

REFUGEE ESSENTIALS

Immigration Law Conference

Montreal Quebec

May 2013

Max Berger

I pity the poor immigrant
who wishes he would've stayed home

Bob Dylan

From the album

John Wesley Harding, 1967

Outline

- Timelines for BOC, Hearings, Document Disclosure, Postponement Requests and Criminality/Eligibility
- Designated Country of Origin (DCO'S)
- Designated Foreign Nationals (DFN's)
- 12 Month PRRA Bar
- 12 Month H & C Bar
- Legal Aid

Timelines for BOC, Hearings, Document Disclosure and Postponement Requests

Inland Claimants

- Hearing date scheduled not later than 60 days from RPD referral for regular claimants.
- Hearing date scheduled not later than 30 days from RPD referral for DCO claimants – R159.9(1).
- BOC submitted to CIC at determination of eligibility – R159.8(1).

POE claimants

- Hearing date not later than 60 days from RPD referral for regular claimants.
- Hearing date not later than 45 days from RPD referral for DCO claimants – R159.9(1).
- BOC submitted to RPD within 15 days after referral – R159.8(2).

- Hearings can be scheduled beyond R159.9(1) time limits due to:
 - Fairness and natural justice.
 - Investigation into A 34 – 37.
 - Operational limitations of RPD – R159.9(3).
- Discretion in Extending Timelines for BOC, Hearings and Document disclosure.
- Administration convenience does not override fundamental justice which includes procedural fairness, Singh v. Canada 1985 1 SCR 177.
- Application to extend time to file BOC not later than 3 working days prior to deadline – RPD Rule 8

Inland claimants can “control” when their BOC is submitted

QUERY:

- Does it compromise subjective fear for inland claimants to delay making their claims if supporting documents cannot be obtained in time for legislated hearing dates?

Disclosure

Document Disclosure:

- Documents can be filed up to 10 days before hearing – RPD Rule 34(3)(a).
- Documents to be filed up to 5 days before hearing in reply to documents from Minister or RPD – RPD Rule 34(3)(b).

Late Disclosure – Board must consider:

- Documents relevance and probative value.
- Is it new evidence?
- Could compliance have been effected with reasonable effort – RPD Rule 36

QUERY:

- Claimant appears on day of hearing with police reports, medical reports, Fedex confirmation of receipt of documents 2 days before hearing and evidence of requesting documents after BOC submitted. Should documents be admitted?

Hearing Postponements

- Application must be made no later than 3 working days prior to hearing and provide at least 3 dates no later than 10 working days after scheduled hearing – RPD Rule 54(1)
- Cannot be allowed unless exceptional circumstances such as :
 - Accommodating vulnerable person
 - Emergency or development outside parties control and party acted diligently – RPD Rule 54(4).
- New hearing date no later than 10 working days after original date or as soon as possible – RPD Rule 54(11).

QUERY:

- Medical and Police reports have not yet arrived but were requested in timely manner – should postponement request be granted?
- Is this a “development outside parties control” per Rule 54(4)?

- Where hearing date scheduled without counsel or counsel's availability, adjournment must be allowed if:
 - Counsel retained 5 working days after date fixed.
 - Counsel not available on date scheduled.
 - Application to adjourn made in writing and within 5 working days after date fixed.
 - 3 dates provided within the legislated time period – RPD Rule 54(5).

- Eligibility changes for serious criminality

For conviction in Canada

- Previously – Act of Parliament punishable by 10 years and 2 year sentence imposed
- Currently – Act of Parliament punishable by 10 years

For convictions outside Canada

- Previously – Equivalence to Act of Parliament punishable by 10 years and danger opinion required.
- Currently – Equivalence to Act of Parliament punishable by 10 years and no danger opinion required – A101(2)

Designated Country of Origin (DCO's)

Designated Foreign Nationals (DFN's)

- DCO as response to large number of European Roma and Mexican claims.
- DFN as response to Tamil boat people.
- Professor Audrey Macklin's thesis of the Harper government shifting the paradigm from sympathy for refugees to neutrality to viewing refugees with caution or suspicion.
- DCO – Minister Kenney declares in April 2009 that “Czech Republic is hardly an island of persecution in Europe.”
- DFN – Tamil boat people greeted by CBSA in hazmat suits and unfounded allegations of carrying contagious diseases.

DCO Designation – Quantitative & Qualitative

- If percentage of rejected, withdrawn and abandoned claims in 12 month period in 3 years prior to designation is 75%.
A109.1(2)(a)(i).
- If percentage of withdrawn and abandoned claims in same period is 60%. A109.1(2)(a)(ii).
- If less than 30 claims made over same period designation may be made if the Minister is of opinion that:
 - There is independent judicial system.
 - Democratic rights and avenues of redress exist.
 - Civil society organizations exist. A109.1(2)(b).
- Panel that was proposed for qualitative designation under BRRRA scrapped.

Consequences of designation

- Hearing on expedited timelines.
- No RAD access – A110(2)(d.1).
- No statutory stay of removal if judicial review sought in Federal Court – R231(2).
- No work permit until RPD acceptance or after 180 days – R206(2).
- No IFH health coverage unless a risk to public health.
- DCO countries may be safe for the majority of its citizens but not for a minority.
- RAD bar casts to wide a net.
- Alternative to outright RAD bar could have been case by case approach where claims with no credible basis or manifestly unfounded were RAD barred.

DCO – Listed Countries

- Australia
- Austria
- Belgium
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Iceland
- Ireland
- Israel (excludes Gaza and the West Bank)
- Italy
- Japan
- Latvia
- Lithuania
- Luxembourg
- Malta
- Mexico
- Netherlands
- New Zealand
- Norway
- Poland
- Portugal
- Slovak Republic
- Slovenia
- Spain
- Sweden
- Switzerland
- United Kingdom
- United States of America

Designated Foreign Nationals

- **20.1** (1) The Minister may, by order, having regard to the public interest, designate as an irregular arrival the arrival in Canada of a group of persons if he or she
 - (a) is of the opinion that examinations of the persons in the group, particularly for the purpose of establishing identity or determining inadmissibility — and any investigations concerning persons in the group — cannot be conducted in a timely manner; or
 - (b) has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a contravention of subsection 117(1) for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group.
- **117.** (1) No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.
- Canadian citizens, permanent residents and persons registered under the Indian Act cannot be designated – A20.1(2).

Consequences of Designation

- 5 year bar to apply for permanent residence from date of refugee claim or PRRA acceptance – A20.2.
- 5 year bar to apply for permanent residence in any category of immigration, if no refugee claim made, from date of designation – A20.2.
- No RAD access – A110(2)(a).
- No statutory stay of removal if judicial review sought in Federal Court – R231(2).
- No IFH health coverage unless a risk to public health.

DFN Chart – OB 440 – D

When an applicant is a DFN and ...	Then an APR ...
has not made a refugee claim, an application for protection or an APR	cannot be made until five years after the day of becoming a DFN
has made a refugee claim but has not applied for a PRRA	cannot be made until five years after the day on which there is a final determination on the refugee claim
has applied for a PRRA	cannot be made until five years after the day on which there is a final determination on the PRRA
When an applicant becomes a DFN after submitting an APR and ...	Then APR ...
has not made a refugee claim or an application for protection	is suspended until five years after the day of becoming a DFN
has made a refugee claim but has not applied for a PRRA	is suspended until five years after the day on which there is a final determination on the refugee claim
has applied for a PRRA	is suspended until five years after the day on which there is a final determination on the PRRA

- Bar on suspension of APR can be extended to a sixth year if reporting requirements are not met without reasonable excuse.
- If designated on arrival – mandatory detention for those age 16 or over on day of arrival.
- If designated after arrival – mandatory detention for those age 16 or over after designation – A55(3.1)
- Detention review after 14 days and not again until after 6 months – A57.1.

For non-DFN's release must be ordered unless:

- Public danger
- Unlikely to appear
- Suspicion of inadmissibility
- Identity not established but subject not cooperative or Minister making reasonable efforts

For DFN's release must be ordered unless:

- Public danger
- Unlikely to appear
- Suspicion of inadmissibility
- Identity not established – A58

No other factors, i.e. alternatives to detention can be considered – A58.

- Minister may entertain request for release and order release if exceptional circumstances exist – A58.1(1).
- Designations made relating to approximately 80 people who entered Canada not at a port of entry in Quebec.
- Most have been released and all of those detained after the 14 day review have withdrawn their refugee claims and removed from Canada.

Charter Challenges to DFN's

- Does 6 month detention with no review violate s.7 security of person and s.12 cruel and unusual treatment or punishment?
- Does 5 year bar on application for permanent residence and family reunification violate s.7 security of person?
- Are grounds for designation sufficiently vague so as not to meet the s.7 right to fundamental justice?
- Claimant can be designated – by mere association with smuggler – with no intention of wrongdoing.
- Does designation by waving the Ministerial wand (as opposed to Immigration Division hearing) meet the s.7 right to fundamental justice?

PRRA Bar

- 12 month bar from date of refusal by RPD or RAD for non-DCO claimants.
- 36 month bar from date of refusal by RPD for DCO claimants – R112(2)(b.1).
- Exceptions are vacated cases claims rejected for Refugee Convention IE or IF.
- Subsequent PRRA is subject to same timelines – R112(2)(c).

Motion for stay of removal in Federal Court.

- Typically CBSA has been seeking to remove failed refugee claimants a few months or weeks before claimant is PRRA eligible.
- Request for deferral made to CBSA with new evidence of risk.
- If refused by CBSA, application for leave and for judicial review of decision refusing deferral made to Federal Court.
- Motion for stay of removal must meet tripartite test of serious issue, irreparable harm and balance of convenience.
- Burden is higher because relief sought in stay motion is same as that being sought in judicial review.

Serious Issue

- What is the test on deferral

In Baron par 51

“... deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat personal safety.”

Baron v. Canada, 2009 FCA 81

However above test in Baron is for h&c cases and test ... “death, extreme sanction ...” is higher than PRRA test under A96 and 97.

- A48(2) mandates that
 - 48(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.
- “as soon as possible” has replaced previous version “as soon as is reasonably practicable.”
- A48(2) must still be interpreted in a fashion consistent with the Charter and the s.7 guarantee of fundamental justice.

- Who should make risk analysis – CBSA OR CIC?
- Some judges finding serious issue if s.7 Charter rights would be violated where risk assessment not conducted by a person competent to do so.
- Other judges finding applicant entitled to risk assessment but not to dictate who conducts it, and that CBSA officer is appropriate to assess risk – therefore no serious issue. (citing Shpati v. Canada, 2011 FCA 286)
- Court has split on granting stays with just over 50% granted in approximately dozen motions.

- Cases where stay granted usually mooted out prior to judicial review as PRRA ineligibility period has passed.
- CARL granted standing following guidelines set in *Downtown East Side Sex Workers v. AG Canada*, 2012 SCC 45 expanding standing rights for public interest groups and will pursue JR's in PRRA cases.

Irreparable harm

- Evidence of new risk must accompany deferral request. First stay motion heard on PRRA bar issue was dismissed for failure to provide new evidence of risk.

H & C Bar

Minister may not examine h&c request if:

- h&c Application already pending
- Refugee claim pending before RPD or RAD
- Less than 12 month before claim rejected, abandoned or determined withdrawn after substantive evidence heard by RPD or RAD – A25(1.2)

12 month bar does not apply if

- Removal would result in risk to life by inability of country of nationality to provide adequate health or medical care; or
- Removal would have adverse effect on best interest of a child directly affected – A25(1.21)

- 5 year bar on DFN's (see DFN chart)
- Minister may not consider factors taken into account under A96 (convention refugee) or A97 (person in need of protection) but must consider hardship that affects the foreign national – A25(1.3).
- Federal Court has certified a question as to proper test in *JMSL v. Canada*, 2012 FC 1274 as follows:

What is the nature of the risk, if any, to be assessed with respect to the humanitarian and compassionate considerations under section 25 of IRPA, as amended by the Balanced Refugee Reform Act?

Does the exclusion from consideration on humanitarian and compassionate grounds of the "factors" taken into account in the determination of whether a person needs protection under section 96 or 97 of IRPA mean that the facts presented to the decision-maker in the application for protection may not be used in a determination of the "elements related to the hardships" faced by a foreign national under subsection 25(1.3) of IRPA?

- Example – Refugee claim by HIV positive claimant alleging denial of medical services due to ethnicity or membership in social group. Can the same factual background support his h&c application based on inadequate health care?
- Where client's allegations would not support a successful refugee claim – i.e. fear of criminal gangs generalized risk – h&c is better option.
- Refugee claim must be withdrawn before substantial evidence heard.

Legal Aid Ontario

- BOC 5 hours
 - Hearing 11 hours plus attendance
 - RAD Pilot project for private bar Mar 1 – Sep 30, 2013 with \$500,000 budget.
16 hours with up to 4 additional preparation hours if oral hearing plus attendance time.
 - Application for Leave 15 hours
 - Judicial Review 15 hours
- (Combination not exceeding 27 hours) plus attendance at Federal Court.

- 2011 – 2012 LAO provided services to 90% of all refugee claimants in Ontario.
- Of 10,860 principal claims referred to RPD in Ontario. LAO issued 9,747 initial certificates.
- LAO call centre accommodates over 200 languages.

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