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September 11, 2012

Via email: reform-reforme@irb-cisr.gc.ca

Sylvia Cox-Duquette
Senior General Counsel, Immigration and Refugee Board
344 Slater Street
Ottawa, ON K1A 0K1

Dear Ms. Cox-Duquette:

Re: Refugee Protection Division Rules and Refugee Appeal Division Rules, Canada Gazette, Part I, August 11, 2012

On behalf of the National Immigration Law Section of the Canadian Bar Association (CBA Section), I am writing to comment on the draft rules for the Refugee Protection Division and the Refugee Appeal Division published in Part I of the Canada Gazette on August 11, 2012.

The CBA is a national association of over 37,000 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA Section comprises lawyers whose practices embrace all aspects of immigration and refugee law.

In many instances, the proposed rules will present unique challenges for self-represented claimants. Given the shortened timelines, limited legal aid budgets, restrictions on access to work permits and other impediments to accessing counsel it can be expected that the Board will see a significant increase in self-represented claimants. Both sets of proposed rules make affidavits and statutory declarations mandatory for many types of applications, which will have a significant impact on self-represented claimants with limited means. The requirement for medical certificates, service of documents on the Minister and the level of detail in the Basis of Claim form will also present unique challenges to self-represented claimants.

The CBA Section continues to have serious concerns about the fairness of the new timelines. Although in many cases the proposed Rules are simply implementing statutory timelines and requirements, we wish to emphasize our concerns with the overall structure of the new system. A number of provisions in both sets of proposed rules concern the power of the Board to grant extensions of time and waivers of other requirements. While flexibility is beneficial, the Rules appear to be drafted in anticipation that requirements will have to be waived in many circumstances in light of the strict timelines and the impact on self-represented persons. A fair and efficient refugee system should have procedural requirements that are realistic for the parties to meet. Placing the onus on parties to overcome problems with the feasibility of the requirements by applying for extensions or waivers does not address the fundamental nature of the problem.

Below are our specific comments on various aspects of the proposed rules.

Refugee Protection Division Rules

Rule 7

Rule 7(3) is unclear about the extent of documents to be provided by the applicant with the Basis of Claim (BoC) form. It appears to include all documents supporting the claim, which can be substantial. Under the current system, the Board provides the Personal Information Form to the Minister and supporting documents need only be served on the Minister if there is an intervention. This requirement will place an additional financial burden on claimants and appears designed to offload costs. It will also create an additional bureaucratic hurdle for self-represented claimants.

Rule 8

Rule 8(1) requires applications for extension of time to file the BoC to be made three days prior the deadline. As inland claimants will be required to file the form on making their claim, it is unclear how an extension could be requested three days in advance in any case but particularly in the case of inland claims made upon arrest or detention.

Rules 8(2) and 54(6) require medical certificates. Given the severe reduction in eligibility for medical services under the Interim Federal Health Program for many types of claimants, it is unclear how claimants would access a diagnosis from a medical professional, much less a medical certificate.

Rule 9

The requirement in Rule 9(2) to provide any changes in the BoC ten days before the hearing is likely to be problematic. Under the current system, it is not uncommon for claimants to make changes to the Personal Information Form at the hearing when presented with the form. Given the significantly shorter timelines under the new system, it is likely that changes to the BoC at the hearing will be even more common.

Rule 9(1) requires that documents provided to the Division "must be accompanied by a written statement indicating how and when they were provided to the Minister." It is unclear whether a stamp acknowledging receipt by the Minister is sufficient, or if a written statement of service need also be attached.

Rule 15

Rule 15(3) states that counsel remains counsel of record unless a request to be removed is granted. It is unclear under which circumstances such a request might be denied and whether the Board would expect counsel to continue to act in such circumstances. Circumstances may arise in which counsel have an ethical obligation to withdraw but are bound by solicitor-client privilege not to disclose the reasons for withdrawing. We would suggest any issues of inappropriate withdrawal be dealt with as an issue for the relevant regulatory body of the representative, rather than by denying requests to be removed as counsel of record.

Rule 21

Rule 21 concerns the disclosure of personal and other information relating to another claim to a claimant. It is unclear whether this Rule is an attempt to codify the current Board practice, or is intended to expand the scope of that practice. The Board has in the past taken the position that in certain circumstances claims directly connected to each other, such as claims from family members, could be disclosed with notice to the claimants in question. The Board has taken the position that the current practice is compliant with the *Privacy Act*. Assuming the Board's interpretation is correct, the proposed Rule would not be required to maintain the status quo.

We believe the proposed Rule would in fact significantly expand the scope for disclosure of claimant's personal information, eroding claimants' privacy interests. The regulation would supplant any protections under the *Privacy Act*: s. 8 (2)(b) of the Act states that "personal information under the control of a government institution may be disclosed...for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure."

The proposed Rule would authorize disclosure of any claimant's personal information "if the claims involve similar questions of fact or if the information is otherwise relevant". "Otherwise relevant" is extremely broad, and would significantly expand the scope for potential disclosure. Although the proposed BoC form states that the information may be used in other proceedings, there is no "opt-out" clause for claimants who do not want their information disclosed in other proceedings. It also appears that the proposed Rule would apply retroactively to historical claims – individuals who have not been put on notice about the potential use of their private information.

Further, the proposed Rule provides that disclosure shall be refused unless the Division is satisfied that:

- (a) there is not a serious possibility that disclosing the information will endanger the life, liberty or security of any person; or
- (b) disclosing the information is not likely to cause an injustice.

While the CBA Section is pleased that the proposed Rule places the onus on the Board to refrain from disclosure unless it is satisfied that both criteria are met, these criteria do not address the full scope of a claimant's privacy interests. Refugee claims often contain private and highly embarrassing information which, while falling short of putting a claimant in physical danger, could be devastating if the information were shared. In many cases, the information may be disclosed to individuals who have limited respect for confidentiality obligations. Such concerns may be particularly acute in the cultural or social context of particular claimants. Many ethnic, political, social or religious communities in Canada are small and close-knit. Claimants would likely come into contact with individuals to whom their personal information was disclosed. Claimants already have difficulties being psychologically ready to share information with counsel and the Board in the short timeframes provided for the proceedings. If the Board sends the message that the information will not remain confidential, these challenges may become insurmountable.

Rule 27

Rule 27 requires notification to the Minister where the Division believes "issues relating to the integrity of the Canadian refugee protection system may arise from the claim." Rule 27(3)(b) specifically lists a "substantial change to the basis of the claim" along with misrepresentation or fraudulent behavior as instances where Ministerial notification would be required. With a very short timeline for preparing the BoC, changes may not be uncommon, as many BoCs will be prepared without the assistance of counsel. To imply that "substantial changes" are akin to misrepresentation or fraud is inaccurate.

Rule 34

Rule 34(3)(b) gives only five days to respond to the Minister's materials if there is an intervention. The Minister's materials may be provided as late as 10 days prior to the date fixed for the hearing. In cases where the first indication of Ministerial intervention is provided at the 10 day mark, five days to respond is unworkable and will almost invariably require an exemption.

Rule 54

The requirement to provide three available dates within five working days from the original date fixed for the proceeding is not realistic for many counsel whose calendars are booked months in advance. It is an unreasonable expectation that counsel maintain a series of openings after a hearing date in case an adjournment becomes necessary. We recommend eliminating this requirement.

Rule 58

Rule 58(1), concerning observers at the hearing, refers to the presence of individuals “other than the media”. As “media” is not defined in the rules or elsewhere, the scope of the prohibition is unclear, particularly as it relates to independent media. The reason for the bar on an individual granting permission to a member of the media to attend a hearing is also unclear, as presumably the media would be covered by the measures the Division is entitled to take under Rule 58(3) to preserve the confidentiality of the hearing.

Refugee Appeal Division Rules

Rule 2

Rule 2(3)(b), concerning the contents of the appellant’s record, appears to require a transcript for any portions of the hearing on which the Appellant wishes to rely. At the information session on the proposed rules, Board representatives indicated that an Appellant could refer to the audio recording and would not necessarily need to produce a transcript. Given the significant cost of producing transcripts in the very short timelines for preparing the appellant’s record, this requirement will have a significant impact on Appellants’ ability to perfect their appeal. The Rules should explicitly permit the ability to rely on the audio recordings without producing a transcript.

Rules 2(5) and 4(4) require both proof of service and a written statement confirming that the referenced appeal documents were provided. It is unclear why both would be required. One or the other ought to be sufficient.

Rule 4

Rule 4(5) provides a ten day deadline to respond to a Minister’s intervention. As the Minister need not give notice and is not constrained by any timelines or evidentiary limitations, the intervention could come at any time. An intervention received late in the day before a long weekend would leave little time to respond or apply for an extension. This should be at least ten working days.

Rule 17

See comments on Rule 15 of the RPD Rules.

Conclusion

Thank you for the opportunity to comment on the proposed rules for the Refugee Protection Division and the Refugee Appeal Division. We hope that they have been helpful.

Yours truly,

(original signed by Kerri Froc for Kevin L. Zemp)

Kevin L. Zemp
Chair, Immigration Law Section