Canada having entrusted to a special court the adjudication of claims to refugee status this was done in this case without any semblance

> of due process. The Court is faced with a decision without reasons, without a hearing, without any statement of the Minister's objections, if any, to appellant's claim for refugee status.

110. It should be pointed out that in the cases at bar, all the appellants were provided with short reasons of the Minister and two of them were provided with more elaborate reasons of the Immigration Appeal Board. The remaining appellants did not exercise their rights to request and receive the reasons of the Board pursuant to s. 71(4) of the *Immigration Act, 1976*. But the opinion of Pigeon J. retains all its relevance with respect to the necessity of a hearing and it is reinforced by the *Canadian Bill of Rights*. As indicated earlier, this was a dissenting opinion, but it was not on this point that it differed from the reasons of the majority. It was also concurred in by two other members of the Court. Pigeon J. does not expressly mention the necessity of an oral hearing but this is what he must have meant given his distinguishing the *Komo Construction* case dealing with a situation in which there had been no oral hearing, and his reference to the *MacDonald* case, a special Court Martial case where an oral hearing had been held.

111. Since the appellants have been denied their fundamental right to a hearing, the question arises as to what remedy they are entitled to in the circumstances of these cases.

112. It seems clear to me that the orders of the Immigration Appeal Board concerning them ought to be set aside and that their claims to Convention refugee status ought to be adjudicated upon on the merits after the holding of full oral hearings. The question is by whom should these claims so be adjudicated upon.

113. For various reasons, all the appellants have expressed a preference for an adjudication at the initial stage, that is at the level of the Refugee Status Advisory Committee which would then not only advise, but decide in a manner consistant with s. 2(*e*) of the *Canadian Bill of Rights*; or alternatively, at the level of the Minister who would decide the issue in a similar manner. In their written submissions, counsel argued that it was more proper as well as more convenient that the situation be remedied at the first instance level rather than at the appellate one. It was pointed out that in a press release dated May 2, 1983, the Minister of Employment and Immigration announced that oral hearings for refugee claimants would be held on an experimental basis in Montréal and Toronto by members of the Refugee Status Advisory Committee. It was observed that the text of s. 45 of the *Immigration Act, 1976* in no way forbids or prevents the holding of oral hearings. Declarations that certain parts of ss. 45(4) and 45(5) of the *Immigration Act, 1976* are inoperative were suggested to empower the Refugee Status Advisory Committee to adjudicate rather than to advise.

114. The points might be well taken if they were addressed to Parliament. There is probably more than one way to remedy the constitutional shortcomings of the *Immigration Act, 1976*. But it is not the function of this Court to re-write the Act. Nor is it within its power. If the Constitution requires it, this and other courts can do some relatively crude surgery on deficient legislative provisions, but not plastic or re-constructive surgery. Furthermore, for the procedural and jurisdictional reasons mentioned earlier, all that is before us is a decision of the Federal Court of Appeal dismissing s. 28 applications aimed at the orders of the Immigration Appeal Board. To repeat, the advice given by the Refugee Status Advisory Committee and the initial

determinations made by the Minister have not been attacked and are not subject to review in these appeals.

115. We are thus left with the Immigration Appeal Board and with ss. 70 and 71 of the *Immigration Act, 1976*:

> **70.** (1) A person who claims to be a Convention refugee and has been informed in writing by the Minister pursuant to subsection 45(5) that he is not a Convention refugee may, within such period of time as is prescribed, make an application to the Board for a redetermination of his claim that he is a Convention refugee.
>
> (2) Where an application is made to the Board pursuant to subsection (1), the application shall be accompanied by a copy of the transcript of the examination under oath referred to in subsection 45(1) and shall contain or be accompanied by a declaration of the applicant under oath setting out
>
> (*a*) the nature of the basis of the application;
>
> (*b*) a statement in reasonable detail of the facts on which the application is based;
>
> (*c*) a summary in reasonable detail of the information and evidence intended to be offered at the hearing; and
>
> (*d*) such other representations as the applicant deems relevant to the application.
>
> **71.** (1) Where the Board receives an application referred to in subsection 70(2), it shall forthwith consider the application and if, on the basis of such consideration, it is of the opinion that there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established, it shall allow the application to proceed, and in any other case it shall refuse to allow the application to proceed and shall thereupon determine that the person is not a Convention refugee.

> (2) Where pursuant to subsection (1) the Board allows an application to proceed, it shall notify the Minister of the time and place where the application is to be heard and afford the Minister a reasonable opportunity to be heard.
>
> (3) Where the Board has made its determination as to whether or not a person is a Convention refugee, it shall, in writing, inform the Minister and the applicant of its decision.
>
> (4) The Board may, and at the request of the applicant or the Minister shall, give reasons for its determination.

116. While section 71(1) may not expressly prohibit an oral hearing, as drafted, it does not make any sense if an oral hearing is held at this stage, and it is accordingly inconsistant with the holding of an oral hearing. Mr. Scott made the two following submissions:

> 31. In the further alternative, the Appellants submit that if section 45(4) is not construed as requiring a hearing before either the Minister or the RSCA, "fundamental justice" would nevertheless be satisfied if section 71 were construed as requiring a hearing before the Immigration Appeal Board on an application for "redetermination".
>
> 32. It is submitted, however, that this would require a somewhat awkward construction of section 71(1) insofar as the section would then require a full oral hearing and consideration of the merits, in conformity with natural justice, in order that the Board might determine whether to grant leave to appeal, in which case a second hearing on the merits would occur. It is submitted, therefore, that the most straightforward and reasonable alternative is to declare "inoperative" all the words of section 71(1) following the words "Where the Board receives an application referred to in subsection 70(2), it shall forthwith consider the application...". If the remainder of this subsection were "inoperative", the result would be a hearing on the merits before the Appeal Board, which would decide the case.

117. I agree with the last submission and I would grant the declaration therein requested, such a declaration to be in force however only with respect to the seven cases at bar where Convention refugee claims have been adjudicated upon on the merits without the holding of an oral hearing at any stage.

118. The reason of the last mentioned restriction in the declaration is that I wish to refrain from expressing any view and to reserve judgment on the question whether s. 71(1) of the *Immigration Act, 1976* is compatible with s. 2(*e*) of the *Canadian Bill of Rights*, in a case where a Convention refugee claim has been dismissed at the initial stage but after an oral hearing, and the claimant applied to the Board for a redetermination of his claim. It seems to me that in such a case, an application in writing for what is analogous to a leave to appeal, would not necessarily deprive the claimant of the right to a fair hearing in accordance with the principles of fundamental justice. Much might depend on the type of oral hearing held at the earlier stage, as well as on the type of questions to be decided in the appeal.

119. In such a hypothetical case, the question would also arise as to whether the burden imposed upon the applicant by s. 71(1) to show a probability of success on a full hearing is compatible with the principles of natural justice. This test was adopted by this Court as a matter of statutory construction in *Kwiatkowski v. Minister of Employment and Immigration*, [1982] 2 S.C.R. 856, but the *Canadian Bill of Rights* was not argued in that case. This question would not arise in the cases at bar where the Immigration Appeal Board will have to adjudicate on merits for the appellants' claims.

120. I realize that if the Board does as I propose, the proceedings contemplated by s. 71(1) of the *Immigration Act, 1976* will be short-circuited and, for all practical

purposes, be replaced by what amounts to a full appeal. But I fail to see any other practical or reasonable alternative in the circumstances of these cases.

121. In the case of *The Queen v. Drybones*, [1970] S.C.R. 282, a provision of the *Indian Act*, R.S.C. 1952, c. 149, enacted prior to the adoption of the *Canadian Bill of Rights* was declared inoperative because it operated so as to abrogate, abridge or infringe one of the rights declared and recognized by the *Canadian Bill of Rights*. It has not been declared by any Act of the Parliament of Canada that the *Immigration Act, 1976* shall operate notwithstanding the *Canadian Bill of Rights*. In view of s. 5(2) of *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, 1960 (Can.), c. 44, in Part II which follows the *Canadian Bill of Rights*, I do not see any reason not to apply the principle in the *Drybones* case to a provision enacted after the *Canadian Bill of Rights*. Section 5(2) provides:

> (2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

122. One last point before I reach my conclusion.

123. All the parties agree that when the Immigration Appeal Board proceeds under s. 71(1) of the *Immigration Act, 1976* it should not take into account any facts or materials other than those specified by s. 70(2) of the Act, notwithstanding some decisions of the Federal Court of Appeal which would appear to hold that the Board may rely for instance on information acquired through its experience in refugee cases.

I would so direct the Board to restrict itself to the facts and material specified in s. 70(2) of the Act.

Conclusions

124. The appeals are allowed, the decisions of the Federal Court of Appeal and of the Immigration Appeal Board are set aside. The applications of the appellants for redetermination of their refugee claims are remanded to the Immigration Appeal Board which is directed to adjudicate upon them on the merits after a full oral hearing in each case, in accordance with the directions contained in these reasons.

125. For the purposes of these seven cases, I would declare inoperative all the words of s. 71(1) of the *Immigration Act, 1976*, following the words:

> "Where the Board receives an application referred to in subsection 70(2), it shall forthwith consider the application".

126. I would award costs on the application for leave to appeal and costs of the appeal to this Court to Mr. Satnam Singh on a solicitor-client basis. Costs in respect of the other six appellants shall be as prescribed by the Order of this Court dated February 16, 1984.

Appeals allowed.

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Solicitor for the respondent: Roger Tassé, Ottawa.

Solicitors for the intervener the Federation of Canadian Sikh Societies: Green & Spiegel, Toronto; Knazan, Jackman & Goodman, Toronto.

Solicitors for the intervener the Canadian Council of Churches: Donald Chiasson, Toronto; Heifetz, Crozier & Schelew, Toronto.