

## **CBA NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION**

### **COMMENTARY**

#### **CONDUCT OF HEARINGS**

##### **Overview**

The Refugee Protection Division of the Immigration and Refugee Board proposes to change the procedure in the conduct of its hearings. Under the present system, hearings follow a quasi-judicial format which incorporates a variety of similar legal procedures at every hearing, and which places the burden of proof and presentation of evidence on the claimant. The RPD wishes to conduct its hearings in a more informal and expeditious manner.

##### **Proposed Changes**

The RPD proposes a number of changes to the procedure at hearings. These changes include early identification of issues, strict compliance with disclosure deadlines, more focused research, prompt commencements of proceedings, narrow and precise identification of issues at the commencement of proceedings, omitting the interpreter's oath, and reversing the order of questioning of the claimant and presentation of evidence.

As authority for these proposed changes, the RPD notes that their hearings and decision-makers are appointed under the *Inquiries Act*, and that inquiries can be conducted in a variety of different formats. Various of these changes are intended to eliminate unnecessary procedures – such as the interpreters oath in every hearing, or to abbreviate the amount of time it takes to complete a hearing – narrowing of issues and changing the order of questioning. The RPD notes that they have control over their own proceedings.

##### **Our Comments**

The CBA commends the efforts of the RPD to eliminate unnecessary steps from the hearing process and to generally make their proceedings informal and expeditious. To the extent the

proposed changes can be implemented without overriding the claimant's right to a fair hearing, these changes are positive. However, the CBA Section does not support certain initiatives of the RPD.

A review of the common law of administrative proceedings shows that the principle that administrative tribunals can control their own process is set within the context of their greater obligation to work within the framework of fairness and natural justice. To this end, the CBA Section objects to two of the proposed changes in particular.

The CBA Section objects to the general trend of formalizing and bureaucratizing the RPD process. This trend makes hearings before the RPD less informal, and more difficult for unrepresented claimants to navigate the system. Two examples of this trend are the proposals to require amendments to the Personal Information Form and objections to the order of questioning to be submitted in advance via a formal written procedure. This requirement will be difficult for self-represented claimants to comply with and may very well interfere with the claimant's reasonable ability to present their claim in an unobstructed manner.

The CBA Section also objects to the proposal to change the order of questioning in the hearings. The published guideline proposes that the Minister, RPO and Member with counsel questioning the claimant last. This proposal must be considered, not in light of what an ideal RPD proceeding might look like, but the setting in which RPD hearings actually take place. Hearings before the RPD are adversarial in practice. The Members are not of universal quality of ability to control their proceedings. The RPOs and Ministers Representatives are often highly combative and hostile to the presentation of the refugee claims. Each hearing commences with the Member advising the claimant that credibility is always an issue. In this context, reversal of questioning and removing the ability of the claimant to present evidence unfettered and to meet their burden of proof, undermines the fairness of the process. Where the burden of proof rests on the claimant, they must have a chance to meet it, before being subjected to cross-examination. While the RPD might hope that the questioning at hearings would not be of the nature of cross-examination of claimants, but more in the nature of a full examination of only the relevant issues, that is not the context in which refugee claims are heard.

The CBA Section suggests that the RPD proceed with the other recommendations to make their hearings more expeditious, but leave the order of questioning in place. If the Members are able to sufficiently narrow the relevant issues, and control their proceedings by requiring evidence to be led only on relevant issues, hearings will be much more efficient and there will be no loss of fairness to the claimants.

## **CBA NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION**

### **COMMENTARY**

#### **SCHEDULING**

##### **Overview**

The Refugee Protection Division of the Immigration and Refugee Board proposes changes to its method of scheduling its hearings. Under the current system counsel are contacted by staff of the RPD when the case is ready to be scheduled for hearing. Hearing dates are generally picked in a manner of cooperation and consultation with counsel for the claimant. The RPD states that this procedure has created barriers to their stated goals of efficiency and fairness in circumstances where particular counsel have such a large caseload that their cases cannot be scheduled expeditiously, or where counsel are otherwise extensively engaged in outside matters.

##### **Proposed Changes**

The RPD proposes changing their process of scheduling to require counsel to submit a list of their available dates in accordance with the request of the RPD. Counsel are required to keep this list up to date, advising the RPD if they are no longer available on previously submitted dates. The RPD is not bound by counsel's availability but will attempt to schedule hearings in a manner that accommodates this calendar. In the event that counsel is retained after a date for hearing is scheduled, the claimant must retain counsel who is available on that date. Counsel with a high volume of cases will have their cases scheduled by the RPD and the RPD will advise the claimants to seek alternative, available counsel.

As authority for these changes, the IRB relies on the principle that scheduling of hearings is an internal administrative matter, and thus entirely within their jurisdiction. They cite the common law principle that choice of counsel is not absolute, but means counsel who are ready and able to appear according the requirements of the Court.

## **Our Comments**

The CBA Section commends the efforts of the IRB to deliver proceedings as quickly as circumstances and fairness permit.

A review of the common law makes it clear that the efforts of the IRB to deliver expeditious proceedings must be balanced against the interests of the claimants and the principles of fairness within their proceedings. The need for the RPD to proceed with a hearing cannot outweigh the claimants' right to a reasonable opportunity to present their claim. There are several ways in which this more restrictive policy toward scheduling hearings may affect the claimants' ability to present their case:

- Claimants could be denied the benefit of counsel who have prepared for a long and complex matter;
- Claimants could be faced with choosing counsel who are available but who are unfamiliar with their case and who have insufficient time to prepare;
- Claimants could be denied the benefit of counsel who have expertise in a particular aspect of their claim (knowledge of their home country, language abilities, familiarity with a specialized consideration);
- Claimants could be denied the benefit of representation by a counsel whom they trust and are prepared to confide in, thus facilitating the full disclosure of facts and sensitive issues before the RPD.

The CBA Section notes from consultation with the IRB that the impetus for the proposed scheduling changes is a response to limited circumstances where the lack of availability of a small number of counsel is impeding the RPD's desire for expeditious processing. The CBA Section suggests that it is inappropriate to implement rigid procedural rules, which will affect every claimant and result in potential cases of unfairness, in response to scheduling difficulties with the minority of counsel. The CBA Section notes that the proposed changes create an additional onus on already burdened counsel in an environment where legal representation of refugee claimants is under siege across the country. As a rule, counsel are opposed to the administrative burden placed on them to keep their schedule current with the

RPD, especially in light of the highly evolving nature of counsel's schedule. Lastly, the CBA Section notes that the administrative burden of keeping track of schedule availability and changes is likely to be time consuming and costly for the RPD.

The CBA Section understands the desire of the RPD to conduct its process efficiently. We note that the majority of counsel who appear before the RPD are able to schedule their cases within a reasonable time, according to the present procedure at the RPD. Those counsel whose schedule is excessively engaged outside of the IRB proceedings account for a very small number of counsel and claimants, and thus impose a very small burden on the RPD to accommodate these schedules. The CBA accepts that, for counsel with large refugee caseloads, it may never be possible to conduct these hearings expeditiously due to the volume of claimants represented by individual counsel. The CBA Section suggests that the RPD could continue to implement their proposed changes, but only for counsel with a certain volume of cases, to be heard within the scheduling period. The RPD can fix a numerical limit for those counsel who must comply with this proposed scheduling procedure. In this way the RPD minimizes the potential unfairness to claimants, and also shows that it has taken the most reasonable steps to confront a particular problem.