THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

September 4, 2012

Via email: Teny.Dikranian@cic.gc.ca

Teny Dikranian
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Citizenship and Immigration Canada
365 Laurier Avenue W
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Dear Ms. Dikranian:

Re: Immigration and Refugee Protection Regulations Amendments, Canada Gazette, Part I: Notices and Proposed Legislation, August 4, 2012

On behalf of the National Immigration Law Section of the Canadian Bar Association ("CBA Section"), I am writing to comment on the above-noted proposed regulations.

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.

1. Amendments requiring Designated Foreign Nationals ("DFNs") to report

These proposed regulations would implement reporting requirements for "Designated Foreign Nationals". The category of "Designated Foreign Nationals" was created when the *Immigration and Refugee Protection Act* (IRPA) was amended by the *Protecting Canada's Immigration System Act* (PCISA) in 2010.

PCISA gave the Minister of Public Safety the authority to designate the arrival of a group of foreign nationals as an irregular arrival if:

> (a) the examinations relating to identity and admissibility of the persons involved in the arrival, and any related investigations, cannot be conducted in a timely manner; or
>
> (b) there are reasonable grounds to suspect that the arrival involves organized human smuggling for profit, or for the benefit of, at the direction of or in association with, a criminal organization or terrorist group.

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Once designated to be part of an irregular arrival, foreign nationals without documents required for entry, and determined by an officer not to be inadmissible to Canada, are deemed "Designated Foreign Nationals" (DFNs). The CBA's concerns with the Designated Foreign National (DFN) category were fully elaborated in our submissions on Bill C-31.[1] The CBA Section opposed the creation of a category of DFNs, as it punished the victims, rather than the perpetrators of human smuggling. One such punishment is that DFNs with positive refugee claims are not able to apply for permanent resident status for a period of at least five years and up to six years if they do not comply with the conditions imposed. Further, section 98.1 of IRPA states that, "a designated foreign national on whom refugee protection is conferred… must report to an officer in accordance with the regulations." The proposed regulations would require DFNs to report:

- Not more than 30 days after refugee protection is conferred on the DFN;
- Once a year after the day they first report, "on a day fixed by the officer";
- On request, if an officer "has reason to believe that any of the circumstances referred to in paragraph 108(a) to (e) may apply";
- A change in address, not more than 10 works days after the change;
- A change in employment status, not more than 20 days after the change;
- A departure from Canada, not less than 10 working days *before* the date of departure;
- Any return to Canada, not more than 10 working days after the day of their return.

Failure to report within the timelines could result in a finding that the DFN has not complied with their obligations, and add an additional year to the ban on permanent residence. The CBA Section is concerned that the reporting requirements are too onerous and will lead to DFNs inadvertently failing to comply with their conditions.

The regulations do not specify whether reporting "to an officer" means in person, by telephone or in writing. The CBA Section believes that "to an officer" should include reporting by telephone or in writing. Requiring in-person reporting for each change of employment, address and visit abroad is unnecessarily onerous. Many refugee claimants live in smaller communities, with no physical Canada Border Service Agency office. They may not have access to vehicles to travel to another city.

Currently, refugee claimants awaiting their hearings are able to report their change in addresses by phone or in writing to Citizenship and Immigration Canada, Canada Border Services Agency and the Immigration and Refugee Board. This same consideration should apply to DFNs with successful refugee claims.

Further, the term "a change in employment status" is particularly vague. The proposed regulations do not specify whether it refers to: a change from unemployed to employed (or vice-versa), a change in employers, a change in employment locations, and a change in positions within a company, or all of the above. The precise parameters of a "change in employment status" should be defined to avoid confusion.

In addition, we have concerns with the requirement that DFNs report 10 days *before* leaving Canada. Last minute travel may be required for family emergencies. DFNs would be in the unenviable position of having to choose between travelling to be with family, who may be ill, or running afoul of the regulatory requirements. There is no clear reason why, in this one instance, DFNs must report *before* the change in circumstance occurs and not after. The CBA Section recommends that this requirement be amended to be no sooner than ten days *after the* date of departure.

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1 Online: http://www.cba.org/CBA/submissions/pdf/12-27-eng.pdf.

2. Amendments regarding work permits for claimants from "Designated Countries of Origin"

At the outset, we note our opposition to the creation of a category of "Designated Countries of Origin" (DCOs). As discussed in our submission on Bill C-31, refugee determination is an individualized assessment. There may well be circumstances where a claim is founded even though it comes from a country we might consider democratic. Of even greater concern, however, was the likelihood that the list will become politicized.

The CBA Section continues to oppose the differing treatment of refugee claimants based solely on a Ministerial designation.

The proposed regulations provide that refugee claimants from DCOs who cannot support themselves without working will *not* be entitled to work permits unless 180 days have passed since the claim was referred to the Refugee Protection Division (RPD). As refugee hearings for DCOs are to be held within 30 or 45 days, the implication is clearly that DCOs will not receive work permits in Canada.

The inability of refugee claimants to get work permits, when they are unable to support themselves without working, simply increases the burden on already-strained social supports. Allowing refugee claimants to work eases the burden on social housing and legal aid systems, among other services.

While section 111.1(2) of IRPA now states that regulations with respect to refugee claimant from DCOs may provide "time limits that are different from the time limits for other claimants," these relate primarily to the provision of documents, hearings and appeals. There is no requirement in IRPA that claimants from DCOs must receive different treatment when it comes to work permits. The CBA Section recommends that the regulation limiting work permits for claimants from designated countries of origin be eliminated.

If the provision remains, the CBA Section recommends clarifying the intent of the Regulation, so that the proposed regulation reproduced the language of section 111.1(2), rather than simply referring to this section. Specifically, we recommend the following wording:

> (2) Despite subsection (1), a work permit must not be issued to <u>claimants who are nationals of a country that is, on the day on which their claim is made, a country designated under subsection 109.1(1)</u> unless at least 180 days have elapsed since their claim was referred to the Refugee Protection Division.

3. Amendments setting out time limits for claims for refugee protection and appeals

(a) <u>Basis of Claim Document and Refugee Hearings</u>

The proposed regulations also set out the new timelines for claims for refugee protection and appeals.

The proposed timelines for the Basis of Claim document are:

- Refugee claimants who make their claim in-land must provide the Basis of Claim document to an officer on the day on which the officer determines the eligibility of the claim; and

- Refugee claimants who make their claim at a port of entry will have 15 days to provide their Basic of Claim document. If the documents and information cannot be provided within the 15 day time limit, the RPD may, for reasons of fairness and natural justice, extend that time limit by the number of days necessary in the circumstances.

The proposed timelines for the hearing are:

- For a DCO refugee claimant who makes a claim in-land, the hearing will be held within 30 days after the claim is referred to the RPD;
- For a DCO refugee claimant who makes a claim at a port of entry, the hearing will be held within 45 days after the claim is referred to the RPD; and
- For all other claimants, the hearing will be held within 60 days after the claim is referred to the RPD.

The CBA Section raised concerns about the compressed timelines in our submission on Bill C-31. Applicants and counsel need time to prepare the case, disclose documents, and in many cases, retain expert witnesses such as psychologists and doctors. Credible expert opinion on psychological conditions often requires multiple meetings between the expert and applicant. In some cases, claimants require time to obtain documents from the country from which they fled, including identity documents, police and medical reports or other evidence to confirm the veracity of their claim. When this documentation is obtained, it often needs to be translated.

A rush to judgment will prejudice claimants with legitimate claims who are not able to adequately prepare. Important documentation may be missed because of the tight timelines. Without sufficient time, the Immigration and Refugee Board will be bogged down in adjournment requests. From a practical perspective, requiring hearings within four months will not result in any greater delay.

As we did in our Bill C-31 submissions, the CBA Section recommends that the operational requirements for the new process be changed to four months for the hearing for all claimants. This timeline would allow refugee hearings to be completed within six months of initiating a claim and is consistent with the goals of faster processing and administrative efficiency.

(b) Refugee Appeal Division (RAD)

Similarly, the timelines for appeal to the RAD are very compressed:

- An appellant must file and perfect an appeal within fifteen working days after receiving written reasons.

- If the appeal cannot be filed and perfected within this time limit, the Refugee Appeal Division may, for reasons of fairness and natural justice, extend that time limit by the number of working days that is necessary in the circumstances.

In our Bill C-31 submissions, the CBA Section expressed our opinion that these timelines are unworkably short. These concerns were also expressed in a letter from the Section to CIC in May 2011, commenting on proposed regulations under the *Balanced Refugee Reform Act* (BRRA).[2] The letter provides the legal basis for our opinion that this deadline would be *ultra vires* the powers of the Governor in Council in IRPA. As a practical matter, these deadlines are so unrealistic that they

[2] Online: http://www.cba.org/CBA/submissions/pdf/11-25-eng.pdf.

will lead to significant requests for adjournments and reviews based on procedural fairness arguments, resulting in additional, unnecessary costs.

The extremely short timeline for perfecting the appeal disproportionately affects claimants, as IRPA and the proposed Refugee Appeal Division Rules[3] place no restrictions on the type of evidence that can be presented by the Minister. The Minister is able to present additional evidence at any time up until the time a decision is made. The impact of failing to perfect the appeal within the 15 day time limit therefore presumably has less impact on the Minister. The CBA continues to take the position that both the Minister and a claimant should be in the same position before the Refugee Appeal Division.

The CBA Section continues to recommend that the time limit to file and perfect an appeal to the Refugee Appeal Division be no later than 45 days after the date on which a decision is received. This would bring the RAD time limits in line with those of the Federal Court.

In the proposed regulations, the Refugee Appeal Division will have 90 days to make a decision after the appeal is perfected. As mentioned in our Bill C-31 submissions, this longer timeline is indicative of the anticipated complexity of appeals to the RAD.

In the proposed BRRA regulations, the proposed timeline for a decision by the Refugee Appeal Division was four months. The CBA Section recommended that the time to appeal be extended for a month (from 15 to 45 days) and that the time to make a decision be shortened (from four months to three), thereby keeping the same total timeline for an appeal.

The CBA Section notes that, under PCISA, proposed timeline to make a decision has been reduced from four months to 90 days. The CBA Section again recommends that the time to perfect the appeal be extended to 45 days.

Yours truly,

(original signed by Kerri Froc for Kevin Zemp)

Kevin Zemp
Chair, National Immigration Law Section

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3 Refugee Appeal Division Rules, (2012) C Gaz I, 2360, online: http://www.gazette.gc.ca/rp-pr/p1/2012/2012-08-11/html/reg2-eng.html.