Date: 20070525

Docket: A-38-06

Citation: 2007 FCA 198

CORAM: **DÉCARY J.A.**
SHARLOW J.A.
EVANS J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

DANIEL THAMOTHAREM

Respondent

and

THE CANADIAN COUNCIL FOR REFUGEES and
THE IMMIGRATION REFUGEE BOARD

Interveners

Heard at Toronto, Ontario, on April 16, 2007.

Judgment delivered at Ottawa, Ontario, on May 25, 2007.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: DÉCARY J.A.

CONCURRING REASONS BY: SHARLOW J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] The Chairperson of the Immigration and Refugee Board ("the Board") has broad statutory powers to issue both guidelines and rules. Rules have to be approved by the Governor in Council and laid before Parliament, but guidelines do not.

[2] This appeal concerns the validity of Guideline 7 (*Preparation and Conduct of a Hearing in the Refugee Protection Division*), issued in 2003 by the Chairperson of the Board pursuant to the statutory power to "issue guidelines … to assist members in carrying out their duties": *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"), paragraph 159(1)(*h*). The key paragraphs of Guideline 7 provide as follows: "In a claim for refugee protection, the standard practice will be for the R[efugee] P[rotection] O[fficer] to start questioning the claimant" (para. 19), although the member of the Refugee Protection Division ("RPD") hearing the claim "may vary the order of questioning in exceptional circumstances" (para. 23).

[3] The validity of Guideline 7 is challenged on two principal grounds. First, it deprives refugee claimants of the right to a fair hearing by denying them the opportunity to be questioned first by their own counsel. Second, even if Guideline 7 does not prescribe a hearing that is in breach of the duty of fairness, the Chairperson should have introduced the new standard order of questioning as a rule of procedure under IRPA, paragraph 161(1)(*a*), not as a guideline under IRPA, paragraph 159(1)(*h*). Guideline 7 is not valid as a guideline because paragraphs 19 and 23 unlawfully fetter the discretion of members of the RPD to determine the appropriate order of questioning when hearing refugee protection claims.

[4] This is an appeal by the Minister of Citizenship and Immigration from a decision by Justice Blanchard of the Federal Court granting an application for judicial review by Daniel Thamotharem to set aside a decision by the RPD dismissing his claim for refugee protection: *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 16, [2006] 3 F.C.R. 168.

[5] Justice Blanchard held that Guideline 7 is an unlawful fetter on the exercise of discretion by individual RPD members to determine the order of questioning at a hearing, in the absence of a provision in either IRPA or the *Refugee Protection Division Rules*, SOR/2002-228, dealing with this aspect of refugee protection hearings. He remitted Mr Thamotharem's refugee claim to be determined by a different member of the RPD on the basis that Guideline 7 is an invalid fetter on the exercise of decision-makers' discretion.

[6] However, Justice Blanchard rejected Mr Thamotharem's argument that Guideline 7 is invalid because it deprives refugee claimants of the right to a fair hearing, and distorts the "judicial" role of the member hearing the claim. Mr Thamotharem has cross-appealed this finding.

[7] The Judge certified the following questions for appeal pursuant to paragraph 74(*d*) of IRPA.

1. Does the implementation of paragraphs 19 and 23 of the Chairperson's Guideline 7 violate principles of natural justice by unduly interfering with claimants' right to be heard?

2. Has the implementation of Guideline 7 led to fettering of Board Members' discretion?

3. Does a finding that Guideline 7 fetters a Refugee Protection Division Member's discretion necessarily mean that the application for judicial review must be granted, without regard to whether or not the applicant was otherwise afforded procedural fairness in the particular case or whether there was an alternate basis for rejecting the claim?

[8] Immediately after hearing the Minister's appeal in *Thamotharem*, we heard appeals by unsuccessful refugee claimants challenging the validity of Guideline 7 and, in some of the cases, impugning on other grounds the dismissal of their claim. In the Federal Court, 19 applications for

judicial review concerning Guideline 7 were consolidated. Justice Mosley's decision on the Guideline 7 issue is reported as *Benitez v. Canada (Minister of Citizenship and Immigration*), 2006 FC 461, [2007] 1 F.C.R. 107. The appeals from these decisions were also consolidated, *Benitez* being designated the lead case.

[9] In *Benitez*, Justice Mosley agreed with the conclusions of Justice Blanchard on all issues, except one: he held that Guideline 7 was not an unlawful fetter on the discretion of Board members because its text permitted them to allow the claimant's counsel to question first, as, in fact, some had.

[10] For substantially the reasons that they gave, I agree with both Justices that Guideline 7 is not, on its face, invalid on the ground of procedural unfairness, although, as the Minister and the Board conceded, fairness may require that, in certain circumstances, particular claimants should be questioned first by their own counsel. I also agree that Guideline 7 is not incompatible with the impartiality required of a member when conducting a hearing which is inquisitorial in form.

[11] However, in my opinion, Guideline 7 is not an unlawful fetter on the exercise of members' discretion on the conduct of refugee protection hearings. The Guideline expressly directs members to consider the facts of the particular case before them to determine whether there are exceptional circumstances warranting a deviation from the standard order of questioning. The evidence does not establish that members disregard this aspect of Guideline 7 and slavishly adhere to the standard

order of questioning, regardless of the facts of the case before them. Accordingly, I agree with Justice Mosley on this issue, and must respectfully disagree with Justice Blanchard.

[12] Nor does it follow from the fact that Guideline 7 could have been issued as a statutory rule of procedure that it is invalid because it was not approved by the Governor in Council. In my opinion, the Chairperson's rule-making power does not invalidate Guideline 7 by impliedly excluding from the broad statutory power to issue guidelines "to assist members in carrying out their duties" changes to the procedure of any of the Board's Divisions.

[13] Accordingly, I would allow the Minister's appeal, and dismiss Mr Thamotharem's cross-appeal and his application for judicial review. Although separate reasons are given in *Benitez* (2007 FCA 199) dealing with issues not raised in Mr Thamotharem's appeal, a copy of the reasons in the present appeal will also be inserted in Court File No. A-164-06 (*Benitez*) and the files of the appeals consolidated with it.

B. FACTUAL BACKGROUND

(i) Mr Thamotharem's refugee claim

[14] Mr Thamotharem is Tamil and a citizen of Sri Lanka. He entered Canada in September 2002 on a student visa. In January 2004, he made a claim for refugee protection in Canada, since he feared that, if forced to return to Sri Lanka, he would be persecuted by the Liberation Tigers of Tamil Eelam.

[15] In written submissions to the RPD before his hearing, Mr Thamotharem objected to the application of Guideline 7, on the ground that it deprives refugee claimants of their right to a fair hearing. He did not argue that, on the facts of his case, he would be denied a fair hearing if he were questioned first by the Refugee Protection Officer ("RPO") and/or the member conducting the hearing. There was no evidence that Mr Thamotharem suffered from post-trauma stress disorder, or was otherwise particularly vulnerable.

[16] At the hearing of the claim before the RPD, the RPO questioned Mr Thamotharem first. The RPD held that the duty of fairness does not require that refugee claimants always have the right to be questioned first by their counsel and that the application of Guideline 7 does not breach Mr Thamotharem's right to procedural fairness.

[17] In a decision dated August 20, 2004, the RPD dismissed Mr Thamotharem's refugee claim and found him not to be a person in need of protection. It based its decision on documentary evidence of improved country conditions for Tamils in Sri Lanka, and on the absence of reliable evidence that Mr Thamotharem would be persecuted as a perceived member of a political group or would, for the first time, become the target of extortion.

[18] In his application for judicial review, Mr Thamotharem challenged this decision on the ground that Guideline 7 was invalid, and that the RPD had made a reviewable error in its determination of the merits of his claim. As already noted, Mr Thamotharem's application for judicial review was granted, the RPD's decision set aside and the matter remitted to another

member for re-determination on the basis that Guideline 7 is an invalid fetter on the RPD's discretion in the conduct of the hearing. In responding in this Court to the Minister's appeal, Mr. Thamotharem did not argue that, even if Guideline 7 is valid, Justice Blanchard was correct to remit the matter to the RPD because it committed a reviewable error in determining the merits of the claim.

(ii) Guideline 7

[19] Before the Chairperson issued Guideline 7, the order of questioning was within the discretion of individual members; neither IRPA, nor the *Refugee Protection Division Rules*, addressed it. Refugee protection claims are normally determined by a single member of the RPD. The evidence indicated that, before the issue of Guideline 7, practice on the order of questioning was not uniform across Canada. Members sitting in Toronto and, possibly, in Vancouver and Calgary, permitted claimants to be "examined in chief" by their counsel before being questioned by the RPO and/or the member. In Montreal and Ottawa, on the other hand, the practice seems to have been that the member or the RPO questioned the claimant first, although a request by counsel for a claimant to question first seems generally to have been granted.

[20] It is not surprising that the Board did not regard it as satisfactory that the order of questioning was left to be decided by individual members on an *ad hoc* basis, with variations among regions, and among members within a region. Claimants are entitled to expect essentially the same procedure to be followed at an RPD hearing, regardless of where or by whom the hearing is conducted.

[21] There was also a view that refugee protection hearings would be more expeditious if claimants were generally questioned first by the RPO or the member, thus dispensing with the often lengthy and unfocussed examination-in-chief of claimants by their counsel. The backlog of refugee determinations has been a major problem for the Board. For example, from 1997-98 to 2001-02 the number of claims referred for determination each year increased steadily from more than 23,000 to over 45,000, while, in the same period, the backlog of claims referred but not decided grew from more than 27,000 to nearly 49,000: Canada, Immigration and Refugee Board, *Performance Report, for the period ending March 31, 2004*.

[22] Studies were undertaken to find ways of tackling this problem. For example, in a relatively early report, *Rebuilding Trust*: *Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (Ottawa: Immigration and Refugee Board, 1993), refugee law scholar, Professor James C. Hathaway, made many recommendations designed to make the Board's determination of refugee claims more effective, expeditious, and efficient. The following passage from the Report (at 74) is particularly relevant to the present appeal.

> The present practice of an introductory "examination in chief" by counsel should be dispensed with, the sworn testimony in the Application for Refugee Status being presumed to be true unless explicitly put in issue. Panel members should initially set out clearly the substantive matters into which they wish to inquire, and explain any concerns they may have about the sufficiency of documentary evidence presented. Members should assume primary responsibility to formulate the necessary questions, although they should feel free to invite counsel to adduce testimony in regard to matters of concern to them. Once the panel has concluded its questioning, it should allow the Minister's representative, if present, an opportunity to question or call evidence, ensuring that the tenor of the Ministerial intervention is not allowed to detract from the non-adversarial nature of the hearing. Following a brief recess, the panel should outline

> clearly on the record which matters it views as still in issue, generally using the Conference Report as its guide. Any matters not stated by the panel to be topics of continuing concern should be deemed to be no longer in issue. Counsel would then be invited to elicit testimony, call witnesses, and make submissions as adjudged appropriate, keeping in mind that all additional evidence must be directed to a matter which remains in issue. [footnotes omitted]

[23] Starting in 1999, the Board worked to develop what became Guideline 7, which was finally issued in October 31, 2003, as part of an action plan to reduce the backlog on the refugee side by increasing the efficiency of its decision-making process. In addition to the order of questioning provisions in dispute in this case, Guideline 7 also deals with the early identification of issues and disclosure of documents, procedures when a claimant is late or fails to appear, informal pre-hearing conferences, and the administration of oaths and affirmations.

[24] In addition to the consultations with the Deputy Chairperson and the Director General of the Immigration Division mandated by paragraph 159(1)(*h*) before the Chairperson issues a guideline, the Board held consultations on the proposed Guideline with members of the Bar and other "stakeholders". Some, however, including the Canadian Council for Refugees, an intervener in this appeal, regarded the consultations as less than meaningful, while others characterized Guideline 7 as an overly "top-down" initiative by senior management of the Board. On the basis of the material before us, I am unable to comment on either of these observations.

[25] From December 1, 2003, the implementation of Guideline 7 was gradually phased in, becoming fully operational across the country by June 1, 2004. Like other guidelines issued by the Chairperson, Guideline 7 was published.

C. LEGISLATIVE FRAMEWORK

(i) IRPA

[26] IRPA confers on the Chairperson of the Board broad powers over the management of each Division of the Board, including a power to issue guidelines.

159. (1) The Chairperson is, by virtue of holding that office, a member of each Division of the Board and is the chief executive officer of the Board. In that capacity, the Chairperson	159. (1) Le président est le premier dirigeant de la Commission ainsi que membre d'office des quatre sections; à ce titre :
(a) has supervision over and direction of the work and staff of the Board;	a) il assure la direction et contrôle la gestion des activités et du personnel de la Commission;
…	[…]
(g) takes any action that may be necessary to ensure that the members of the Board carry out their duties efficiently and without undue delay;	g) il prend les mesures nécessaires pour que les commissaires remplissent leurs fonctions avec diligence et efficacité;
(h) may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons and the Director General of the Immigration Division, to assist members in carrying out their duties;	h) après consultation des vice-présidents et du directeur général de la Section de l'immigration et en vue d'aider les commissaires dans l'exécution de leurs fonctions, il donne des directives écrites aux commissaires et précise les décisions de la Commission qui serviront de guide jurisprudentiel;
…	[…]

[27] IRPA also empowers the Chairperson of the Board to make rules for each of the three Divisions of Board. The rules, however, must be approved by the Governor in Council, and laid before Parliament.

161. (1) Subject to the approval	161. (1) Sous réserve de

of the Governor in Council, and in consultation with the Deputy Chairpersons and the Director General of the Immigration Division, the Chairperson may make rules respecting	l'agrément du gouverneur en conseil et en consultation avec les vice-présidents et le directeur général de la Section de l'immigration, le président peut prendre des règles visant :
(a) the activities, practice and procedure of each of the Divisions of the Board, including the periods for appeal, the priority to be given to proceedings, the notice that is required and the period in which notice must be given;	a) les travaux, la procédure et la pratique des sections, et notamment les délais pour interjeter appel de leurs décisions, l'ordre de priorité pour l'étude des affaires et les préavis à donner, ainsi que les délais afférents;
(b) the conduct of persons in proceedings before the Board, as well as the consequences of, and sanctions for, the breach of those rules;	b) la conduite des personnes dans les affaires devant la Commission, ainsi que les conséquences et sanctions applicables aux manquements aux règles de conduite;
(c) the information that may be required and the manner in which, and the time within which, it must be provided with respect to a proceeding before the Board; and	c) la teneur, la forme, le délai de présentation et les modalités d'examen des renseignements à fournir dans le cadre d'une affaire dont la Commission est saisie;
(d) any other matter considered by the Chairperson to require rules.	d) toute autre mesure nécessitant, selon lui, la prise de règles.
(2) The Minister shall cause a copy of any rule made under subsection (1) to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the approval of the rule by the Governor in Council.	(2) Le ministre fait déposer le texte des règles devant chacune des chambres du Parlement dans les quinze premiers jours de séance de celle-ci suivant leur agrément par le gouverneur en conseil.

[28] IRPA emphasises the importance of informality, promptness and fairness in the Board's proceedings.

162. (2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.	162. (2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.

[29] In keeping with the inquisitorial nature of the RPD's process, IRPA confers broad discretion on members in their conduct of a hearing.

165. The Refugee Protection Division and the Immigration Division and each member of those Divisions have the powers and authority of a commissioner appointed under Part I of the *Inquiries Act* and may do any other thing they consider necessary to provide a full and proper hearing.	165. La Section de la protection des réfugiés et la Section de l'immigration et chacun de ses commissaires sont investis des pouvoirs d'un commissaire nommé aux termes de la partie I de la *Loi sur les enquêtes* et peuvent prendre les mesures que ceux-ci jugent utiles à la procédure.

[30] Part I of the *Inquiries Act*, R.S.C. 1985, c. I-11**,** empowers commissioners of inquiry as follows:

4. The commissioners have the power of summoning before them any witnesses, and of requiring them to (a) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and (b) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.	4. Les commissaires ont le pouvoir d'assigner devant eux des témoins et de leur enjoindre de : a) déposer oralement ou par écrit sous la foi du serment, ou d'une affirmation solennelle si ceux-ci en ont le droit en matière civile; b) produire les documents et autres pièces qu'ils jugent nécessaires en vue de procéder d'une manière approfondie à l'enquête dont ils sont chargés. 5. Les commissaires ont, pour contraindre les témoins à

5. The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.	comparaître et à déposer, les pouvoirs d'une cour d'archives en matière civile.

[31] The following provisions of IRPA respecting the decision-making process of the RPD are also relevant.

170. The Refugee Protection Division, in any proceeding before it,	170. Dans toute affaire dont elle est saisie, la Section de la protection des réfugiés :
(a) may inquire into any matter that it considers relevant to establishing whether a claim is well-founded;	a) procède à tous les actes qu'elle juge utiles à la manifestation du bien-fondé de la demande;
…	[…]
(g) is not bound by any legal or technical rules of evidence;	g) n'est pas liée par les règles légales ou techniques de présentation de la preuve;
(h) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances;	h) peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision;
…	[…]

(ii) Guideline 7

[32] Paragraphs 19 and 23 of Guideline 7, issued by the Chairperson under IRPA, paragraph 159(1)(*h*), are of immediate relevance in this appeal, while paragraphs 20-22 provide context.

19. <u>In a claim for refugee protection, the standard practice will be for the RPO to start questioning the claimant</u>. If there is no RPO participating in the hearing, the member will begin, followed by counsel for the claimant. Beginning the	19. <u>Dans toute demande d'asile, c'est généralement l'APR qui commence à interroger le demandeur d'asile</u>. En l'absence d'un APR à l'audience, le commissaire commence l'interrogatoire et est suivi par le conseil du demandeur d'asile.

hearing in this way allows the claimant to quickly understand what evidence the member needs from the claimant in order for the claimant to prove his or her case.

Cette façon de procéder permet ainsi au demandeur d'asile de connaître rapidement les éléments de preuve qu'il doit présenter au commissaire pour établir le bien-fondé de son cas.

20. In a claim for refugee protection where the Minister intervenes on an issue other than exclusion, for example, on a credibility issue, the RPO starts the questioning. If there is no RPO at the hearing, the member will start the questioning, followed by the Minister's counsel and then counsel for the claimant.

20. Dans les demandes d'asile où l'intervention du ministre porte sur une question autre que l'exclusion, la crédibilité par exemple, l'APR commence l'interrogatoire. En l'absence d'un APR à l'audience, le commissaire commence l'interrogatoire; viennent ensuite le conseil du ministre puis le conseil du demandeur d'asile.

21. In proceedings where the Minister intervenes on the issue of exclusion, Minister's counsel will start the questioning, followed by the RPO, the member, and counsel for the claimant. Where the Minister's counsel requests another chance to question at the end, the member will allow it if the member is satisfied that new matters were raised during questioning by the other participants.

21. Dans les demandes où l'intervention du ministre porte sur la question de l'exclusion, le conseil du ministre interroge d'abord le demandeur d'asile; il est suivi de l'APR, du commissaire, puis du conseil du demandeur d'asile. Le commissaire donne au conseil du ministre la possibilité de ré-interroger le témoin à la fin de l'audience s'il est convaincu que les interrogatoires par les autres participants ont soulevé de nouvelles questions.

22. In proceedings where the Minister is making an application to vacate or to cease refugee protection, Minister's counsel will start the questioning, followed by the member, and counsel for the protected person. Where the Minister's counsel requests another chance to question at the end, the member will allow it if the member is satisfied that new matters were raised during

22. Dans les demandes d’annulation ou de constat de perte d’asile présentées par le ministre, le conseil du ministre commence l’interrogatoire; il est suivi du commissaire, puis du conseil de la personne protégée. Le commissaire donne au conseil du ministre la possibilité de ré-interroger le témoin à la fin de l’audience s’il est convaincu que les interrogatoires par les autres participants ont soulevé de

questioning by the other participants.	nouvelles questions.
23. The member may vary the order of questioning in exceptional circumstances. For example, a severely disturbed claimant or a very young child might feel too intimidated by an unfamiliar examiner to be able to understand and properly answer questions. In such circumstances, the member could decide that it would be better for counsel for the claimant to start the questioning. A party who believes that exceptional circumstances exist must make an application to change the order of questioning before the hearing. The application has to be made according to the RPD Rules.	23. Le commissaire peut changer l'ordre des interrogatoires dans des circonstances exceptionnelles. Par exemple, la présence d'un examinateur inconnu peut intimider un demandeur d'asile très perturbé ou un très jeune enfant au point qu'il n'est pas en mesure de comprendre les questions ni d'y répondre convenablement. Dans de telles circonstances, le commissaire peut décider de permettre au conseil du demandeur de commencer l'interrogatoire. La partie qui estime que de telles circonstances exceptionnelles existent doit soumettre une demande en vue de changer l'ordre des interrogatoires avant l'audience. La demande est faite conformément aux Règles de la SPR.

D. ISSUES AND ANALYSIS

Issue 1: Standard of review

[33] The questions of law raised in this appeal about the validity of Guideline 7 are reviewable on a standard of correctness: they concern procedural fairness, statutory interpretation, and the unlawful fettering of discretion. The exercise of discretion by the Chairperson to choose a guideline

rather than a formal rule as the legal instrument for amending the procedure of any of the Board's Divisions by is reviewable for patent unreasonableness.

Issue 2: Does Guideline 7 prescribe a hearing procedure that is in breach of claimants' right to procedural fairness?

[34] Justice Blanchard dealt thoroughly with this issue at paras. 36-92 of his reasons. He concluded that the jurisprudence did not require that, as a matter of fairness, claimants always be given the opportunity to be questioned first by their counsel (at paras. 38-53). He then considered (at paras. 68-90) the criteria set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 21-28 ("*Baker*"), for determining where to locate refugee protection hearings on the procedural spectrum from the informal to the judicial. Largely on the basis of the adjudicative nature of the RPD's functions, the finality of its decision, and the importance of the individual rights at stake, he concluded (at para. 75) that "a higher level of procedural protection is warranted".

[35] However, recognizing also that the content of the duty of fairness varies with context, Justice Blanchard noted that Parliament had chosen an inquisitorial procedural model for the determination of refugee claims by the RPD, in the sense that there is no party opposing the claim, except in the rare cases when the Minister intervenes to oppose a claim on exclusion grounds. Consequently, in the overwhelming majority of cases, the task of probing the legitimacy of claims inevitably falls to the RPO, who questions the claimant on behalf of the member, and/or to the member of the RPD conducting the hearing, especially when no RPO is present. This is an

important reason for concluding that not all the elements of the adversarial procedural model followed in the courts are necessarily required for a fair hearing of a refugee claim: see paras. 72-75.

[36] Justice Blanchard also acknowledged that claimants may derive tactical advantages from being taken through their story by their own lawyer before being subjected to questioning by the RPO, who will typically focus on inconsistencies, gaps, and improbabilities in the narrative found in the claimant's personal information form ("PIF") and any supporting documentation, as well as any legal weaknesses in the claim. The tactical advantage of questioning first may be particularly significant in refugee hearings because of the vulnerability and anxiety of many claimants, as a result of: their inability to communicate except through an interpreter; their cultural backgrounds; the importance for them of the RPD's ultimate decision; and the psychological effects of the harrowing events experienced in their country of origin.

[37] Nonetheless, Justice Blanchard concluded that these considerations do not necessarily rise to the level of unfairness. Indeed, in addition to shortening the hearing, questioning by the RPO may also serve to improve the quality of the hearing by focusing it and enabling a claimant's counsel to make sure that aspects of the claim troubling the member are fully dealt with when the claimant comes to tell his or her story. Consequently, in order to be afforded their right to procedural fairness, claimants need not normally be given the opportunity to be questioned by their counsel before being questioned by the RPO and/or RPD member.

[38] Justice Blanchard noted, for example, that RPD members receive training to sensitize them to the accommodations needed when questioning vulnerable claimants, that claimants may supplement or modify the information in their PIF and adduce evidence before the hearing, and that expert evidence indicated that vulnerable claimants' ability to answer questions fully, correctly and clearly is likely to depend more on the tone and style of questioning than on the order in which it occurs.

[39] Moreover, the duty of fairness forbids members from questioning in an overly aggressive and badgering manner, or in a way that otherwise gives rise to a reasonable apprehension of bias. Fairness also requires that claimants be given an adequate opportunity to tell their story in full, to adduce evidence in support of their claim, and to make submissions relevant to it. To this end, fairness may also require that, in certain circumstances, a claimant be afforded the right to be questioned first by her or his counsel. In addition, Guideline 7 recognizes that there will be exceptional cases in which, even though not necessarily required by the duty of fairness, it will be appropriate for the RPD to depart from the standard order of questioning.

[40] I agree with Justice Blanchard's conclusion on this issue and have little useful to add to his reasons. Before us, counsel did not identify any error of principle in the Applications Judge's analysis nor produce any binding judicial authority for the proposition that it is a breach of the duty of fairness to deny claimants the right to be questioned first by their own counsel. Criticisms were directed more to the weight that Justice Blanchard gave to some of the evidence and the factors to be considered. I can summarize as follows the principal points made in this Court by counsel.

[41] First, the importance of the individual rights potentially at stake in refugee protection proceedings indicates a court-like hearing, in which the party with the burden of proof goes first: see, for example, *Can-Am Realty Ltd. v. Canada* (1993), 69 F.T.R. 63 at 63-64. I agree at a general level that the seriousness of the rights involved in the determination of a refugee claim, as well as the generally "judicial" character of the oral hearings held by the RPD, militate in favour of affording claimants a high degree of procedural protection. However, its details must also be tailored to fit the inquisitorial and relatively informal nature of the hearing established by Parliament, as well as the RPD's high volume case load, considerations which reduce the power of the claim to aspects of the adversarial model used in courts, including the order of questioning.

[42] Second, the procedure set out in Guideline 7 is derived from the erroneous notion that the RPD is a board of inquiry, not an adjudicator. Unlike those appearing at inquiries, refugee claimants have the burden of proving a claim, which the RPD adjudicates.

[43] I do not agree. The Board correctly recognizes that the RPD's procedural model is more inquisitorial in nature, unlike that of the Immigration Appeal Division (*Chieu v. Canada (Minister of Citizenship and Immigration),* 2002 SCC 3, [2002] 1 S.C.R. 84 at para. 82). I cannot conclude on the basis of the evidence as a whole that the Board adopted the standard order of questioning in the mistaken view that the RPD is a board of inquiry, even though it decides claimants' legal rights in the cases which they bring to it for adjudication and claimants bear the burden of proof. This conclusion is not undermined by a training document ("Questioning 101"), prepared by the Board's

Professional Development Branch in 2004 for members and RPOs, which contains a somewhat misleading reference to the compatibility of the standard order of questioning with “a board of inquiry model”.

[44] A relatively inquisitorial procedural form may reduce the degree of control over the process often exercisable by counsel in adversarial proceedings, especially before inexperienced tribunal members or those who lack the confidence that legal training can give. Nonetheless, the fair adjudication of individual rights is perfectly compatible with an inquisitorial process, where the order of questioning is not as obvious as it generally is in an adversarial hearing.

[45] Third, placing RPD members in the position of asking the claimant questions first, when no RPD is present, distorts their judicial role by thrusting them into the fray, thereby creating a reasonable apprehension of bias by making them appear to be acting as both judge and prosecutor. Guideline 7 is particularly burdensome for members now that panels normally comprise a single member, and there is often no RPO present to assume the primary responsibility for questioning the claimant on behalf of the Board.

[46] I disagree. Adjudicators can and should normally play a relatively passive role in an adversarial process, because the parties are largely responsible for adducing the evidence and arguments on which the adjudicator must decide the dispute. In contrast, members of the RPD, sometimes assisted by an RPO, do not have this luxury. In the absence in most cases of a party to oppose the claim, members are responsible for making the inquiries necessary, including

questioning the claimant, to determine the validity of the claim: see IRPA, paragraph 170(*a*); *Sivisamboo v. Canada (Minister of Citizenship and Immigration*), [1995] 1 F.C. 741 (T.D.) at 757-78; *Shahib v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1250 at para. 21. The fact that the member or the RPO may ask probing questions does not make the proceeding adversarial in the procedural sense.

[47] To the extent that statements in *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.), suggest that a member of the RPD hearing a refugee claim is restricted to asking the kind of questions that a judge in a civil or criminal proceeding may ask, they are, in my respectful opinion, incorrect, especially when no RPO is present.

[48] The fact that members question the claimant first when there is no RPO present does not distort the inquisitorial process established by IRPA and would not give rise to a reasonable apprehension of bias on the part of a person who was informed of the facts and had thought the matter through in a practical manner. Inquisitorial processes of adjudication are not unfair simply because they are relatively unfamiliar to common lawyers.

[49] Fourth, Guideline 7 interferes with claimants' right to the assistance of counsel because it prevents them from being taken through their story by their counsel before being subject to the typically more sceptical questioning by the RPO. I do not agree. Guideline 7 does not curtail counsel's participation in the hearing; counsel is present throughout and may conduct an examination of the client to ensure that the claimant's testimony is before the decision-maker. The

right to be represented by counsel does not include the right of counsel to determine the order of questioning or, for that matter, any other aspect of the procedure to be followed at the hearing.

[50] Finally, no statistical evidence was adduced to support the allegation that Guideline 7 jeopardizes the ability of the RPD accurately to determine claims for refugee protection. There is simply no evidence to establish what impact, if any, the introduction of Guideline 7 has had on acceptance rates.

[51] In summary, the procedure prescribed by Guideline 7 is not, on its face, in breach of the Board's duty of fairness. However, in some circumstances, fairness may require a departure from the standard order of questioning. In those circumstances, a member's refusal of a request that the claimant be questioned first by her counsel may render the determination of the claim invalid for breach of the duty of fairness.

[52] Consequently, if the Chairperson had implemented the reform to the standard order of questioning at refugee determination hearings in a formal rule of procedure issued in accordance with paragraph 161(1)(*a*), it would have been beyond challenge on the grounds advanced in this appeal respecting the duty of fairness, including bias. The somewhat technical question remaining is whether the Chairperson's choice of legislative instrument (that is, a guideline rather than a formal rule of procedure) to implement the procedural change was in law open to him.

Issue 3: Is Guideline 7 unauthorized by paragraph 159(1)(*h*) because it is a fetter on RPD members' exercise of discretion in the conduct of hearings?

[53] As already noted, Justice Blanchard and, in *Benitez*, Justice Mosley, reached different conclusions on whether Guideline 7 unlawfully fettered the discretion of members of the RPD in deciding the order of questioning at a refugee determination hearing. The records in the two applications were not identical. In particular, there was more evidence before Justice Mosley, comprising some forty decisions and excerpts from transcripts of RPD hearings, that RPD members are willing to recognize exceptional cases in which it is appropriate to depart from the standard order of questioning.

[54] In the circumstances of these appeals, it is appropriate to consider all the evidence before both judges. From a practical point of view, it would be anomalous if this Court were to reach different conclusions about the validity of Guideline 7 in two cases set down to be heard one after the other. However, I do not attach much, if any, significance to the differences in the records. Justice Blanchard properly based his conclusion, for the most part, on what he saw as the mandatory language of Guideline 7.

(i) Rules, discretion and fettering

[55] Effective decision-making by administrative agencies often involves striking a balance between general rules and the exercise of *ad hoc* discretion or, to put it another way, between the benefits of certainty and consistency on the one hand, and of flexibility and fact-specific solutions on the other. Legislative instruments (including such non-legally binding “soft law” documents as policy statements, guidelines, manuals, and handbooks) can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly,

and enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case by case basis.

[56] Though the use of "soft law" an agency can communicate prospectively its thinking on an issue to agency members and staff, as well as to the public at large and to the agency's "stakeholders" in particular. Because "soft law" instruments may be put in place relatively easily and adjusted in the light of day-to-day experience, they may be preferable to formal rules requiring external approval and, possibly, drafting appropriate for legislation. Indeed, an administrative agency does not require an express grant of statutory authority in order to issue guidelines and policies to structure the exercise of its discretion or the interpretation of its enabling legislation: *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 121 D.L.R. (4th) 79 (Ont. C.A.) at 83 ("*Ainsley*").

[57] Both academic commentators and the courts have emphasized the importance of these tools for good public administration, and have explored their legal significance. See, for example, Hudson N. Janisch, "The Choice of Decision-Making Method: Adjudication, Policies and Rule-Making" in Special Lectures of the Law Society of Upper Canada 1992, *Administrative Law: Principles, Practice and Pluralism*; David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 374-79**;** P.P. Craig, *Administrative Law*, 5th edn. (London: Thomson, 2003) at 398-405, 536-40; *Capital Cities Communications Inc. v. CRTC*, [1978] 2 S.C.R. 141 at 171; *Vidal v. Canada (Minister of Employment and Immigration*) (1991), 49 Admin. L.R. 118 (F.C.T.D.) at 131; *Ainsley* at 82-83.

[58] Legal rules and discretion do not inhabit different universes, but are arrayed along a continuum. In our system of law and government, the exercise of even the broadest grant of statutory discretion which may adversely affect individuals is never absolute and beyond legal control: *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140. (*per* Rand J.). Conversely, few, if any, legal rules admit of no element of discretion in their interpretation and application: *Baker* at para. 54.

[59] Although not legally binding on a decision-maker in the sense that it may be be an error of law to misinterpret or misapply them, guidelines may validly influence a decision-maker's conduct. Indeed, in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, McIntyre J., writing for the Court, said (at 6):

> The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; …" does not fetter the exercise of that discretion. [Emphasis added]

The line between law and guideline was further blurred by *Baker* at para. 72, where, writing for a majority of the Court, L'Heureux-Dubé J. said that the fact that administrative action is contrary to a guideline "is of great help" in assessing whether it is unreasonable.

[60] The use of guidelines, and other "soft law" techniques, to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions. This is especially true for large tribunals, such as the Board, which sit in panels; in the case of the RPD, as already noted, a panel typically comprises a single member.

[61] It is fundamental to the idea of justice that adjudicators, whether in administrative tribunals or courts, strive to ensure that similar cases receive the same treatment. This point was made eloquently by Gonthier J. when writing for the majority in *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*, [1990] 1 S.C.R. 282 at 327 ("*Consolidated-Bathurst*"):

> It is obvious that coherence in administrative decision-making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be "difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one". [Citation omitted]

[62] Nonetheless, while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision-makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision-maker's exercise of discretion was unlawfully fettered: see, for example, *Maple Lodge Farms* at 7. This level of compliance may only be achieved through the exercise of a statutory power to make "hard" law, through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure.

[63] In addition, the validity of a rule or policy itself has sometimes been impugned independently of its application in the making of a particular decision. *Ainsley* is the best known example. That case concerned a challenge to the validity of a non-statutory policy statement issued

by the Ontario Securities Commission setting out business practices which would satisfy the public interest in the marketing of penny stocks by certain securities dealers. The policy also stated that the Commission would not necessarily impose a sanction for non-compliance on a dealer under its "public interest" jurisdiction, but would consider the particular circumstances of each case.

[64] Writing for the Court in *Ainsley*, Doherty J.A. adopted the criteria formulated by the trial judge for determining if the policy statement was "a mere guideline" or was "mandatory", namely, its language, the practical effect of non-compliance, and the expectations of the agency and its staff regarding its implementation. On the basis of these criteria, Doherty J.A. concluded that the policy statement was invalid. He emphasized, in particular, its minute detail, which "reads like a statute or regulation" (at 85), and the threat of sanctions for non-compliance. He found this threat to be implicit in the Commission's pronouncement that the business practices it described complied with the public interest, and was evident in the attitude of enforcement staff ,who treated the policy as if it were a statute or regulation, breach of which was liable to trigger enforcement proceedings.

(ii) Guideline 7 and the fettering of discretion

(a) ***Is Guideline 7 delegated legislation?***

[65] An initial question is whether guidelines issued under IRPA, paragraph 159(1)(*h*) constitute delegated legislation, having the full force of law ("hard law"). If they do, Guideline 7 can no more be characterized as an unlawful fetter on members' exercise of discretion with respect to the order of questioning than could a rule of procedure to the same effect issued under IRPA, paragraph

161(1))(*a*): *Bell Canada v. Canadian Telephone Association Employees*, 2003 SCC 36, [2003] 1 S.C.R. 884 at para 35 ("*Bell Canada*").

[66] In my view, despite the express statutory authority of the Chairperson to issue guidelines, they do not have the same legal effects that statutory rules can have. In particular, guidelines cannot lay down a mandatory rule from which members have no meaningful degree of discretion to deviate, regardless of the facts of the particular case before them. The word "guideline" itself normally suggests some operating principle or general norm, which does not necessarily determine the result of every dispute.

[67] However, the meaning of "guideline" in a statute may depend on context. For example, in *Society of the Friends of Oldman River v. Canada (Minister of the Environment),* [1992] 1 S.C.R. 3 at 33-37, La Forest J. upheld the validity of mandatory environmental assessment guidelines issued under section 6 of the *Department of the Environment Act,* R.S.C. 1985, c. E-10, which, he held, constituted delegated legislation and, as such, were legally binding.

[68] In my view, *Oldman River* is distinguishable from the case before us. Section 6 of the *Department of the Environment Act* provided that guidelines were to be issued by an "order" ("*arrêté*") of the Minister and approved by the Cabinet. In contrast, only rules issued by the Chairperson require Cabinet approval, guidelines ("*directives*") do not. It would make little sense for IRPA to have conferred powers on the Chairperson to issue two types of legislative instrument,

guidelines and rules, specified that rules must have Cabinet approval, and yet given both the same legal effect.

[69] Guidelines issued by the Human Rights Commission pursuant to subsection 27(2) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, have also been treated as capable of having the full force of law, even though they are made by an independent administrative agency and are not subject to Cabinet approval: *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146 (T.D.) at paras. 136-41; *Bell Canada* at paras. 35-38.

[70] In *Bell Canada*, LeBel J. held (at para. 37), "on a functional and purposive approach to the nature" of the Commission's guidelines, that they were "akin to regulations", a conclusion supported by the use of the word "*ordonnance*" in the French text of subsection 27(2) of the *Canadian Human Rights Act*. In addition, subsection 27(3) expressly provides that guidelines issued under subsection 27(2) are binding on the Commission and on the person or panel assigned to inquire into a complaint of discrimination referred by the Commission under subsection 49(2) of the Act.

[71] In my opinion, the scheme of IRPA is different, particularly the inclusion of a potentially overlapping rule-making power and the absence of a provision that guidelines are binding on adjudicators. In addition, the word "*directives*" in the French text of paragraph 159(1)(*h*) suggests a less legally authoritative instrument than "*ordonnance*".

[72] I conclude, therefore, that, even though issued under an express statutory grant of power, guidelines issued under IRPA, paragraph 159(1)(*h*) cannot have the same legally binding effect on members as statutory rules may.

(b) Is Guideline 7 an unlawful fetter on members' discretion?

[73] Since guidelines issued by the Chairperson of the Board do not have the full force of law, the next question is whether, in its language and effect, Guideline 7 unduly fetters RPD members' discretion to determine for themselves, case-by-case, the order of questioning at refugee protection hearings. In my opinion, language is likely to be a more important factor than effect in determining whether Guideline 7 constitutes an unlawful fetter. It is inherently difficult to predict how decision-makers will apply a guideline, especially in an agency, like the Board, with a large membership sitting in panels.

[74] Consequently, since the language of Guideline 7 expressly permits members to depart from the standard order of questioning in exceptional circumstances, the Court should be slow to conclude that members will regard themselves as bound to follow the standard order, in the absence of clear evidence to the contrary, such as that members have routinely refused to consider whether the facts of particular cases require an exception to be made.

[75] I turn first to language. The Board's *Policy on the Use of Chairperson's Guidelines*, issued in 2003, states that guidelines are not legally binding on members: section 6. The introduction to Guideline 7 states: "The guidelines apply to most cases heard by the RPD. However, in compelling

or exceptional circumstances, the members will use their discretion not to apply some guidelines or to apply them less strictly"

[76] The text of the provisions of Guideline 7 of most immediate relevance to this appeal. Paragraph 19 states that it "will be" standard practice for the RPO to question the claimant first; this is less obligatory than "must" or some similarly mandatory language. The discretionary element of Guideline 7 is emphasized in paragraph 19, which provides that, while "the standard practice will be for the RPO to start questioning the claimant" (emphasis added), a member may vary the order "in exceptional circumstances".

[77] Claimants who believe that exceptional circumstances exist in their case must apply to the RPD, before the start of the hearing, for a change in the order of questioning. The examples, and they are only examples, of exceptional circumstances given in paragraph 23 suggest that only the most unusual cases will warrant a variation. However, the parameters of "exceptional circumstances" will no doubt be made more precise, and likely expanded incrementally, on a case-by-case basis.

[78] I agree with Justice Blanchard's conclusion (at para. 119) that the language of Guideline 7 is more than "a recommended but optional process". However, as *Maple Lodge Farms* makes clear, the fact that a guideline is intended to establish how discretion will normally be exercised is not enough to make it an unlawful fetter, as long as it does not preclude the possibility that the decision-maker may deviate from normal practice in the light of particular facts: see *Ha v. Canada (Minister of Citizenship and Immigration),* 2004 FCA 49, [2004] 3 F.C.R. 195.

[79] To turn to the effect of Guideline 7, there was evidence that, when requested by counsel, members of the RPD had exercised their discretion and varied the standard order of questioning in cases which they regarded as exceptional. No such request was made on behalf of Mr Thamotharem. In any event, members must permit a claimant to be questioned first by her or his counsel when the duty of fairness so requires.

[80] In at least one case, however, a member wrongly regarded himself as having no discretion to vary the standard order of questioning prescribed in Guideline 7. On July 3, 2005, this decision was set aside on consent on an application for judicial review, on the ground that the member had fettered the exercise of his discretion, and the matter remitted for re-determination by a different member of the RPD: *Baskaran v. Canada (Minister of Citizenship and Immigration)* (Court File No. IMM-7189-04). Nonetheless, the fact that some members may erroneously believe that Guideline 7 removes their discretion to depart from the standard practice in exceptional circumstances does not warrant invalidating the Guideline. In such cases, the appropriate remedy for an unsuccessful claimant is to seek judicial review to have the RPD's decision set aside.

[81] There was also evidence from Professor Donald Galloway, an immigration and refugee law scholar, a consultant to the Board and a former Board member, that RPD members would feel constrained from departing from the standard order of questioning. However, he did not base his opinion on the actual conduct of members with respect to Guideline 7.

[82] In short, those challenging the validity of Guideline 7 did not produce evidence establishing on a balance of probabilities that members rigidly apply the standard order of questioning without regard to its appropriateness in particular circumstances.

[83] I recognize that members of the RPD must perform their adjudicative functions without improper influence from others, including the Chairperson and other members of the Board. However, the jurisprudence also recognizes that administrative agencies must be free to devise processes for ensuring an acceptable level of consistency and quality in their decisions, a particular challenge for large tribunals which, like the Board, sit in panels.

[84] Most notably, the Supreme Court of Canada in *Consolidated-Bathurst* upheld the Ontario Labour Relations Board's practice of inviting members of panels who had heard but not yet decided cases to bring them to "full Board meetings", where the legal or policy issues that they raised could be discussed in the absence of the parties**.** This practice was held not to impinge improperly on members' adjudicative independence, or to breach the principle of procedural fairness that those who hear must also decide. Writing for the majority of the Court, Gonthier J. said (at 340):

> The institutionalization of the consultation process adopted by the Board provides a framework within which the experience of the chairman, vice-chairmen and members of the Board can be shared to improve the overall quality of its decisions. Although respect for the judicial independence of Board members will impede total coherence in decision making, the Board through this consultation process seeks to avoid inadvertent contradictory results and to achieve the highest degree of coherence possible under these circumstances. …
>
> The advantages of an institutionalized consultation process are obvious and I cannot agree with the proposition that this practice necessarily conflicts with the rules of natural justice. The rules of

> natural justice must have the flexibility required to take into account the institutional pressures faced by modern administrative tribunals as well as the risks inherent in such a practice. …

[85] However, the arrangements made for discussions within an agency with members who have heard a case must not be so coercive as to raise a reasonable apprehension that members' ability to decide cases free from improper constraints has been undermined: *Tremblay v. Québec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952.

[86] Evidence that the Immigration and Refugee Board "monitors" members' deviations from the standard order of questioning does not, in my opinion, create the kind of coercive environment which would make Guideline 7 an improper fetter on members' exercise of their decision-making powers. On a voluntary basis, members complete, infrequently and inconsistently, a hearing information sheet asking them, among other things, to explain when and why they had not followed "standard practice" on the order of questioning. There was no evidence that any member had been threatened with a sanction for non-compliance. Given the Board's legitimate interest in promoting consistency, I do not find it at all sinister that the Board does not attempt to monitor the frequency of members' compliance with the "standard practice".

[87] Nor is it an infringement of members' independence that they are expected to explain in their reasons why a case is exceptional and warrants a departure from the standard order of questioning. Such an expectation serves the interests of coherence and consistency in the Board's decision-making in at least two ways. First, it helps to ensure that members do not arbitrarily ignore Guideline 7. Second, it is a way of developing criteria for determining if circumstances are

"exceptional" for the purpose of paragraph 23 and of providing guidance to other members, and to the Bar, on the exercise of discretion to depart from the standrd order of questioning in future cases.

[88] In my opinion, therefore, the evidence in the present case does not establish that a reasonable person would think that RPD members' independence was unduly constrained by Guideline 7, particularly in view of: the terms of the Guideline; the evidence of members' deviation from "standard practice"; and the need for the Board, the largest administrative agency in Canada, to attain an acceptable level of consistency at hearings, conducted mostly be single members.

[89] Adjudicative "independence" is not an all or nothing thing, but is a question of degree. The independence of judges, for example, is balanced against public accountability, through the Canadian Judicial Council, for misconduct. The independence of members of administrative agencies must be balanced against the institutional interest of the agency in the quality and consistency of the decisions, from which there are normally only limited rights of access to the courts, rendered by individual members in the agency's name.

(iii) Is Guideline 7 invalid because it is a rule of procedure and should therefore have been issued under IRPA, paragraph 161(1)(*a*)?

[90] On its face, the power granted by IRPA, paragraph 159(1)(*h*) to the Chairperson to issue guidelines in writing "to assist members in carrying out their duties" is broad enough to include a guideline issued in respect of the exercise of members' discretion in procedural, evidential or substantive matters. Members' "duties" include the conduct of hearings "as informally and quickly

as the circumstances and the considerations of fairness and natural justice permit": IRPA, section 162. In my view, structuring members' discretion over the order of questioning is within the subject-matter of the guidelines contemplated by section 159.

[91] In any event, the Chairperson did not need an express grant of statutory authority to issue guidelines to members. Paragraph 159(1)(*h*) puts the question beyond dispute, establishes a duty to consult before a guideline is issued, and, perhaps, enhances their legitimacy.

[92] An express statutory power to issue guidelines was first conferred on the Chairperson of the Board in 1993, as a result of an amendment to the former *Immigration Act* by *Bill C-86.* Appearing before the Committee of the House examining the Bill, Mr Gordon Fairweather, the then Chairperson of the Board welcomed this addition to the Board's powers:

> I'm also pleased that the minister has responded to the need for new tools for managing the board itself. In the board's desire to ensure consistency of decision-making, we welcome the legislative provision allowing for guidelines…. The provision will reinforce my authority, after appropriate consultations, and the courts have been very specific about saying, no guidelines until you have consulted widely with the caring agencies, the immigration bar, and other non-governmental organizations. But the courts have given the green light for such provision provided we go through those consultations. This provision will reinforce my authority, or the chair's authority – that is a little less pompous – after appropriate consultations to direct members toward preferred positions and therefore foster consistency in decisions. [Emphasis added]
>
> (Canada, House of Commons, Legislative Committee on Bill C-86, Minutes of Proceedings and Evidence, 34th Parl., 3d sess., Issue 5 (July 30, 1992) at 80)

[93] In my view, the present appeal raises an important question about the relationship between the Chairperson's powers to issue guidelines and rules. In particular, are these grants of legal authority cumulative so that, for the most part, the scope of each is to be determined independently of the other? Or, is the Chairperson's power to issue guidelines implicitly limited by the power to make rules of procedure? If it is, then a change to the procedure of any Division of the Board may only be effected through a rule of procedure issued under paragraph 161(1)(*a*) which has been approved by Cabinet and subjected to Parliamentary scrutiny in accordance with subsection 161(2).

[94] The argument in the present case is that Guideline 7 is a rule of procedure and, since it reforms the existing procedure of the RPD, should have been issued under paragraph 161(1)(*a*), received Cabinet approval and been laid before Parliament. The power of the Chairperson to issue guidelines may not be used to avoid the political accountability mechanisms applicable to statutory rules issued under subsection 161(1).

[95] For this purpose, the fact that Guideline 7 permits RPD members to exercise their discretion in "exceptional circumstances" to deviate from "standard practice" in the order of questioning does not prevent it from being a rule of procedure: rules of procedure commonly confer discretion to be exercised in the light of particular facts.

[96] An analogous line of reasoning is found in the Ontario Court of Appeal's decision in *Ainsley*, where it was said that the Ontario Securities Commission's policy statement prescribing business practices of penny stock dealers which would satisfy the statutory public interest standard

was invalid, because it was in substance and effect "a mandatory provision having the effect of law" (at 84). In my opinion, however, *Ainsley* should be applied to the present case with some caution.

[97] First, when *Ainsley* was decided, the Commission had no express statutory power to issue guidelines and no statutorily recognized role in the regulation-making process. In contrast, the Chairperson of the Board has a broad statutory power to issue guidelines and, subject to Cabinet approval, to make rules respecting a broad range of topics, including procedure.

[98] Admittedly, the Board's rules of procedure (as well, of course, as IRPA itself and regulations made under it by the Governor in Council) have a higher legal status than guidelines, in the sense that, if a guideline and a rule conflict, the rule prevails.

[99] Second, the policy statement considered in *Ainsley* was directed at businesses regulated by the Commission and was designed to modify their practices by linking compliance with the policy to the Commission's prosecutorial power to institute enforcement proceedings, which could result in the loss of a licence by businesses not operating in "the public interest". Guideline 7, on the other hand, is directed at the practice of RPD members in the conduct of their proceedings. It does not impose *de facto* duties on members of the public or deprive them of an existing right. Guideline 7 lacks the kind of coercive threat, against either claimants or members, in the event of non-compliance, which was identified as important to the decision in *Ainsley*.

[100] The Commission's promulgation of detailed industry standards, other than through enforcement proceedings against individuals, when it lacked any legislative power, raised rule of law concerns. In my opinion, the same cannot plausibly be said of the Chairperson's decision to introduce a standard order of questioning through the statutory power to issue guidelines, rather than his power to issue rules.

[101] Third, while the Board can only issue formal statutory rules of procedure with Cabinet approval, tribunals often do not require Cabinet approval of their rules. In Ontario, for example, the procedural rules of tribunals to which the province's general code of administrative procedure applies are not subject to Cabinet approval: *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, subsection 25.1(1). Hence, it cannot be said to be a principle of our system of law and government that administrative tribunals' rules of procedure require political approval.

[102] Fourth, while Guideline 7 changed the way in which the Board conducts most of its hearings, it represents, in my view, more of a filling in of detail in the procedural model established by IRPA and the *Refugee Protection Division Rules*, than "fundamental procedural change" or "sweeping procedural reform", to use the characterization in the memorandum of the intervener, the Canadian Council for Refugees.

[103] For example, rule 16(*e*) includes the questioning of witnesses in the RPO's duties, but is silent on the precise point in the hearing when the questioning is to occur. Similarly, while rule 25 deals with the intervention of the Minister, it does not specify when the Minister will lead evidence

and make submissions. Rule 38 permits a party to call witnesses, but does not say when they will testify.

[104] Fifth, the differences in the legal characteristics of statutory rules of procedure and Guideline 7 should not be overstated. Rules of procedure commonly permit those to whom they are directed to depart from them in the interests of justice and efficiency. Thus, rule 69 of the *Refugee Protection Division Rules* permits a member to change a requirement of a rule or excuse a person from it, and to extend or shorten a time period. Failure to comply with a requirement of the Rules does not make a proceeding invalid: rule 70.

[105] Finally, as I have already indicated, the Chairperson's power to issue guidelines extends, on its face, to matters of procedure. Its exercise is not made expressly subject to paragraph 161(1)(*a*), although a guideline issued under paragraph 159(1)(*h*) which is inconsistent with a formal rule of procedure issued under paragraph 161(1)(*a*) will be invalid.

[106] On the basis of the foregoing analysis, I conclude that, on procedural issues, the Chairperson's guideline-issuing and rule-making powers overlap. That the subject of a guideline could have been enacted as a rule of procedure issued under paragraph 161(1)(*a*) will not normally invalidate it, provided that it does not unlawfully fetter members' exercise of their adjudicative discretion, which, for reasons already given, I have concluded that it does not.

[107] In my opinion, the Chairperson may choose through which legislative instrument to introduce a change to the procedures of any of the three Divisions of the Board. Parliament should not be taken to have implicitly imposed a rigidity on the administrative scheme by preventing the Chairperson from issuing a guideline to introduce procedural change or clarification.

[108] I do not say that the Chairperson's discretion to choose between a guideline or a rule is beyond judicial review. However, it was not unreasonable for the Chairperson to choose to implement the standard order of questioning through the more flexible legislative instrument, the guideline, rather than through a formal rule of procedure.

[109] First, Guideline 7 is not a comprehensive code of procedure nor, when considered in the context of the refugee determination process as a whole, is it inconsistent with the existing procedural model for RPD hearings. Second, the procedural innovation of standard order questioning may well require modification in the light of cumulated experience. Fine-tuning and adjustments of this kind are more readily accomplished through a guideline than a formal rule. Parliament should not be taken to have intended the Chairperson to obtain Cabinet approval for such changes.

E. CONCLUSIONS

[110] For these reasons, I would allow the Minister's appeal, dismiss Mr Thamotharem's cross-appeal, set aside the order of the Federal Court, and dismiss the application for judicial review. I would answer the first two certified questions as follows:

1. Does the implementation of paragraphs 19 and 23 of the Chairperson's Guideline 7 violate principles of natural justice by unduly interfering with claimants' right to be heard? No

2. Has the implementation of Guideline 7 led to fettering of Board Members' discretion? No.

[111] Since I would dismiss the application for judicial review, the third question does not arise and need not be answered.

"John M. Evans"
J.A.

"I agree.
Robert Décary J.A."

SHARLOW J.A. (Concurring)

[112] I agree with my colleague Justice Evans that this appeal should be allowed, but I reach that conclusion by a different route.

[113] As Justice Evans explains, IRPA gives the Chairperson two separate powers. One is the power in paragraph 159(1)(h) to issue guidelines in writing to assist Members in carrying out their duties. The other is the power in paragraph 161(1)(a) to make rules respecting the activities, practice and procedure of the Board, subject to the approval of the Governor in Council. Both powers are to be exercised in consultation with the Deputy Chairpersons and the Director General of the Immigration Division. In my view, these two powers are different in substantive and functional terms, and are not interchangeable at the will of the Chairperson.

[114] The subject of Guideline 7 is the order of proceeding in refugee hearings. That is a matter respecting the activities, practice and procedure of the Board, analogous to the subject matter of the procedural rules of courts. In my view, the imposition of a standard practice for refugee determination hearings should have been the subject of a rule of procedure, not a guideline.

[115] I make no comment on the wisdom of the Chairperson's determination that the standard practice in refugee hearings, barring exceptional circumstances, should be for the RPO or the Member to start questioning the refugee claimant. That is a determination that the Chairperson was entitled to make. However, to put that determination into practice while respecting the limits of the statutory authority of the Chairperson, the Chairperson should have drafted a rule to that effect, in

consultation with the Deputy Chairpersons and the Director General of the Immigration Division, and sought the approval of the Governor in Council.

[116] Justice Evans notes that some commentators have suggested that the implementation of a rule under paragraph 161(1)(a) is more onerous in administrative and bureaucratic terms than the implementation of a guideline under paragraph 159(1)(h). That appears to me to be an unduly negative characterization of the legislated requirement for the approval of the Governor in Council, Parliament's chosen mechanism of oversight for the Chairperson's rule making power under paragraph 161(1)(a). It is also belied by the facts of this case, which indicates that the development of Guideline 7 took approximately four years. I doubt that a rule with the same content would necessarily have taken longer than that.

[117] The more important question in this case is whether the Chairperson's erroneous decision to implement a guideline rather than a rule to establish a standard practice for refugee hearings provides a sufficient basis in itself for setting aside a negative refugee determination made by a Member who requires a refugee claimant to submit to questions from the RPO or the Member before presenting his or her own case.

[118] I agree with Justice Evans that the standard procedure outlined in Guideline 7 is not in itself procedurally unfair and that Guideline 7, properly understood, does not unlawfully fetter the discretion of Members. In my view, despite Guideline 7, each Member continues to have the

unfettered discretion to adopt any order of procedure required by the exigencies of each claim to which the Member is assigned.

[119] It may be the case that a particular Member may conclude incorrectly that Guideline 7 deprives the Member of the discretion to permit a refugee claimant to present his or her case before submitting to questioning from the RPO or the Member. If so, it is arguable that a negative refugee determination by that Member is subject to being set aside if (1) the Member refused the request of a refugee claimant to proceed first and required the refugee claimant to submit to questioning by the RPO or the Member before presenting his or her case, and (2) it is established that, but for Guideline 7, the Member would have permitted the refugee claimant to present his or her case first. In the case of Mr. Thamotharem, those conditions have not been met.

[120] For these reasons, I would dispose of this appeal as proposed by Justice Evans, and I would answer the certified questions as he proposes.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-38-06

APPEAL FROM A DECISION OF HON. MR. JUSTICE BLANCHARD, DATED JANUARY 19, 2006, IN FEDERAL COURT FILE IMM-7836-04

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND IMMIGRATION — Appellant

and

DANIEL THAMOTHAREM — Respondent

and

THE CANADIAN COUNCIL FOR REFUGEES and THE IMMIGRATION AND REFUGEE BOARD — Interveners

PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 16, 2007
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	DÉCARY J.A.
CONCURRING REASONS BY:	SHARLOW J.A.
DATED:	MAY 25, 2007

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