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May 6, 2009

David Tilson, M.P.
Chair, Standing Committee on
Citizenship and Immigration
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Tilson

Re: Bill C-291 – An Act to amend the *Immigration and Refugee Protection Act*

I am writing on behalf of the National Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section) to urge quick passage of Bill C-291, bringing into force the Refugee Appeal Division (RAD) provisions in the *Immigration and Refugee Protection Act* (IRPA). The CBA Section has long supported the introduction of the RAD,[1] given the interests at stake and the need to ensure consistency in decision-making. Refugee determinations are often, quite literally, matters of life and death. The current system lacks appropriate checks to minimize the potential of wrong decisions in these circumstances.

Background

Under the former *Immigration Act,* two members constituted a hearing panel of the Refugee Division of the Immigration and Refugee Board (IRB).[2] With some very limited exceptions, split decisions were decided in favour of the claimant.[3] Having two-member panels was an extra safeguard to ensure the reasonableness of refugee determinations.

In December 1997, the Legislative Review Advisory Group commissioned by the Minister of Citizenship and Immigration, issued a report entitled *Not Just Numbers: A Canadian Framework*

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1 See CBA Section's document dated May, 2001 entitled, "Bill C-11, *Immigration and Refugee Protection Act:* Issue Papers and Correspondence," where we call the introduction of the RAD a "commendable redesign of the process." In fact, the CBA Section called for broader powers of review that include consideration of fresh evidence.

2 Section 69.1(7).

3 Section 69.1(10).

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for Future Immigration.[4] The Report proposed that refugee claim determinations be decided by one protection officer. However, at the same time, the Advisory Group advocated that these decisions be subject to appeal. It noted that the judicial review system for refugee decisions was too restrictive because of the leave requirement, and that the grounds for review were limited to the legality of the decision.[5] The Report stated that the appeal was "necessary to maintain procedural fairness, to correct erroneous findings of fact, and to ensure consistent interpretations of the law, especially given the potentially life-threatening consequences of an error in judgment."[6]

In 2001, IRPA was introduced, reducing the hearing panel for refugee claims from two to one member,[7] and establishing the RAD.[8] The reduction of IRB hearing panels to one member was justified on the basis that the establishment of the RAD would ensure the continued reasonableness of decisions. This meant that the efficiencies gained by having one-member panels would not be at the price of quality decisions. The two components of the Bill were consistently linked by the government and presented to Parliament as a package.

For instance, in March 2001, the government backgrounder #5 to Bill C-11 (which became IRPA) states:

> Use of single-member panels as the norm at the IRB
>
> Currently, two member panels hear refugee cases at the IRB, and in the majority of cases the decisions are unanimous. The process will be made more efficient by the use of single-member panels as the norm.
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> …
>
> Paper review on merit to be introduced
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> To ensure consistency in decision-making and fairness to all refugee claimants, a paper review on merit may be conducted by a division of the IRB. This step is intended to ensure fairness and reduce the number of protracted applications for leave for judicial review by the Federal Court.[9]

When then-Minister of Citizenship and Immigration, Elinor Caplan, introduced the second reading of Bill C-11 in the House of Commons, she said:

> Bill C-11 will also streamline the refugee determination process. Referrals to the immigration and refugee board will take place within three working days of a claim. By consolidating several current steps and protection criteria into a single decision at the IRB and, moreover, by combining increased use of single member panels at the board with an internal paper appeal on merit, we will see faster but fairer decisions on refugee claims".[10]

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4 Ottawa: Minister of Public Works and Government Services Canada, 1997.

5 Chapter 7, p. 94.

6 *Ibid.*

7 Section 163. The Section does permit the Chair to make an exception and constitute a panel of three.

8 Section 110.

9 Citizenship and Immigration Canada, Backgrounder, 2001-03, "Backgrounder #5: A Fair, Faster, More Effective Refugee Determination Process" (February 21, 2001).

10 Hansard, House of Commons, February 26, 2001.

However, once the legislation was passed, the government announced that "the implementation of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board (IRB) is being delayed."[11] The government then announced on November 3, 2005 a decision not to implement the RAD "at this time"[12]. IRPA s.110 establishing the RAD has never been proclaimed in force by the Governor in Council.

Proclamation Power Should Not be Used to Delay the RAD Indefinitely

The reduction of panel size from two members to one and the introduction of an appeal are so closely linked in the history of the current legislation that it could not have been the intention of Parliament to allow the government to use the power in IRPA to bring legislation into force[13] to separate the two indefinitely.

It is contrary to the rule of law for statutory provisions to be set aside at the discretion of the executive. Parliament has approved detailed provisions governing an appeal. That appeal underpinned the statute. The RAD is part of a blueprint for refugee determinations approved in the most solemn form for which our constitution provides. The Governor in Council can not, so long as the appeal provisions stand un-repealed as an enduring statement of Parliament's will, ignore them and by default maintain indefinitely a scheme radically different from what Parliament had approved. It is for Parliament, not the executive, to amend and repeal legislation.

The government in 2002 justified its failure to proclaim the RAD by "an unprecedented increase in refugee claims," stating it would focus on "reducing the inventory and processing times."[14] Since then, that reduction occurred. A subsequent build up of inventory results from failure to appoint a full complement of IRB members. An IRB with its full complement could easily process the existing case load. Furthermore, implementation of the RAD would result in a decrease in the work of the Federal Court, which currently has its own inventories and delays in processing times for review of refugee determinations.

That other recourses are available to refugees – through pre-removal risk assessment and humanitarian review and judicial review – does not change the value of an appeal. None of the other recourses address squarely the result an appeal could provide, namely, a different result on the merits. The pre-removal risk assessment and humanitarian review consider new and different material but do not revisit the determination by the Refugee Protection Division of the IRB.

As the Legislative Review Advisory Group pointed out in 1997, the Federal Court considers only legal errors.[15] Judicial review is not sufficient to smooth out the extreme variations in the application of the refugee definition. Under judicial review, the Federal Court has no power to

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11 CIC, News Release, 2002-12, ″Refugee Appeal Division Implementation Delayed″, (April 29, 2002).

12 See Citizenship and Immigration Canada, "The Refugee Appeal Division: Backgrounder", (date extracted: November 6, 2005). online: CIC <http://www.cic.gc.ca/english/refugees/rad-background.html>.

13 Section 275.

14 *Supra*, note 10.

15 Factual errors must be so egregious as to be considered errors in law.

retry a case and come to different conclusions that those reached by the Board.[16] In reviewing a finding of credibility, the question is not whether the Court finds the claimant credible. The question on judicial review is whether no reasonable person could have drawn the same conclusion as the Board on credibility.[17] That the Court may have reached a different conclusion than the Board is not enough to justify the intervention.[18] The Court will not interfere with the exercise of discretion by a statutory authority merely because the Court might have exercised its discretion in a different manner.[19] The Federal Courts have said that the Board must be trusted that it is dealing carefully and fairly with the cases that come before it.[20] For the Courts to interfere on judicial review, it is not enough for there to be an error; the error must be palpable and overriding.[21]

The CBA Section does not question any of these principles as appropriate for judicial review. However, these principles mean that judicial review is far different from an appeal decided on the basis of correctness – whether the claimant is a refugee or not. Judicial review is no substitute for an appeal. Judicial review does not have the power to generate consistency of decisions in the same way as an appeal.

Conclusion

Parliament linked the reduction of panel size for refugee determinations from two members to one with the introduction of an appeal for a reason. The system must account for the fact that human beings are fallible. There must be sufficient checks and balances to ensure that legitimate refugees are not denied safe haven in Canada as a result of faulty decision-making. An appeal provides a remedy that is superior to any other review mechanism, which is the reason why it was enacted. The use of the proclamation power should no longer be used to circumvent the will of Parliament when it passed the RAD. The CBA Section urges Parliament to adopt Bill C-291.

Sincerely yours,

(Original signed by Kerri A. Froc for Baerbel Langner)

Baerbel Langner
Chair, National Citizenship and Immigration Section

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16 *C.H.R.C. v. Greyhound Lines* (May 4, 1986) T-15-86 at 1; *Maharani J. Robins v. M.M.I.* (May 22, 1987) T-229-87 at 14.

17 *Grewal v. M.E.I.* (February 23, 1983) A-972-82.

18 *Miranda and M.E.I.* (1993) 63 F.T.R. 81 (Joyal J.)

19 *Re Maple Lodge Farms Ltd* [1982] 2 S.C.R. 2

20 *Boulis and M.M.I.* (1972), 26 D.L.R. (3d) 215; *Medina and M.E.I.* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.); *Rodriguez and M.E.I.* (August 18, 1993) T-3031-92, (Wetston J.).

21 *Fletcher v. M.P.I.C.* (1990), 74 D.L.R. (4th) 636 at 644 (S.C.C.).