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September 30, 2009

Michelle Lauzon
Director, Policy and Procedures Directorate
Operations Branch
Immigration and Refugee Board of Canada
Minto Place, Canada Building
344 Slater Street, 12th Floor
Ottawa, ON K1A 0K1

Dear Ms. Lauzon:

Re: Consultation on Guideline 6 – Scheduling and Changing Date and Time of a Proceeding

I am writing on behalf of the National Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section), regarding the Immigration and Refugee Board's Guideline 6, Scheduling and Changing Date or Time of a Proceeding.

The CBA is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. As the fairness and efficiency of Immigration and Refugee Board proceedings is of great concern to us, we appreciate the opportunity to comment on the draft revisions to Guideline 6 (the draft Guideline). Unfortunately, we believe that the draft Guideline has the potential to seriously affect a person's right to counsel at the IRB. We believe the better solution to scheduling difficulties is to address the IRB's internal inefficiencies that are contributing to the problem, set hearings in full consultation with counsel and address rare problems with counsel availability on a case-by-case basis. Our position is explained in more detail below.

Reasonable Notice

Sections 3.2.1, 3.3.3 and 3.3.4 of the draft Guideline indicate that the IRB always gives reasonable notice of hearing dates and times to counsel:

- 3.2.1. The IRB provides the parties *with reasonable notice of the date and time of a proceeding in every case...*
- 3.3.3 The fact that a party is waiting for an application for legal aid to be approved is not a sufficient reason to allow an application to change the date or time of a proceeding *as the IRB gave reasonable notice of the time and date of the proceeding.*
- 3.3.4 The fact that immigration or other proceedings involving the party are in progress is not a sufficient reason to allow an application to change the date or time of a proceeding *as the IRB gave the party and their counsel reasonable notice of the date and time of the proceeding.* [Emphasis added]

However, “reasonable notice” is not defined, and at times the IRB sets hearings on very short notice. Clear parameters on what constitutes reasonable notice should be included in the draft Guideline. These parameters should recognize that what constitutes reasonable notice depends on the circumstances of a given case (such as urgency, length of the proceedings, and complexity of the matter).

Right to Counsel

We fundamentally disagree with the assertion that the IRB is not required to consult with counsel for scheduling and that scheduling is an internal, administrative matter solely within the authority and control of the IRB. In the case of *Dias*, Heneghan J. of the Federal Court Trial Division held that:

...while the Immigration and Refugee Board has the right to control its own procedures, this is not an absolute right to the exclusion of the right granted the Applicants to retain counsel and make a full and fair presentation of their case.¹

In particular, we find the following statements in the draft Guideline of concern:

- The IRB does not have to consult with counsel on a case-by-case basis as to their ability, and it is the Division – and not the parties – that decide when cases will be scheduled (section 2.2);
- A notice to appear will advise parties that they must choose counsel who is available to proceed on the date scheduled (section 2.4);

¹ *Dias v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 84 at para. 13.

- If counsel is retained after a date is set for a proceeding, the fact that the newly-retained counsel cannot attend is not sufficient reason for a change of date or time of a proceeding (section 2.7);
- Where, for any reason, counsel is unable to appear at a proceeding, counsel must make arrangements to have other counsel appear in their place. If counsel does not appear, the IRB may decide to proceed without counsel, or, if applicable, start abandonment proceedings or conclude a case has been abandoned (section 3.2.1);
- Waiting for legal aid funding to be approved is not a sufficient reason to permit a change in the date or time of a proceeding (section 3.3.3).

While we recognize that the right to counsel is not absolute, the draft Guideline comes close to negating that right entirely in favour of administrative convenience. Implicit in the right to retain counsel and to make a full and fair presentation of their case is the right of an individual to have counsel represent them at the IRB hearing. Also implicit in this right is the right to counsel of one's choosing, not simply *any* counsel who can make themselves available on a particular date or time. Thus, to respect the right to counsel and the duty of fairness, counsel must be consulted in the scheduling process.

Further, Section 3.2.1 places an unreasonably high burden on counsel to arrange for alternate counsel, particularly where cases have been scheduled on short notice and counsel's unavailability is through no fault of their own. As section 3.2.1 makes clear, this expectation would exist where, for *any* reason, counsel is unable to appear at a proceeding.

Section 3.3.2 states that the fact that a party has not had time to prepare adequately (for example, due to the unavailability of documents), is not a reason for the Board to reschedule a hearing. If the Board concludes, in advance, that a lack of time to prepare is irrelevant to the issue of whether a hearing should be rescheduled, it cannot be acting fairly. Fairness has to be substantive, to allow a party to put their best foot forward.

Section 3.3.3 is an effective denial of the party's right to legal counsel where the party is impecunious and must rely on legal aid. Once lawyers become counsel of record, they cannot, as a matter of professional obligation, simply withdraw their services at will. They must consider the effect on the client, and indeed, are professionally obliged not to withdraw where it would cause serious prejudice to the client. Accordingly, in many cases, applicants have legal aid counsel who are willing to be retained, but will not go on the record until a legal aid certificate is obtained. The right of poor people to counsel of choice should not be limited because of this practical reality.

The rigidity of the draft Guideline means that the IRB will likely see more unrepresented individuals and counsel who are not adequately prepared to represent their clients. Unrepresented individuals at the IRB, many of whom face language and cultural barriers, pose particular challenges in ensuring that they obtain fair hearings. More unrepresented applicants and applicants with counsel who have insufficient preparation time are likely to result in additional judicial reviews for breaches of natural justice and ultimately more cases referred back

to the IRB. On a practical level, proceedings run more efficiently when individuals have a well-prepared lawyer. Unrepresented individuals typically require more time and direction, adding to the demands on IRB's administrative resources. Therefore, while the draft Guideline may reduce the backlog on a short-term basis, it may in fact increase it over time.

IRB's Internal Processes

The draft Guideline clearly locates the problem of scheduling inefficiency with counsel. The need for such rigid guidelines would be alleviated if the IRB were able to improve their processes, such as addressing the postponements of hearings because of Board member unavailability and the case backlog. There are lengthy delays in file screening, and problems with accurately identifying issues and approximating time frames needed for preparation. Our members have experienced many occasions where they have sent requests for expedited interviews that are ignored and have attended hearings set for full days, only to end up finishing within one to two hours.

Conclusion

We recommend that all IRB cases be scheduled in full consultation with counsel. From our perspective, the IRB processes that we have identified as causes of delays and scheduling difficulties should be addressed.² In turn, the IRB should deal separately with those few counsel whose abnormally high IRB caseloads cause most of the problems with counsel unavailability.

Thank you for the opportunity to respond to your consultation and we look forward to hearing from you.

Yours truly,

(Original signed by Kerri Froc for Stephen Green)

Stephen Green
Chair, National Citizenship and Immigration Law Section

² The CBA Section has supported the IRB receiving resources that would assist in addressing some of these inefficiencies. See, for example, our April 16, 2007 letter to Commons Committee on Citizenship and Immigration, in which we expressed concern over the high number of IRB member vacancies: online, <<http://www.cba.org/CBA/submissions/pdf/07-22-eng.pdf>>.