Federal Court  Cour fédérale

Date: 20170727

Dockets: IMM-5045-16
IMM-5200-16

Citation: 2017 FC 728

Ottawa, Ontario, July 27, 2017

PRESENT: The Honourable Mr. Justice Russell

Docket: IMM-5045-16

BETWEEN:

MOHSEN MOHAMMED ALHAQLI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-5200-16

AND BETWEEN:

MOHAMMED SALIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of two decisions of case management officers at the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB], dated November 22, 2016 and November 30, 2016 [Decisions], which cancelled the Applicants' refugee claim hearings. Due to the factual similarities and representation by the same counsel, the applications were consolidated to be heard together.

II. BACKGROUND

A. *Alhaqli*

[2] Mr. Alhaqli is a citizen of Yemen who resided in Saudi Arabia before entering Canada on August 11, 2016. After his arrival in Canada, he made a claim for refugee protection on October 12, 2016. His refugee claim was originally scheduled to be heard on December 6, 2016 but was later rescheduled for June 22, 2017. While waiting for the outcome of his refugee claim, Mr. Alhaqli submitted applications for a study permit and work permit on February 23, 2017 and March 13, 2017, respectively. The study permit was approved on April 12, 2017 and the work permit application is still pending.

B. *Salim*

[3] Mr. Salim is a citizen of Syria who resided in Saudi Arabia before entering Canada on October 18, 2016. On the same day of his arrival in Canada, he made a claim for refugee protection that was scheduled to be heard on December 14, 2016 and later rescheduled for December 16, 2016 at his request. While waiting for the outcome of his refugee claim, Mr. Salim submitted an application for a work permit on November 1, 2016, which was approved on November 29, 2016. He was informed that his refugee claim was selected for expedited processing on February 16, 2017 and was found to be a Convention refugee on May 4, 2017.

III. DECISION UNDER REVIEW

A. *Alhaqli*

[4] A decision sent from the RPD to Mr. Alhaqli by letter dated November 22, 2016 cancelled the hearing regarding his claim for refugee protection. Pursuant to the Instructions Governing the Management of Refugee Protection Claims Awaiting Front-End Security Screening [Instructions], the hearing was cancelled because the IRB had not received confirmation from the Canada Border Services Agency [CBSA] that his front-end security screening [FESS] had been completed. The letter informed Mr. Alhaqli that the hearing would be rescheduled upon confirmation that FESS had been completed. Alternatively, the hearing could also be rescheduled without the FESS completion if it had not been completed by April 12, 2017. In closing, the letter acknowledged that the delay in FESS completion did not reflect the merits of Mr. Alhaqli's refugee claim.

B. *Salim*

[5] A decision sent from the RPD to Mr. Salim by letter dated November 30, 2016 cancelled the hearing regarding his claim for refugee protection. Pursuant to the Instructions, the hearing was cancelled because the IRB had not received confirmation from the CBSA that his FESS had been completed. The letter informed Mr. Salim that the hearing would be rescheduled upon confirmation that FESS had been completed. Alternatively, the hearing could also be rescheduled without the FESS completion if it had not been completed by April 19, 2017. In closing, the letter acknowledged that the delay in FESS completion did not reflect the merits of the refugee claim.

IV. ISSUES

[6] The Applicants submit that the following are at issue in these applications:

1. Are the issues raised justiciable?
2. Are the Instructions *ultra vires* insofar as they lack any legislative authority and instruct the RPD to postpone hearings in a manner that overrides the scheme set out in the *IRPA* and the associated *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] and *Refugee Protection Division Rules*, SOR/2012-256 [*Rules*]?
3. Do the Instructions create a reasonable apprehension of institutional bias such that the Decisions are unfair and unlawful?

V. STANDARD OF REVIEW

[7] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a

satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[8] True questions of jurisdiction are reviewable under the standard of correctness; however, this category is narrow and rare: *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at paras 24, 26 [*Edmonton*]. In this instance, as in *Edmonton*, the second issue involves the IRB Chairperson's interpretation of a home statute in the course of carrying out the mandate of hearing and deciding refugee claims. Accordingly, no true question of jurisdiction arises and the presumption of reasonableness is not rebutted.

[9] The third issue, regarding institutional bias and independence within the RPD, is a matter of procedural fairness that is reviewable under the correctness standard: *Muhammad v Canada (Citizenship and Immigration)*, 2014 FC 448 at para 51; *Mission Institute v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*].

[10] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above,

at para 47, and *Khosa*, above, at para 59. Put another way, the Court should intervene only if the Decisions were unreasonable in the sense that they fall outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[11] The following provisions from the *IRPA* are relevant in this proceeding:

Decision	**Sursis pour décision**
100 (2) The officer shall suspend consideration of the eligibility of the person's claim if	(2) L'agent sursoit à l'étude de la recevabilité dans les cas suivants :
(a) a report has been referred for a determination, at an admissibility hearing, of whether the person is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality; or	a) le cas a déjà été déféré à la Section de l'immigration pour constat d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée;
…	…
Suspension	**Sursis**
103 (1) Proceedings of the Refugee Protection Division in respect of a claim for refugee protection are suspended on notice by an officer that	103 (1) La Section de la protection des réfugiés sursoit à l'étude de la demande d'asile sur avis de l'agent portant que :
(a) the matter has been referred to the Immigration Division to determine whether the claimant is inadmissible on grounds of security, violating human or international rights, serious criminality or	a) le cas a été déféré à la Section de l'immigration pour constat d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande

organized criminality; or

criminalité ou criminalité organisée;

(b) an officer considers it necessary to wait for a decision of a court with respect to a claimant who is charged with an offence under an Act of Parliament that may be punished by a maximum term of imprisonment of at least 10 years.

b) il l'estime nécessaire, afin qu'il soit statué sur une accusation pour infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

…

…

Chairperson

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

Fonctions

159 (1) Le président est le premier dirigeant de la Commission ainsi que membre d'office des quatre sections; à ce titre :

…

…

(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, to assist members in carrying out their duties; and

h) après consultation des vice-présidents 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;

…

…

Rules

161 (1) Subject to the approval of the Governor in Council, and in consultation with the Deputy Chairpersons, the Chairperson may make rules respecting

Règles

161 (1) Sous réserve de l'agrément du gouverneur en conseil et en consultation avec les vice-présidents, le président peut prendre des règles visant :

(a) the referral of a claim for refugee protection to the Refugee Protection Division;	a) le renvoi de la demande d'asile à la Section de la protection des réfugiés;
(a.1) the factors to be taken into account in fixing or changing the date of the hearing referred to in subsection 100(4.1);	a.1) les facteurs à prendre en compte pour fixer ou modifier la date de l'audition mentionnée au paragraphe 100(4.1);
(a.2) the activities, practice and procedure of each of the Divisions of the Board, including the periods for appeal, other than in respect of appeals of decisions of the Refugee Protection Division, the priority to be given to proceedings, the notice that is required and the period in which notice must be given;	a.2) les travaux, la procédure et la pratique des sections, et notamment les délais pour interjeter appel de leurs décisions, à l'exception des décisions de la Section de la protection des réfugiés, 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.

[12] The following provisions from the *Regulations* are relevant in this proceeding:

Time limits for hearing	**Délais — audition**
159.9 (1) Subject to	159.9 (1) Pour l'application du

subsections (2) and (3), for the purpose of subsection 100(4.1) of the Act, the date fixed for the hearing before the Refugee Protection Division must be not later than

paragraphe 100(4.1) de la Loi et sous réserve des paragraphes (2) et (3), la date de l'audition devant la Section de la protection des réfugiés ne peut être postérieure à l'expiration :

(a) in the case of a claimant referred to in subsection 111.1(2) of the Act,

a) dans le cas d'un demandeur visé au paragraphe 111.1(2) de la Loi :

(i) 30 days after the day on which the claim is referred to the Refugee Protection Division, if the claim is made inside Canada other than at a port of entry, and

(i) d'un délai de trente jours suivant la date à laquelle la demande est déférée à la Section, si le demandeur se trouve au Canada et demande l'asile ailleurs qu'à un point d'entrée,

(ii) 45 days after the day on which the claim is referred to the Refugee Protection Division, if the claim is made inside Canada at a port of entry; and

(ii) d'un délai de quarante-cinq jours suivant la date à laquelle la demande est déférée à la Section, si le demandeur se trouve au Canada et demande l'asile à un point d'entrée;

(b) in the case of any other claimant, 60 days after the day on which the claim is referred to the Refugee Protection Division, whether the claim is made inside Canada at a port of entry or inside Canada other than at a port of entry.

b) dans le cas de tout autre demandeur — que la demande ait été faite à un point d'entrée ou ailleurs au Canada —, d'un délai de soixante jours suivant la date à laquelle la demande est déférée à la Section.

Exclusion

Exclusion

(2) If the time limit set out in subparagraph (1)(a)(i) or (ii) or paragraph (1)(b) ends on a Saturday, that time limit is extended to the next working day.

(2) Si le délai visé au sous-alinéa (1)a)(i) ou (ii) ou à l'alinéa (1)b) expire un samedi, il est prolongé jusqu'au prochain jour ouvrable.

Exceptions

Exceptions

(3) If the hearing cannot be

(3) Si, pour l'une ou l'autre des

held within the time limit set out in subparagraph (1)(a)(i) or (ii) or paragraph (1)(b) for any of the following reasons, the hearing must be held as soon as feasible after that time limit:	raisons ci-après, l'audition ne peut être tenue dans le délai visé au sous-alinéa (1)a)(i) ou (ii) ou à l'alinéa (1)b), elle est tenue dès que possible après l'expiration du délai :
(a) for reasons of fairness and natural justice;	a) en raison de considérations d'équité et de justice naturelle;
(b) because of a pending investigation or inquiry relating to any of sections 34 to 37 of the Act; or	b) en raison d'une investigation ou d'une enquête en cours, effectuée dans le cadre de l'un des articles 34 à 37 de la Loi;
(c) because of operational limitations of the Refugee Protection Division.	c) en raison de restrictions d'ordre fonctionnel touchant la Section de la protection des réfugiés.

[13] The following provisions from the *Rules* are relevant in this proceeding:

Written application and time limit	**Demande par écrit et délai**
50 (1) Unless these Rules provide otherwise, an application must be made in writing, without delay, and must be received by the Division no later than 10 days before the date fixed for the next proceeding.	50 (1) Sauf indication contraire des présentes règles, toute demande est faite par écrit, sans délai, et doit être reçue par la Section au plus tard dix jours avant la date fixée pour la prochaine procédure.
Oral application	**Demande faite oralement**
(2) The Division must not allow a party to make an application orally at a proceeding unless the party, with reasonable effort, could not have made a written application before the proceeding.	(2) La Section ne peut autoriser que la demande soit faite oralement pendant une procédure que si la partie a été dans l'impossibilité, malgré des efforts raisonnables, de le faire par écrit avant la procédure.

Content of application

(3) Unless these Rules provide otherwise, in a written application, the party must

(a) state the decision the party wants the Division to make;

(b) give reasons why the Division should make that decision; and

(c) if there is another party and the views of that party are known, state whether the other party agrees to the application.

Contenu de la demande

(3) Dans sa demande écrite, sauf indication contraire des présentes règles, la partie :

a) énonce la décision recherchée;

b) énonce les motifs pour lesquels la Section devrait rendre cette décision;

c) indique si l'autre partie, le cas échéant, consent à la demande, dans le cas où elle connaît l'opinion de cette autre partie.

Affidavit or statutory declaration

(4) Unless these Rules provide otherwise, any evidence that the party wants the Division to consider with a written application must be given in an affidavit or statutory declaration that accompanies the application.

Affidavit ou déclaration solennelle

(4) Sauf indication contraire des présentes règles, la partie énonce dans un affidavit ou une déclaration solennelle qu'elle joint à sa demande écrite tout élément de preuve qu'elle veut soumettre à l'examen de la Section.

Providing application to other party and Division

(5) A party who makes a written application must provide

(a) to the other party, if any, a copy of the application and a copy of any affidavit or statutory declaration; and

(b) to the Division, the original application and the original of

Transmission de la demande à l'autre partie et à la Section.

(5) La partie qui fait une demande par écrit transmet :

a) à l'autre partie, le cas échéant, une copie de la demande et, selon le cas, de l'affidavit ou de la déclaration solennelle;

b) à la Section, l'original de la demande et, selon le cas, de

any affidavit or statutory declaration, together with a written statement indicating how and when the party provided a copy to the other party, if any.

l'affidavit ou de la déclaration solennelle, accompagnés d'une déclaration écrite indiquant à quel moment et de quelle façon la copie de ces documents a été transmise à l'autre partie, le cas échéant.

…

…

Application in writing

54 (1) Subject to subrule (5), an application to change the date or time of a proceeding must be made in accordance with rule 50, but the party is not required to give evidence in an affidavit or statutory declaration.

Demande par écrit

54 (1) Sous réserve du paragraphe (5), la demande de changer la date ou l'heure d'une procédure est faite conformément à la règle 50, mais la partie n'est pas tenue d'y joindre un affidavit ou une déclaration solennelle.

Time limit and content of application

(2) The application must

(a) be made without delay;

(b) be received by the Division no later than three working days before the date fixed for the proceeding, unless the application is made for medical reasons or other emergencies; and

(c) include at least three dates and times, which are no later than 10 working days after the date originally fixed for the proceeding, on which the party is available to start or continue the proceeding.

Délai et contenu de la demande

(2) La demande :

a) est faite sans délai;

b) est reçue par la Section au plus tard trois jours ouvrables avant la date fixée pour la procédure, à moins que la demande soit faite pour des raisons médicales ou d'autres urgences;

c) inclut au moins trois dates et heures, qui sont au plus tard dix jours ouvrables après la date initialement fixée pour la procédure, auxquelles la partie est disponible pour commencer ou poursuivre la procédure.

Oral application

(3) If it is not possible for the party to make the application

Demande faite oralement

(3) S'il ne lui est pas possible de faire la demande

in accordance with paragraph (2)(b), the party must appear on the date fixed for the proceeding and make the application orally before the time fixed for the proceeding.

conformément à l'alinéa (2)b), la partie se présente à la date fixée pour la procédure et fait sa demande oralement avant l'heure fixée pour la procédure.

Factors

(4) Subject to subrule (5), the Division must not allow the application unless there are exceptional circumstances, such as

(a) the change is required to accommodate a vulnerable person; or

(b) an emergency or other development outside the party's control and the party has acted diligently.

Éléments à considérer

(4) Sous réserve du paragraphe (5), la Section ne peut accueillir la demande, sauf en cas des circonstances exceptionnelles, notamment :

a) le changement est nécessaire pour accommoder une personne vulnérable;

b) dans le cas d'une urgence ou d'un autre développement hors du contrôle de la partie, lorsque celle-ci s'est conduite avec diligence.

Counsel retained or availability of counsel provided after hearing date fixed

(5) If, at the time the officer fixed the hearing date under subrule 3(1), a claimant did not have counsel or was unable to provide the dates when their counsel would be available to attend a hearing, the claimant may make an application to change the date or time of the hearing. Subject to operational limitations, the Division must allow the application if

(a) the claimant retains counsel

Conseil retenu ou disponibilités du conseil transmises après la date à laquelle l'audience a été fixée

(5) Si, au moment où l'agent a fixé la date d'une audience en vertu du paragraphe 3(1), il n'avait pas de conseil ou était incapable de transmettre les dates auxquelles son conseil serait disponible pour se présenter à une audience, le demandeur d'asile peut faire une demande pour changer la date ou l'heure de l'audience. Sous ré- serve de restrictions d'ordre fonctionnel, la Section accueille la demande si, à la fois :

a) le demandeur d'asile retient

no later than five working days after the day on which the hearing date was fixed by the officer;

les services d'un conseil au plus tard cinq jours ouvrables après la date à laquelle l'audience a été fixée par l'agent;

(b) the counsel retained is not available on the date fixed for the hearing;

b) le conseil n'est pas disponible à la date fixée pour l'audience;

(c) the application is made in writing;

c) la demande est faite par écrit;

(d) the application is made without delay and no later than five working days after the day on which the hearing date was fixed by the officer; and

d) la demande est faite sans délai et au plus tard cinq jours ouvrables après la date à laquelle l'audience a été fixée par l'agent;

(e) the claimant provides at least three dates and times when counsel is available, which are within the time limits set out in the Regulations for the hearing of the claim.

e) le demandeur d'asile transmet au moins trois dates et heures auxquelles le conseil est disponible, qui sont dans les délais prévus par le Règlement pour l'audience relative à la demande d'asile.

Application for medical reasons

Demande pour raisons médicales

(6) If a claimant or protected person makes the application for medical reasons, other than those related to their counsel, they must provide, together with the application, a legible, recently dated medical certificate signed by a qualified medical practitioner whose name and address are printed or stamped on the certificate. A claimant or protected person who has provided a copy of the certificate to the Division must provide the original document to the Division without delay.

(6) Si le demandeur d'asile ou la personne protégée pré- sente une demande pour des raisons médicales, à l'exception de celles ayant trait à son conseil, il transmet avec la demande un certificat médical récent, daté et lisible, signé par un médecin qualifié, et sur lequel sont imprimés ou estampillés les nom et adresse de ce dernier. Le demandeur d'asile ou la personne protégée qui a transmis une copie du certificat à la Section lui transmet sans délai le document original.

Content of certificate

(7) The medical certificate must set out (a) the particulars of the medical condition, without specifying the diagnosis, that prevent the claimant or protected person from participating in the proceeding on the date fixed for the proceeding; and (b) the date on which the claimant or protected person is expected to be able to participate in the proceeding.

Contenu du certificat

(7) Le certificat médical indique, à la fois : a) sans mentionner de diagnostic, les particularités de la situation médicale qui empêchent le demandeur d'asile ou la personne protégée de participer à la procédure à la date fixée; b) la date à laquelle le demandeur d'asile ou la personne protégée devrait être en mesure de participer à la procédure.

Failure to provide medical certificate

(8) If a claimant or protected person fails to provide a medical certificate in accordance with subrules (6) and (7), they must include in their application

(a) particulars of any efforts they made to obtain the required medical certificate, supported by corroborating evidence;

(b) particulars of the medical reasons for the application, supported by corroborating evidence; and

(c) an explanation of how the medical condition prevents them from participating in the proceeding on the date fixed for the proceeding.

Défaut de transmettre un certificat médical

(8) À défaut de transmettre un certificat médical, conformément aux paragraphes (6) et (7), le demandeur d'asile ou la personne protégée fournit avec sa demande :

a) des précisions quant aux efforts qu'il a faits pour obtenir le certificat médical requis ainsi que des éléments de preuve à l'appui;

b) des précisions quant aux raisons médicales au soutien de la demande ainsi que des éléments de preuve à l'appui;

c) une explication de la raison pour laquelle la situation médicale l'empêche de participer à la procédure à la date fixée.

Subsequent application

(9) If the party made a previous application that was

Demande subséquente

(9) Si la partie a déjà présenté une demande qui a été refusée,

denied, the Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.	la Section prend en considération les motifs du refus et ne peut accueillir la demande subséquente, sauf en cas de circonstances exceptionnelles fondées sur l'existence de nouveaux éléments de preuve.
Duty to appear	**Obligation de se présenter**
(10) Unless a party receives a decision from the Division allowing the application, the party must appear for the proceeding at the date and time fixed and be ready to start or continue the proceeding.	(10) Sauf si elle reçoit une décision de la Section accueillant la demande, la partie est tenue de se présenter pour la procédure à la date et à l'heure fixées et d'être prête à commencer ou à poursuivre la procédure.
New date	**Nouvelle date**
(11) If an application for a change to the date or time of a proceeding is allowed, the new date fixed by the Division must be no later than 10 working days after the date originally fixed for the proceeding or as soon as possible after that date.	(11) Si la demande de changement de date ou d'heure d'une procédure est accueillie, la Section fixe une nouvelle date qui tombe au plus tard dix jours ouvrables après la date initialement fixée ou dès que possible après cette date.

VII. ARGUMENTS

A. *Applicants*

(1) Justiciability

[14] The Applicants submit that the issues raised are justiciable.

[15] The postponements affect the Applicants' legal rights because Canada withholds important legal rights from refugee claimants until they have been granted refugee status. Consequently, a delay in the hearing postpones access to those legal rights.

[16] Additionally, the sudden postponement of an important and life-altering event and subsequent indefinite waiting period causes stress that is prejudicial to the Applicants.

[17] Moreover, the Applicants have standing to challenge the legality of the Instructions due to the negative impact on them. Accordingly, the matter is justiciable and not merely an interlocutory step in the proceedings.

(2) *Ultra Vires*

[18] The Applicants submit that the Decisions and Instructions are *ultra vires* because they allow RPD decision-makers to postpone refugee hearings *ex proprio motu* where FESS results are not received and are inconsistent with the procedures for the scheduling and postponement of refugee claims as provided in the *IRPA*, *Regulations*, and *Rules*.

a. Legislative Framework

[19] A review of the applicable legislation and *Regulations* demonstrates that there are specific timelines that must be adhered to in the refugee claim process. According to the *IRPA*, an officer has three days from receipt of the claim to refer the matter to the RPD, or the claim is deemed to be referred unless suspended or deemed ineligible. Subsection 159.9(1) of the

Regulations provides that the date for the hearing of the claim must be within 30, 45, or 60 days of the claim, depending upon where the claim is made. An exception to this timeline is permissible under s 159.9(3) of the *Regulations*, but the hearing must be held as soon as feasible. While the IRB has flexibility to extend the timelines, the parties seeking to obtain a change of date must meet the criteria set out in ss 50 and 54 of the *Rules*.

[20] Subsections 100(2)(a) and 103(1) of the *IRPA* allow the suspension of a refugee claim pending consideration of the claimant's potential inadmissibility. The CBSA conducts the FESS with the Canadian Security Intelligence Service [CSIS] and informs the IRB upon completion of the FESS. In the event that the FESS is not completed, the Instructions provide that the RPD should remove the hearing from the schedule and set a new date as soon as feasible upon confirmation of the FESS completion. If the FESS results are not received within six months after the claim was referred, the hearing is rescheduled and the claim is heard unless the CBSA applies and receives a change of date. If the FESS results are pending past twelve months from the date of the referral, then a conference between all parties is convened and a hearing date may be set. In other words, the CBSA is granted an automatic, *ex proprio motu* postponement if it delays the FESS results for up to six months.

[21] Moreover, the Instructions are mandatory and universal. Unlike the *Chairperson Guideline 6: Scheduling and Changing the Date or Time of a Proceeding* [Guidelines], which are non-binding, the Instructions are expressly mandatory, as indicated by the statement: "Members and other IRB personnel shall follow these Instructions in the processing of refugee protection claims before the Refugee Protection Division (RPD)" [emphasis added].

b. Legislative Authority

[22] The Applicants argue that the Instructions are not simple administrative matters; they affect the scheduling and postponement of RPD hearings, which are already governed by the *IRPA*, *Regulations* and *Rules*. The Instructions also allow the RPD to postpone hearings on its own initiative when FESS results are not received. Additionally, the Guidelines assume that the Instructions are mandatory, despite having no legal basis or authority to override the *IRPA*, *Regulations*, and *Rules*.

[23] The Applicants submit that there is no provision in the legislation that permits the Instructions to be binding. Subsections 161(1) and 161(2) of the *IRPA* stipulate that rules governing the procedural aspects of hearings must be approved by the Governor-in-Council and tabled before both houses of Parliament within fifteen days. The Instructions were not adopted in this manner and are therefore not issued under the authority of s 161(1), unlike the *Rules*, which have the force of law.

[24] The Federal Court of Appeal has confirmed that the *IRPA* provides the Chairperson with broad powers, including the issuance of guidelines and rules: *Kozak v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124 at paras 60-61. However, s 159(1)(h) of the *IRPA* stipulates that guidelines must assist members in carrying out duties, but cannot fetter discretion and adjudicative discretion or override the *IRPA* or *Regulations*.

[25] The Applicants claim that the Instructions have no legislative foundation and purport to bind all decision-makers by stating that they "shall" follow the Instructions that specify the conditions upon which hearings are automatically postponed. More importantly, the Instructions are also inconsistent with the applicable legislation and *Regulations*. There are clear timelines and procedures that must be followed, yet the Instructions require the RPD to ignore them by obliging the RPD to change the hearing dates without applications from either party, and without fulfilment of the conditions as required by the legislation and *Regulations*.

[26] Consequently, the Instructions are *ultra vires* because they are not issued with legislative authority and override other legal instruments.

c. Inconsistency

[27] The Applicants disagree with the Respondent's arguments that the Instructions do not require the RPD to act in a manner that is inconsistent with the *IRPA* or *Regulations*.

[28] Subsection 159.9(3) of the *Regulations* sets out the grounds for changing a hearing date, but not the process, which is outlined in ss 50 and 54 of the *Rules*. While the RPD has the authority to fix the time and place of a hearing, as well as change the date, the RPD is not authorized to ignore the provision that sets out the criteria for which a hearing can be postponed beyond the statutory deadline. The Chairperson has the power to establish guidelines that are non-binding; the Instructions, however, are binding.

[29] Moreover, the exceptions permit postponement in the event of a pending investigation or inquiry and the fact that FESS results have not been received does not necessarily constitute a pending investigation. In the present case, there has not been any evidence adduced that the unavailability of the FESS results means there is a pending investigation. And even where it is established that there is a pending investigation, the proper procedure for the suspension of the claim is governed by s 103 of the *IRPA*, which the Instructions effectively supersede.

(3) Institutional Bias

[30] The Applicants submit that the Decisions and Instructions breach procedural fairness because they give rise to a reasonable apprehension of institutional bias by granting the Respondent a cancellation of a refugee hearing without following the procedures for the scheduling and postponement of refugee claims as provided in the *IRPA*, *Regulations*, and *Rules*. As a result, the Respondent is provided preferential treatment via an automatic postponement whenever the CBSA has not performed its statutory duties in accordance with the prescribed time-frames, because the Respondent neither has to establish that the legislative and regulatory criteria for a postponement have been satisfied nor move for the relief sought.

[31] While the duties of procedural fairness may vary depending on the function and nature of a tribunal, the adjudicative nature of an RPD hearing necessitates that the RPD's independence must be viewed on the high end of the spectrum: *Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36 at para 21. Decisions are liable to be set aside for bias if a reasonable person would conclude, based on a balance of probabilities, that the decision-maker was not impartial: *Restrepo Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 at

para 6. Institutional bias is found if such a reasonable apprehension exists in a substantial number of cases: *R v Lippé*, [1991] 2 SCR 114.

[32] The Applicants submit that a reasonable and well-informed person could only conclude that the IRB is not impartial because it allows the RPD to cancel hearings for refugee claims whenever the FESS results are not received, and without any written application whatsoever from the parties. The claimant must adhere to the applicable procedures governing the process of postponement, yet the Respondent is entirely exempt. The resulting disparity demonstrates an instance of institutional bias and a lack of independence on the part of the IRB.

[33] The Applicants take the position that they do not need to establish that the RPD always cancels hearings when FESS results are not received. Their hearings were cancelled on the ground that FESS results were not received and the Instructions are explicit in mandating the RPD to always cancel hearings under such circumstances. There is no evidence adduced that the RPD ignores its own Instructions.

[34] Additionally, the Applicants submit that whether or not the postponement favours the Respondent or affects the conduct or assessment of the hearing and claim is not dispositive. The Instructions require the RPD to respond automatically to the Respondent's failure to act within the statutory timeframe while claimants are not afforded the same treatment. The Respondent is therefore given favourable procedural treatment via automatic relief from the failure to meet statutory deadlines. Accordingly, the Instructions compromise the RPD's institutional independence due to the preferential treatment afforded to the Respondent.

B. *Respondent*

(1) Applications are Barred

[35] The Respondent submits that these applications are not properly before the Court.

[36] First, the postponements do not affect the Applicants' legal rights, impose legal obligations, or cause prejudice subject to judicial review. The hearings will proceed and the claims will be decided. Even if the Decisions are subject to judicial review, cancellation is an interlocutory step in an ongoing proceeding, and is therefore not subject to immediate review: *Air Canada v Toronto Port* Authority, 2011 FCA 347 at paras 27, 32; *CB Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 at paras 30-33 [*CB Powell*]. Additionally, the Applicants have had access to other recourse that they did not take, such as an application to the RPD.

[37] Second, the Applicants advanced their issues for the first time on leave and failed to raise them before the RPD, despite the *vires* of the Instructions and allegations of institutional bias being questions of law within the jurisdiction of the RPD.

(2) Mootness

[38] With regard to Mr. Salim, the Respondent submits that the application is moot because his claim was successful.

(3) *Intra Vires*

[39] The Respondent submits that the Instructions are *intra vires*. The Chairperson is empowered to issue written guidelines on any matter within his or her purview, including the procedure to be followed by the RPD in fixing the time of a hearing: ss 159(1)(h) and 159(1)(f) of the *IRPA*. The Instructions are also in line with how RPD hearings are scheduled and do not affect the assessment of the claim on its merits. Moreover, the Instructions are not inconsistent with the legislation, which allows exceptions to statutory deadlines where there are inquiries outstanding on potential inadmissibility. The Instructions enhance the ability to suspend RPD proceedings in such circumstances and avoid the need to nullify a RPD decision on a claim that is later found to be ineligible. Additionally, a short postponement to allow for the completion of FESS is consistent with the objectives of maintaining the integrity of the refugee protection system and protecting the security of Canadian society. The Instructions are therefore consistent with the authority of the Respondent and ensure that members work efficiently.

(4) Institutional Bias

[40] The Respondent also disagrees with the Applicants' allegations of institutional bias. There is no evidence that the RPD cancels the hearing in every case where the FESS results are not received. In fact, the Decisions refer to the fact that the hearings can be rescheduled and heard even if FESS has not been confirmed by specific dates. The Instructions govern when a hearing can be scheduled or rescheduled, depending on the status of the FESS results. The Instructions do not affect the conduct of the hearing or assessment of the claim. Accordingly, an informed person would not apprehend a real likelihood of bias.

[41] Additionally, the postponement does not automatically favour the Minister. The Minister is rarely a party to RPD proceedings except in cases of exclusion and therefore cannot obtain the judicial advantage underlying the Applicants' claim of institutional bias.

C. *Respondent's Further Argument*

(1) Applications are Barred

[42] The Respondent reiterates the position that the applications for judicial review are not properly before the Court.

a. Reviewability

[43] The Respondent submits that the postponement of a RPD hearing is not a matter that is the subject of judicial review. The Decisions do not constitute final decisions in relation to the refugee claim and do not affect the legal rights of the claimants; accordingly, no legal consequences flow from the postponements. The Applicants seek to challenge an administrative act or interlocutory step that is not properly the subject of judicial review.

[44] While the Applicants frame their arguments as a jurisdictional issue, the arguments must fail. First, the Federal Court of Appeal has held that the existence of a jurisdictional issue by itself is insufficient and does not qualify as an exceptional circumstance to allow the launch of a judicial review before the administrative process is completed or the jurisdictional argument is presented to the IRB: *CB Powell*, above, at paras 39-46. Second, the Instructions are

administrative in nature in that they deal with scheduling, internal management of advice, evidence, and communications. They do not deal with the process regarding the hearing itself. Additionally, the Applicants have not established that the RPD does not have the jurisdiction to hear the matter.

b. Alternative Remedy

[45] The Respondent also submits that the Applicants have failed to establish that all adequate remedial recourses in the administrative process have been exhausted. The Applicants could have challenged the Instructions before the RPD, yet they did not do so. The RPD has the authority to deal with all matters of law related to its own jurisdiction, including *vires* and institutional bias. Thus, the Applicants cannot advance these issues for the first time on judicial review when it was open to them to raise them before the RPD.

(2) Mootness

[46] The Respondent argues that the matter is moot with regards to Mr. Salim, whose refugee claim was accepted on May 4, 2017 and is now moot with regards to Mr. Alhaqli, whose refugee hearing has been set for June 22, 2017. There is no adversarial relationship that remains between the parties or consequences from the cancellation. The applications should therefore be dismissed in accordance with the doctrine of mootness: *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353, 358-359 [*Borowski*].

(3) *Intra Vires*

a. Background

[47] Public safety and national security are serious concerns of the government. The refugee protection process supports the objective of protecting Canadian society and promoting international justice and security. Accordingly, the *IRPA* provides that a refugee claim may be suspended in the face of an ongoing investigation for inadmissibility. The *Regulations* outline the timelines and exceptions. The Instructions provide that the RPD will not hear a claim for up to six months from referral without FESS results. After the six month period, the hearing may proceed without the FESS results unless the CBSA applies for and is granted a change in hearing date or the Minister applies for a change in hearing date. If the FESS results are still pending after twelve months from referral, a conference may be convened between all parties to fix a date.

b. Authority

[48] As an administrative tribunal, the RPD has inherent authority to control its own processes, including scheduling the matters before it. The Instructions are therefore within the Chairperson's powers to issue guidelines and instructions.

[49] There are two ways to change a hearing date. If changed by a party, then s 54 of the *Rules* governs the procedure. If changed by the Chairperson, then ss 159(1)(a), (h), (f), and (g) of the

Regulations govern the procedure. The two methods ensure that FESS is completed prior to the hearing and that hearings are not postponed indefinitely.

[50] There are distinctions between instructions and guidelines. The former are administrative in nature and the latter deal with adjudicative issues that deal with the hearing itself. The Respondent argues that the Instructions are administrative in nature and do not affect the hearing itself or the processing of the claim, and are therefore not subject to the same approval process as statutory rules.

[51] The Instructions also do not require the RPD to act in a manner inconsistent with the legislation. The *Regulations* mandate hearings to be held within certain timeframes, but they also provide exceptions, including cases where inquiries about potential inadmissibility are outstanding. The Instructions enhance the ability to suspend RPD proceedings and avoid the need to nullify a RPD decision that is later determined to be ineligible. Consequently, the Instructions are within the authority of the Chairperson to direct the RPD's work and ensure that members work efficiently.

[52] The Respondent submits that it is clear that the Chairperson has the authority to issue the Instructions under s 159.9(3)(b) of the *Regulations*. Parliament allows individuals to seek refugee protection in Canada, but not if they are inadmissible on certain grounds. The grounds in the s 159.9(3) exception mirror the ineligibility provisions. The exception is also clearly linked to the possibility of ongoing investigation related to FESS results.

[53] Moreover, the Chairperson has the authority to direct the RPD to change hearing dates: s 159(1)(f) of the *IRPA*; s 159.9(3) of the *Regulations*.

[54] As a result, the Instructions support the objectives of the *IRPA* by allowing the Minister an opportunity to complete an investigation while balancing the claimant's right to an expeditious resolution of their claim. The Respondent therefore submits that the Instructions do not purport to indefinitely postpone a refugee hearing pending the receipt of the FESS results, but ensure the interests of security as well as timely resolution of the refugee claim. Accordingly, the Instructions are not *intra vires*.

(4) Institutional Bias

[55] The Respondent submits that the Applicants have not met the test for institutional bias on both evidentiary and legal grounds.

[56] There is a two-part legal test for institutional bias, as outlined in *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at para 67:

> Step One: Having regard for a number of factors including, but not limited to, the potential for conflict between the interests of tribunal members and those of the parties who appear before them, will there be a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases?
>
> Step Two: If the answer to that question is no, allegations of an apprehension of bias cannot be brought on an institutional level, but must be dealt with on a case-by-case basis.

[57] The RPD is held to a high standard of impartiality in its adjudicative capacity. The establishment of institutional bias requires substantial grounds for a reasonable apprehension of bias and is not related to the very sensitive or scrupulous conscience: *Yukon Francophone School Board, Education Area No 23 v Yukon Territory (Attorney General)*, [2015] 2 SCR 282 at para 26.

[58] The Respondent argues that the effect on the Applicants' s 7 interests protected by the *Canadian Charter of Rights and Freedoms* is marginal at best. The Applicants have little evidence to support the argument that they have been adversely affected by the postponement of their hearings; indeed, Mr. Salim has received a positive determination. The Applicants had access to benefits under the Federal Interim Healthcare Program, social assistance, and the ability to apply for study and work permits. The stress alleged in their arguments is therefore no more than the normal consequences of the refugee process.

[59] Additionally, there is no evidence to support the assertion that the RPD cancels the hearing in every case where FESS results are not received. The Instructions govern when a hearing can be scheduled or rescheduled, depending on the status of the FESS results, but they do not affect the conduct of the hearing or assessment of the claim. The Minister has the burden of applying for adjournments where the delays are outside the Instructions. Consequently, an informed person would not apprehend a real likelihood of bias flowing from the Instructions.

[60] Furthermore, institutional bias is not demonstrated simply by the adherence to the Instructions. The legislation allows the Chairperson to issue guidelines that are mandatory in

nature and Parliament can displace the level of institutional independence that fairness or natural justice dictates. In this case, Parliament has chosen to prioritize safety and security and the Instructions are a flexible administrative tool which allow the RPD to manage its inventory while respecting the rights of claimants.

[61] Finally, the Applicants presuppose, without evidence, that postponement favours the Minister. However, the Minister is rarely a party to RPD proceedings save for exclusion cases. In the present case, the Minister cannot obtain the judicial advantage that underlies the Applicants' claims of institutional bias.

VIII. ANALYSIS

A. *Introduction*

[62] In order to deal with the situation where FESS results have not been received prior to the date set for a refugee hearing, the Chairperson has issued the Instructions which read as follows:

> In those cases where confirmation of security screening has not been received in time for the initially scheduled hearing, the IRB will remove the hearing from the schedule and set a new date and time for the hearing as soon as feasible upon confirmation of the security screening. Parties will be advised in accordance with the process outlined in Notification.
>
> In those cases where confirmation of security screening has not been received at six (6) months from the date of referral, the RPD will normally proceed to schedule and hear the claim unless the CBSA files an application change the date and time that is granted by the IRB. In considering such an application, the RPD will provide an opportunity to the claimant to make representations.
>
> In those cases where the IRB grants a delay and confirmation of security screening is subsequently received, it will be rescheduled as soon as feasible.

> In cases where confirmation of security screening remains pending at twelve (12) months from the date of referral, the RPD will convene a conference with the claimant, counsel and Minister's counsel and may fix a date for a hearing.

[63] This means that the refugee hearing is removed from the schedule and a new time and date will be set as soon as feasible upon confirmation of security screening. If the screening results have not been received six months after the claim was referred, the hearing will be rescheduled and the claim will be heard, unless the CBSA makes an application to change the date and time and such application is granted. When confirmation of security screening remains pending twelve months from the date of referral, the RPD must convene a conference with the claimant, counsel, and Minister's counsel and may fix a date for a hearing.

[64] The obvious purpose of the Instructions is to provide, in routine and exceptional cases, an administrative breathing space to ensure that FESS results are available before the refugee hearing occurs. This makes eminent sense because there is no point in conducting a hearing if eligibility could be an issue.

[65] In the present case, the Applicants' refugee hearings were postponed in accordance with the Instructions, but, in Mr. Salim's case, his claim has now been heard and he has been granted refugee status. In Mr. Alhaqli's case, the hearing date has now been set for June 22, 2017. In other words, the delays have not been significant.

Mr. Salim	Arrival in Canada:	October 18, 2016
	Claim submitted:	October 18, 2016
	Original hearing date:	December 14, 2016 (changed to December 16, 2016 at his counsel's request)
	Hearing date cancelled:	November 30, 2016
	New hearing date:	Unknown – he was informed on February 16, 2017 that his application had been selected for expedited processing
	Decision:	May 4, 2017
Mr. Alhaqli	Arrival in Canada:	August 11, 2016
	Claim submitted:	October 12, 2016
	Original hearing date:	December 6, 2016
	Hearing date cancelled:	November 22, 2016
	New hearing date:	June 22, 2017
	Decision:	Unknown or pending

[66] The Applicants concede that hearings need to be rescheduled if FESS results are not obtainable in time for the original hearing date. However, they say that this cannot be done in accordance with the Instructions, which are both *ultra vires* the Chairperson and create a systemic bias that favours the Minister. Before addressing these issues, the present status of the Applicants and their approach to dealing with their concerns raise a number of preliminary issues that the Court must deal with.

B. *Mootness*

[67] In Mr. Salim's case, he has now been granted precisely what he wanted: refugee status. Why he now wishes to take issue with the delay required to ensure he was eligible is not convincingly explained.

[68] In Mr. Alhaqli's case, if he does not yet have everything he wants, he does have what he is entitled to: *i.e.* a fixed date for his hearing. If he is not granted refugee protection then he can bring any negative decision before this Court on judicial review. He does not need a declaration regarding the Instructions to do this and nor would the Instructions be an issue in such a review.

[69] On their arrival in Canada, both Applicants had the right to have their refugee claims decided in accordance with Canadian law, to receive the support and accommodations available to those who are awaiting a hearing, and a decision for their claim. Mr. Salim's claim has been decided on its merits and Mr. Alhaqli's will be. The Instructions have had no impact upon the merits of either claim. The positive result in Mr. Salim's case is evidence against any form of systemic bias in his case, and there is no reason why an apprehension of bias should appear in Mr. Alhaqli's case which will be decided upon the merits. There is nothing to suggest that either Applicant needs the assistance of the Court at this stage, or that the declaratory relief requested could have any practical impact upon their lives.

[70] Counsel for the Applicants has argued before me that the delays in their refugee hearings subjected the Applicants to additional stress and that the declaratory relief requested would have a practical significance for the Applicants if they decide to sue the Crown for the delays in a civil action. There is no evidence before me to suggest that the Applicants have suffered anything more than the stress inherent in coming to a new country and seeking refugee protection, and the Court is not in the business of providing declaratory judgments to parties who may decide to take civil action. And realistically, on the record before me, civil action is highly unlikely. Counsel

for the Applicants has not convinced me that the postponements of the Applicants' refugee hearings have had any real material impact upon the Applicants' rights or their well-being.

[71] As matters now stand, there is no live controversy between the parties and the declaratory relief sought can have no practical utility for either Applicant. In other words, these applications are moot in accordance with the principles established in *Borowski*, above, and again in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 17:

> 17. The doctrine of mootness reflects the principle that courts will only hear cases that will have the effect of resolving a live controversy which will or may actually affect the rights of the parties to the litigation except when the courts decide, in the exercise of their discretion, that it is nevertheless in the interest of justice that the appeal be heard (see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 353). In our view, the instant appeal is moot. The parties attended several reporting hearings, presented evidence and allowed the deponents of affidavits to be cross-examined. The desired effect has been achieved: the schools at issue have been built. Restoring the validity of the trial judge's order would have no practical effect for the litigants in this case and no further reporting sessions are necessary.

[72] The question before me, then, is whether, in the interests of justice, I should hear and decide these applications notwithstanding that, in my view, there is no live controversy between the parties and the relief sought will have no practical effect upon the rights of the Applicants.

[73] When deciding whether to exercise its discretion to hear and decide a moot case, the decision in *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 44 [*Baron*] provides the following guidance:

> A final comment on this issue. In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at paragraphs 29 to 42, the Supreme Court identified three factors that a court should consider

> in deciding whether or not to exercise its discretion to hear the merits of an action or an application for judicial review which it finds to be moot: (1) the existence of an adversarial relationship between the parties; (2) the concern for judicial economy; and (3) the need for the court not to intrude into the legislative sphere.

[74] This Court has since applied *Baron* with an emphasis on judicial economy. See *Singh v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 403 at para 10:

> When there is no longer any existing dispute that can have a practical impact on the parties' rights, legal recourse becomes theoretical. In such cases, three factors may be taken into account to determine whether a Court should still examine the merits: the existence of an adversarial context; judicial economy; the law-making function of the Court and not intruding into the role of the legislative branch (*Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342). Even if there was an adversarial context regarding the reasonableness of the officer's decision, judicial economy argues against exercising my judicial discretion to decide on the merit of the application, and as for the law-making function of the Federal Court, no question of law of general importance was really argued by the parties, as was the case in *Baron*.

[75] The Applicants argue that the Court should decide the *vires* and bias issues raised, and place particular emphasis on the following:

a) There is an adversarial relationship between the parties;

b) The substantive issues have now been fully argued before me and the Court has the record needed to make a decision;

c) The issues are evasive of review;

d) If the Instructions are not declared *ultra vires* then refugee applicants still suffer an ongoing prejudice;

e) There is no intrusion into the Parliamentary sphere because this is a pure rule of law issue: Has the Chairperson, in issuing the Instructions, acted beyond the powers conferred by Parliament as set out in *IRPA* and the *Regulations*?; and

f) The issues have now been fully argued before the Court and there is no excessive expenditure involved.

[76] I have already found that there is no live controversy between the parties and, in my view, I see no adversarial relationship as matters now stand. The Applicants chose to come to Canada and to subject themselves to whatever stresses are involved when making a refugee claim. When their hearings were postponed, the Applicants were given assurances that the delay would have no impact upon their rights to seek refugee protection and they have continued to receive the accommodation and assistance available to those involved in the refugee process. There is no evidence before me of any psychological, physical, personal or social harm suffered by the Applicants as a result of the delays in hearing their claims.

[77] In effect, the Court is being asked to provide a legal opinion on the legality of the Instructions without any facts to suggest that a legal opinion is required at this time. In my view, such an opinion will not assist the Applicants in any way. Counsel points out that the Instructions have been used, and will be used, to postpone refugee hearings in a significant number of other cases. But there is no evidence before me to suggest that such use has caused, or will cause, harm to any applicant, will impact rights in any material way, or will affect the fair assessment of any claim on its merits. The Applicants' arguments of systemic bias before me remain totally abstract. I have concrete evidence of a lack of bias in the fact that Mr. Salim has already been granted refugee status, notwithstanding the delay in hearing his claim as a result of the Instructions. Indeed, if the Instructions are not used, the likelihood is that any claim that comes before the RPD before the FESS results are available will have to be postponed in any event.

Neither Applicant in this case has established that, but for the Instructions, their claims would have been heard on the original hearing dates.

[78] It seems to me that the principal concern of Applicants' counsel for other cases is that the Instructions mandate a postponement of the hearing without allowing applicants to be heard on the issue. Conceivably, this could lead to unfairness or other problems in particular cases, but it is my view that the Court should not be providing what is, in effect, a legal opinion on the validity of the Instructions unless and until a particular set of facts arises that requires such an opinion. In my view, the Court should not encourage counsel to come to Court seeking legal opinions for administrative acts without a set of facts that requires such an opinion and that provide a practical justification for the declaratory relief sought.

[79] Applicants' counsel believes that the Instructions are *ultra vires* and cause an unacceptable imbalance in the claims process that favours the Minister. In the end, this amounts to a general debate about the possible effects of an administrative instrument that is obviously intended to deal with a real problem (*i.e.* how to balance security and protection in a situation where the FESS results are not available in time for the hearing). There is nothing underhand about this and there is nothing before me to suggest that the Instructions are being used in any way that affects the rights of claimants.

[80] The Court is here to adjudicate disputes, not to provide legal opinions in abstract debates and Court resources should not be used to debate the legality of inconsequential delays when there is no underlying dispute between actual parties who need an answer.

[81] For these reasons, my conclusion is that these review applications are moot and that the Court should decline to exercise its discretion to decide the *vires* and systemic bias issues raised by the Applicants.

[82] Counsel for the Applicants has submitted the following questions for certification:

> 1. Are the IRB Chairperson's *Instructions Governing the Management of Refugee Protection Claims Awaiting Front-end Security Screening ultra vires*?
>
> 2. Do the *Instructions Governing the Management of Refugee Protection Claims Awaiting Front-end Security Screening* create a reasonable apprehension of institutional bias?

[83] Counsel for the Respondent has submitted the following questions for certification:

> 1. Are the Chairperson's *Instructions Governing the Management of Refugee Protection Claims Awaiting Front-end Security Screening* authorized pursuant to s. 159(1) of the *Immigration and Refugee Protection Act* and ss. 159(3) of the *Immigration and Refugee Protection Regulations*?
>
> 2. Do the Chairperson's *Instructions Governing the Management of Refugee Protection Claims Awaiting Front-end Security Screening* give rise to reasonable apprehension of bias?

[84] In *Zaghbib v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 182 at paras 55-56, Justice Pelletier stated, in regards to certified questions:

> The jurisprudence of this Court is clear that it has no jurisdiction to hear an appeal unless there is a legitimate certified question before it. A legitimate certified question is one which was dealt with in the Federal Court's reasons and which is dispositive of the appeal: see *Zaza v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368, at paragraph 12; *Canada (Minister of Citizenship and Immigration) v. Varela*, 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraph 43; *O'Brien v. Canada*

> *(Minister of Citizenship and Immigration)*, 2016 FCA 159, [2016] F.C.J. No. 567, at paragraph 8.
>
> The certified question in this case did not arise on the facts because at the time the case was heard, a decision had been made even though the Minister, for reasons best known to him, proceeded as though none had. Furthermore, the Federal Court dealt with Mr. Zaghbib's application as one based on delay: "…he is not owed any duty of investigation by the CBSA in the time frame he experienced": see Decision, at paragraph 29. The right to an investigation of a complaint of marriage fraud by a private citizen qua citizen was not dealt with.
>
> [emphasis added]

[85] Given my conclusions on mootness, these questions cannot be certified as they have neither been dealt with in this application nor would they be dispositive on appeal since the applications have been dismissed for mootness.

JUDGMENT IN IMM-5045-16 AND IMM-5200-16

THIS COURT'S JUDGMENT is that:

1. These applications are dismissed; and

2. There is no question for certification.

3. A copy of this Judgment and Reasons shall be placed on each file.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5045-16
STYLE OF CAUSE:	MOHSEN MOHAMMED ALHAQLI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
DOCKET:	IMM-5200-16
STYLE OF CAUSE:	MOHAMMAD SALIM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 1, 2017
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	JULY 27, 2017

APPEARANCES:

Jared Will	FOR THE APPLICANTS
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