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Via email: IRCC.ICAS-Consultations-Consultations-SOAC.IRCC@cic.gc.ca

André Baril
Director of Asylum Policy and Program
Immigration, Refugees and Citizenship Canada
365 Laurier Avenue West
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Ottawa, ON K1A 0K1

Dear Mr. Baril:

Re: In-Canada Asylum review

Thank you for the opportunity to join the roundtable discussion on July 14, 2016 to review the In-Canada Asylum system. The CBA Immigration Law Section (the CBA Section) is following up on that discussion with this written response to the key questions posed for the consultation.

Question 1 a): What measures do you recommend for increasing the fairness of Canada's asylum system?

General Recommendations

- Ensure compliance with the *Charter of Rights and Freedoms* and the *Convention relating to the Status of Refugees*.
- Eliminate the Designated Country of Origin (DCO) policy and the Designated Foreign National Regimes.
- Release refugee claimants from detention while their identity is established to allow them to present their case in a fair manner.
- Allow more time and or more exceptions to the tight delays to filling the Basis of Claim (BOC) form, in conformity with the *Convention on the Rights of Persons with Disabilities*.
- Allow claimants access to a medical examination at the time they make a refugee claim. Refugees with wounds or health problems should be medically assisted.
- Repeal *Immigration and Refugee Protection Act* (IRPA) ss. 170.2 and 171.1 to allow reopening claims where a final determination has been made by the Family Class (FC) or the Refugee Appeal Division (RAD).

- Clarify that the RAD is a full fledged de novo appeal to avoid duplicating the role of the Federal Court or the Pre-Removal Risk Assessment process (PRRA).
- Eliminate the RAD bar to claimants coming from the US through the Safe Third Country Agreement.
- Reopen the Immigration and Refugee Board (IRB) in Ottawa to reduce travel costs for claimants, especially the elderly, vulnerable and poor, and reduce the pressure of additional workload on IRB members in Montreal.
- Reinstate the list of issues sheet (fairness sheet) prior to the IRB refugee hearing to focus issues in the file, help preparations and save time.
- Clarify questions on the Basis of Claim form (BOC).
- Ensure a fast track procedure for refugee claimants who have been forced to leave their children behind in danger in their home country.
- Ensure the same fair and appropriate legal aid tariffs across the country.
- Eliminate cessation proceedings against permanent residents.
- Eliminate cessation proceedings against permanent residents who have filed citizenship applications.
- Further ensure the confidentiality of refugee claims.

Recommendations for Children

- Allow children access to an independent lawyer to ensure a real risk assessment, in conformity with the *Convention on the Rights of the Child*.
- Allow children included in a failed refugee claim of a parent to present their own claim on return to Canada. Currently, they are ineligible to claim refugee status under IRPA s. 101(1)(b) and are offered a right to the PRRA instead of a refugee hearing (*Tobar Toledo v. Canada (Citizenship and Immigration)*, 2012 FC 764 (CanLII), *Canada (Citizenship and Immigration) v. Tobar Toledo*, 2013 FCA 226 (CanLII)). We recommend that this unintended consequence be eliminated and that IRPA s. 101(1)(b) be amended to clarify that children of refugee claimants can present their own refugee claim if they were previously included in their parent's refugee claim. We believe it was never the intention to render children ineligible to claim refugee status since there is no discussion on the Hansard debates of any abuse of the refugee system by the children when s. 46.01 was repealed in 2002. Additional evidence that the government did not intend to prejudice the children of failed refugee claimants included in their parent's claim is previous IRPA ss. 226 (1) and (2), which provided that children of failed refugee claimants did not need an Authorization to Return (ARC) to come back to Canada. This section was repealed, and now children of failed refugee claimants need an ARC to return to Canada.
- Ensure all children have access to education as required by the *Convention of the Rights of the Child*. Currently, failed refugee claimants without status are expected to pay for each child. In Quebec, for example, the costs per year are \$5000 for elementary school, \$6000 for high school, \$8000 for college and \$10,000 for university. As soon as claimants are refused while they are waiting for a decision on Humanitarian and Compassion consideration, they will be invoiced by the schools.

- Prohibit the detention of children claiming refugee status as being only guests at the detention accompanying their parents claiming refugee status.
- Keep question 2 (i) and (j) in the BOC and ensure a fair protection of children.
- Include in debate the effect of legislation on children.

Recommendations for Persons with Disabilities

- Allow claimants with mental illness special accommodations. Often, for this to occur, this will require additional delays to allow the claimant time to submit a psychological assessment in conformity with the *Convention on the Rights of Persons with Disabilities*.
- Eliminate the 30, 45 and 60 days hearing dates pursuant to *Immigration and Refugee Protection Regulations* (IRPR) s. 159.9(1) and either restate the previous 30 day deadline for filing the BOC or, in exceptional cases such as those mentioned above, a suitable deadline to accommodate a disability.
- Grant an automatic postponement when the Minister presents evidence outside the strict timelines imposed to the claimants.

Recommendations to Ensure Quality Decision Making

- [Review the appointment process](#) at the IRB as per the CBA Section's recommendation.
- Improve the quality of the interpreters at the IRB and IRCC and Canadian Border Service Agency (CBSA).

Recommendations to Protect the Public

- Tighten legislation to prohibit ghost consultants and protect refugee claimants from abuse by dishonest consultants.
- Promote higher standards for refugee representations to protect the public and ensure compliance with the *Charter*.

Question 1 b): How can the refugee determination process be made faster?

- Return to the old fast track system. There was a triage of the cases that made sense. All *prima facie* good files, no matter the country of origin, that were fast tracked under the old system should continue to be fast tracked under the new system.
- Bring back interview rooms for non-formal fast track at the RPD in all provinces.
- Reopen the IRB in Ottawa. Closing the Ottawa IRB has worsened the Montreal backlog.
- Expedite obvious unfounded abusive claims to reduce clutter in the system. A parallel fast track system should be put in place for files that have *prima facie* no chance to succeed.
- Schedule claimants who have evidence ready and filed for a hearing sooner. This would encourage claimants with strong files to submit evidence in advance, knowing they will be heard faster. In the old system, claimants represented by counsel with large caseloads would not see their lawyer for years until their hearing date came.
- Address the thousands of legacy cases put on hold without hearing dates.

- Reinststate the list of issues sheet (fairness sheet) given to counsel and client prior to the refugee hearing at the IRB. This helped all parties focus on the issues in the file and saved time at the hearing.

Question 2 a): Can the DCO policy be improved to better serve these purposes?

The CBA Section supports complete elimination of the DCO designation. Several constitutional challenges to the PRRA bar have been settled out of court in favour of refugee claimants, creating no precedents for other DCO failed refugees. The DCO has also been found to be unconstitutional and discriminatory by the Federal Court: *Y.Z. v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 892 and *Canadian Doctors for Refugee Care v. Canada*, 2014 FC 651. Constitutional challenges are costly, most claimants cannot afford to pay for a lawyer, and legal aid is insufficient to finance constitutional challenges at the Supreme Court of Canada. Everyday DCO represented and unrepresented claimants including women and children are denied a stay and deported without access to the PRRA.

Question 2 b): If the DCO policy cannot be improved, what are better alternatives?

Refugee determination requires an individualized assessment. We favour abolition of the DCO regime and a fast track procedure for refugee claimants who have been forced to leave their children behind in their home country.

The regime that predated the DCO triggered a high abandonment rate. Refugee claimants abandon or withdraw claims because of the long processing delays, during which their children remain back home in danger. During long processing delays several young refugee claimants married Canadians who sponsored them or presented a humanitarian case that triggered withdrawn refugee claims.

Question 3: Should claims be prioritized in Canada's asylum system? If so, on what basis and how?

Well-founded *prima facie* cases should always be expedited. Claims can be prioritized based on country conditions and membership in a social group but also based on evidence.

Prima facie cases should be settled in a non-formal hearing as per the old refugee determination system. Fast track can be granted to women, children, members of social groups such as the LGBT community, religious communities and claimants facing persecution based on personal political opinion.

All claims from countries with a high percentage of acceptance should be expedited under the fast track system without a formal hearing using a less formal interview as per the old system.

Question 4 a): Can these existing measures be improved in order to prevent the misuse of the asylum system?

Unfortunately, these measures have unintended consequences. The lack of work permit encourages claimants to go underground, increasing the number of illegal migrants, human trafficking, tax evasion, exploitation and violence against women.

A system in which claimants come forward with refugee claims has many advantages, can reduce costs on health care and catch fugitives of justice. Refugees should not be stereotyped. Several refugees fleeing persecution in their home country are entrepreneurs and they will often establish

businesses and create jobs in Canada. Other refugees are professionals who want to work freely and do not want to be on welfare. Claimants prevented from working are forced to apply for welfare and legal aid, creating an extra financial burden on the provinces.

The current processing delays for work permits disempower all refugee claimants with valid claims. Non DCO refugee claimants are getting work permits after their refugee claim has been processed and after being accepted as refugees by the IRB.

Families without work permits are forced to live in poverty. They are disempowered from presenting the best refugee claim possible. They often don't have enough money to pay what is required to transfer their evidence from their home country. Without a work permit, claimants cannot obtain funds to translate information, pay for a stenographer or transcriber, or retain the lawyer of their choice.

DCO claimants have to wait 180 days to apply for a work permit. They can only apply earlier if they are granted refugee status. Former processing delays for work permits were 20 to 28 days.

Safety nets are necessary to protect refugee claimants with valid claims to avoid *refoulement*. Claimants should not be barred access to the PRRA or humanitarian applications.

Question 5: In your view, what aspects of the in-Canada asylum system are working well?

- Board members are now truly bilingual.
- Under the new system we now have a faster refugee determination process that accelerates removal for unfounded claims.
- Claimants are no longer waiting years to be heard under the new system. This has the effect of improving the preparedness of cases since clients and their lawyers now meet over a briefer period of time, and the evidence is fresher and the reported context is closer.
- The vast majority of refugee claimants are now represented by lawyers before the IRB and the RAD. The overall acceptance rate at the Refugee Protection Division and RAD is also considerably higher for DCO and non DCO countries than under the old system.
- There are fewer ghost consultants. Currently, only about 5% of claimants are represented by unknown parties before the RAD.

The CBA Section appreciates the opportunity to discuss these important issues relating to the In-Canada Asylum process. We look forward to continuing discussions with IRCC.

Yours truly,

(original letter signed by Kellie Krake for Stéphane Duval)

Stéphane Duval
Chair, CBA Immigration Law Section