PRESENTATION TO STANDING COMMITTEE ON CITIZENSHIP AND IMMIGRATION REGARDING BILL C -11

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OVERVIEW

Why do we Need Refugee Reform?

Given that this legislation is about reform, the first question that must be asked is whether or not the current system is in need of reform?

Many have argued with considerable effect, that the current system provides a reasonable refugee determination system. The delays inherent in the current procedure are not related to deficiencies in the system *per se* but rather to external problems, principally lack of adequate funding.

Indeed a review of the bottlenecks in the current system reveal that many are in fact not related to the procedure itself but rather to insufficient resources or other external factors.

1. ANALYSIS OF CURRENT PROCEDURE

a) Eligibility Procedure

The first step in the refugee determination procedure requires an eligibility determination to be made by the Canada Border Services Agency (CBSA). The *Act* deems that a person's claim is referred to the Board within three days but the Board has developed a policy where it will not consider cases until the CBSA signs off on eligibility concerns, which are mostly related to security. In some instances, there have been lengthy delays of a year or longer while the CBSA does security clearances on specific cases. It is not clear how the new system will change that dynamic.

b) Presenting Initial Statement (PIF)

Under the current system, a claimant is required to file his PIF within 28 days. There are often delays in the presentation of the form due to the claimant's difficulty in retaining counsel within that time frame. Again, although the new system proposes to replace the PIF with a hearing, holding such an important information gathering exercise without counsel will raise serious concerns about the fairness of the procedure. Here the issue is ensuring that claimants have timely access to counsel, a problem that exists under the current system and will continue under the new regime.

c) Scheduling of Hearing

Given the volume of cases that often confronts the Board, there have been lengthy delays in scheduling hearings. Sometimes, there can be a delay of a year and a half or even longer between the person's initiating the claim and the scheduling of a hearing. This is a result of the number of claims exceeding the Board's capacity. At different times, the Board has not had a full complement of members, and the Board's capacity to hear claims was significantly diminished. This created a large backlog. Although the new legislation proposes to replace GIC appointees with Public Service Employees, this change will not make the system more efficient. What has been required and is required is a firm commitment to ensure that the IRB will always have a sufficient number of decision makers to render decisions in a timely fashion.

d) Delays at the Federal Court

Under the current system, in most cases, when a person makes a claim for refugee protection, if it is rejected, the person has a right to apply for leave to commence an application for judicial review in the Federal Court. If the person seeks leave then the deportation is stayed until leave is determined. The effect of this is to delay removal until the Federal Court determines leave. In the past, there were significant delays and backlogs in processing applications for leave. However, over the last two years, the court has been successful in eliminating much of the backlog. However, in recent times a new backlog has begun to develop again. The legislation proposes to add four Federal Court Justices. This will alleviate the backlog to some extent.

e) Pre-Removal Risk Assessment

One cause for delay in the current process is the pre-removal risk assessment (PRRA). The purpose of the PRRA was to provide for a timely assessment of risk prior to removal. The PRRA was to be an administrative process done by officers as opposed to a process requiring an oral hearing. In addition, in some cases where persons were found ineligible to have a hearing, the PRRA would be the only place where risk would be determined. Once a person applies for a PRRA his or her deportation is stayed until the PRRA is decided.

The difficulty with the PRRA process is that although it is an administrative process and does not usually require an oral hearing, PRRA officers usually can decide one or two cases a day. Given the large volume of cases that make their way through the PRRA process, this has created delays in the system. At the present time, the average time from when a person is found not to be a refugee and to when his or her PRRA is decided can exceed six months. However, reforms to the PRRA procedure could make it more

efficient so that it properly achieves its objective of reviewing new evidence that has arisen since the previous proceeding.

The new legislation proposes to replace the PRRA with an appeal to the Refugee Appeal Division in most cases. While I believe that this is a superior alternative to the PRRA, I do believe that a properly constituted PRRA could achieve the same objective. The issue is not with the legislation but rather with how it has been implemented by CIC.

f) Humanitarian and Compassionate Applications and Applications for Temporary Resident Permits

There has been some suggestion that humanitarian and compassionate (H&C) applications and applications for temporary resident permits also create delays in removal. This is incorrect. Neither an application for consideration on H&C grounds, an application for a temporary resident permit or an application to defer removal in and of themselves provide grounds for delay. There is no statutory requirement to defer removal or to delay removal pending such an application. These applications are only relevant insofar as a person who has made one of these applications can seek a stay of removal in the Federal Court. However, in order to obtain a stay, the applicant must satisfy a Federal Court judge that he or she raises a serious issue with respect to the application and that he or she will suffer irreparable harm. Given the very high threshold for both of these, obtaining a stay is extremely difficult and only a small minority of cases obtain stays. The number of stays granted by the Federal Court in any given year likely does not number more than a few hundred.

As such, there is no basis to argue that H&C applications, temporary resident permit applications or applications to defer removal cause delays in the system.

More importantly humanitarian and compassionate applications are a key component of our immigration system. It is a procedure that has been used by tens of thousands of persons over the years. It is an important safeguard in a system that must deal with human beings in desperate situations. Any attempt to curtail it will undermine our humanitarian tradition.

2. A Fair Refugee Determination System

There is no dispute as to what would be the ideal refugee system. Refugees want a quick, expeditious and fair determination of their claim. This will require a hearing before an independent and competent decision maker with the possibility of an appeal on the merits. A fair, fast and efficient determination process favours genuine refugees. It also acts as a disincentive for claimants who do not have genuine fears because if their claims are disposed of quickly and removal falls shortly after a person is rejected, there is no incentive to make a bogus claim.

Given the nature of the decision-making and the importance to the individual, it is essential that the system be fair. A fair system requires:

a) A reasonable opportunity to present his or her case.

The person should have access to legal counsel and the resources necessary to establish that he or she has a well-founded fear of persecution. In order to ensure that the person has access to legal counsel, there should be a provision for legal aid. While it is accepted that legal aid is generally the responsibility of the provinces, the federal government does enter into negotiations on a regular basis with the different legal aid plans to provide financing for legal aid. In 1989, there was a major reform of the immigration and refugee system. The government agreed to provide finding for legal aid counsel to be provided to refugee claimants at their initial hearing before the either the credible basis or the hearing before the Immigration and Refugee Board. Persons who are forced to proceed without counsel are often denied a fair hearing. Clearly including in any determination process funding for legal aid is essential to a fair and efficient determination procedure.

b) A Determination Before a Competent, Independent Decision-maker

The Immigration and Refugee Board (IRB) is an independent tribunal with the responsibility of determining refugee claims. As the IRB will continue to determine refugee claims, the proposed reforms satisfy the requirement for independence.

The question of competence is more complex. In the past, difficulties have arisen with respect to the competency of decision-makers. There has been the perception that in some cases the government in power has used the Immigration and Refuge Board in order to provide patronage appointments to political supporters. There have been efforts to rectify this problem through the creation of independent selection committees which make recommendations to the Minister

In terms of Public Service appointees, the main criticism of the appointment process is that it has often favoured persons from within the system and, in some cases, results in the selection of persons who have, for a long period of time, represented the Minister as an advocate and as a result are perceived to be biased in favour of the Minister. This problem can be remedied by ensuring that any application process is an open one, and not restricted to persons from within the public service.

c) Appeal on the Merits

One issue that has been of major concern for persons concerned about a fair system since the inception of the Immigration and Refugee Board in 1989 has been the lack of appeal on the merits. The only review available to claimants at this time is to seek leave to commence an application for judicial review in the Federal Court.

The leave provision is legally complex and it requires a lawyer who has expertise in immigration matters. Moreover, the Federal Court judge cannot review factual issues. They cannot receive fresh evidence but only makes his or her determination based upon

the evidence that was before the panel at the time of the hearing. As a result, the effectiveness of this appeal as a remedy to cure unjust decisions is extremely limited.

3. Analysis of the New Proposals

The new proposals attempt to address the problems with the refugee determination process by:

a. Seeking to make the first stage of the process more expeditious. This is done through several measures:

i. Replacing GIC appointees with public service appointees. This change is certainly positive. It will eliminate the possibility of political patronage and will likely ensure that the staffing delays of members, which was endemic throughout the history of the Board up until now, do not occur in the future.

RECOMMENDATION : The government must make a firm commitment to continue to adequately fund the procedure to ensure that there is a sufficient complement of members and in ensuring that the new appointment process is an open one.

ii. Replacing the filing of a personal information form within 28 days with an interview within eight days.

There will be some efficiencies in this new procedure but they will not be determinative of ensuring a timely disposition of claims because the time gained here will not be significant. There are two major problems with this proposal---first the time frames are unrealistic and will place immense pressure on claimants. Second they will undoubtedly work to deny claimants counsel. It has been suggested by some that there is no need for counsel at this stage in the proceeding because the process here is an information gathering exercise. However, any information provided can be used in subsequent proceedings and despite suggestions to the contrary, if a claimant omits important details during the interview, these omissions can be used to draw adverse inferences regarding credibility at the hearing.

Suggestions that adequately trained tribunal officers can replace counsel are incorrect. Claimants need time to develop a relationship of trust with counsel and this cannot be achieved within the context of an interview of the claimant by a person perceived to be in a position of authority.

RECOMMENDATION: The timeframe for the initial interview should be extended to twenty one days. Moreover, if this procedure is implemented, there must be some provision for legal aid prior to the interview

iii Hearing Within 60 Days

The third proposal for expediting the process is to ensure that the hearing is held within 60 days. Again, there are obvious concerns about trying to implement this both from the point of view of allowing the claimants sufficient time to prepare the case, and in ensuring that there are sufficient resources available to have the hearings within 60 days and allowing the claimant access to legal counsel. Sixty days is an unrealistic time period. If implemented it will not be followed and this will undermine public confidence in the administration of justice.

RECOMMENDATION: The period for scheduling a hearing should be extended to 120 days.

b) Appeal on the Merits

The inclusion of an appeal to the Refugee Appeal Division is an important innovation. The access to the Division, however, is restricted by the list of democratic countries that the government proposes to implement. Also, the jurisdiction of the Board is limited somewhat by ensuring that it is only able to receive new evidence or evidence not reasonably available at the time of the hearing.

RESTRICTIONS ON APPEALS FROM DEMOCRATIC COUNTRIES.

Although at first blush the list of democratic countries seems attractive because intuitively one would expect that there are certain countries that could be easily identified from which claims could not be well founded, there are serious problems with creating such a list. First, as refugee determination is an individualized assessment, there may well be circumstances where a claim is well founded even though it comes from a country which we might consider democratic. Of more concern is the likelihood that the list will become politicized.

I do not believe that the list is necessary.

RECOMMENDATION : If the list is implemented, changes must be included in the legislation to clearly set out the criteria for inclusion on the list; for providing for a one year sunset clause; for providing for an independent committee to determine which countries can be included on the list.

c) Restrictions on Access to Other Immigration Procedures for One Year

The most contentious measure in the new reform package is the restrictions on the right to appeal during a one-year period. With respect to the PRRA, this is certainly understandable because PRRAs created huge bottlenecks, it is also important to recognize that there may be changes that occur within the one-year period. The government proposes to create a committee of CIC officials who will monitor situations. However, this process is not likely to be viewed as impartial or acceptable. Moreover it does not allow for consideration of changes in individual circumstances and will almost certainly be subject to a Charter challenge.

By the same token, restrictions on rights to H&Cs, temporary resident permits or requests for referral are unnecessary because they do not impede removal and can only result in delaying the removal of persons if they successfully seek a stay of deportation. Stays are infrequently given and are only given if the claimant satisfies the judge that there is a serious issue and that the person, if deported, would suffer irreparable harm. Attempts to restrict access to the Humanitarian and Compassionate procedure are inconsistent with one of the cornerstones of our immigration policy—ensuring that there is the possibility of a compassionate review.

RECOMMENDATION: The right to a compassionate review was affirmed by the Supreme Court in the case of Jiminez Perez (1984 2 SCR 566) in 1984 and this right must be left intact.

d) Timing of the implementation of the new procedures

The Government has indicated reasonably that implementation of the new RAD will take time and has proposed that the RAD not come into effect for between one and two years. Yet the legislation now calls for immediate implementation of the bans on procedures. Given that the ban on procedures was justified by the creation of the RAD, it is unreasonable to phase in one part of the legislation while dealing implementation of the RAD.

RECOMMENDATION: All aspects of the legislation must come into force at the same time.