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August 15, 2018

Via email: [IRCC.COMMConsultations-ConsultationsCOMM.IRCC@cic.gc.ca](mailto:IRCC.COMMConsultations-ConsultationsCOMM.IRCC@cic.gc.ca)

The Honourable Ahmed Hussen, P.C., M.P.  
Minister of Immigration, Refugees and Citizenship  
Immigration, Refugees and Citizenship Canada  
365 Laurier Avenue West  
Ottawa, ON K1A 1L1

Dear Minister Hussen:

**Re: Review of Canada's refugee determination procedures**

I am writing on behalf of the Immigration Law Section of the Canadian Bar Association (the CBA Section) to provide input on a recent report<sup>1</sup> (the Report) that followed an independent review of refugee determination procedures at the Immigration and Refugee Board (IRB).

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Section has approximately 1,000 members practicing in all areas of immigration law. Our members deliver professional advice and representation on the Canadian immigration system to clients in Canada and abroad.

We wrote to you in June 2018, in anticipation of the Report, about the importance of maintaining the IRB as an independent quasi-judicial tribunal responsible for refugee determination in Canada.<sup>2</sup> The IRB stands as a model around the world for independent refugee determination, separate from other arms of government and insulated from politicization. While improved operational capacity is clearly warranted (through efficiencies and an appropriate level of funding), the autonomy of IRB decision-makers is of paramount importance. Our input is rooted in that primary concern.

We support many of the recommendations in the Report, especially the importance of advance planning and sufficient funding. We offer some comments and suggestions on the analysis and recommendations presented in the Report.

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<sup>1</sup> [Report of the Independent Review of the Immigration and Refugee Board: A Systems Management Approach to Asylum](#) (April 10, 2018).

<sup>2</sup> CBA submission [Independence of Canada's refugee determination process](#) (June 7, 2018).

## No need for a new agency

We support proposals that improve operational coordination in refugee determination, while maintaining independence in decision-making.

The Report proposes (at its most minimally-invasive) the creation of an Asylum System Management Board at the Deputy Minister level to recommend an annual plan for the asylum system to the Minister of Immigration, Refugees and Citizenship, including:

- setting out processing priorities;
- confirming forecasts;
- establishing operational performance targets;
- setting resource allocations in a comprehensive budget plan;
- setting quality assurance objectives;
- establishing an information technology and system investment/innovation plan; and,
- establishing a results reporting framework.<sup>3</sup>

Creating a new agency, in which the IRB would have only one vote, would bring the refugee determination process under further government control, undermining the independence of IRB decision-making. The IRB is currently responsible for its own operational planning. A new agency would add new layers of bureaucracy without addressing the core barrier to improving operational functionality: underfunding and understaffing of the institutions that support the refugee determination process, including the IRB, in the context of fluctuating numbers of arrivals. A new agency would also further expend valuable, and already scarce, resources.

The Report goals of “fast, fair and final”<sup>4</sup> are better achieved in the current IRB structure, without adding another layer of management. Although the proposed changes purport to be at a case management level only, without the intent to interfere in independent decision-making, there is an inherent tension between “fast” and “fair”. Putting the IRB under the supervision of an administrative task-master risks elevating efficiency over thorough and thoughtful decision-making.

We agree that advance planning is essential, and we support efforts to better forecast the needs of our asylum system. However, the IRB is best placed to assess its own operational needs (including funding, staffing and process improvements). Many positive steps have already been taken to expedite hearings on meritorious cases. We recommend leaving advance planning in the IRB’s hands.

## Expedited hearings

We support the expanded use of paper-based hearings only in the narrow circumstances of strong, well-documented claims, or for *prima facie* refugees, where an experienced IRB member determines in an early review that a positive determination is likely. It is important that oral hearings continue to be required where a positive determination is unlikely, with full written reasons when a negative determination is made.

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<sup>3</sup> Report, *supra* 1, p. 50.

<sup>4</sup> Report, *supra* 1, p. 24.

To further expedite the resolution of claims, we encourage increased front-end screening of claims by IRB members, who can apply their experience to narrow the issues and stream toward early resolution in appropriate cases. We also support greater involvement of Immigration, Refugees and Citizenship Canada (IRCC)/Canada Border Services Agency (CBSA) hearings officers in the refugee determination process at an early pre-hearing stage, to facilitate faster decision-making in straightforward cases. At the Immigration Appeal Division, hearings officers play a meaningful role in early review and alternative dispute resolution, leading to more efficient and timely resolution of cases, often without the need for a full hearing.

Lastly, in cases of women fleeing sexual or domestic violence, and others especially affected by trauma, the type and timing of the hearing is essential to ensuring a fair process. It is critical that the tribunal apply gender persecution guidelines and be trained in taking a trauma-informed approach. Rather than expediting, the tribunal may need to pause the proceedings to allow claimants to obtain counselling, after which a paper hearing can be considered. Additional accommodations, such as allowing a support person to attend the oral hearing, might also be warranted.<sup>5</sup>

### **Role of legal counsel and legal aid**

Canada's immigration legislation permits refugee claimants to be represented by legal counsel in proceedings before the IRB at their own expense.<sup>6</sup> The Report acknowledges the important role that lawyers play in the refugee system.<sup>7</sup>

Political and climatic instability has intensified globally, contributing to an unprecedented 65 million forcibly displaced persons, and dramatically altering the context in which refugee and immigration legal services are provided in Canada. Refugee claims have recently increased dramatically, along with demand for legal services and, in turn, legal aid funding.

Legal aid funding has not kept pace, compromising access to legal services for many vulnerable refugee claimants.<sup>8</sup> Access to justice is a foundational component of the rule of law for all members of our society, including refugees and immigrants. Refugee claimants in Canada should receive the same benefit of legal assistance as Canadian citizens and permanent residents.

Refugees comprise a truly marginalized group in Canada. In addition to typical challenges faced by newcomers (financial, housing, employment), they often suffer burdens of language and educational barriers, limited support networks, limited knowledge of Canadian laws, and post-traumatic stress disorder. It is unrealistic to expect refugees to navigate the immigration and refugee system without the assistance of a lawyer. Reduction in legal aid funding leads to an increase in self-represented refugees and negatively impacts the refugee process, not only by lengthier hearings and delays but by an unjust disparity in the resolution of cases. Studies have shown that refugee claimants represented by a lawyer have a 230% greater chance of success compared to unrepresented claimants.<sup>9</sup>

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<sup>5</sup> See CBA submission [IRB Appointments, Training and Complaints Processes](#) (May 18, 2018).

<sup>6</sup> [Immigration and Refugee Protection Act](#), S.C. 2001 c. 27, section 167.

<sup>7</sup> Report, *supra* 1, p.96.

<sup>8</sup> See CBA resolution [16-05-A](#), endorsing national legal aid benchmarks.

<sup>9</sup> See CBA submission, [Immigration and Refugee Legal Aid Services](#) (October 2, 2017).

We offer a few suggestions to address this issue:

1. Safeguard federally-funded legal aid in any changes to the refugee process.
2. Consult the legal community on reforms to the refugee process.
3. Implement mechanisms to streamline the process (for example by eliminating restrictive timelines for hearings which contribute to wasteful hearing postponements based on availability of counsel).
4. Help claimants in their search for qualified legal aid counsel.<sup>10</sup>
5. Hire duty counsel where claimants cannot afford their own counsel and legal aid funding is unavailable.
6. Offer immediate eligibility for work permits to decrease reliance on legal aid.

We applaud recent efforts by IRCC to decrease the processing time for refugee work permits from three months to three weeks, and suggest a further step – issuing a work permit at the eligibility interview, without requiring another application. The second application takes time, is a substantial effort for a person who may not speak English or French or have any formal education, and imposes an unnecessary burden on IRCC to process formal applications where the permit is virtually guaranteed. Further, many applications are returned unprocessed because the claimant has missed a signature or a field on the form, necessitating yet another application.

### **Consider impact of IRB vacancies**

Many operational inefficiencies identified in the Report can be attributed to the high number of vacancies on both the IRB Refugee Protection Division (RPD) and the Refugee Appeal Division (RAD), resulting in excessive delays and hardship for those awaiting decisions.

The CBA Section recently made recommendations to the House of Commons Committee on Citizenship and Immigration<sup>11</sup> to relieve the detrimental effects of the vacancies, including:

1. implementing a transparent, systematic and merit-based appointment process, with a majority of IRB members who are experienced lawyers, with the associated ethical obligations; and
2. moving quickly from candidate approval to appointment, offering a right of renewal (subject to performance review), and lengthening the term.

### **Adopt new technologies**

We offer a number of suggestions for improving efficiency through enhanced use of technology.

#### **Make better use of e-post Connect**

While the IRB uses an online option, e-post Connect, to share documents, the RPD does not use the system to communicate with counsel or claimants. Nor can e-post Connect be used to provide documents to the Minister. It is limited to submitting documents under the RPD Rules. A more comprehensive method of communication and filing would increase efficiency, as discussed further below.

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<sup>10</sup> For example, by use of the CBA's [Find-a-Lawyer](#) tool.

<sup>11</sup> CBA submission, *supra* 5.

### **Create pdf of national documentation packages**

National Documentation Packages (NDP) should be made available as a consolidated PDF with tabs, to better facilitate printing and use. The PDF should also enable optical character recognition, making the content of the NDP searchable.

### **Correspond with counsel by email**

The IRB does not use email to correspond with counsel. Given the widespread acceptance of email by businesses, governments and other non-governmental organizations, the RPD's practice is anomalous, slows the process considerably, and impedes producing a consolidated record of communications.

### **Develop a portal for case management, e-filing, and communication**

While the IRB has taken some steps to modernize (e.g. teleconferencing since the mid-1990s, e-post Connect), it has not fully embraced opportunities for technological advancement. We suggested a few interim steps above, but recommend a more comprehensive approach longer term.

Digital documentation, shared databases, cloud-based services, scheduling apps and web portals have helped streamline processes in notoriously complex sectors, such as banking, insurance and taxation.<sup>12</sup> There are many opportunities for process streamlining at the IRB.

For example, a web portal could compile and organize correspondence, document disclosure, deadlines and notices, and make it accessible to the IRB and all parties via a user-friendly dashboard.

This consolidation could improve process efficiency in a number of ways:

1. help claimants and their representatives serve and file forms and documents
2. submit electronic, audio or video evidence with ease and decrease risk of technological failure at the hearing
3. allow access to documents on demand and in real time, and simplify cross-referencing of documents
4. make information about the status of the file immediately available
5. minimize the risk of missed deadlines
6. decrease potential for conflicts by setting dates electronically
7. allow quick document searching by including e-search function
8. provide immediate access to audio recordings
9. facilitate simple interlocutory or procedural applications before the IRB
10. more easily transmit the reasons for judgment to the parties
11. more easily launch an appeal to the RAD
12. provide easy access to exhibits by RAD

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<sup>12</sup>

Paul Gallant, [How Technology can Create a Better Justice System](#), The Walrus (February 13, 2018).

As with any significant change, a commitment by all IRB Members to the implementation of technology would be needed, and an iterative approach adopted, to ensure success.

### **Allow witnesses to testify via videoconference**

RPD Rules allow witnesses to testify by teleconference, but not by videoconference. This is an unnecessary limitation, especially in circumstances where the claimant potentially faces a risk to life and liberty, and bears the burden of proof. Video testimony would allow IRB members to assess non-verbal cues and body language in determining credibility.

As the IAD has videoconference capability, extending its use to the RPD should not be costly.

### **Permit claimants to file H&C applications in lieu of or in addition to protection claims**

The RPD and RAD are currently overburdened due to the recent surge in irregular land crossings from the U.S. into Canada, but also with claims that are more accurately based on humanitarian and compassionate grounds (H & C) rather than true refugee protection claims. The Report notes that RPD intake is currently at double the funded amount<sup>13</sup> and the RPD and RAD are below target for finalized claims.<sup>14</sup>

Pursuant to the *Immigration and Refugee Protection Act*, section 25(1.2)(c), refugee claimants who withdraw their claims are largely prohibited by the 12-month bar from submitting a permanent residence application on H & C grounds, no matter how meritorious.<sup>15</sup> RPD decision-makers have no H & C discretion.

Many refugee claimants do not meet with a lawyer until after initiating a refugee claim so, at the initial stage, many claimants do not understand the elements of an IRPA refugee protection claim (section 96 or section 97 application), or the merits of their claim. Once a lawyer is involved it may become clear that the individual has a weak refugee claim, but strong H & C factors for a permanent residence application.

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<sup>13</sup> Report, *supra* 1, p. 18: "The RPD had over 47, 000 referred cases pending at the end of 2017. However, with intake of claimants at almost 50,000 for 2017, it is double the funded 'steady state' capacity."

<sup>14</sup> Report, *supra* 1, p. 19: "In the period prior to this Review, processing output at the IRB Refugee Protection Division fell significantly short of the funded capacity of 22,500 in 2015 and 2016, with finalizations of 16,200 in 2015 and 16,432 in 2016. While hearings for 90% of claimants were supposed to be held within regulated timelines, the IRB was never able to meet this target achieving a high of 65% in 2014 to 2016 and dropping to 59% by 2017."

<sup>15</sup> *Immigration and Refugee Protection Act*, *supra* 5, s. 25 (1.2) The Minister may not examine the request if [...] (c) subject to subsection (1.21), less than 12 months have passed since the foreign national's claim for refugee protection was last rejected, determined to be withdrawn after substantive evidence was heard or determined to be abandoned by the Refugee Protection Division or the Refugee Appeal Division.

Exception to paragraph (1.2)(c): (1.21) Paragraph (1.2)(c) does not apply in respect of a foreign national (a) who, in the case of removal, would be subjected to a risk to their life, caused by the inability of each of their countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, to provide adequate health or medical care; or (b) whose removal would have an adverse effect on the best interests of a child directly affected.

By that stage, it is often too late to withdraw the refugee claim and submit an H & C application. Despite having strong H & C factors, the individual may be removed during the 12-month bar. Another effect is that the 12-month bar acts a deterrent to dropping less meritorious claims from the RPD stream.

This process does not allow the claimant to receive professional legal advice tailored to their situation at the time it is most needed, and adds unnecessarily to the burden on the RPD as well as associated wait times and cost.

We recommend removing the 12-month bar under section 25(1.2)(c), permitting claimants to file H&C applications in lieu of or in addition to refugee protection claims.

At the very least, refugee claimants should be counselled by a lawyer at an earlier stage regarding the available options including, where the facts support it, filing a permanent resident application based on H & C grounds rather than a refugee protection claim.

In summary, we offer the following suggestions in response to the Report:

- 1) Put the importance of an independent decision-maker at the forefront.
- 2) Reconsider the need for a new agency to assist with annual planning.
- 3) Expand the use of expedited and paper hearings where appropriate.
- 4) Increase involvement of IRCC/CBSA hearings officers to facilitate earlier resolution of straightforward cases.
- 5) Facilitate access to legal counsel and legal aid.
- 6) Consider impact of IRB vacancies.
- 7) Adopt new technologies to effect process improvements.
- 8) Permit claimants to file H & C applications in lieu of or in addition to refugee protection claims.

We trust that our comments are helpful, and would be pleased to provide any needed clarification.

Yours truly,

*(original letter signed by Sarah MacKenzie for Barbara Jo Caruso)*

Barbara Jo Caruso  
Chair, CBA Immigration Law Section