

November 20, 2002

Mr. Joe Fontana, M.P.
Chair
Standing Committee on Citizenship and Immigration
House of Commons
Room 630, 180 Wellington
Ottawa, ON K1A 0A6

RE: *Immigration and Refugee Protection Regulations*
(Safe Third Country Agreement)

Dear Mr. Fontana,

The National Citizenship and Immigration Section of the Canadian Bar Association welcomes the opportunity to present its views on the proposed *Immigration and Refugee Protection Regulations* to implement the *Agreement between Canada and the United States for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* (the Safe Third Country Agreement)¹. The Section has examined the proposed regulations against the Safe Third Country Agreement, the *Immigration and Refugee Protection Act* (IRPA) and Canada's international obligations.

1. Article 6 of the Safe Third Country Agreement provides:
Notwithstanding any provision of this Agreement, either Party may at its own discretion examine any refugee status claim made to that Party where it determines that it is in its public interest to do so.

There is no comparable provision in the proposed regulations. There should be.

DRAFTING SUGGESTION

Add new section 159.8:
Notwithstanding any other provision in this regulation, the Minister may decide that paragraph 101(1)(e) of the Act does not apply where the Minister determines that it is in the public interest to do so.

¹ Canada Gazette, Part 1, October 26, 2002, p. 3241.

2. There is no provision for *de facto* family members. Citizenship and Immigration Canada recognizes the concept of *de facto* family members in the exercise of its humanitarian and compassionate discretion for landing. The Immigration Manual refers to persons not necessarily related by blood, but who are *de facto* part of the family by reason of financial or emotional dependency.²

Some of these people will be children. One principle that runs through IRPA is the need to take into account the best interests of children [sections 25(1), 29(2)(c), 68(1), 69(2)]. That need is particularly relevant here.

These people could be covered by a discretionary provision. Right now there is none.

DRAFTING SUGGESTION:

Add to the definition of "family member" the phrase "and includes any person who is *de facto* a member of the family of the claimant."

3. The Safe Third Country Agreement provides that unaccompanied minors are exempt from the rule that the refugee claim should be determined in the country of last presence [Article 4(2)(c)]. The term "unaccompanied minors" is defined more narrowly in the proposed regulations than in the Agreement.

The Agreement defines an unaccompanied minor as:

an unmarried refugee status claimant who has not yet reached his or her 18th birthday and does not have a parent or legal guardian in either Canada or the United States.

The proposed regulations define an unaccompanied minor as a person who:

- (i) has not attained the age of 18 years and is not accompanied by a person who has attained the age of 18 years;
- (ii) has neither a spouse nor a common-law partner; and
- (iii) has neither a mother or father nor a legal guardian in Canada or the United States.

Under the proposed regulations, a child accompanied by any adult, even a stranger, could no longer claim an exemption from the requirement that his or her refugee claim be made in the US. This restriction violates the Safe Third Country Agreement and should not be there.

DRAFTING SUGGESTION:

Delete from section 159.5(d)(i) the phrase "and is not accompanied by a person who has attained the age of 18 years".

4. In the proposed regulations, a minor with both parents in Canada cannot join his or her parents in Canada, if the parents have made a claim that has been rejected. As well, a minor with one parent in Canada and the other parent in neither Canada nor the US

² See OP (Overseas Processing) Chapter 4, *Processing Applications under IRPA section 25*, section 8.3.

cannot join his or her parent in Canada, if the parent in Canada has made a claim that has been rejected. These exceptions are permitted, but not required, by the Agreement and certainly not in the best interests of the child. They should not exist.

DRAFTING SUGGESTION:

Change section 159.5(iii) to read:

"has

A. neither a mother or father nor a legal guardian in Canada or the United States or,

B. a parent or guardian in Canada but no parent or guardian in the United States".

5. IRPA distinguishes between claims and applications for refugee protection. A claim for refugee protection is made to the Refugee Protection Division of the Immigration and Refugee Board (IRB). An application for refugee protection is made to the Minister of Citizenship and Immigration under the pre-removal risk assessment procedure.

The proposed regulations allow for an exemption from the rule that the refugee claim should be determined in the country of last presence where the "family member of the claimant is in Canada and has made a claim for refugee protection that has been accepted" but not where the family member is in Canada and has made an *application* for refugee protection that has been accepted. As well, the proposed regulations allow for an exemption where the family member of the claimant "has attained the age of 18 years in Canada and has made a claim for refugee protection that has been referred to the Board for determination", but do not allow for an exemption where the family member has made an application for refugee protection that has been referred to the Minister for determination.

Even though referrals of a claim to the IRB and applications for protection to the Minister under pre-removal risk assessment are different procedures, there are fundamental similarities that suggest the exemption should be extended to both. Both consider the same facts and apply the same protection criteria. Both can result in protected person status.

DRAFTING SUGGESTIONS:

Change proposed section 159.5 (b) to read:

a family member of the claimant is in Canada and has made either a claim or application for refugee protection that has been accepted under the Act.

Change proposed section 159.5(c) to read:

a family member of the claimant who has attained the age of 18 years in Canada and has either made a claim for refugee protection that has been referred to the Board for determination or an application for refugee protection that has been referred to the Minister for determination.

6. Some people will be eligible to make a refugee claim in Canada, but not in the US. It would frustrate the scheme of IRPA and Canada's understanding of its obligations under the *UN Refugee Convention* to send such people back to the US. For instance, a

person in the US must, on pain of ineligibility, make a claim within the first year of arrival or becomes ineligible. There is no comparable rule in Canada, and the rule has nothing to do with the *Refugee Convention*. All those eligible to make a claim in Canada but ineligible to make a claim in the US should be exempted from the safe third country ineligibility provision.

The US has a two-tier system – an expedited process and a full hearing. The expedited process is not a full and fair hearing, but rather, as the name suggests, an expedited administrative interview. A person who fails at expedited stage is ineligible to make a claim in the part of the US system that comes closest to the Canadian system.

Unlike in Canada, a person excluded at the expedited stage in the US cannot benefit from judicial review. Everyone in the expedited procedure, including children, is subject to detention. As well, during that stage of the proceedings, the person cannot invoke the due process guarantee in the US Constitution.

A person who must pass through the expedited process in the US to make a claim should not be sent back to the US. Only those persons entitled to access to a full refugee hearing in the US without the need to jump the hurdle of the expedited process stage should be returned.

DRAFTING SUGGESTION:

Add new section 159.6(d): "is otherwise eligible to make a claim for refugee protection in Canada and, if returned to the United States, may be ineligible to apply for a full asylum determination."

7. Some claimants who are subject to detention in the US are not subject to detention in Canada. Again, this represents differing views of international obligations and, in particular, section 31 of the *Refugee Convention*. That article provides:

(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.

Canada should not let the Safe Third Country Agreement trump its international obligations.

Many of those detained in the US but whom Canada would not detain are children. Again, the best interests of children must prevail. A person subject to detention in the US but not in Canada should be exempted from the safe third country ineligibility provision.

DRAFTING SUGGESTION:

Add a new section 159.6(e): "is not subject to detention under section 55 of the Act, but would be subject to detention in the United States if returned to the United States".

8. The Canadian and US legal systems apply the refugee definition in different ways. For Canada, the Canadian interpretation should prevail.

The Regulatory Impact Analysis Statement recognizes the differences:

The proposed Regulations, set out to implement the Agreement in safe third countries, will likely have differential impacts by gender and with respect to diversity considerations. Canada and the United States have different approaches to the treatment of claims based on gender-based persecution and in relation to those who arrive and make a refugee claim without appropriate documents. It should be noted that the family reunification exemptions may offset these differential impacts to some extent.

The extent to which gender impacts will have implications for the intended outcomes of the Agreement are difficult to determine in advance of implementation. However, data on patterns of claims processes and procedures by gender, country of origin and grounds will be central to monitoring the impact of the Agreement over time. Such data will assist in the development of options to address unintended differential impacts.³

This proposal works backwards, recognizing that there will be differential impacts but addressing them afterwards. The differential impact and the manner of address should be anticipated in the regulations, since it is obvious they will exist. Any person who, based on the nature of the claim, would likely be rejected in the US but would likely be accepted in Canada should be exempted from the safe third country ineligibility provision.

DRAFTING SUGGESTION:

Add new section 159.6(f): "may succeed in a claim for refugee protection under section 95(1) of the *Immigration and Refugee Protection Act*, but, because of the nature of the claim, would not be protected in the United States."

9. French speakers are given no consideration. French is an official language in Canada, but not in the US. Canada can give French speakers a refugee determination in their own language; the US cannot. It would be consistent with the official language status of French to provide an exemption to the general rule that a claim must be made in the country of last presence to allow French speakers to come forward to make their refugee claims in Canada.

DRAFTING SUGGESTION:

Add new section 159.6(g): "speaks French fluently."

³ *Supra*, note 1, p. 3243.

10. Article 4(3) of the Safe Third Country Agreement provides:

The Party of the country of last presence shall not be required to accept the return of a refugee status claimant until a final determination with respect to this Agreement is made by the receiving Party.

Nothing in the proposed regulation reflects this provision. Unless something is inserted in the regulations, IRPA and the *Regulations* would work to frustrate it.

There is no final determination with respect to the Agreement until an application for leave and judicial review in Federal Court is finally determined. However, under the present regulations, there is no stay of execution pending this application. The result is that the current regulations say one thing – that a person is removable after a determination of ineligibility by an immigration officer – and the Agreement says another, that the person is not removable until judicial recourses are settled. The Regulations need to be amended to allow for a stay of execution of a removal order pending leave and judicial review of a safe third country ineligibility determination.

The meaning of "finally determined" has already been legislated by Parliament. Section 2(4) of the former *Immigration Act* provided: "For the purposes of this Act, a person is finally determined under this Act to be or not to be a Convention refugee or to have abandoned a claim to be a Convention refugee if

- (a) the Refugee Division has so determined and no application for leave to appeal from the determination was made within the time normally limited therefor or, if an application was so made, it was dismissed or, if leave was granted, the appeal was not made within the time normally limited therefor;
- (b) the Federal Court of Appeal has so determined or has dismissed or allowed an appeal the effect of which is to make or confirm such a determination and no application for leave to appeal from the decision was made within the time normally limited therefor or, if an application was so made, it was dismissed or, if leave was granted, the appeal was not made within the time normally limited therefor; or
- (c) the Supreme Court of Canada has so determined or has dismissed or allowed an appeal the effect of which is to make or confirm such a determination."⁴

Presumably, the phrase "finally determined" would mean the same here. The regulations have to take this definition into account.

The need for a stay until the final determination of a judicial review of the decision to apply the Agreement (i.e. eligibility to Canada's system) is critically important because of the Catch-22 set up in the Safe Third Country Agreement. The Agreement allows for a denial of eligibility to Canada's system. The person would be returned to the US. But, as noted in bullet 6, the person could also be ineligible for a full hearing in the US and returned to the country of origin without ever having had access to a full hearing.

⁴ R.S.C. 1985, C.28 (4th Supp.), s.1(4); repealed.

If the other problems with the Agreement are corrected, so that a person returned from Canada to the US is guaranteed access and eligibility to a full hearing on their refugee claim, the problem is eliminated. However, as long as the Agreement allows a situation where people can be denied access to a claim in both Canada and the US, people must have sufficient time to seek a final determination on whether they are eligible to make a claim for refugee status in Canada.

DRAFTING SUGGESTION:

The current Immigration and Refugee Protection Regulation 231(1) should be amended to read: "Subject to subsections (2) to (4), a removal order is stayed if the subject of the order has filed an application for leave for judicial review in accordance with subsection 72(1) of the Act with respect to a determination of the Refugee Protection Division to reject a claim for refugee protection or with respect to a determination under subsection 101(1)(e) of the Act, and the stay is effective until the earliest of the following:"

11. The provision in the Safe Third Country Agreement that neither party shall reconsider any decision that an individual qualifies for an exception under the Agreement [section 4(4)] requires a compensatory provision in the regulations. Nothing in IRPA or regulations prevents reconsideration of other ineligibility decisions. However, with this provision in the Agreement, there needs to be a power to reopen in limited circumstances. The Act and regulations already give a power to reopen to the Immigration Appeal Division [IRPA section 71] and the Refugee Protection Division of the IRB [Refugee Protection Division Rule 55(4)] where the division is satisfied it failed to observe a principle of natural justice. The same power should exist here.

DRAFTING SUGGESTION:

Add section 159.8:

(1) A claimant may make an application to an officer to reopen a determination under this section.

(2) The officer must allow the application if it is established that there was a failure to observe a principle of natural justice.

We trust that these comments will be of assistance to the Standing Committee in reviewing the proposed regulations.

Yours very truly,

Jean-François Harvey
Chair
National Citizenship and Immigration Section

November 20, 2002

Bruce Scoffield
Director, Policy Development and International Coordination
Refugees Branch
Citizenship and Immigration Canada
Jean Edmonds Tower South, 17th Floor
365 Laurier Avenue West
Ottawa ON K1A 1L1

RE: *Immigration and Refugee Protection Regulations*
(Safe Third Country Agreement)
Canada Gazette, Part 1, October 26, 2002

Dear Mr. Scoffield,

The National Citizenship and Immigration Section of the Canadian Bar Association welcomes the opportunity to present its views on the proposed *Immigration and Refugee Protection Regulations* to implement the *Agreement between Canada and the United States for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* (the Safe Third Country Agreement)⁵. The Section has examined the proposed regulations against the Safe Third Country Agreement, the *Immigration and Refugee Protection Act* (IRPA) and Canada's international obligations.

1. Article 6 of the Safe Third Country Agreement provides:
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There is no comparable provision in the proposed regulations. There should be.

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Add new section 159.8:

Notwithstanding any other provision in this regulation, the Minister may decide that paragraph 101(1)(e) of the Act does not apply where the Minister determines that it is in the public interest to do so.

⁵ Canada Gazette, Part 1, October 26, 2002, p. 3241.

3. There is no provision for *de facto* family members. Citizenship and Immigration Canada recognizes the concept of *de facto* family members in the exercise of its humanitarian and compassionate discretion for landing. The Immigration Manual refers to persons not necessarily related by blood, but who are *de facto* part of the family by reason of financial or emotional dependency.⁶

Some of these people will be children. One principle that runs through IRPA is the need to take into account the best interests of children [sections 25(1), 29(2)(c), 68(1), 69(2)]. That need is particularly relevant here.

These people could be covered by a discretionary provision. Right now there is none.

DRAFTING SUGGESTION:

Add to the definition of "family member" the phrase "and includes any person who is *de facto* a member of the family of the claimant."

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Under the proposed regulations, a child accompanied by any adult, even a stranger, could no longer claim an exemption from the requirement that his or her refugee claim be made in the US. This restriction violates the Safe Third Country Agreement and should not be there.

DRAFTING SUGGESTION:

Delete from section 159.5(d)(i) the phrase "and is not accompanied by a person who has attained the age of 18 years".

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⁶ See OP (Overseas Processing) Chapter 4, *Processing Applications under IRPA section 25*, section 8.3.

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Change section 159.5(iii) to read:

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DRAFTING SUGGESTION:

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(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.

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The extent to which gender impacts will have implications for the intended outcomes of

the Agreement are difficult to determine in advance of implementation. However, data on patterns of claims processes and procedures by gender, country of origin and grounds will be central to monitoring the impact of the Agreement over time. Such data will assist in the development of options to address unintended differential impacts.⁷

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Add new section 159.6(f): "may succeed in a claim for refugee protection under section 95(1) of the *Immigration and Refugee Protection Act*, but, because of the nature of the claim, would not be protected in the United States."

9. French speakers are given no consideration. French is an official language in Canada, but not in the US. Canada can give French speakers a refugee determination in their own language; the US cannot. It would be consistent with the official language status of French to provide an exemption to the general rule that a claim must be made in the country of last presence to allow French speakers to come forward to make their refugee claims in Canada.

DRAFTING SUGGESTION:

Add new section 159.6(g): "speaks French fluently."

10. Article 4(3) of the Safe Third Country Agreement provides:

The Party of the country of last presence shall not be required to accept the return of a refugee status claimant until a final determination with respect to this Agreement is made by the receiving Party.

Nothing in the proposed regulation reflects this provision. Unless something is inserted in the regulations, IRPA and the *Regulations* would work to frustrate it.

There is no final determination with respect to the Agreement until an application for leave and judicial review in Federal Court is finally determined. However, under the present regulations, there is no stay of execution pending this application. The result is that the current regulations say one thing – that a person is removable after a determination of ineligibility by an immigration officer – and the Agreement says another, that the person is not removable until judicial recourses are settled. The Regulations need to be amended to allow for a stay of execution of a removal order pending leave and judicial review of a safe third country ineligibility determination.

The meaning of "finally determined" has already been legislated by Parliament. Section 2(4) of the former *Immigration Act* provided: "For the purposes of this Act, a person is finally

⁷ *Supra*, note 1, p. 3243.

determined under this Act to be or not to be a Convention refugee or to have abandoned a claim to be a Convention refugee if

- (a) the Refugee Division has so determined and no application for leave to appeal from the determination was made within the time normally limited therefor or, if an application was so made, it was dismissed or, if leave was granted, the appeal was not made within the time normally limited therefor;
- (b) the Federal Court of Appeal has so determined or has dismissed or allowed an appeal the effect of which is to make or confirm such a determination and no application for leave to appeal from the decision was made within the time normally limited therefor or, if an application was so made, it was dismissed or, if leave was granted, the appeal was not made within the time normally limited therefor; or
- (c) the Supreme Court of Canada has so determined or has dismissed or allowed an appeal the effect of which is to make or confirm such a determination."⁸

Presumably, the phrase "finally determined" would mean the same here. The regulations have to take this definition into account.

The need for a stay until the final determination of a judicial review of the decision to apply the Agreement (i.e. eligibility to Canada's system) is critically important because of the Catch-22 set up in the Safe Third Country Agreement. The Agreement allows for a denial of eligibility to Canada's system. The person would be returned to the US. But, as noted in bullet 6, the person could also be ineligible for a full hearing in the US and returned to the country of origin without ever having had access to a full hearing.

If the other problems with the Agreement are corrected, so that a person returned from Canada to the US is guaranteed access and eligibility to a full hearing on their refugee claim, the problem is eliminated. However, as long as the Agreement allows a situation where people can be denied access to a claim in both Canada and the US, people must have sufficient time to seek a final determination on whether they are eligible to make a claim for refugee status in Canada.

DRAFTING SUGGESTION:

The current Immigration and Refugee Protection Regulation 231(1) should be amended to read: "Subject to subsections (2) to (4), a removal order is stayed if the subject of the order has filed an application for leave for judicial review in accordance with subsection 72(1) of the Act with respect to a determination of the Refugee Protection Division to reject a claim for refugee protection or with respect to a determination under subsection 101(1)(e) of the Act, and the stay is effective until the earliest of the following:"

11. The provision in the Safe Third Country Agreement that neither party shall reconsider any decision that an individual qualifies for an exception under the Agreement [section 4(4)] requires a compensatory provision in the regulations. Nothing in IRPA or regulations prevents reconsideration of other ineligibility decisions. However, with this provision in the Agreement, there needs to be a power to reopen in limited circumstances. The Act and regulations already give a power to reopen to the Immigration Appeal Division [IRPA section 71] and the Refugee

⁸ R.S.C. 1985, C.28 (4th Supp.), s.1(4); repealed.

Protection Division of the IRB [Refugee Protection Division Rule 55(4)] where the division is satisfied it failed to observe a principle of natural justice. The same power should exist here.

DRAFTING SUGGESTION:

Add section 159.8:

(1) A claimant may make an application to an officer to reopen a determination under this section.

(2) The officer must allow the application if it is established that there was a failure to observe a principle of natural justice.

We trust that these comments will be of assistance to the Standing Committee in reviewing the proposed regulations.

Yours very truly,

Jean-François Harvey
Chair
National Citizenship and Immigration Section