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**Robert Néron, Assistant Deputy Chairperson
Refugee Protection Division, Canada Eastern Region
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**“The Reform of Canada’s Refugee Determination System:
the New Canadian Refugee Determination System”**

On March 30, 2010, the Canadian government tabled legislation known by its short title as the *Balanced Refugee Reform Act* (BRRRA).^[1] It received Royal Assent on June 29, 2010. The BRRRA amends parts of the *Immigration and Refugee Protection Act* (IRPA)^[2] with the aim of improving Canada’s existing system of refugee determination. Although the new legislation deals with the entire process, this paper focuses primarily on the impact of the reform measures taken by the Immigration and Refugee Board of Canada (IRB or the Board), whose Refugee Protection Division (RPD) and Refugee Appeal Division (RAD) are the two tribunals directly concerned with refugee determination.

The government indicated that the purpose of the reform was both to increase support for refugees in need of protection by reducing the time required to process their claims and to discourage unfounded claims by ensuring the prompt removal of people whose claims are refused. When the government introduced the legislation, the average wait time before a refugee protection claim was heard was 19 months and the number of refugee protection claims in the backlog had reached approximately 60,000. Quicker resolution of claims was clearly needed, but this goal had to be achieved without compromising procedural fairness.

A few sections of the BRRRA came into force immediately at the time of Royal Assent,^[4] but most provisions will come into force on the earlier of either June 28, 2012, or a date fixed by the Governor in Council (GIC). Twelve months after that, when responsibility for most pre-removal risk assessments (PRRAs) is transferred to the RPD, all the BRRRA amendments will have come into force.^[5]

The changes brought about by the BRRRA are not limited to additions or amendments to existing provisions. In 2002, the IRPA included sections to create an appeal tribunal for parties who wished to contest decisions of the RPD. The RAD was considered by many an integral part of the comprehensive legislative scheme. However, the RAD provisions did not come into force on June 28, 2002, at the same time as the rest of the IRPA was proclaimed in force. Under the BRRRA, the RAD provisions will finally come into force, although some amendments were made to the legislation passed in 2002.

The refugee determination process at the IRB under the BRRRA is described below.

Referral to the IRB

There is no change to the way a claim is initiated. Asylum seekers will make their refugee protection claims at ports of entry or inland as they did before, and the Canada Border Services Agency and Citizenship and Immigration Canada officials who are responsible for

referring claims to the RPD will examine eligibility within the same three-day time frame as currently exists.

If the person seeking protection is eligible, the referring officer will set a date for the person to attend an interview with an official of the Board. By law, this interview is to take place no sooner than 15 days after referral.^[6] In keeping with the goal of processing claims as efficiently as possible, the proposed *Refugee Protection Division Rules* (RPD Rules),^[7] which were pre-published on July 2, 2011, clearly indicate that it is the Board's intention to conduct the interviews within a few days of the prescribed 15-day period.

Interview at the IRB

When the bulk of the BRRRA provisions come into force, refugee protection claimants will be required to attend an interview at the Board. This is an entirely new proceeding mandated by the BRRRA.^[8] Board officials who will play no part in assessing the merits of the claim will conduct an interview to collect information from claimants, as well as provide them with information about making a refugee protection claim. This controlled system for gathering relevant information allows the determination process to be set in motion within a few weeks of a claimant's arrival. Under the current RPD Rules,^[9] claimants whose claims are referred to the RPD receive a document called the Personal Information Form (PIF), which contains a series of questions about the claimant and the basis of the claim. They have 28 days to answer the questions in writing, and to send the PIF to the Board. The current procedure is not only slower, but also lacks any means of controlling the quality of the responses provided by claimants. After the BRRRA comes into force, claimants will be required to attend an interview with an official of the Board and to produce the documents and information requested.^[10] Moreover, the BRRRA has explicitly added failure to attend an interview as one of the ways in which a claimant may be in default in the proceedings. Consequently, a claimant who does not attend the interview will be considered to have abandoned his or her claim,^[11] unless the claimant provides a satisfactory explanation within five days.^[12]

The BRRRA is silent regarding most procedural aspects of the interview. It did amend the IRPA to explicitly provide for the right to counsel at an interview.^[13] Everything else concerning the interview is set out in the proposed RPD Rules:^[14] how an interview is to be conducted, what information and documents the claimant will be expected to provide, the requirement to record the interview, what claimants can expect to receive, and the respective roles of the participants.

The Board exercises control over the next step as well because the Board official who conducts the interview provides, at the end of the interview, the date on which the claimant is to attend his or her RPD hearing.^[15] The date is set in accordance with the timelines set out in the *Immigration and Refugee Protection Regulations* (the Regulations) and any directions received from the Chairperson of the Board.

Designated countries of origin

Another completely new feature of the BRRRA allows the Minister to designate, by order, certain countries, parts of countries or classes of nationals of a country. The designation is significant because the Regulations can provide special time limits in these cases for the scheduling of the RPD hearing, the filing and perfecting of appeals to the RAD and the making of a decision by the RAD.^[16]

Generally speaking, a designated country should be identifiable by indicia such as statistics showing low acceptance rates (i.e. the state normally does not produce refugees), a good human rights record and strong state protection. The Regulations^[17] stipulate the criteria and the process that the Minister is required to follow in order to make the designation. The Board will not be involved in any way in the designation process; however, RPD hearings will be scheduled earlier and RAD decisions will be rendered more quickly when refugee protection claims fall within the criteria designated by the Minister.

Refugee determination by the RPD

RPD hearings will be conducted in the same manner as they were before the BRRRA, except that the decision-maker will be a public servant^[18] rather than a GIC appointee. Also, the hearing will have to be conducted before a single member.^[19] There is no provision for designating a three-member panel.

The time that claimants will have to wait for an RPD hearing will be dramatically reduced by the BRRRA. Except for persons referred to in the designated countries of origin provision, hearings are to be held no later than 90 days after the date of referral.^[20] In the case of a person referred to in the designated countries of origin provision, the Regulations require that the RPD hearing be held even more expeditiously, thus no later than 60 days after the date of referral.^[21]

There is no time limit in the Regulations for RPD members to render their decisions. The proposed RPD Rules, however, provide that the member must render an oral decision and reasons at the hearing unless it is not practicable to do so.^[22] Consequently, in most cases, only the time it takes to prepare a transcript of the oral reasons and to send it to the claimant and the Minister will be added to the time limits prescribed by the Act or the Regulations.

The time limit for a party to file and perfect an appeal to the RAD from a decision of the RPD is no later than 15 working days^[23] after the day on which the party receives the written reasons for decision. In accordance with the proposed RPD Rules, written reasons are provided for all RPD decisions, with the exception of interlocutory decisions.^[24]

Manifestly unfounded claims

Since its inception, the IRPA has provided that when the RPD rejects a claim for refugee protection, it can also state in its reasons that the claim lacks credible basis. Such a finding precludes the stay of removal that the Regulations accord to other claimants who seek judicial review. Under the BRRRA, the RPD member may, if of the opinion that the claim is clearly fraudulent, go even further and state that the claim is manifestly unfounded.^[25]

Stating that a claim is manifestly unfounded has the effect of shortening the time limit for the RAD to make a decision if an appeal is filed and no oral hearing is held. Instead of having 120 days after the appeal is perfected to make a decision, the RAD must render a decision in just 30 days.^[26] Although claimants with ostensibly unfounded claims will maintain the right to appeal, appeals concerning claims characterized as manifestly unfounded will be processed especially quickly by the RAD.

Appeals to the Refugee Appeal Division

In many respects, the RAD under the BRRRA is the same as the RAD envisaged in 2002.

A person or the Minister may appeal to the RAD against a decision of the RPD to allow or reject a claim for refugee protection or against a decision of the RPD regarding an application for cessation or vacation. The appeal may be based on a question of law, of fact or of mixed law and fact.^[29] A determination that a claim has been withdrawn or abandoned may not be appealed to the RAD.^[30]

RAD members are GIC appointees, not public servants. Although matters are normally conducted before a single member, the Chairperson may constitute a panel of three members.^[27] A decision rendered by a three-member panel has, for the RPD and for a single-member panel of the RAD, the same precedential value as a decision of an appeal court for a trial court.^[28]

The BRRRA has also made some changes mainly with respect to the possibility of the person who is the subject of the appeal introducing new evidence and the possibility of the RAD holding an oral hearing.

An RAD appeal is based on the record of the proceedings of the RPD. The RAD may accept other evidence from a person who is the subject of the appeal only if it is “new” evidence, that is, evidence that arose after the rejection of the claim or that was not reasonably available or that the person could not reasonably have been expected in the circumstances to have presented at the time of the rejection of the claim. The Minister is not subject to the same restriction, nor is the new evidence limitation applicable to evidence that is presented in response to evidence presented by the Minister.

An RAD appeal generally proceeds without an oral hearing, but the BRRRA has provided that in limited circumstances, as outlined in subsection 110(6) of the IRPA, where the documentary evidence presented by the parties raises a serious issue with respect to the credibility of the person who is the subject of the appeal, there may be an oral hearing. All the conditions to be met before an oral hearing can be held leave no doubt that RAD members are encouraged not to look beyond the record.

The RAD may do any one of the following:

- (a) confirm the determination of the RPD;
- (b) set aside the determination and substitute a determination that, in its opinion, should have been made; or
- (c) refer the matter to the RPD for re-determination, giving the directions to the RPD that it considers appropriate.^[31] However, the BRRRA amended this subsection of the IRPA to make it clear that option (c) is a choice of last resort, limited to the specific circumstances set out in the IRPA.

Unless the RAD holds a hearing, it must render a decision in accordance with the time limits set out in the Regulations,^[32] namely within 30 days from the time the appeal is perfected for claims that the RPD had found to be manifestly unfounded or ones which involved the designated country of origin provisions; the time limit for all other appeals is 120 days.

Judicial review

The BRRRA did not amend the IRPA provisions^[33] regarding judicial review. After exhausting their right to an appeal before the RAD, parties can still make an application for leave and for judicial review to the Federal Court.

Conclusion

The BRRRA has amended the IRPA in an effort to make refugee determination faster and more efficient. The Regulations and the rules of the RPD and the RAD that flow from the amended IRPA are consistent with the BRRRA's goal to streamline the process.

Having claimants come to the IRB for an interview instead of requiring them to complete and send in a PIF will save time at the front end of the Board's processes.

The interview starts the countdown to the date of the hearing, which is the next step in the determination process. Whereas regular claims will be scheduled within 90 days, ones from designated countries of origin or regions or ones made by specific classes of nationals within a country will be heard sooner, within 60 days.

In the large majority of cases, RPD members will deliver oral reasons at the end of the hearing, eliminating the long delays that are sometimes associated with reserved decisions. The written version of the reasons given orally should be available within a fairly short time to ensure that parties receive the written reasons quickly and that the 15-day time limit to make an appeal to the RAD can start to run.

While the BRRRA shortens time frames, it also implements the right to an appeal. The intent to include an appeal before the RAD in the IRPA was undoubtedly to improve fairness. However, an appeal adds another step, and necessarily more time, to the refugee determination process. By eliminating PIFs and mandating faster scheduling of hearings, the BRRRA has more than offset the time needed to conduct appeals.

In addition, the fact that appeals in most cases are to be based on the record, evidence presented to the RAD by the subject of the appeal must qualify as new evidence and oral hearings—though allowed in some circumstances—are severely restricted strongly indicates a commitment to effect true reform that efficiently provides protection to those in need and deters others with fraudulent or otherwise unfounded claims from claiming refugee protection in Canada.

¹ The formal name of the legislation is: *An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act*.

² It also increases the number of judges at the Federal Court.

⁴ These include the amendments to provisions regarding applications to the Minister made on humanitarian and compassionate grounds (IRPA, s. 25), and to the new IRPA, s. 24(4), which prohibits failed refugee protection claimants from applying for a temporary resident permit if less than 12 months have passed since their claim was last rejected or withdrawn or abandoned.

⁵ BRRRA, subsection 42(2). This provision also allows for the possibility of an earlier date to be fixed by order of the GIC .

⁶ IRPA, as amended, subsection 100(4).

⁷ The proposed RPD Rules were pre-published in the *Canada Gazette*, Part 1, on July 2, 2011. These rules will hereafter be referred to as the "proposed RPD Rules". Subrule 55(10) of the proposed RPD Rules states that if an application to change the date and time of an interview is allowed, the new date must be within three working days of the date originally scheduled, or as soon as possible after that date.

⁸ IRPA, as amended, subsection 100(4).

⁹ RPD Rules, SOR/2002-228

¹⁰ IRPA, as amended, subsection 100(4).

¹¹ IRPA, as amended, subsection 168(1).

- [12] Proposed RPD Rules, subrule 66(1).
- [13] IRPA, as amended, subsection 167(1).
- [14] Proposed RPD Rules, rules 6 and 7.
- [15] IRPA, as amended, subsection 100(4.1).
- [16] IRPA, as amended, subsection 109.1(1) and section 111.1.
- [17] *Regulations Amending the Immigration and Refugee Protection Regulations*, as pre-published in the *Canada Gazette*, Part 1 on March 19, 2011, sections 159.8 to 159.93.
- [18] IRPA, as amended, subsection 169.1(2).
- [19] IRPA, as amended, section 163.
- [20] *Regulations Amending the Immigration and Refugee Protection Regulations*, as pre-published in the *Canada Gazette*, Part 1 on March 19, 2011, paragraph 159.94(b).
- [21] *Regulations Amending the Immigration and Refugee Protection Regulations*, as pre-published in the *Canada Gazette*, Part 1 on March 19, 2011, paragraph 159.94(a).
- [22] Proposed RPD Rules, subrule 10(8).
- [23] *Regulations Amending the Immigration and Refugee Protection Regulations*, as pre-published in the *Canada Gazette*, Part 1 on March 19, 2011, subsection 159.95(1).
- [24] Proposed RPD Rules, rule 69.
- [25] IRPA, as amended, section 107.1.
- [26] *Regulations Amending the Immigration and Refugee Protection Regulations*, as pre-published in the *Canada Gazette*, Part 1 on March 19, 2011, paragraph 159.96(1)(a).
- [27] IRPA, as amended, section 163.
- [28] IRPA, paragraph 171(c).
- [29] IRPA, subsection 110(1).
- [30] IRPA, subsection 110(2).
- [31] IRPA, subsection 111(1), but subject to amended subsection 111(2).
- [32] *Regulations Amending the Immigration and Refugee Protection Regulations*, as pre-published in the *Canada Gazette*, Part 1 on March 19, 2011, paragraphs 159.96 (1)(a) and (b).
- [33] IRPA, paragraph 72(2)(a).