THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
The Voice of the Legal Profession
La voix de la profession juridique

4 August 2004

Mr. Michel Dorais
Deputy Minister
Citizenship and Immigration Canada
Jean Edmonds South Tower, 20th floor
365 Laurier Avenue West
Ottawa ON K1A 1A1

Dear Mr. Dorais:

Re: Out-of-Status Spouses – IP 5
Refusals of Humanitarian and Compassionate applications

Thank you for your letter of June 14 respecting the review of humanitarian and compassionate (H&C) spousal determinations under IRPA. This administrative review was undertaken following the meeting earlier this year between members of the CBA Citizenship and Immigration Section Executive (the CBA Section), Minister Sgro and Daniel Jean. Your letter has been circulated to CBA Section members, and this reply addresses several of your comments.

Refusal rate for out-of-status spouses and interpretation of spousal policy is a concern across our membership

We want to emphasize that the issues of refusal rates of spousal H&C applications and the rationales expressed by officers are matters of concern to counsel across Canada. The CBA Section executive wholly embraces these concerns.

Your letter suggests that these are interpreted as one individual's perception. They are not. Before bringing these concerns forward we canvassed the Section executive and members for their observations and experience. We undertook regional discussions to confirm the local experience of members. Ms. Seligman was delegated by the executive to lead the presentation on this issue, and her expression of these concerns is on behalf of the executive and members.

The Section has observed that the change in public policy reflected in IRPA (to remove the presumption of hardship in separation of spouses in a genuine relationship) has resulted in systematically higher refusal rates for spousal H&C applicants and the inappropriate refusal of applicants in genuine relationships, despite the existence of substantial H&C circumstances.

500 - 865 Carling, Ottawa, ONTARIO Canada K1S 5S8
Tel/Tél. : (613) 237-2925 Toll free/Sans frais : 1-800-267-8860 Fax/Télécop. : (613) 237-0185
Home Page/Page d'accueil : www.cba.org E-Mail/Courriel : info@cba.org

What the statistical refusal rate tells us

We believe that the 71% overall acceptance rate confirms that the change in spousal H&C policy has resulted in systematically higher refusals of applications by bona fide spouses. Prior to IRPA the H&C acceptance rate was greater than 90% overall.

Pre-IRPA H&C statistics would include applicants now processed under the Spouse or Partner in Canada class. These numbers should be factored in to calculate the extent of the pre-IRPA to post-IRPA change. In the absence of these figures, we can compare the pre-IRPA acceptance rate of all H&C applications in the order of 90% with our estimate of post-IRPA refusals of all H&C applicants in the order of 40%-60%.

If Vegreville is approving 13% of spousal H&C applications without referral to local offices, then the acceptance rate on referred files averages only about 66%. Our evidence and anecdotal sources suggest that the local office refusal rate in the major Ontario offices is significantly higher, in the order of 50% refusals of referred spousal H&Cs. We would like your confirmation of this assessment.

The 50%-66% acceptance rate of referred files is a significant concern. It is a high refusal rate relative to the pre-IPRA numbers.

The critical concern arises from your advice that only 37% of these refusals involve determinations that the marriage or relationship is not bona fide. In other words, 63% of the refusals involve couples in genuine relationships, not primarily entered into for immigration purposes. This was a central issue raised in our meeting with the Minister and Mr. Jean. The Minister advised that applications by those in bona fide relationships should generally be accepted. Mr. Jean requested evidence that such cases were being refused.

Implications of the higher refusal rate

This statistic is at the heart of the Section's concerns. Pre-IRPA policy would have resulted in accepting the majority of these applications in the absence of significant inadmissibility. Post-IRPA, these cases are being refused, casting considerable doubt on whether the spousal policy recognizes legitimate H&C considerations.

At least one officer has interpreted the spousal policy as indicating no sufficient H&C considerations arising from separation of spouses in legitimate relationships. From the cases we forwarded, other officers share this view.

This is happening because officers are directed that, even in genuine marriage relationships, separating spouses or partners to force overseas processing of a family class application does not constitute hardship in itself. Officers are not to approve the inland application unless there is evidence of "disproportionate or undeserved" hardship — something more than mere separation. Since almost all spousal H&C applications involve out-of-status spouses, it is easy for officers to see applicants as being responsible for their own situation and so not experiencing any "disproportionate or undeserved" hardship. These applications are being refused.

The 11 refusal decisions we forwarded to you represent the logic now being applied against genuine spouses. All the cases involved couples acknowledged as being in genuine marriages or common law relationships. These cases give rise to several troubling observations:

- At least three cases involved infant children (less than two years of age). Officers not only determined that there was no hardship between the partners, but that there was no "excessive hardship or irreparable harm" to the children by separating them from a parent for application abroad. In these cases the spouses were required to return to India or Ukraine for processing abroad.

- Officers seem to be under the misapprehension that overseas processing is immediate. It is not. It is costly and inconsistent. At this point only 50% of overseas cases are processed in six months. Many cases require more than a year. Even a six-month separation leads to hardship in separation from an infant child.

- An applicant who does not have a good work history is refused because there is not sufficient establishment to create hardship on separation. One with an excellent work history is refused on the ground that it can be restored on return.

- A spouse who is a failed refugee claimant will likely be refused.

- Spouses are separated where there is evidence of financial or emotional dependency because the applicant is the breadwinner or the Canadian spouse is incapacitated by illness.

These findings of no hardship defy common sense. Spouses of Canadians citizens or permanent residents are forced to separate, even where there are Canadian children, clear evidence of emotional or physical need, significant establishment of more than 10 years in Canada, or financial dependency by Canadians.

It is difficult to accept that these decisions are justified as following "published H&C guidelines and general H&C policy intent". If that is the case, then the guidelines and policy intent need to be critically reassessed.

Not all spouses in Canada are being separated. Those with legal status who meet the Spouse or Partner in Canada Class requirements are processed routinely. Their marriages are no more genuine that those of out-of-status spouses who must apply on H&C grounds. But the out-of-status spouses are met with IP 5 and suffer the cruel presumption of no hardship.

The CBA Section strongly supports a revision to the IP 5 Manual guidelines, to restore the presumption of hardship when spouses in a genuine relationship are separated. The current policy of differentiating between "in status" and "out of status" spouses is illogical and creates an unfair hardship on a considerable number of couples in Canada. It is contrary to the IRPA mandate for reunification of families and inconsistent with international conventions supporting reunification of families and children. There is a need to restore common sense and humanity into the inland determination process.

We look forward to further discussion with you on this matter.

Yours very truly,

(Original signed by Tamra L. Thomson for Gordon H. Maynard)

Gordon H. Maynard
Chair
National Citizenship and Immigration Law Section.