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*Issue: A Journal of Opinion*, Vol. 12, No. 1/2, African Refugees and Human Rights. (Spring - Summer, 1982), pp. 4-6.

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*Issue: A Journal of Opinion* is currently published by African Studies Association.

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# THE U.S. AND REFUGEES: THE REFUGEE ACT OF 1980

*Maurice A. Roberts*

Public Law 96-212, the Refugee Act of 1980, which President Carter signed into law on March 17, 1980 and which went into effect on April 1, 1980, stands as irrefutable evidence of our humanitarian and democratic ideals and concerns as a nation. Adopted after years of study and in the light of our increasing experience in confronting the refugee problem as a permanent phenomenon of global dimensions, the new law represents a watershed in our immigration history. This is the first comprehensive amendment of our general immigration laws designed to face up to the realities by stating a clear-cut national policy and providing a flexible mechanism to meet the rapidly shifting developments of a troubled world.

That the new law has not lived up to all expectations should not be too surprising. In the rapid and dynamic interplay of international forces these days, not all developments are rational or even predictable. The present 97th Congress can study what has happened and enact the amendments needed to meet any unanticipated problems that have arisen. In the meantime, the new provisions have plugged many of the gaps in the former law and should prove eminently helpful, when put to the test, to all concerned with the ongoing refugee crisis.

The impact of the new law can best be surveyed in the light of the former provisions and the entire scheme will be more meaningful if viewed against the backdrop of our historical experience as a refugee-receiving nation.

## BACKGROUND OF OUR REFUGEE LEGISLATION

America has had along and proud tradition as a haven for those seeking here the freedoms denied them in their own homelands. From the earliest days of our colonial history, we encouraged the immigration of all who would come, those in quest of refuge from political or religious persecution as well as those motivated by the greater economic opportunities available here. After we became an independent sovereign state, during the first hundred years of our national existence we had no exclusionary immigration laws. As a developing nation, we needed and welcomed the manpower and skills of our new settlers. Those who came in the wake of the potato famine of 1849 and those who fled Europe following the abortive political revolutions of 1848 were equally acceptable. But we received them as immigrants, not as refugees. Even

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after we adopted increasingly restrictive immigration laws in the early part of this century, excluding whole classes of aliens on account of their personal characteristics or national origins, our general immigration laws contained no special dispensation for refugees as such. As recently as 1946, one federal court on the West Coast was able to state quite accurately, in rejecting a deportable alien's asylum claim, "Aliens illegally in the United States have no right of asylum therein."

Following the close of World War II, with the disclosure of millions of Eastern Europeans uprooted from and fearful of returning to their now Communist-dominated homelands, the United States adopted the first of what was to prove to be a succession of emergency refugee programs. These were *ad hoc*, "one shot" affairs, premised on the notion that the refugee situation then addressed was a temporary phenomenon, and each program was conducted outside the general immigration laws. Typical were the Displaced Persons Act of 1948, the Refugee Relief Act of 1953, and the Refugee-Escapee Act of 1957. When Soviet troops invaded Hungary in October 1956, President Eisenhower announced that we would offer asylum to 21,500 of the Hungarian refugees. It was soon discovered that the existing refugee legislation was inadequate to meet these needs, and the Attorney General's parole power was invoked to enable the others to come here. That power, granted to the Attorney General by the Immigration and Nationality Act of 1952, was designed to permit the temporary admission of individual aliens who would otherwise be inadmissible. This was the first time that the parole authority was exercised in behalf of large groups of aliens. Congressional objection to the continued use of the parole power as the mechanism for admitting large groups of refugees laid the groundwork for the first statutory provisions governing the admission of refugees as part of our permanent immigration laws.

Enacted in 1965 as amendments to the basic 1952 immigration statute, the new refugee provisions largely codified our prior precepts and practices. For one thing, the new law defined a refugee as one who had "fled" his former country. It was contemplated that the refugees would have arrived in a country of first asylum abroad, and that United States officials there would have an opportunity to screen those who applied for admission to our country. The statute also contained numerical, ideological, and geographic limitations. As part of the preference system then applicable only to the Eastern Hemisphere, a maximum of 10,200 slots were reserved for refugees. To qualify, the alien must have

fled from a Communist country or a country in the Middle East and be unable to return home because of persecution on account of race, religion, or political opinion. Instead of being admitted to the United States for permanent residence, the refugee was permitted to enter only conditionally, an uneasy status that could be converted to that of permanent residence after two years as a probationer.

Despite the Congressional desire that the parole authority be exercised thereafter only for isolated, individual cases, the 1965 amendments soon demonstrated that they, too, could not meet all contingencies. Following the Cuban airlift program worked out in 1965, there was a dramatic upsurge in the number of Cuban refugees coming here. Since the preference system was then limited to the Eastern Hemisphere, the Cuban refugees were ineligible for the conditional entry slots provided by the 1965 amendments, and it was necessary to resort once more to the parole authority. Over 600,000 Cubans were permitted to enter as parolees and in 1966 special legislation was enacted to permit them to adjust their status to permanent residents.

Parole was again employed as the vehicle for entry for some 130,000 refugees from Indochina following the cataclysmic events there in 1976. As new refugee emergencies erupted thereafter, new Indochinese refugee parole programs were authorized or extended by the Attorney General in each of the years that followed. Special legislation was enacted in 1977 to permit such paroled refugees to adjust their status to permanent residents. Parole was also used increasingly to expedite the entry of Soviet and other Eastern European refugees. It was also used to permit the entry of refugees not covered by the 1965 amendments, e.g., those still in the country of oppression and those fleeing persecution by right-wing dictatorships.

Another area virtually untouched by the 1965 amendments involved aliens who managed to arrive at our borders or who claimed asylum only after entering the United States. While in 1968 our country became a party to a United Nations Protocol on refugees which contained specific asylum provisions, our immigration laws had not been amended specifically to embody those provisions. Following the dramatic Kudirka incident in 1970, when a Lithuanian seaman seeking asylum here was forcibly returned to the Soviet vessel, regulations and instructions were issued by the Immigration Service to provide a mechanism for the channeling of asylum claims by aliens already here, but there were highly ineffectual.

Perhaps the chief difficulty with the 1965 amendments was the unrealistically low limit on the number of refugees who could be permitted entry each year. Even after a statutory amendment in 1976 extended the preference system to the Western Hemisphere as well, the total number of slots made available worldwide to refugees as conditional entrants was increased to only 17,400. The facts of life are that the refugee problem is one of worldwide dimensions and is with use for the foreseeable future. That our national policy is to participate with other nations in the alleviation of that problem is demonstrated by the fact that we have in recent years actually received as refugees annually, many times the 17,400 limit. The dramatic events in recent years have also underscored the need for greater flexibility in our refugee laws to meet the unforeseen emergencies that keep recurring.

Also, the impact of the new refugee arrivals on our economy and support systems has made it abundantly clear that these are not problems that can be dumped on the local communities or the voluntary agencies, and that a realistic system of federal funding and support is imperative.

The Refugee Act of 1980, which went into effect on April 1, 1980, is designed to meet the deficiencies disclosed by our experience with the prior law. Its stated purpose is to establish a coherent and comprehensive refugee policy for this country and to create a systematic and flexible procedure for the admission and resettlement of refugees.

### HIGHLIGHTS OF THE NEW LAW

Among the major concerns addressed by the new law are the following:

1. *Definition of Refugees.* The new law contains a specific definition of "refugee" which conforms to the language used in the United Nations Protocol on the Status of Refugees, to which the United States subscribed in 1968. This more expansive definition eliminates the geographic and ideological restrictions of the old law, so that refugees may now qualify regardless of the location of the country they fled and regardless of whether the persecution feared there is at the hands of a right-wing or left-wing regime. Provision is also made to afford refugee treatment for a person persecuted by the government of his home country who is still within that country. Specifically excluded from consideration as refugees are aliens who themselves engaged in the persecution of others.

2. *Resettlement Elsewhere.* The former law had been interpreted by the Supreme Court as not applicable to a refugee who had already found a haven elsewhere. The new statute codifies this concept by restricting admission to a refugee who is not "firmly established" in a foreign country. The quoted phrase is not defined in the new law but is left to be defined in administrative regulations.

3. *Numerical Limitations.* In place of the former 17,400 annual limit, the new law raises the limit on refugee admissions to 50,000 annually for the first three fiscal years. Thereafter, the number is determined annually by the President, after consulting with Congress. If a greater need is foreseen before the start of the fiscal year, an additional number may be allowed. In emergency situations which could not be anticipated at the start of the fiscal year, additional admissions can be authorized.

4. *Asylum.* For the first time, the new law draws a distinction between refugees, who are abroad, and asylum, which is sought by aliens already here or knocking on our gates for admission. The statute does not spell out asylum procedures but requires these to be developed administratively by regulations.

5. *Refugee Procedures.* As heretofore, the new law contemplates that the refugee will be abroad, in a country of first asylum, where he can be screened by United States officials to make he meets our standards. On entry to the United States, the refugee is not admitted for permanent residence but can achieve that status after a year here. Aliens granted asylum can also apply for permanent residence status at the end of a year.

6. *Parole.* The new law restricts the Attorney General's parole power in refugee situations to make it available only

on a case-by-case basis. This restriction is premised on the notion that the flexibility built into the new law will enable us to meet emergency group situations under the refugee provisions without the need to resort to parole.

7. *Resettlement Assistance.* Recognizing the Federal Government's responsibility to assist state and local communities and the voluntary agencies in resettling refugees, the new law contains flexible and generous support programs. To administer these programs, provision is made for a United States Coordinator for Refugee Affairs and an Office of Refugee Resettlement. Fiscally, provision is made for direct cash and medical assistance provided by states to newly arrived refugees and asylees, as well as for supportive services to be funded through discretionary grants and contracts. A time limit of three years is set for such funding a phase-down is fixed for the Cuban resettlement program, now approximately 20 years old.

### MAJOR IMPLICATIONS

How is the new law working? It is still too early to pass judgment. It is not conclusive that on its first major test, involving the Cuban-Haitian entrants, the new law fell flat on its face.

The situation presented was unprecedented and unanticipated. The thousands of Haitians who came here in open boats and the 130,000 Cubans who arrived last spring as part of a flotilla instigated by the Cuban government took us quite by surprise. For obvious reasons, we could not repel the landings and push the boats back to sea. Yet, we were hard put to deal with them under the new law.

For one thing, we had no opportunity to examine these aliens abroad. The new law, like the old, contemplated an orderly procedure wherein the applicants for refugee status had made their way to a country of first asylum, where representatives of our government could screen them before allowing them to come here. The sudden arrival here of the Cuban flotilla and the Haitian open boats made the United States, in effect, the country of first asylum. This made it difficult to apply the new law to these cases.

In addition, local political considerations played a part in precipitating a governmental conclusion that these aliens did not meet the statutory definition of refugee. Asserting that it could not treat them as refugees under the new law, the government promptly fell back upon its old stand-by, the parole power, and paroled them all in temporarily until January 15, 1981, in an ambiguous posture as "Cuban/Haitian Entrant (Status Pending)," now extended to July 15, 1981. In the meantime, support funding for these groups outside the provisions of the Refugee Act of 1980 was authorized by Congress and an administration-sponsored bill to deal with them separately as a class was introduced in Congress. This bill failed to be enacted in the 96th Congress, and its counterpart will undoubtedly soon be introduced in the 97th. Whatever its fate, this new development must alert us to the fact that the new law, flexible as it is, will not enable us to cope with all situations that may arise.

The effect of the Refugee Act on immigration to the United States of those previously considered refugees is not yet clear. The present immigration of Indochinese takes place under the Attorney General's parole authority, at the rate of 14,000 per month, until September 30, 1981. Recent

applications of Refugee Act terms to people resettling under the "parole programs" is causing concern among resettlement agencies and others.

Eligibility to go to the United States is based, in the case of the "boat people," essentially on the fact of leaving Vietnam by boat. Grounds for exclusion do, of course, exist, along with other qualifications. One of these provides that a refugee without close family members already in the United States will accept a resettlement offer from another country, if it is extended. But, these factors aside, final acceptance under the United States program has been pretty much a matter of time. The criteria which govern the implementation of the parole authority are the result of consultation among the Department of State, Congress, and the Immigration and Naturalization Service (INS).

In recent months, apparently without consultation, the INS in Southeast Asia began using the Refugee Act definition of "refugee." This would exclude some of the Indochinese "boat people," who might be deemed "economic" migrants and hence not eligible under the Act.

Assisting countries of first asylum in Southeast Asia by resettling refugees from their territory, the parole program was intended as an international example, and it has encouraged third countries to offer resettlement opportunities. Application of the Refugee Act in this manner can be seen as contradicting this intent and raises issues on a broad foreign policy level.

As this example indicates, how the new law will work in practice still remains to be seen.