CONSEIL CANADIEN POUR LES RÉFUGIÉS

CANADIAN COUNCIL FOR REFUGEES

C-11 REGULATORY AMENDMENTS

Comments on proposed Regulations Amending the Immigration and Refugee Protection Regulations [Designated Countries of Origin], Published in the Canada Gazette, Part I, Vol. 145, No. 12, March 19, 2011

18 April 2011

On March 19, 2011, Citizenship and Immigration Canada published proposed regulatory amendments in the Canada Gazette.[1] The following are the comments of the Canadian Council for Refugees (CCR) on the proposed amendments.

TIMELINE FOR SUBMITTING AN APPEAL TO THE REFUGEE APPEAL DIVISION

The proposed regulations give refugee claimants just 15 days, from the day they receive a negative decision, to file their appeal, with all the submissions (technically speaking, 15 days to "file and perfect the application").

It is completely impossible in most cases for refugees to meet a 15 day deadline. A lawyer needs to review the legal and evidentiary issues and prepare the submissions – to do that properly takes more than 15 days. With the fast time-lines of the new refugee determination system, few claimants are likely to have received a work permit by the time of the IRB decision, so most will require legal aid. Simply getting legal aid coverage can take more than 15 days.

A 15-day deadline for filing and perfecting an appeal will:

- Mean that wrong decisions will go uncorrected and refugees may be sent back to persecution, torture or death.
- Hurt in particular the most vulnerable refugees, including survivors of torture, children and youth, refugees who don't speak English or French, women with children, and people suffering from Post-Traumatic Stress Disorder.
- Make the Refugee Appeal Division a huge waste of money – the decision-makers won't have any proper submissions to consider.

Because the 15 day timeline is unworkable, there will inevitably be requests for extensions of time in almost every case. The Refugee Appeal Division will be forced to dedicate significant time and resources to processing these requests. A reasonable timeline would be more efficient, by making it unnecessary to argue in each individual case that the 15 day timeline is inconsistent with the principle of fairness.

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[1] Canada Gazette, Part I, Vol. 145, No. 12, March 19, 2011, Regulations Amending the Immigration and Refugee Protection Regulations [Designated Countries of Origin], http://www.gazette.gc.ca/rp-pr/p1/2011/2011-03-19/html/reg1-eng.html

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Recommendation
The CCR recommends that the Regulations be amended to give claimants appealing a negative decision a minimum of 15 days to file the application to the Refugee Appeal Division and 30 days to perfect (complete) the application.

Rationale for 15 days + 30 days
The current timelines for an application for judicial review at the Federal Court are 15 days to give notice and 30 days to perfect the application. Applications for judicial review and to the Refugee Appeal Division involve many of the same steps: interviewing the claimant, reading the decision, obtaining all the documents submitted in the claim, listening to the audio recording of the hearing, deciding if there are any errors, researching the law and writing the submissions.

In the case of applications to the Refugee Appeal Division it will also be necessary to identify and prepare for submission any new evidence that shows that the person is in fact a refugee. This might include sworn affidavits and expert evidence.

The proposed timeline is not what was presented to Parliament when Bill C-11 was passed
In adopting Bill C-11, parliamentarians were led to believe that refugee claimants would have a reasonable time to prepare their appeal.

The Minister of Citizenship and Immigration specifically told the Senate that the 15-day period would be the timeline for claimants simply to give notice of their intention to file an appeal to the Refugee Appeal Division.

On June 22, 2010, at a meeting of the Standing Senate Committee on Social Affairs, Science and Technology, which was studying Bill C-11, Senator Cordy raised the matter of timelines for the refugee appeal:

> Senator Cordy: There is some concern that the new rules may require appeals to be filed too quickly, that people may not have time to get counsel. I understand that the time frames are not in the legislation but will likely be in regulations. The Federal Court allots 15 days to the appeal and a further 30 days to file the appeal itself. Are those the guidelines? We do not want the appeal time dragging on forever, but we do want enough time for those filing an appeal to get their case in order.

The Minister responded as follows:

> Mr. Kenney: No, we will not be using the Federal Court guidelines, because the IRB has its own guidelines. Those will be modified to reflect the timelines that we are calling for in the new system. A claimant who is rejected by the refugee protection division has a 15-day period in which to indicate their intention to file an appeal to the Refugee Appeal Division. Most claimants would then have four months before their appeal is reviewed. Fast-track claimants, that is, clearly fraudulent claimants or those coming from safe countries, would have their appeal heard within about 30 days.[2] [emphasis added]

[2] http://bit.ly/i8guU6

To adopt regulations requiring that claimants not only indicate their intention to file an appeal, but also make all relevant submissions, would not be consistent with the Minster's assurance to Parliament.

The timeline is not workable for claimants who need legal aid

Many refugee claimants will need to rely on legal aid to prepare an appeal. This will be particularly true for the most vulnerable claimants, including survivors of torture and organized violence, claimants with health problems, unaccompanied children, and mothers alone with their children. In fact, most claimants will likely need to rely on legal aid, since with the fast time-lines of the new refugee determination system, few claimants will have received a work permit by the time of the IRB decision.

Provincial legal aid societies are unlikely to be able to provide coverage to meet the proposed 15 day timeline for filing and perfecting a RAD application. The BC Legal Services Society has already indicated in its submission to the IRB that a 15 day timeframe would be problematic:

> "We anticipate that this 15 day timeframe will pose significant barriers to LSS's ability to screen legal aid applicants for RAD representation, and to appoint counsel. Performing a merit screening and making a referral to a lawyer could take 15 days or more (assuming the claimant contacts LSS on the day he or she receives the decision, which is not always the case). After receiving the referral, the lawyer then needs time to prepare the appeal notice and the appeal document. This timeframe will prove extremely problematic for counsel preparing for the appeal, if that counsel was not counsel of record for the RPD Hearing.
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> We recommend that there be a 15-day timeframe for filing the notice of appeal and an additional 30 days be provided for filing the appeal document."[3]

BC is not the only province where there is a screening stage, at which the legal aid society decides whether an appeal is strong enough to deserve to be covered by legal aid. In Ontario, for example, a lawyer must prepare an opinion letter that is reviewed by an area committee of Legal Aid Ontario. The decision on whether the appeal will be covered may take one to two weeks. Clearly these timelines are not compatible with submitting a perfected appeal within 15 days of a decision.

DESIGNATED COUNTRIES OF ORIGIN

The Canadian Council for Refugees is firmly opposed to the provisions related to designated countries of origin. Treating claimants differently based on country of origin is unfair. Refugee determination requires individual assessment of each case, not group judgments. Claimants from designated countries will face a bias against them even at the first level, since Board members will be aware of the government's judgement on the country. In addition, shorter timelines will give them less opportunity to prepare themselves adequately and to obtain evidence documenting their claim. Denial of fair process to these claimants may lead to their forced return to persecution, in violation of human rights law.

[3] http://www.lss.bc.ca/assets/aboutUs/reports/submissions/submissionToImmigrationAndRefugeeBoard2010.pdf

We note that claimants that will be particularly hurt include women making gender-based claims, and persons claiming on the basis of sexual orientation. In many countries that otherwise seem relatively peaceful and "safe", there may be serious problems of persecution on these grounds.

Given the fundamental unfairness of designated countries of origin, we recommend that no regulations be adopted regarding their designation and that no countries be designated.

In the event that regulations are adopted, we note the following flaws in the proposed regulations:

- *Quantitative criteria* (IRPR 159.8 and 159.9)

The quantitative criteria (at least 1% of claims and 15% or less acceptance rate) are to be applied to any 12 month period in the three preceding years. This makes the criteria largely meaningless as they would allow the designation of a country based on three-year-old data.

Consider the following hypothetical example. A country had an acceptance rate of 15% three years ago, but since then the acceptance rate climbed to over 30%, as a consequence of a dramatic increase in human rights abuses in the country. This country would still be eligible for designation, according to the quantitative criteria, based on an acceptance rate from three years ago.

The fact that the draft regulations provide for "any 12 month period" to be selected reinforces the impression that the criteria have been designed for the purposes of manipulation, rather than to set an objective standard. Even if no calendar year yields the required statistics, the Minister can attempt to reach them by cobbling together some months from one year and others from the next year.

- *Factors to be considered* (IRPR 159.92)

The proposed factors fail to take into account:

- Existence of discrimination (as noted above, many of the founded claims from countries that might generally appear safe for many citizens relate to gender persecution, or persecution on the basis of sexual orientation. There may also be extreme discrimination on the basis of religion or ethnicity).

- The effectiveness of rights. For example, a country may have an independent judiciary and a system of remedies, but if the court's rulings are not respected and the system of remedies does not actually deliver remedies, these protections are meaningless.