



Gender Persecution and Refugee Law Reform in Canada

IN RESPONSE TO
*The Balanced Refugee
Reform Act (BILL C-11)*

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GENDER PERSECUTION and REFUGEE LAW REFORM IN CANADA¹

Gender is not one of the grounds of asylum listed in the 1951 Convention relating to the Status of Refugees, upon which Canadian refugee law is based. Despite this, gender-related persecution has been found by our courts and the international legal community as being a basis on which to seek asylum. Typically, gender-related claims for protection have related to family or domestic violence, acts of sexual violence, forced marriage, punishment for transgression of social mores, coerced family planning, or female genital mutilation.² Canada was the first country to develop guidelines to recognize the special issues that arise for women claimants in the refugee process.³

Canada's refugee system is scheduled for a major overhaul as set out in *The Balanced Refugee Reform Act* (Bill C-11), which received royal assent in June of 2010.⁴ The legislation provides until June 2012 for the Immigration and Refugee Protection Board ("IRB") to implement the new law. The IRB has publically stated that they intend to begin most aspects of the new system starting in December 2011.⁵ Regulations setting out timelines and other details of the reform were proposed in March 2011.⁶ At the time of writing the regulations have not yet been adopted into law. This article will explore the possible consequences of these reforms on women whose fear of persecution relates to their gender. Many of the comments about the possible consequences for these women would also apply to other refugee claimants who are severely traumatized and vulnerable.

I practice refugee and immigration law in Vancouver where the majority of my cases have involved women who have experienced some form of violence. As a refugee lawyer my job is to make arguments about how a particular claim fits within the refugee definition based on the facts of my client's case and the law. The most challenging part of that work is ensuring that my client is able to fully present the facts of their claim to the decision-maker. For women who have experienced violence this can be extremely difficult; often these are facts that they have not disclosed to anyone and now are expected to disclose to a stranger. My work with these women has taught me that a significant struggle in these cases is being able to create the right conditions for highly traumatized claimants to be able to present their story to a decision-maker. Instead of making it easier for the most vulnerable claimants to present their stories, in my view, the amendments to *IRPA* under Bill C-11 and the proposed regulations make it much more likely that the full facts of these types of cases are not presented to refugee decision-makers.

¹ Written by Lobat Sadrehashemi, refugee and immigration lawyer at Elgin Cannon and Associates, April 2011

² UNCHR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 2002

³ Chairperson Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution

⁴ *An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act*

⁵ Presentation by Simon Coakeley, Executive Director of the IRB, at the CCR Fall Consultation, November 2010, Calgary

⁶ *Regulations Amending the Immigration and Refugee Protection Regulations*

Key Changes

The amendments to *IRPA* under Bill C-11 and the proposed regulations is a major shift in our refugee determination process. There are many changes. Key changes include:

- **INTERVIEW INSTEAD OF WRITTEN NARRATIVE:** There will no longer be a Personal Information Form (``PIF``) where a claimant can explain in writing the basis of their fear of return. Instead the initial step after an eligibility determination will be an interview with an official from the IRB; a transcript of this interview will be provided to the Member hearing the refugee claim.
- **FAST TIMELINES :** The timelines are fast for all steps in the process, from interview, through to hearing, and then appeal at the new Refugee Appeal Division.
- **DIFFERENT TIMELINES FOR DIFFERENT COUNTRIES OF ORIGIN:** For the first time claimants from particular countries that have been designated by the Minister of Citizenship and Immigration Canada will be subject to quicker timelines for their refugee hearings and for decision from their appeals to the Refugee Appeal Division.
- **RIGHT OF APPEAL:** Both the claimant and the Minister have a right to appeal refugee decisions to a new body, the Refugee Appeal Division.

Interview instead of written narrative

After a refugee claim has been determined eligible, the first stage of the current refugee determination process involves the filing of a Personal Information Form (``PIF``). The PIF is a document that includes background questions about the claimant's family, education, work, and travel. The central part of the PIF is the space for a claimant to provide their story – why it is that they are seeking protection, what efforts they have made to obtain assistance from their government, and why they are unable to be able to go anywhere else in their country. Legal aid funds lawyers to represent claimants with their PIFs in most cases. Under our current system the PIF is a very important document and forms the basis for the refugee claim. The Member of the IRB who hears the claim treats the narrative in the PIF as sworn testimony. Claimants often are not expected to go through the details that they have provided in their narrative at the hearing.

For women who have experienced violence, like family or domestic violence, their narratives may be about decades of abuse. It is a very difficult process to set out these incidents of violence. Many cannot remember the sequence of events or may have blocked certain events out of their mind; others need trauma counselling or other forms psychological support while they are going through the process of setting out their history of abuse. Others do not feel comfortable disclosing incidents of sexual violence. A well developed narrative is important in these cases as the narrative becomes one form of evidence

that the abuse has happened to them. In my experience it also means a lot less questions at the hearing about the abuse if it is set out in detail in the narrative.

Under the new legislation instead of providing the Member with a written statement, the claimant is interviewed by an official of the IRB. From my perspective this is the most significant change for women whose claims are based on gender persecution. The legislation provides that this interview happen *no earlier than 15 days* after the claim has been found to be eligible.⁷ This means that the IRB is not permitted to hold the interview prior to 15 days after eligibility determination. However, in public meetings the IRB has stated that they plan to hold these interviews on the 15th day or as soon after as possible.⁸ There is nothing in the legislation that requires them to do this. The IRB has also stated that they expect that these interviews will take a maximum of 4 hours to conduct. A transcript of the interview will then be provided to the Member hearing the claim.

For women who have experienced violence an interview that can happen within 20 days after they have arrived in Canada or filed a refugee claim in Canada is too soon for them to be prepared to discuss the basis of their claim with an official of the IRB. No matter how friendly or well-trained officials from the IRB are in asking questions of claimants, trust is something that takes time to build. I have never been able to get an accurate picture of the narrative of a refugee claim in one sitting with a claimant. This is particularly the case with women who have experienced violence. In many cases that I have worked on I only learn about some of the most horrific acts of violence in my third or fourth time speaking to the claimant. In other cases it takes a number of meetings to piece together the various incidents that have happened – to assist the woman, if she is able, to put the events into some type of sequence. It is unimaginable to me that a government official will be able to get an accurate picture within four hours of meeting a claimant.

Moreover, many claimants have a distrust of authority figures and interpreters from their country of origin. The Federal Court in the *Lubana* case quoted from a study on asylum seekers in the UK in describing some of the difficulties in relying upon initial interviews with government officials :

He may have a deep distrust of the interviewer or interpreter, having learnt by bitter experience that it is safest to reveal as little as possible to those in authority. With all these inhibitory factors, is it any wonder that many initial interviews produce errors, omissions and apparent discrepancies?⁹

The legislation provides that a claimant *may* attend the interview with counsel.¹⁰ With such short timeframes many women will not be able to arrange for a lawyer to attend the meeting with them; many will not have gotten any legal advice prior to attending an interview that will form the basis of their claim for protection.

⁷ *IRPA* (as amended) s.100

⁸ Presentation by Simon Coakeley, Executive Director of the IRB, at the CCR Fall Consultation, November 2010, Calgary

⁹ *Lubana v. Canada (MCI)*, [2003] FCT 116 at para. 24

¹⁰ *IRPA* (as amended) s.167(1)

At the end of this interview with the official from the IRB a date will be set for the hearing. The Member hearing the refugee claim will have a copy of the transcript of this initial interview with the official. The way the Member understands the claim will arise from the responses to questions in this interview. There is nothing in the legislation that prevents counsel from continuing to prepare written sworn statements (i.e. affidavits) with their clients and submitting these affidavits to the Board prior to the hearing. In fact, I would argue that in gender related cases this is particularly necessary especially where the abuse has been over a long period of time. There will however be claimants who either do not have counsel or do not have counsel who will prepare these statements.

Imagine a claimant who was deeply afraid at her initial interview, did not feel comfortable with the interviewer, got mixed up about the events that happened to her, did not fully explain the incidents of violence that had occurred, and misunderstood many of the questions posed to her. She then appears at her hearing where the Member has before him or her a transcript that sets out a confusing history. Instead of the hearing being focused on a few narrow issues, the hearing becomes a frustrating process of trying to figure out why the claimant said this or that at the interview or trying to develop some sort of timeline of the events that the claimant mentioned at her interview and new incidents she is now mentioning at the hearing. It takes time to develop a person's narrative; the hearing should not be the place where the Member is trying to sort this out. Instead the hearing should be focused on whether based on the facts of the claimant's case she fits within the refugee definition.

In our current system the Member can pose questions first of the claimant, followed by questions by the claimant's counsel.¹¹ Part of the rationale for this scheme was that the IRB already had a written statement of the claimant's history from the claimant themselves in the form of the PIF. The IRB has stated publicly that they are not willing to change Guideline 7, which provides for Members questioning claimants before counsel, under the new system even though the IRB will no longer have a written statement from the claimant.¹² I imagine that the validity of Guideline 7 in the new context of no PIF will be challenged in litigation. In any case, under the new system, it is even more important for counsel for women who have experienced violence to apply to reverse the order of questioning and pose questions first. This will give the claimant the opportunity to set out their claim before the Member questions them.

Faster Timelines

Our current system does not provide any set timelines for when hearings must take place. Under the new system, in most cases, hearings must take place within 90 days after the initial interview with the IRB official.¹³ The 20 day disclosure rule will still apply – requiring claimants to provide any document they wish to rely upon at their hearing within 20 days prior to the hearing date.

¹¹ Chairperson Guideline 7 - Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division

¹² Presentation by IRB at Rules Consultation held in November 2011, Vancouver

¹³ *Regulations Amending the Immigration and Refugee Protection Regulations*

There are a number of concerns with the faster scheduling of hearings. Just over two months is not very much time to gather documents in support of your claim. In the case of women who have experienced violence they may have to obtain police records, medical records, and proof of their relationship with their abuser. These documents also have to be translated. In these types of cases I also often rely upon medical reports from Canada. In most cases I request a medical assessment documenting any physical scarring on the claimant that has arisen from the violence she has endured. I also request a psychological assessment that explores the impact of the abuse on the claimant and their ability to testify as well as their ability to relocate in the country of origin. It will be difficult to obtain these medical reports within such a short timeframe.

It will also be challenging for claimants to secure counsel within such a short timeframe. There will need to be structural changes at legal aid in order to respond with a faster turn-around time to requests for counsel for hearings. Claimants without financial means who are unsuccessful at obtaining legal aid will not have had much, if any, time in Canada working in order to pay the costs of counsel or even the costs for the translation of their documents into English.

The quick timelines will also mean that claimants who have suffered trauma may not be prepared psychologically to testify at a hearing. The hearing will be taking place for many claimants just under four months after they first arrived in Canada. Claimants may not yet be prepared to present their story to a decision-maker.

The legislation provides that the rules of the tribunal will set out the circumstances where requests for postponements can be made. We will have to see how the IRB responds to these requests. Under our current system the IRB has been very rigid in granting postponements.

Different Timelines for Different Countries of Origin

The new legislation allows for a formal distinction based on country of origin in scheduling the timing of hearings and providing decisions from appeals at the Refugee Appeal Division. This is the first time that our refugee law has distinguished formally between claimants from different source countries in setting out which procedural rules apply to them. The Minister of Citizenship and Immigration can create a list of "Designated Countries of Origin". A designation can apply to an entire country, a portion of a country, or a group of individuals from a country.¹⁴ Claimants from these countries will face different timelines than other claimants. The proposed regulations provide that for claimants who are from "designated countries of origin" refugee hearing will be held within 60 days of the initial interview, not 90 days and their appeals must be decided by the Refugee Appeal Division within 30 days of being filed instead of 120 days.

The proposed regulations also provide that in order to name a "Designated Country of Origin" the Minister of Citizenship and Immigration will consider a number of factors, including the opinion of a panel of experts on the human rights situation in particular countries as well as quantitative measures, such as

¹⁴ IRPA (as amended) s.109.1

the volume of claimants from a particular country and the refugee acceptance rate by the IRB for that country.

A number of groups have commented that this provision will have a detrimental impact on groups like women who have experienced gender related persecution.¹⁵ A particular country may produce a very low acceptance rate at the IRB and may in general have democratic, functioning institutions, but still not provide adequate protection to women fleeing domestic violence. In my practice, I have successfully represented women fleeing domestic violence in Mexico, Chile, and South Korea. All of these countries are generally thought to have a system of functioning democratic institutions with low levels of acceptance rates for refugee claims at the IRB. However, in all of these countries there is evidence that women who have experienced domestic violence are not being adequately assisted by the police; their experience of state protection is fundamentally different than another person seeking protection. In the case of South Korea and Chile there is not a great deal of documentary evidence documenting this failure to protect women on the part of state institutions; these claims were primarily grounded in the experiences of the claimants and their family members with the police. Under the new system, these women may have all been put in the faster processing stream, where as outlined above, it would be much more difficult for them to present their stories to the decision-maker.

Access to Appeal at the Refugee Appeal Division

The new legislation provides for the implementation of a Refugee Appeal Division (``RAD``) . Refugee claimants and the Minister will both be able to appeal decisions made by the Refugee Protection Division at the IRB to the RAD. In general the RAD will be a paper process where the decision-makers can be provided with new evidence that was not reasonably available to the claimant at their hearing at the Refugee Protection Division. The Member at the RAD can confirm the decision made at the Refugee Protection Division, set aside the decision and substitute their own decision, or refer the case back to the Refugee Protection Division.¹⁶

Many practitioners and advocates are pleased that the IRB will finally be able to implement an appeal system. It remains to be seen how restrictive the RAD will be in interpreting what new evidence can be presented. Given that the new timelines for the hearing are quite restrictive, I imagine that there will be claimants who are only able to obtain particular documents in support of their claim after their hearing and will wish to present these documents to the RAD.

Timelines are a major concern with the implementation of the RAD. The proposed regulations state that appeals will have to be filed and perfected (completed) 15 days following a decision of the Refugee Protection Division.¹⁷ This is an incredibly restrictive and nonsensical timeline to impose. It means that within the space of 15 days, a claimant would have to do the following: decide that they would like to

¹⁵ See CCR, ``Changes to the Refugee System – What C-11 Means``, September 2010

¹⁶ *IRPA* (as amended) s.110

¹⁷ *Regulations Amending the Immigration and Refugee Protection Regulations*

file an appeal of the decision, submit any new evidence that was not reasonably available at the time of their hearing, provide written arguments outlining how the tribunal erred in their decision, and arrange for counsel to assist with the process. The 15 day timeline makes a claimant's appeal right meaningless.

In order to have a meaningful appeal process, claimants must be able to present new evidence that was not before the decision-maker at their hearing ; claimants must be given adequate time to obtain counsel, and prepare documents and arguments as to why their appeal should be allowed. Otherwise the implementation of an appeal process will be a complete waste of energy.

Conclusion

It is heartbreaking when I read a transcript of a refugee hearing where it is painfully obvious that the crux – the heart of why a claimant is afraid – is completely missed, where the particular facts of their case are muddled and confused. When a decision-maker cannot get why a person is afraid, or fails to understand the context in which the claimant was living, no justice can be done. So much of the hard work of being a refugee lawyer or advocate is ensuring that a claimant's story is understood.

Our refugee system is going to fundamentally change over the next year. I am afraid that the changes I have described will make it more difficult for women fleeing gender-related persecution to be able to make their stories understood by decision-makers at the IRB. Given that procedural adjustments will be even more necessary under the new system, it will be important to continue to use the Vulnerable Person Guideline¹⁸, requesting in these types of cases that the claimant be recognized as a vulnerable person requiring procedural accommodations. These accommodations can include: female interviewers, interpreters, and Members, postponements of the interview and the hearing, permission to file documents like medical documentation post hearing, extension of time to file the appeal at the RAD, and reverse order of questioning. The challenge is that there will be many women who slip through the cracks, who do not have access to counsel making these types of requests on their behalf. If the norm is to have the hearing within 60 or 90 days without any type of written statement, I am deeply concerned that for many claimants this will mean that decisions are made on their cases without an opportunity for them to fully present the facts of their case.

¹⁸ Chairperson Guideline 8 - Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada