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Docket: IMM-9766-04

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Ottawa, Ontario, April 10th, 2006

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JORGE LUIS RESTREPO BENITEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-9220-04

SIRISENA KURUVITA ARACHCHIGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-9452-04

AFUA GYANKOMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-9797-04

MIKE BILOMBA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-353-05

GERARDO MARTIN ROSALES RINCON
CATALINA RODRIGUEZ PATINO
ERLIS BEATRIZ DELGADO OCANDO
GERLY JOANNY ROSALES DELGADO
WANDA SOFIA ROSALES DELGADO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-407-05

EDWIN ERNESTO CARRILLO MEJIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-934-05

MAJID REZA YONGE SAVAGOLI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-1144-05

MUHAMMAD SADIK QADRI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-1419-05

JUVINNY BALMORE FLORES GOMEZ
YANETH BEATRIZ CASTILLO CAMPOS
KONNY BEATRIZ FLORES CASTILLO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-1877-05

SHURLYN CATHY ANN JONES
SHURNIKYA JONES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-2034-05

LUIS ALEJANDRO LEMUS ORTIZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-2150-05

INTHIKHAB HUSSAIN MATHEEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-2709-05

GUILLERMO GUTIERREZ TRUJILLO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-3313-05

JACQUELINE ROBINSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-3994-05

SIRISENA KURUVITA ARACHCHIGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-4044-05

RANJIT DEY ROY
RATNA RANI DEY ROY
SWAKSHAR DEY ROY
SWAIKOT DEY ROY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-712-05

MENA GUIRGUIS
MARIE GOORGY
MONICA GUIRGUIS
MALAK GUIRGUIS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-470-05

JORGE ISAAC MARTINEZ MARTINEZ
EVA LIBERTAD MORALES (a.k.a. EVA LIBERTAD MORALES DE MARTINEZ)
JORGE ARMANDO MARTINEZ MORALES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

Docket: IMM-4064-05

SUTHARMINI KAMALENDRAN
SINOJAN KAMALENDRAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

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Procedural History

[1] These reasons concern nineteen applications for judicial review which were consolidated in part for hearing by the Order of Justice Judith A. Snider dated February 20, 2006. Each of the 19 applications raises issues regarding a guideline made by the Chairperson of the Immigration and Refugee Board ("IRB") under the authority of paragraph 159(1)(h) of the *Immigration and Refugee Protection Act* S.C. 2001, c. 27 ("IRPA").

[2] This guideline, entitled "Guideline 7 – Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division", was the subject of a recent decision of Justice Edmond P. Blanchard in *Thamotharem v. The Minister of Citizenship and Immigration*, 2006 FC 16, [2006] F.C.J. No. 8 (QL). In reasons dated January 6, 2006, Justice Blanchard found that Guideline 7 unlawfully fettered the discretion of members of the Refugee Protection Division ("RPD") and held that the decision that was before him would be quashed and the applicant's claim remitted for redetermination by a differently constituted panel. In an Order dated January 19, 2006, Justice Blanchard allowed the application and certified three questions as being of general importance in accordance paragraph 74(d) of IRPA. An appeal and cross-appeal have been filed from this decision.

[3] Following the release of Justice Blanchard's decision in *Thamotharem*, it became apparent that there were a number of applications for judicial review raising similar issues scheduled to be heard by different judges at various sittings of this Court. Following consultations with counsel for the parties, Chief Justice Allan Lutfy ordered that 20 applications be continued as specially managed

proceedings and, pursuant to Rule 383, appointed Mr. Justice Gibson and Madam Justice Snider as Case Management Judges for those applications.

[4] Justice Frederick E. Gibson and Justice Snider participated in conference calls with counsel for the parties on several dates in February. Upon being satisfied that it was in the interest of justice that the identified Guideline 7 issues be dealt with as expeditiously as is consistent with fairness and justice, Justice Snider ordered the consolidation of the twenty applications.

[5] Pursuant to Rule 105 (a) of the *Federal Court Rules*, Justice Snider's Order provided that the consolidated judicial reviews were, in part, to be heard together, or one immediately after the other, at the discretion of the hearing judge. Further to Rule 107(1), the issues in the consolidated judicial reviews that relate in whole or in part to Guideline 7 were to be determined separately following a single hearing with counsel located in centres outside the Greater Toronto Area participating by video conference if it were impractical to attend in person. The Order also instructed that any remaining issues on each of the consolidated cases were to be determined in separate hearings presided over by one or more different judges, on dates that are as early as practicable following the expedited hearing of the Guideline 7 issues. It also set out deadlines for the filing of further written submissions and affidavits and completion of cross-examinations on the affidavits.

[6] Prior to the hearing on the Guideline 7 issues, one application was resolved on consent leaving 19 which were the subject of these proceedings. The hearing took place at Toronto on March 7 and 8, 2006 with counsel participating by video conference from Montreal and Halifax. Submissions were received from counsel for each of the applicants in sequence, followed by the respondent's

consolidated submissions. Reply submissions were received in the same order. As one of the applicants sought and was granted leave, on consent, to file an IRB document during reply submissions, Counsel were invited to submit further written representations on the content of that document following the hearing as well as to propose serious questions of general importance for certification in accord with IRPA s.74.

[7] The evidence that was before Justice Blanchard in *Thamotharem* was also filed in these proceedings. That included the affidavits and cross-examinations, of Mr. Raoul Boulakia, President of the Refugee Lawyers Association, Professor James Galloway of the University of Victoria and former IRB Member, Dr. Donald Payne, a psychiatrist, and Mr. Paul Aterman, lawyer and Director General, Operations for the IRB**.** This evidence is described in detail in Justice Blanchard's reasons at paragraphs 26 and 27.

[8] A second affidavit from Mr. Aterman, sworn January 6, 2006, and cross-examination dated February 23, 2006, were also filed. In addition, the respondent submitted the affidavit of Asad Kiyani sworn February 20, 2006 to which was attached two volumes of RPD decisions and excerpts of transcripts from RPD hearings relating to the implementation of Guideline 7.

[9] Simultaneous interpretation in English and French was provided on Tuesday, March 7, 2006 at the request of counsel for the respondent. Counsel for one applicant presented her submissions in French. The submissions in both languages were heard and understood by the Court without the assistance of the interpretation, as required by s.16 of the *Official Languages Act* R.S., 1985, c. 31 (4th Supp.).

[10] In keeping with the consolidation order, submissions from counsel respecting the facts in relation to each application for judicial review were not received in this hearing except to the extent that counsel deemed it necessary to refer to them in support of their arguments respecting the Guideline 7 issues. Counsel did draw the Court's attention to the particular circumstances of certain applicants for whom an increased susceptibility to stress in a hearing room and to questioning by strangers could be inferred. Counsel also referred to portions of the transcripts of the refugee determination hearings to illustrate certain points in issue.

[11] After the hearing, on March 13, 2006, counsel for one of the applicants brought a motion in writing pursuant to Rule 369 for an Order to permit the applicant to amend his application record to include a second affidavit from Mr. Boulakia, attaching a recent decision by a RPD member opposed to Guideline 7. The respondent opposed that motion on the ground that it was incompatible with the Order of Justice Snider dated February 20, 2006. By Order dated April 1, 2006, I dismissed the motion to amend the application record.

LEGISLATIVE FRAMEWORK

[12] The provisions of the *Immigration and Refugee Protection Act* that are of particular significance in these proceedings, in my view, are paragraph 159 (1)(h), section 161, subsection 162(2) and section 170.

[13] The Chairperson's discretionary authority to issue guidelines to Board members is set out in IRPA paragraph 159(1)(h). The enactment states that the purpose of this authority is to assist the members with carrying out their duties:

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 … (*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 and the Director General of the Immigration Division, to assist members in carrying out their duties;	**159.** (1) Le président est le premier dirigeant de la Commission ainsi que membre d'office des quatre sections; à ce titre : … *h*) après consultation des vice-présidents et du directeur général de la Section de l'immigration 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 ;

[14] Under IRPA s. 161, the IRB Chairperson may also make rules respecting, among other things, the "activities, practice and procedure" of each division of the Board. Rules made under this authority require the approval of the Governor-in-Council and must be laid before each House of Parliament within 15 sitting days of such approval. I note that there are no similar requirements for guidelines or jurisprudential guides under paragraph 159 (1) (h). See *Refugee Protection Division Rules*, SOR/2002-228.

[15] The text of subsection 161 (1) is reproduced here:

161. (1) Subject to the approval of the Governor in Council, and in consultation with the Deputy Chairpersons and the Director General of the Immigration Division, the Chairperson may make rules respecting	**161.** (1) Sous réserve de l'agrément du gouverneur en conseil et en consultation avec les vice-présidents et le directeur général de la Section de l'immigration, le président peut prendre des règles visant :

(*a*) the activities, practice and procedure of each of the Divisions of the Board, including the periods for appeal, the priority to be given to proceedings, the notice that is required and the period in which notice must be given;

(*b*) the conduct of persons in proceedings before the Board, as well as the consequences of, and sanctions for, the breach of those rules;

(*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

(*d*) any other matter considered by the Chairperson to require rules.

a) les travaux, la procédure et la pratique des sections, et notamment les délais pour interjeter appel de leurs décisions, l'ordre de priorité pour l'étude des affaires et les préavis à donner, ainsi que les délais afférents;

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) 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) toute autre mesure nécessitant, selon lui, la prise de règles.

[16] Subsection 162 (2) indicates Parliament's intent that proceedings before the IRB are to be conducted with as little formality, and as quickly, as is consistent with natural justice:

(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

(2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.

[17] Section 170 describes the mandate of the Refugee Protection Division and sets out certain mandatory and permissive considerations respecting its proceedings:

170. The Refugee Protection Division, in any proceeding before it,

(*a*) may inquire into any matter that it considers relevant to establishing whether a claim is well-founded;
(*b*) must hold a hearing;
(*c*) must notify the person who is the subject of the proceeding and the Minister of the hearing;
(*d*) must provide the Minister, on request, with the documents and information referred to in subsection 100(4);
(*e*) must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations;
(*f*) may, despite paragraph (*b*), allow a claim for refugee protection without a hearing, if the Minister has not notified the Division, within the period set out in the rules of the Board, of the Minister's intention to intervene;
(*g*) is not bound by any legal or technical rules of evidence;
(*h*) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances; and
(*i*) may take notice of any facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge

170. Dans toute affaire dont elle est saisie, la Section de la protection des réfugiés :
a) procède à tous les actes qu'elle juge utiles à la manifestation du bien-fondé de la demande;
b) dispose de celle-ci par la tenue d'une audience;
c) convoque la personne en cause et le ministre;
d) transmet au ministre, sur demande, les renseignements et documents fournis au titre du paragraphe 100(4);
e) donne à la personne en cause et au ministre la possibilité de produire des éléments de preuve, d'interroger des témoins et de présenter des observations;
f) peut accueillir la demande d'asile sans qu'une audience soit tenue si le ministre ne lui a pas, dans le délai prévu par les règles, donné avis de son intention d'intervenir;
g) n'est pas liée par les règles légales ou techniques de présentation de la preuve;
h) peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision;
i) peut admettre d'office les faits admissibles en justice et les faits généralement reconnus et les renseignements ou opinions qui sont du ressort de sa spécialisation.

<u>BACKGROUND TO THE GUIDELINE 7 CONTROVERSY</u>

[18] Under the authority of a provision in the precedessor statute, subsection 65(3) of the *Immigration Act* R.S.C. 1985, c.I-2, guidelines were issued by the Chairperson of the Immigration and Refugee Board to encourage consistent and transparent decision making with respect to a number of subject areas. The Guidelines on Women Refugee Claimants Fearing Gender-Related

Persecution were issued in 1993 and updated in November 1996. The Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations were issued in March 1996, Guidelines on Child Refugee Claimants in August 1996, Guidelines on Detention on March 12, 1998. Upon the coming into force of IRPA on June 28, 2002, the gender, civilian non-combatants and child refugee claimant guidelines were reissued by the Chairperson under paragraph 159 (1) (h).

[19] In October, 2003 the Chairperson issued three further guidelines as part of an action plan to address the backlog of refugee claims which had accumulated by that time. Guideline 5 dealing with the submission of personal information forms and abandonment proceedings came into effect on October 30, 2003 and Guideline 6, relating to scheduling and date changes, became effective on December 1, 2003. Guideline 7 was also made effective December 1, 2003 but was not brought fully into effect until June 2004.

[20] Paul Aterman's affidavits describe the purpose of these guidelines from the Board's perspective. He says that they are issued to address specific legal issues, to provide guidance on questions of mixed law and fact, to codify the exercise of discretion, and to provide guidance on procedural issues. The intent is to promote consistency, coherence and fairness in the treatment of cases at the Board. They are not viewed as binding. Members are advised to use their discretion to follow a different approach where warranted in individual cases. These views are also set out in a statement entitled "Policy on the use of the Chairperson's Guidelines" attached as Exhibit "J" to the second Aterman affidavit.

[21] At paragraph 30 of the second affidavit, Mr. Aterman states that prior to the issuance of Guideline 7, the order of questioning at RPD hearings varied regionally within the IRB. Guideline 7 introduced a national standard order of questioning. His affidavit further describes the consultations that were undertaken with interested non-governmental organizations prior to the implementation of the guideline which resulted in steps being taken by the Board to respond to concerns raised. These included internal training sessions on questioning and a six month phase-in period from December 1, 2003 to May 31, 2004 during which the standard order was implemented only with the claimant's consent.

[22] In paragraph 19 of Guideline 7, found at Exhibit "I" to the second Aterman affidavit, RPD members and others are advised:

> In a claim for refugee protection, the standard practice will be for the [Refugee Protection Officer] RPO to start questioning the claimant. If there is no RPO participating in the hearing, the member will begin, followed by counsel for the claimant [emphasis added].

[23] The paragraph concludes with the statement:

> Beginning the hearing in this way allows the claimant to quickly understand what evidence the member needs from the claimant in order for the claimant to prove his or her case.

[24] The Guideline contemplates that the RPD will define the issues which are to be addressed at the hearing through disclosure of the RPD File Screening Form with the Notice to Appear for the hearing and that questioning would be limited to those issues and any others that the claimant may wish to submit. Guideline 7 covers matters such as case preparation, disclosure of documents, research requests, pre-hearing conferences, interpretation and the making of representations. The

Guideline also stipulates the order of questioning where the Minister intervenes on the issue of exclusion, on other issues, or in an application to vacate or cease refugee protection.

[25] Paragraph 23 of the Guideline provides that the RPD member may change the order of questioning in exceptional circumstances. The examples provided of exceptional circumstances are a severely disturbed claimant or a very young child who might feel intimidated by an unfamiliar examiner and thereby finds it difficult to understand and answer questions. In such circumstances, the paragraph says, the member could decide that it would be better for the claimant's counsel to begin the questioning. However, the party who believes that exceptional circumstances exist is expected to make an application to change the order of questioning before the hearing and the application is to be made according to the RPD Rules s.44, that is, in writing before the hearing supported by evidence in affidavit or statutory declaration form.

[26] The introduction to the Guideline states, in part:

> Administrative tribunals operate less formally and more expeditiously than courts of law. Accordingly, the Immigration and Refugee Protection Act (IRPA) requires the IRB to deal with proceedings before it informally, quickly and fairly. The Chairperson has issued these guidelines to explain what the RPD does before and during the hearing to make its proceedings more efficient but still fair. The guidelines also set out what the RPD expects participants to do.
>
> The guidelines apply to most cases heard by the RPD. However, in compelling or exceptional circumstances, the members will use their discretion not to apply some guidelines or to apply them less strictly.
>
> Generally speaking, the RPD will make allowances for unrepresented claimants who are unfamiliar with the Division's processes and rules. Claimants identified as particularly vulnerable will be treated with special sensitivity.

[27] The role of RPD members under IRPA is described in the Guideline as comparable to that of Commissioners under the *Inquiries Act* R.S.1985, c.I-11**.** The text states that members may inquire into anything they consider relevant to establishing whether a claim is well-founded and define the issues that must be resolved in order to render a decision. This role is distinguished in the Guideline from that of a judge. A judge's role, the Guideline states, is to consider the evidence and argument which the parties chose to present. Moreover, it provides, the RPD has control of its own procedure, including who is to start the questioning. RPD members, the text states, have to be actively involved to make the RPD's inquiry process work properly.

[28] Mr. Aterman's evidence is that in drafting the guideline, a deliberate choice was made to avoid the use of terminology such as "examination-in-chief" and "cross-examination" as inappropriate concepts better suited to an adversarial model requiring judicial formality. Attached to his affidavit as Exhibit "N" is a copy of the Board's training handout entitled "Questioning 101" which instructs new members and RPOs that they are not to "cross-examine" claimants, or employ aggressive techniques such as attempting to trap the claimant, to badger or harass by repetitious or misleading questions or to adopt a hostile or sarcastic tone. The object is not to try to "win" a case.

[29] Notwithstanding these instructions, the Court is familiar with instances in which RPD members have failed to live up to these expectations, some of which are described in the cases discussed below in these reasons and in the evidence of Mr. Boulakia and Professor Galloway. It is clear from that evidence that RPOs and members do not always maintain neutrality and a non-adversarial stance in their questioning as they are instructed to do in their training.

[30] It appears from the evidence, and submissions of counsel, that prior to the implementation of Guideline 7, it was common in Toronto, and possibly Calgary and Vancouver, although the evidence with respect to those cities is not clear, for counsel for the claimant to begin the questioning at the hearings. The RPO (if present) would then question the claimant, followed by the Board member if he or she had any remaining matters to raise. This practice, the applicants submit, was more in keeping with the nature of a quasi-judicial hearing and allowed for an “examination-in-chief” in which claimants were encouraged to fully recount their histories with the assistance of counsel whom they had come to know and trust.

[31] In Montreal and Ottawa, it appears the practice described in Guideline 7 was more common but was not mandatory before June, 2004. In those cities, counsel could ask to question their clients first and were frequently accommodated by the Board members.

[32] According to Mr. Aterman’s affidavit evidence, the standard order of questioning was introduced as part of an Action Plan to increase the Board’s efficiency, decrease the average time of a hearing and reduce burdens on the Board’s resources while maintaining fairness. The applicants challenge these assertions as unfounded and unwarranted. The change, they say, has had little effect on hearing times or the overall disposition rate for refugee determinations but has denied claimants their rights to the effective assistance of counsel and to be heard, both of which are aspects of fundamental justice and procedural fairness.

ISSUES

[33] In considering the issues raised by the parties in these proceedings I have been conscious of the fact that much of the ground that I am covering has been travelled previously by other judges of this Court, notably Justice Blanchard in *Thamotharem*. I am not bound by those decisions but the notion of judicial comity suggests that I should exercise restraint when dealing with legal issues which my colleagues have previously decided.

[34] Judicial comity is not the application of the rule of *stare decisis*, but recognition that decisions of the Court should be consistent to the extent possible so as to provide litigants with some predictability. I am aware, as was stated in *Re Hansard Spruce Mills Ltd.,* [1954] 4 D.L.R. 590 (B.C.S.C.):

> ...I have no power to overrule a brother Judge, I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight.

[35] With judicial comity in mind, I have concluded that I should differ from the prior decisions of my colleagues only if I am satisfied that the evidence before me requires it or that I am convinced that the decisions were wrongly decided in that they did not consider some binding authority or relevant statute. In that regard, I would note that while the record before me includes the evidence that was before the Court in *Thamotharem*, it also includes new evidence that was not part of the record in that case.

[36] In these proceedings, the applicants' submissions start from Justice Blanchard's finding in *Thamotharem* that RPD members' discretion has been fettered by the manner in which Guideline 7 was defined and imposed. However, as he did not hold that the Guideline order of questioning, in

itself, denied procedural fairness, the applicants collectively submit that the Court should recognize that a higher standard of procedural fairness is called for in refugee determination hearings. This, they contend, would include a right to an "examination-in-chief" by their counsel in advance of any questioning by the RPO or Board member. The applicants submit that this should be acknowledged by the Court to be an aspect of fundamental justice in the context of refugee hearings, as contemplated by section 7 of the Charter, or, at the very least, as a principle of natural justice in the common law sense.

[37] One applicant, Shurlyn Jones (IMM-1877-05), submits that it is never permissible for a RPD member, in the absence of an RPO, to engage in questioning the claimant prior to claimant's counsel and that this practice results in an apprehension of institutional bias and undermines claimants' right to an impartial and independent tribunal.

[38] Another applicant, Mike Balomba (IMM-9797-04), contends that the equality rights guaranteed by section 15 of the *Charter* have been infringed in that refugee claimants are discriminated against by being denied the same procedural protections as other litigants before judicial and quasi-judicial bodies, notably those who appear before the other Divisions of the IRB.

[39] The respondent also starts from Justice Blanchard's decision and urges that I follow his finding that fairness does not dictate a right to an "examination-in-chief." The respondent asks the Court to conclude, on the basis of the fresh evidence before me, that the discretion of RPD members has not in fact been fettered by implementation of the Guideline. To the extent that any of the applicants perceive that the application of the Guideline has denied them a fair hearing, the

respondent submits that they may seek a remedy in this Court, as they have, and that each case of alleged procedural unfairness should be reviewed on an individual basis.

[40] The respondent urges the Court to resolve the controversy between the parties on administrative law principles rather than upon a *Charter* analysis.

[41] Further, the respondent submits that any applicants who did not object to the Guideline 7 procedure in a timely manner before the refugee hearing or in their applications for leave to this Court, should not now be permitted to claim a denial of procedural fairness.

[42] I have concluded that the issues related to Guideline 7 in the 19 applications before me that I must address in these reasons are as follows:

1. What is the standard of review to be applied to the applications under review?
2. Whether an analysis of the Guideline 7 procedure pursuant to the *Canadian Charter of Rights and Freedoms* analysis is required and, if so, does it infringe fundamental justice under s.7 or violate s.15?
3. Was the procedure mandated by Guideline 7, in itself, contrary to common law principles of natural justice?
4. Did the implementation of Guideline 7 fetter the discretion of Board members?
5. Is Guideline 7 beyond the scope of the Chairperson's authority to issue guidelines?
6. Does questioning by the Board member demonstrate a reasonable apprehension of institutional bias?
7. If natural justice is implicated, when must the applicant raise an objection to the use of Guideline 7?

ANALYSIS

Standard of Review

[43] In applications for judicial review of the actions of administrative tribunals, the starting point is usually to determine the standard of review on a pragmatic and functional analysis. This is a question of law which must be decided by the Court even in cases where the parties are in agreement as to what that standard should be: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54 at para. 6.

[44] However, as noted by Justice Blanchard in *Thamotharem* at paragraph 15, a pragmatic and functional analysis is not required when the Court is assessing allegations of the denial of natural justice or procedural fairness: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour),* [2003] 1 S.C.R. 539, 2003 SCC 29. Instead, the Court must examine the specific circumstances of the case and determine whether the tribunal in question observed the duty of fairness. If the Court concludes that there has been a breach of natural justice or procedural fairness, no deference is due and the Court will set aside the decision of the Board.

[45] Where a breach of fairness is found to result from a reasonable apprehension of bias, the standard is particularly demanding, particularly where, as here, the rights of claimants in proceedings before the Board are at stake: *Kozak v. Canada (Minister of Citizenship and Immigration; Smajda v. Canada (Minister of Citizenship and Immigration),* 2006 FCA 124 [*Kozak*].

Application of the *Canadian Charter of Rights and Freedoms*

[46] Two notices of constitutional question were served on the federal and provincial Attorneys General in these proceedings as required by section 57 of the *Federal Courts Act* R.S.C. 1985, c. F-7. The Notice filed in Benitez (IMM-9766-04) identifies three constitutional issues. They are: (1) that the order of questioning mandated by paragraph 19 of Guideline 7 is contrary to section 7 of the *Charter*; (2) that Guideline 7 is also contrary to section 15 of the *Charter* because persons appearing before other tribunals have a right to present their evidence first, have their counsel present their evidence first, and have their counsel question first; and (3) that the failure to implement the Refugee Appeal Division is contrary to section 7. This third issue was not argued at the hearing. The Notice filed in Jones (IMM-1877-05) states that by permitting the Board member to conduct an examination-in-chief of the claimant, paragraph 19 breaches the right to a fair and independent judiciary resulting in a reasonable apprehension of bias which is contrary to section 7 of the *Charter*.

Section 7

[47] There is no dispute between the parties that section 7 of the Charter is engaged in the refugee determination process as that question was determined by the Supreme Court in *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422 [*Singh*]. The respondent takes the position, however, that there is no need for the Court to determine this matter on fundamental justice considerations as this case may be resolved through the application of administrative law principles respecting natural justice.

[48] I note that in *Thamotharem*, neither the applicant nor the intervener argued that the Chairperson's standard order of questioning procedure violates the principles of fundamental justice guaranteed under section 7 of the *Charter*. Rather, they based their submissions on the common law principles of natural justice and procedural fairness. Accordingly, Justice Blanchard determined the content of the procedural protections to be afforded the applicant in that case by an analysis of the factors described by Justice L'Heureux-Dubé in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker*]. The applicants submit that should be the starting point in considering fundamental justice.

[49] As held in *Singh*, the *Charter* protects the personal security interests of Convention refugee status claimants. Those interests are engaged by the risk of being returned to persecution and claimants are thus entitled to fundamental justice in the determination of their status. "Fundamental justice", as used in *Charter* s. 7, is broader than the administrative law concept of natural justice. It encompasses substantive as well as procedural elements. At a minimum, fundamental justice in the refugee determination context requires that claimants are provided with an adequate opportunity to state their case and to know the case they have to meet. In *Singh*, the Supreme Court found that this requires notice and an oral hearing, although how that hearing was to be conducted was not specified.

[50] The applicants submit that refugee determination proceedings are quasi-judicial in nature because the Board has some of the trappings of a judicial body, adjudicates on individual rights, is statutorily mandated to hold hearings to make findings of fact, and must identify the relevant laws and apply them to the facts as found. Accordingly, the applicants submit, the procedures employed

by the Board will not meet minimum standards of fairness if they deviate significantly from the curial mode. Moreover, as held in *Singh*, administrative convenience and considerations such as the interest of the tribunal in quicker resolution of cases cannot be determinative of fundamental justice principles. That is the important difference, they submit, between a natural justice argument and a fundamental justice argument – the needs of the tribunal, relevant to a natural justice analysis, cannot trump the *Charter* rights of the individual.

[51] The fundamental principles at stake here, the applicants submit, are the right to counsel and the right to be heard. Both principles, they argue, are undermined by the standard order of questioning procedure adopted by the Board, as the practice diminishes the role of counsel in assisting the client and prevents the claimant from adequately presenting his or her case.

[52] The issue was framed in somewhat different terms during oral argument. Counsel submitted that the two principles at play, the right to counsel and to be heard meet the test of fundamental justice principles defined by the Supreme Court in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, i.e., they are legal principles, vital to our societal notion of justice and can be applied with precision and applied predictably. Counsel suggested, however, that the issue before the Court was slightly more subtle:

> It is whether or not within the context of a refugee hearing the right to be heard…encompasses the right of counsel to determine whether or not he will examine in chief. (Transcript at 76)

[53] I have some difficulty with the notion that the rights at issue in these proceedings are those of counsel. This may have been just a matter of unfortunate phrasing but a recurring theme

throughout the oral argument was that what upset counsel most was the loss of control over the presentation of the claimant's case in the hearing setting.

[54] I accept that counsel, generally, have spent considerable time with the claimants prior to the hearings, have gained their trust and know the evidence to be adduced and the claimants' frailties. Many claimants will have been traumatized from their past experiences, as was indicated by Dr. Payne in his evidence. Should the RPO or the Board member, strangers to the claimants, question first, the claimants may be exposed to unnecessary stress that may make it difficult for them to be properly heard.

[55] In the applicants' submissions, this vulnerability requires that the highest order of procedural protection be applied in refugee determinations and that the application of Guideline 7 be reviewed on fundamental justice standards. In my view, that vulnerability calls for sensitivity and discretion to be exercised by whomever is examining the claimant. Experienced RPOs and Board members may be more adept at it than inexperienced or poorly trained counsel.

[56] The respondent submits that fundamental justice does not require that a claimant for refugee status have a right to an "examination-in-chief". The proceedings are administrative in nature and the role of the hearings has to be considered in the context of the entire inquiry into the validity of the claim. There is no party adverse in interest to the claimant, unless the Minister intervenes on exclusion grounds, which happens in a small percentage of cases.

[57] As a general rule, the courts should endeavour to avoid expressing an opinion on a question of law where it is not necessary to do so in order to dispose of a case, especially when the question of law that need not be decided is a constitutional question: *A.G. Quebec v. Cumming*, [1978] 2 S.C.R. 605 at 611, 22 N.R. 271; *Philips v. Nova Scotia (Commission of Inquiry in the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, 124 D.L.R. (4th) 129 at para 9; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634.

[58] I note that in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3 at para 19, Justice Iacobucci stated that it was not necessary to consider the scope of section 7 in a case arising in the immigration context as it could be decided on administrative law principles and statutory interpretation. The same conclusion was reached by the Supreme Court in *Baker*, above, at para. 11. In *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, the Court discouraged litigants from seeking the use of "Charter values" to interpret legislation when it was not absolutely necessary to resolve ambiguity.

[59] In *Suresh v. Canada (Minister of Citizenship & Immigration)* [2002] 1 S.C.R. 3, 2002 SCC 1 [*Suresh*], the Supreme Court made the following comment in relation to the scope of fundamental justice at paragraph 113:

> The principles of fundamental justice of which s. 7 speaks, though not identical to the duty of fairness elucidated in Baker, are the same principles underlying that duty. As Professor Hogg has said, "The common law rules [of procedural fairness] are in fact basic tenets of the legal system, and they have evolved in response to the same values and objectives as s. 7": see P. W. Hogg, Constitutional Law of Canada (loose-leaf ed.) vol. 2, at para. 44.20. In Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177, at pp. 212-13, Wilson J. recognized that the principles of fundamental justice demand, at a minimum, compliance with the common law

> requirements of procedural fairness. Section 7 protects substantive as well as procedural rights: Re B.C. Motor Vehicle Act, supra. Insofar as procedural rights are concerned, the common law doctrine summarized in Baker, supra, properly recognizes the ingredients of fundamental justice [emphasis added].

[60] The applicants seek to elevate the issue of the order of questioning in refugee determination proceedings to a level where constitutional protection would be required and appropriate. While it is an important issue in light of the security of the person interests that are affected by the fairness of the refugee determination process, I am satisfied that this case concerns classic administrative law issues that may be determined under the principles of natural justice and fairness without invoking the *Charter*. As noted in *Suresh*, the principles underlying the duty of fairness are the same as those of which section 7 speaks in the procedural context. This controversy can be properly dealt with on the basis of the procedural protections reflected in the common law doctrine of fairness.

[61] I find, therefore, that it is not necessary for the Court to determine the scope and effect of fundamental justice under section 7 with regard to the application of the Guideline. If I am wrong in that regard, I would conclude that fundamental justice does not require that the questioning order employed in the civil and criminal courts be extended to refugee determination hearings. That procedural order was developed in the context of adversarial proceedings and strict rules of evidence in which the role of the Court was to oversee the contest between the parties, decide issues of law and instruct a jury, if sitting with one, or itself, if sitting alone, to find the facts and apply the law within the narrow confines of the pleadings or indictment.

[62] I recognize that the language of court procedures has crept into the practice of the IRB. Counsel and, indeed, Board members in their decisions speak of "examination-in-chief" and "cross-examination" and describe the procedure mandated by Guideline 7 as a "reverse order" of questioning. But the nature of the hearings before the RPD is meant to be administrative and non-adversarial, as is reflected in the language of subsection 162(2) and section 170 of the statute. If Parliament had intended that these hearings employ court procedures it could easily have said so. The legislative intent is to the contrary.

[63] Subsection 162(2) provides that "[e]ach Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit". While s.170 states that the RPD must give the claimant and the Minister a reasonable opportunity to present evidence, question witnesses and make representations, the procedure is not bound by "legal or technical rules of evidence".

[64] These provisions indicate to me, a legislative intention to avoid the formalities which are attendant upon court hearings in civil or criminal proceedings. This legislative intention is not inconsistent with the requirements of fundamental justice. I note that the Supreme Court has cautioned against extending the procedural rights provided by the *Charter* for criminal cases to administrative law cases: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 at para. 88.

[65] The Board should not be held to the same procedural standards as a judicial body. In *Kozak*, above, the Court of Appeal in commenting on the Board's "uniquely difficult mandate of administrative adjudication" had this to say at paragraph 56:

> In view of these challenges, the Board has had to devise means of maintaining and enhancing the consistency and quality of its decisions, which is of critical importance to its ability to perform its statutory functions and to retain its legitimacy. To this end, the Board's procedure should not be confined in a model of due process that draws exclusively on the judicial paradigm and discourages innovation. Nonetheless, procedures designed to increase quality and consistency cannot be adopted at the expense of the duty of each panel to afford to the claimant before it a high degree of impartiality and independence [emphasis added].

[66] What constitutes a "reasonable opportunity to present evidence" must depend upon the circumstances of each case. It may be that in a particular refugee determination hearing it would be necessary for the claimant's counsel to question first in order to ensure that his or her evidence is properly presented. But I have difficulty understanding why that would be necessary in every case or why it is essential in fundamental justice terms that the claimant have the option at his or her discretion to determine the order of questioning, as the applicants have argued.

[67] Under Guideline 7, it remains open to each claimant in a refugee determination hearing to fully present any element of his or her case that the RPO or Board member does not explore in their initial questioning and to have the effective assistance of counsel in so doing. Were it to foreclose such an opportunity, I would have no hesitation in finding that the right to a hearing was being denied. But that is not the result of the implementation of Guideline 7. While fundamental justice entitles a refugee claimant to a fair hearing, it does not entitle him or her to "the most favourable

procedures that could possibly be imagined": *R v. Lyons,* [1987] 2 S.C.R. 309 at 362, 44 D.L.R. (4th) 193; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3 at para. 46, 2002 SCC 75.

Section 15

[68] With regard to section 15 of the Charter, counsel for one of the applicants has argued that refugee claimants are discriminated against because they do not have the right to present their evidence first and to have their counsel question them first, in contrast to the procedure before other tribunals, including the other IRB Divisions. This argument is advanced on a hypothetical and theoretical basis without reference to a factual foundation other than that revealed by the Guideline 7 documentation filed in these proceedings.

[69] There is no evidence before me as to the practice of other administrative tribunals and I am not prepared to speculate as to what their practices might be based on my own knowledge or counsel's submissions. In so far as the proceedings before the other IRB Divisions are concerned, the only material that I have indicates that they are in fact adversarial and involve parties with opposing interests. Thus, I would have difficulty finding that they are suitable comparators for the purpose of a section 15 analysis.

[70] In *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385, the Supreme Court of Canada cautioned that *Charter* decisions should not be made in a factual vacuum as doing so would both trivialize the *Charter* and result in ill-considered opinions.

[71] I am satisfied that there is an insufficient factual basis in this case upon which the Court could decide whether claimants in refugee determination proceedings were discriminated against through the implementation of Guideline 7 as contemplated by s.15 of the *Charter*. And, as discussed above, it is not necessary to determine the question when there is an adequate alternative remedy available to the applicants at common law. Accordingly, I decline to address that question.

Is the procedure mandated by Guideline 7 and adopted by the tribunal contrary to natural justice?

[72] The question of whether the order of questioning implemented by the Board under Guideline 7 is, in itself, inconsistent with natural justice was addressed in a number of decisions of this Court prior to *Thamotharem*. In none of these decisions was "reverse order questioning" alone found to deny procedural fairness: *B.D.L. v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 866, [2005] F.C.J. No. 1080 (QL) [*B.D.L.*]; *Cortes Silva v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 738 , [2005] F.C.J. No. 920 (QL) [*Cortes Silva*]; *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1121, [2005] F.C.J. No. 1377 (QL) [*Martinez*]; *Fabiano v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1260, [2005] F.C.J. No. 1510 (QL) [*Fabiano*]; *Liang v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 622, [2005] F.C.J. No. 750 (QL) [*Liang*]; and *Zaki v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1066, 48 Imm. L.R. (3d) 149 [*Zaki*].

[73] In general, the common view expressed by my colleagues in these decisions is that the procedure followed in each case had to be examined to determine whether there had been a breach of fairness. As stated by the Court in *Zaki,* above, at paragraph 14:

> Although the Guideline per se is not, in my view, procedurally unfair, it may well be that its implementation in any given case is done in such a way as to lead to a conclusion that a claimant was not afforded an opportunity to make his case. The relevant question is whether the procedure, on the facts of this case, resulted in unfairness to the Applicant…

[74] Justice Blanchard reviewed these decisions in *Thamotharem* and found that, while instructive, they were not determinative of the issues before him. The Court had not previously had the benefit of the extensive evidence and submissions that were presented by the parties and by the intervenor in that case. The issues had not been as comprehensively canvassed and argued. Accordingly, Justice Blanchard revisited the question of whether the application of Guideline 7, was, in itself, inconsistent with procedural fairness.

[75] I have had the benefit of the thorough review of that question which Justice Blanchard conducted together with the submissions of counsel in these proceedings which have largely focused on his analysis.

[76] In an effort to establish that the Court has previously recognized that fairness dictates that refugee claimants must be examined first by their counsel, the applicants have cited several decisions in which the conduct of the hearing was in question. These include *Kante v. Canada (Minister of Employment and Immigration)*, [1994] F.CJ. No. 525 (F.C.T.D.) (QL)*; Ganji v.*

Canada (Minister of Citizenship and Immigration) (1997), 135 F.T.R. 283, 40 Imm. L.R. (2d) 95 (F.C.T.D.) [*Ganji*]; *Atwal v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 258, [1998] F.C.J. No. 1693 (F.C.T.D.) (QL); and *Veres v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 124, [2000] F.C.J. No. 1913 (F.C.T.D.) (QL).

[77] These decisions were also the subject of submissions to the Court in *Thamotharem.* Following a review of each case, Justice Blanchard expressed the following conclusion at paragraph 46 of his reasons:

> In my opinion, in none of these cases did the Court establish that the principles of natural justice and procedural fairness require that refugee claimants be questioned by their counsel first. In fact, whether the Board's choice of the order of questioning accorded with natural justice or procedural fairness was not before the Court in any of the cases. The cases all dealt with specific circumstances in which the Court held that the Refugee Board's conduct of the hearing was improper or led to an error in the Board's findings of fact.

And further at paragraph 53:

> In my opinion, the cases cited by the Applicant and the Intervener do not lead to the conclusion that a meaningful opportunity to present one's case includes a right to question first. Rather, they reaffirm that the Board is entitled to control the procedures of a hearing but that the Board must conduct the hearing in a way that does not unfairly restrict the claimant's right to present her or his case.

[78] Having closely reviewed the reasons in each of the cases cited above and considered the arguments of counsel, I see no reason to depart from the conclusions reached by my colleague in *Thamotharem* on the correct interpretation of these prior decisions. While the reasons for decision contain statements which may be construed as lending support for the notion that a fair hearing requires that the claimant's counsel question first, a close examination discloses that the Court in

each case was more concerned with whether the hearing, as a whole, was fair than with the order of questioning. The order of questioning may have contributed to unfairness in a particular case but was not determinative of that finding.

[79] The applicants rely in particular upon two decisions of this Court: *Herrera v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1724, [2005] F.C.J. No. 118 (QL) [*Herrera*] and *Sandor v. Canada (Minister of Citizenship and Immigration)* (2004), 266 F.T.R. 311, 2004 FC 1782 [*Sandor*]. *Herrera* was considered by Justice Blanchard and distinguished. *Sandor* was, I believe, not addressed before Justice Blanchard.

[80] In *Herrera*, the Court held that a hearing had been unfairly conducted where the applicant's counsel had consented to the RPO questioning first, to be followed by the RPD member. The applicants rely on paragraph 4 of the reasons which reads as follows:

> As argued by Counsel for the Applicant in the present application, a serious due process issue exists as to whether there was a fair hearing before the RPD. At the hearing, the Applicant was not allowed to lead his evidence, but instead, the Refugee Protection Officer was instructed to question first, and then, the RPD followed with what I find is accurately described by Counsel for the Applicant as "badgering" cross-examination

[81] The fact that the Member conducted what the Court described as a "badgering cross-examination" alone would have been enough, in my view, to send the matter back for a rehearing. However, it is also clear from the decision that the Court was concerned that the RPD had effectively set a trap for the applicant at the outset of the hearing by misdescribing the issues to be addressed. At paragraph 5 he states:

> It is quite clear that at the opening of the hearing the RPD had a suspicion that the Applicant's credibility was seriously in question, given the variance between the two statements which were in the written record. Immediately prior to asking for the Applicant's lawyer to consent to the procedure whereby the RPO would lead the claimant's case, the case was simply called "a simple outlined claim". As it turns out, it was anything but.

[82] As I read the Court’s reasons, this decision does not stand for the proposition that the claimant’s counsel must always question first but rather, whichever procedure is followed, that the claimant must be given fair notice of the issues and a fair opportunity to be heard. A similar reading of this decision was reached by Justice Blanchard in *Thamotharem* and by Justice Snider in *Zaki*.

[83] In *Sandor*, above, at paragraph 36, the Court found that the applicant was denied a fair hearing largely because of the Board Member’s extensive questioning. He stated that he reached that conclusion because of this questioning and because of “the fact that the RPO was allowed to cross-examine the applicant <u>before his examination in chief was completed</u>” [emphasis added]. This is the phrase that the applicants rely upon but, in my view, it is an exceedingly thin basis upon which to make the case that the Court has accepted that procedural fairness requires that counsel examine first.

[84] It appears that the hearing had commenced with the claimants counsel questioning first when the interruptions from the Board Member began. The issue of whether procedural fairness required that the claimant’s counsel go first does not appear to have been squarely addressed in the proceedings as it had not been raised prior to the judicial review hearing. One may infer from the Court’s reasons that it was the interruptions by the Board Member that offended my colleague’s sense of fairness together with the RPO’s extensive questioning.

***Baker* Analysis**

[85] As noted above, the factors to be considered in determining whether the common law duty of fairness has been met by the procedures in question were discussed by Justice L'Heureux-Dubé in *Baker*, above, at paragraphs 22-28. The factors identified by Justice L'Heureux-Dubé, while not exhaustive, are as follows:

1. The nature of the decision being made and the process followed in making it.
2. The role of the particular decision within the statutory scheme.
3. The importance of the decision to the individual affected.
4. The legitimate expectations of the person challenging the decision where undertakings were made as to the procedure to be followed.
5. Whether the decision-maker is empowered by statute to set its own procedures.

[86] The application of these factors to the Guideline 7 order of questioning procedure was analysed in depth by Justice Blanchard in *Thamotharem* at paragraphs 68-83 of his reasons. He concluded that an application of the first, second and third factors indicated that a higher level of procedural fairness was called for. His analysis of the fourth factor dealing with legitimate expectation and the fifth concerning the ability of the tribunal to control its own process pointed to a lesser standard. With regard to the importance of the decision to the individual affected, the third factor, I agree with Justice Blanchard that as the security interests of the claimants are engaged and will be determined by the Board's decision, this indicates that a higher degree of procedural fairness is required.

[87] The applicants do not take issue with Justice Blanchard's analysis of the second and third *Baker* factors but question his analysis of the first factor and invite me to reach different conclusions regarding the remaining two. They submit that there are additional factors that militate in favour of a higher standard of procedural fairness that were not considered in *Thamotharem*.

[88] The respondent questions Justice Blanchard's findings that the first two factors indicate a higher standard. The first, the respondent submits, should indicate a lower standard and the second is, at best, neutral. The third, the importance of the decision to the individual, the respondent agrees points to greater protection. In these reasons, I will deal only with those factors where there is a substantial disagreement between the parties.

[89] With respect to the second factor, the nature of the decision making process in the legislative scheme, *Baker*, above, at paragraph 24, indicates that the lack of a right of appeal suggests a higher degree of procedural protection will be required.

[90] The applicants submit that the enactment by Parliament in IRPA of provisions for a Refugee Appeal Division (RAD), combined with the failure of the Governor-in-Council to bring the RAD into effect enhances the duty of fairness owed to the applicant and decreases the deference owed by the Court to a decision of the Board on refugee protection. The applicants submit that the duty is greater and deference less than if the appeal provisions had not been legislated.

[91] The respondent acknowledges that the lack of a right to appeal a negative refugee decision is a factor to be considered in ascertaining the content of procedural fairness in refugee hearings as per

the second branch of the *Baker* test. The respondent submits, however, that issues concerning the RAD are separate and distinct from the Guideline 7 issues that are properly before this Court.

[92] Justice Blanchard took into account the fact that IRPA sections 110 and 111 creating the appeal division had not been brought into force in finding that the second factor called for greater protection. I have nothing to add to his conclusion in that regard other than to note that the appeal provided for in the unproclaimed sections was to be conducted on the basis of the record of the refugee determination proceedings below rather than through an oral hearing. Judicial review is not an appeal and this does not detract from the significance of the factor in the *Baker* analysis but in so far as that record may disclose procedural unfairness that may be addressed in an application for judicial review to this Court.

The nature of the decision being made by the administrative tribunal and the process followed in making that decision.

[93] With respect to the first factor, Justice Blanchard found that Parliament intended the RPD procedure to be less judicial and more inquisitorial. He concluded at paragraph 75, after comparing RPD hearings with court proceedings, that the RPD hearing was not an adversarial process notwithstanding the often aggressive and probing nature of questioning by RPOs and members. However, because the nature of the decision calls for the Board to adjudicate issues that have an impact on the rights of refugee claimants he concluded that a higher level of procedural protection is warranted.

[94] The applicants submit that the characterization of the refugee determination process as non-adversarial is suspect when the role of counsel for the claimant is compared to that of the RPO. Counsel's role is to demonstrate that the claimant is a person in need of protection. By contrast, the role of the RPO is, in part they submit, to flush out any weaknesses in the claimant's case which may lead to a determination that a person is not a person in need of protection. In this sense, the applicants contend the roles of counsel and the RPO are opposed.

[95] Further, the applicants submit that Justice Blanchard reached the conclusion that the refugee proceedings are non-adversarial without reference to a suitable factual foundation. Had he considered the facts in Benitez (IMM-9766-04), the lead application in these proceedings, he may have arrived at a different conclusion. In Benitez, it is submitted, the record discloses that the Member and RPO in turn, took turns over almost the entire day of the hearing to aggressively examine the claimant on perceived inconsistencies in his account. This demonstrates, the applicants contend, that while RPOs and members are ostensibly neutral, in reality they see their role in a hearing as being to focus on any negative evidence while leaving the presentation of the positive evidence to counsel, effectively an adversarial position.

[96] The respondent points to the legislative framework as supporting the conclusion that the proceedings are non-adversarial and require a lesser standard of procedural protection. In particular, the respondent contrasts the rules applicable to the Immigration Appeal Division, constituted as a court of record under IRPA s.174, and clearly the setting for an adversarial contest. This was recognized by the Supreme Court in *Chieu v. Canada (Minister of Citizenship and Immigration)*,

[2002] 1 S.C.R. 84, 2002 SCC 3 at para. 82 which described the hearings before the Convention Refugee Determination Division, the RPD's forerunner, as "more inquisitorial in nature" in contrast to those before the IAD.

[97] The respondent further submits that the fact that RPOs and Board members may question claimants does not make the process adversarial. Thorough questioning has been recognized by the Court as consistent with the Board's mandate to get at the truth of claims. If a member goes too far, an effective remedy is always available to claimants through judicial review: *Cota v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 872 at para. 26 (F.C.T.D.) (QL); *Shahib v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1250, [2005] F.C.J. No. 1509 (QL) at para. 20; *Bady-Badila v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 399, [2003] F.C.J. No. 559 (F.C.T.D.) (QL).

[98] In my view, the conclusion that the process was intended by Parliament to be inquisitorial rather than adversarial in nature is supported on the face of the legislation. Notwithstanding Professor Galloway's evidence and the Court's awareness of egregious examples of hostile and aggressive questioning, I am not persuaded that a failure to respect that intent by RPOs or Board members in individual cases establishes that the hearings are adversarial. The process was not designed to be a contest between parties adverse in interest but rather an inquiry into whether a claim to Canada's protection is being legitimately made. In that context, a close examination of the merits of the claim is consistent with the nature of the process and the roles of the member and the RPO.

[99] While Refugee Protection Officers and Board members receive training and guidance on how to question effectively and how to deal with vulnerable claimants, it is not surprising that there will be cases in which the questioning crosses a line as to what is acceptable in terms of fairness. One should not assume from these exceptions that all hearings take on an adversarial tone and that the procedures adopted should mirror those used in a courtroom setting. The process does not require recognition of a higher procedural standard, such as the right to an examination-in-chief, but rather greater attention to ensuring that the hearing as a whole is conducted fairly.

Legitimate Expectation

[100] With regard to the fourth *Baker* factor, Justice Blanchard found that the Board's advance notice that it was implementing the procedure set out in Guideline 7 indicated that there was no legitimate expectation that refugee counsel would be able to question first. I note that the applicant in *Thamotharem* had not made any submissions on this factor.

[101] In these proceedings, the Toronto-based applicants submit that they had a legitimate expectation that they would be allowed to question first because that was the general practice prior to the adoption of the Guideline, outside of hearings conducted in Montreal and Ottawa. With respect to the Montreal-based applicants, they submit that the practice in that city was to allow counsel to question first on request, and that the reason why this was not done as a general rule had more to do with the exigencies of the provincial legal aid tariff than any other reason.

[102] Further the applicants submit, the elimination of certain of the procedural safeguards that were present under the former *Immigration Act*, such as two-member panels and the reduction of time within which to submit a personal information form (“PIF”) has led to a legitimate expectation on the part of refugees that such protections as they have left will be respected, particularly in the absence of a statutory right to an appeal.

[103] The respondent contends that the applicants could not have a legitimate expectation concerning the order of questioning as refugee claimants were never given any indication that they would be questioned first by their counsel when they made their claims. They cannot rely on their counsel’s experience that this is the way it was done in Toronto and assert that it should remain the same as the practice varied across the country. Moreover, counsel and claimants were advised of the adoption of the Guideline long in advance of its implementation.

[104] In *Baker*, above, at paragraph 26, Justice L’Heureux-Dubé noted that the doctrine of legitimate expectation is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness.

[105] The cases cited by Justice L’Heureux-Dubé in support of this statement of principle are *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57, [1995] F.C.J. No.

1615 (F.C.T.D.) (QL) [*Qi*]; *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36, [1995] F.C.J. No. 1024 (F.C.T.D.) (QL)[*Mercier-Néron*]; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16, 61 D.L.R. (4th) 313 (F.C.A.) [*Bendahmane*].

[106] In each of these cases, the question of legitimate expectation arose in the context of representations made or alleged to have been made directly to the party seeking to rely on the doctrine. For example in *Qi*, the applicant had been invited to have counsel present at her interview but counsel was then denied an opportunity to take part in the process. In *Mercier-Néron*, a hearing was offered and then withdrawn. In *Bendahmane*, the Minister had advised the applicant that his claim would be considered and then proceeded to try to remove him.

[107] In these cases, there appear to have been no “representations as to procedure” or “substantive promises” made directly to any of the applicants with respect to the procedure to be followed. I am asked to find that a legitimate expectation arose from the regular practice of some Board members, at least in Toronto, to allow or invite counsel to question their clients first because that is what, in essence, counsel there have come to expect. In my view, the expectations of counsel do not constitute legitimate expectations in the sense contemplated in *Baker*.

The choice of procedures by the agency itself.

[108] At paragraphs 81-83 of his reasons, Justice Blanchard concluded that Parliament accorded the Board the authority to determine its own procedures provided they were not contrary to the

principles of natural justice. As the Court must guard against imposing a level of procedural formality that would unduly encumber efficient administration, he concluded this indicated a lesser level of procedural fairness.

[109] The applicants acknowledge that the courts have held that an administrative tribunal is master of its own proceedings and may determine the procedures to be followed where the enabling statute is silent: *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, 57 D.L.R. (4th) 663.

[110] The applicants submit, nonetheless, that for the purpose of the *Baker* analysis in this case, it is necessary to consider whether the evidence supports the conclusion that the order of questioning adopted by the Board does in fact improve its efficiency or, put another way, whether counsel-first questioning would be an impediment to hearing efficiency. They suggest that was not considered in *Thamotharem* and invite the Court in these proceedings to arrive at a different conclusion of the weight to be afforded this factor. The applicants point to the concession of Mr. Aterman on cross-examination that there is no evidence that the implementation of the Guideline order of questioning has, in itself, had any impact on increasing the efficiency of refugee hearings.

[111] I note that in *Baker*, above, at paragraph 27, Justice L'Heureux-Dubé stated that in this analysis respect must be accorded the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

Important weight, she said, must be given to the choice of procedures made by the agency itself and its institutional constraints.

[112] It is clear that Parliament has left much to the Board to decide through the Chairperson's rule and guideline-making authority with respect to its own procedures. In giving weight to the choices made by the Board respecting its procedures, it is not necessary for the Court to conclude that these procedures have been effective or the best choice. That choice is for the Board to make, recognizing always that the application of the Board's procedures in an individual case may result in a denial of fairness. It is not appropriate, in my view, for the Court, in hindsight, to substitute its own view of what procedure would be preferable unless it is necessary to ensure natural justice.

"Other" Factors

[113] The five factors discussed by Justice L'Heureux-Dubé in *Baker* are not exhaustive of the considerations that may indicate that a higher degree of procedural protection is required. In *Thamotharem*, Justice Blanchard also considered the particular vulnerabilities that are found among refugee claimants, which he found to militate in favour of an increased requirement for procedural protections. However, he concluded, at paragraph 90, that the fact that many refugee claimants are vulnerable and as a result have difficulty testifying effectively does not necessarily make Guideline 7 unfair. It was a factor to be considered in each case but did not necessarily dictate that the order of questioning should always be counsel-first.

[114] The applicants submit that a number of considerations common to refugee claimants underscore the need to allow claimants' counsel to conduct an examination-in-chief in refugee proceedings. The applicants point to characteristics shared by many refugee claimants which result from their experiences prior to coming to Canada. The following is a list of the characteristics identified:

1. Distrust of individuals in general and government agents in particular;
2. Post-traumatic Stress Disorder;
3. Suppression and/or Repression of memories;
4. Anxiety and Panic Attacks; and
5. Depression.

The applicants submit that because of these considerations, it is unfair to the applicants to have questioning begin by someone other than their own counsel.

[115] The respondent concedes that some refugee claimants do suffer from one, or a combination of the conditions outlined by the applicants. If a claimant believes that his or her personal circumstances require than an exception be made for him or her from the standard practice of questioning in the hearing, the respondent says, the claimant may file a motion setting out the specific reason why an exemption from the standard practice should be provided. The Board would then be in a position to make a determination as to whether the application of Guideline 7 to the particular case is the best course of action.

[116] Contrary to the applicants' assertions that Guideline 7 is intended to be a mandatory provision, the respondent submits that paragraph 23 anticipates that it may not be appropriate in every hearing. The Guideline does not require a specific mode of procedure. The claimant is free in

any particular case to bring to the attention of the Board any relevant evidence which would establish why proceeding with an examination by the RPO or Board member would prejudice their case.

[117] The applicant in *Thamotharem* had not put forward any evidence that he had any of these characteristic vulnerabilities. The applicants submit that Justice Blanchard may have reached a different conclusion on the weight to be given this factor if he had evidence before him of actual, rather than hypothetical vulnerability.

[118] To illustrate, the applicants point to the case of applicant Gutierrez Trujillo (IMM-2709-05) in which a psychological report had been submitted to the Board indicating that he was suffering from post-traumatic stress that could affect his ability to testify. The Board Member did not refer to this evidence in making his determination that the Guideline 7 order should be maintained. The applicants submit that fairness cannot be ensured by a case-by-case determination of the order of questioning if such evidence can be readily discounted or overlooked. Moreover, they submit, such a process would not contribute to the efficient use of the Board's resources. The only practical approach to the reality that many claimants have vulnerabilities which would make it fairer for their counsel to question them first, is to require this as the normal procedure.

[119] The respondent submits that the evidence indicates that the manner in which vulnerable claimants are questioned matters much more than who questions them. This was acknowledged by Dr. Payne in cross-examination. Professor Galloway conceded that the training received by members and RPOs and their involvement in hundreds of refugee hearings may well give them

more experience and aptitude in questioning claimants than novice counsel. In cases where the questioning inhibits claimants' ability to present their cases, the Court can and will intervene if they have not been afforded a fair hearing.

[120] There is considerable strength to the applicants' argument that vulnerable claimants require greater care in presenting their evidence and that may well mean that counsel should be permitted to assist their clients by questioning them first, but I am not persuaded that this cannot be accommodated on a case-by-case basis with prior notice to the Board that a change in the order may be required. It is not every case that would require counsel to question first and I am satisfied from the additional evidence filed in these proceedings that members can and do make appropriate decisions to change the order of questioning when presented with a request and supporting information.

[121] An additional factor raised in these proceedings is the perceived distortion of the role of the Board member. The function of making decisions on a daily basis that have profound implications for those appearing before them is very challenging. Guideline 7 adds to the burden of that task as members must often now take on a lead role in questioning where no RPO is present, which is increasingly common.

[122] The applicants submit that while a Board member can and should ask questions to clarify matters that arise in the course of a hearing, it is not appropriate for the member to take on the role of counsel or the RPO and conduct an examination and/or cross-examination of a refugee claimant. The member should remain out of the arena in order to impartially assess the evidence presented in

the course of the hearing and intervene only when necessary to clarify or gather evidence necessary to the determination if that evidence has not been elicited by counsel or the RPO. Guideline 7, it is submitted, impedes the adjudicative role of the member and this further contributes to the denial of procedural fairness.

[123] In support of this argument, the applicants rely upon a statement by Justice Stone of the Federal Court of Appeal in *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300, [1991] F.C.J. No.1271 (QL) [*Rajaratnam*] in which he observed that the Court was concerned "that the Board Member, by her questioning, may have removed her judicial hat and put on the hat of an advocate." This arose in the context of extensive questioning by the Member after the evidence of the claimant had already been elicited by counsel and the refugee hearing officer. Justice Stone referred to the principles respecting judicial intervention in hearings and concluded that the questioning had remained within the bounds of propriety.

[124] The question was raised in *Rajaratnam* by the Court on its own motion and does not appear to have been fully argued by the parties. Moreover it occurred in the context of proceedings under the former legislation and the order of questioning was not in issue. Justice Stone's discussion supports the principles that a Board member must act fairly, impartially and judiciously, and does not stand, in my view, for the proposition that a member should not question a claimant or, indeed, that a member may not question in advance of the claimant's counsel.

[125] Some of the applicants have submitted that an additional factor in determining the content of the duty of fairness in refugee hearings should be the short time allowed for the preparation of the

claimants Personal Information Form (PIF). The argument is that as it is more difficult to present a complete history within the 28-day deadline, this has made it all the more necessary for claimants to present their cases first with the assistance of counsel. Further, they submit, the filing of the PIF and the presentation of the claimant's narrative in written form does not mitigate the need for an examination-in-chief. This is particularly so because of the central role that credibility determinations play in refugee proceedings. Since natural justice requires that credibility be assessed primarily on the basis of viva voce evidence, it follows that presentation of the PIF is not an adequate substitution for an examination-in-chief, the applicants submit.

[126] However, as also found by Justice Blanchard, the PIF is not the only way claimants may tell their story to the panel. They may also submit documentary evidence, make further written submissions before the hearing, make oral representations at the hearing and may have the opportunity to subsequently file further submissions. Claimants are not limited by their PIFs nor are any problems with the PIF process sufficient to elevate the standard of procedural fairness at the hearing to require a form of examination-in-chief.

Conclusion on the *Baker* analysis

[127] I have no difficulty, after considering the *Baker* factors and the further factors submitted by the applicants, in deciding that it has not been established that natural justice requires that counsel for a refugee claimant be provided with the opportunity to question the claimant first in order for the claimant to have a meaningful opportunity to present his or her case fully and fairly, or that the Guideline results in denial of the effective assistance of counsel.

[128] I agree with the conclusion reached by Justice Blanchard that the opportunity for the applicant to make written submissions and provide evidence to the Board, to have an oral hearing with the participation of counsel, and to make oral submissions, satisfies the requirements of the participatory rights required by the duty of fairness and that Guideline 7 does not, in itself, breach that duty.

Was the Discretion of Board Members Fettered by the Imposition and Implementation of Guideline 7?

[129] A convenient starting point for an analysis of this issue is the decision of the Ontario Court of Appeal in *Ainsley Financial Corporation et al. v. Ontario Securities Commission et al.* (1994), 21 O.R. (3d) 104, 121 D.L.R. (4th) 79 [*Ainsley*]. In that case, the issue was whether an Ontario Securities Commission policy statement was actually a set of binding rules and thus required legislative or regulatory authority.

[130] At the trial level, the Court in *Ainsley* found the statement to be mandatory and regulatory in nature based on three factors: (1) the language of the policy; (2) the practical effect of failing to comply with the policy; and (3) the evidence with respect to the expectations of the Commission and staff regarding the implementation of the policy: see *Ainsley Financial Corporation et al. v. Ontario Securities Commission et al.* (1993), 14 O.R. (3d) 280, 106 D.L.R. (4th) 507 (Ont. Ct. Gen. Div).

[131] In upholding that decision, the Court of Appeal held that the two factors of particular importance in determining whether a guideline has "crossed the Rubicon" dividing the not always clear line between guideline and regulation are the language of the statement and the threat of coercive action. In that case, the guideline read like a statute or regulation. Further, it made a direct link between compliance being "in the public interest" and the Commission's power to sanction for infringement of that interest. As stated by Justice Doherty for the Court, "[t]he threat of sanction for non-compliance is the essence of a mandatory requirement."

[132] *Ainsley* was followed by the Federal Court of Appeal in *Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 195, 2004 FCA 49 [*Ha*]. *Ha* dealt with a policy which provided that counsel were not permitted to attend interviews with visa officers. The Court of Appeal concluded, at paragraphs 74-77, that the policy fettered the discretion of visa officers because of the mandatory nature of the language used, there was no indication that the officers had a duty to consider the particular circumstances of each case, the policy gave no guidance to the officers as to how to exercise that discretion other than to deny the attendance of counsel in each case, the objective evidence indicated that the officer in question treated the policy as fettering his discretion and the respondent had offered no evidence to indicate that counsel had ever been allowed to attend.

[133] In *Thamotharem,* Justice Blanchard determined that the implementation of Guideline 7 had the effect of fettering a Board member's discretion to decide the most appropriate process to follow in the circumstances of each case. Fundamental to the right of a fair hearing is that a Board member exercise independent judgment in deciding a case on its merits free from undue influence. Such

fettering, in Justice Blanchard's view, constitutes undue influence upon the member and violates the principles of procedural fairness.

[134] The factors relied upon by Justice Blanchard in arriving at this conclusion are set out in paragraph 135 of his reasons which I reproduce below in part:

> In the instant case, I am satisfied that there is significant evidence that the IRB made known to its members that they are expected to comply with the guideline save in exceptional cases. The problem is not so much with the expression of this expectation by the IRB, but rather its combination with a number of factors: the monitoring and expectation of compliance, the evidence of compliance, and especially the mandatory language of Guideline 7. These factors, in my view, all serve to fetter Board Members' discretion. As Mr. Aterman acknowledged in testimony given on cross-examination: "It's a balancing which respects adjudicative independence on the one hand and the public and institutional interests in consistency on the other hand". In the circumstances of this case, the balancing of these interests, essentially because of the mandatory language used in Guideline 7, results in the interests of consistency outweighing the adjudicative independence of the Board Member. The mandatory language of Guideline 7, the limited and narrow description of exceptional circumstances provided for in the guideline and the not so subtly expressed expectation of compliance by the IRB, all combine to limit a Board Member's discretion. The fact that there are cases where a Board Member has chosen not to follow the guideline does not cure these deficiencies….

[135] Since its release, *Thamotharem* has been followed in two other cases: *Jin v. Canada (Minister of Citizenship and Immigration),* 2006 FC 57, [2006] F.C.J. No. 55 (QL) [*Jin*] and *Gonzalez Vazquez v. Canada (Minister of Citizenship and Immigration),* 2006 FC 106, [2006] F.C.J. No. 136 (QL) [*Gonzalez Vazquez*]. Both cases were heard and decided shortly after the reasons in *Thamotharem* were released.

[136] In *Jin,* the Court was urged by the respondent to follow *Zaki* and not *Thamotharem*. The Court declined to do so, noting that the two decisions were not in conflict on the central question of whether Guideline 7, in itself, breaches procedural fairness. The Court concluded that *Zaki* was distinguishable for the reasons cited by Justice Blanchard. The Court indicated it was fully in agreement with Justice Blanchard's analysis of the fettering issue.

[137] Contrary to what may have been suggested in *Jin,* fettering was argued and considered in *Zaki*, albeit without the extensive evidence and submissions that were before the Court in *Thamotharem*. The Court concluded that fettering could not be established in a hypothetical context and that on the record there was no evidence to support such a finding. At paragraph 16 the Court stated that the Guideline:

> …incorporates a flexible approach to the use of the RPD-first order of questioning; there is no rigid rule that purports to bind the RPD. It is up to each panel to determine, upon application, what order of questioning will be used. Whether a claimant will be granted the right to proceed first will depend on the facts of each case.

[138] In *Gonzalez Vazquez,* the oral hearing took place while the decision in *Thamotharem* was pending. The Court gave counsel the opportunity to submit written submissions once the *Thamotharem* reasons were available. Due to an administrative error, the respondent's submissions were not placed before the Court before the Order was initially signed on January 31, 2006 (see the amended reasons issued February 9, 2006). Thus they were not taken into account in the reasons for the decision which refer solely to the *Thamotharem* and *Jin* decisions.

[139] In these proceedings, the respondent urges the Court to depart from the conclusions with respect to fettering reached by my colleague in *Thamotharem*. The issue, the respondent submits, is whether the working and implementation of Guideline 7 has crossed the line between a non-mandatory guideline and a mandatory pronouncement having the same effect as a statutory instrument, such as a rule made by the Chairperson under the authority of IRPA s. 161.

[140] I think it fair to say that my colleague Justice Blanchard relied less upon the factual history of the matter before him in *Thamotharem* and more upon the evidence relating to the form and content of the Guideline and the manner in which it was implemented in reaching his conclusion that Board Members' discretion was fettered by the imposition of the Guideline. Indeed the applicants have submitted, as discussed above, that had he had a record before him similar to certain of those in these proceedings, he may have found that a higher degree of procedural protection was called for.

[141] The respondent points out that there was no evidence on the record in *Thamotharem* of a refusal by the Board Member to exercise his discretion to vary the order of questioning due to the claimant's particular circumstances, no evidence of any particular vulnerability that would make testimony difficult, no argument of improper questioning and no request to vary the order outside the assertion of an absolute right to an examination-in-chief.

[142] The finding in *Thamotharem* that members' discretion is fettered turns on the language of the Guideline itself and the extrinsic evidence about how it could be interpreted and applied by RPD members and not on the facts of the particular case.

[143] At paragraph 119 of his reasons, Justice Blanchard found that the language of Guideline 7 left little doubt that the thrust of the Guideline indicates to Board members a mandatory process rather than a recommended but optional process: paragraph 19 provides that the standard practice ***will be*** for the RPO to begin, and if no RPO is participating at the hearing, the Board member ***will*** begin. Further, while paragraph 23 allowed for the Board member to vary the order of questioning, the basis for the finding by the Court in *Zaki* that it was sufficiently flexible, Justice Blanchard found that it set a high threshold for what constitutes “exceptional circumstances”: the claimant must be “severely” disturbed and the child must be “very” young for an exception to apply. He concluded that while these may be just examples, they restrict the sort of circumstances that may warrant an exception. He went on to state these views on the language used in Guideline 7:

> The use of qualifiers such as “severely” and “very” leave little doubt that the scope of “such circumstances” contemplated by the guideline is limited. There may well be circumstances which do not fit within the scope of those “exceptional circumstances” contemplated in Guideline 7 which, in the discretion of the Board Member, would warrant proceeding otherwise than by the standard order of questioning. The language of paragraph 23 may leave a member with the impression that he or she has no option but to follow the guideline in such cases. At the very least, in my view, paragraph 23 by requiring “exceptional circumstances” for straying from the norm deters the member from considering other factors before deciding what order of questioning is appropriate. Guideline 7 would in effect, in such a case, serve to fetter the member’s discretion.

[144] In urging me to depart from these conclusions, the respondent submits that the language of the Guideline has to be read as permissive rather than mandatory in keeping with the principles established in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558, that discretion given by statute cannot be confined by general policy statements and that a term such as “will normally” does not mean “in every case”. Here, the respondent submits, the contextual

evidence including the Board's policy on the use of guidelines, indicate that members retain discretion to vary the order of questioning where they deem it appropriate.

[145] The respondent relies on the new evidence attached to the affidavit of Asad Kiyani, some forty decisions and excerpts of transcripts from hearings before various RPD members, which, the respondent submits, demonstrate that the conclusion that members' discretion has been fettered is not shared by the members themselves. I note that Justice Blanchard had evidence before him of Board members deviating from the Guideline order of questioning although the evidence was not as extensive as that filed by the respondent in these proceedings.

[146] While the attachments to the Kiyani affidavit provide only a selective picture of the response of Board members to Guideline 7, they support the respondent's contention that the discretion of Board members is not fettered by Guideline 7 and that members are not restricting themselves to the exceptional examples set out in paragraph 23 of Guideline 7 as an exhaustive list of instances in which the order of questioning should be varied as Justice Blanchard feared.

[147] In each of the cases, the Member considers the applicability of the Guideline in the circumstances and then decides whether the order of questioning should be varied. There are no indications in these exhibits that Board members believe that they will be punished for failing to implement the standard order of questioning. Nor do they support the conclusion that the Guideline has the effect of causing a member, in conducting a hearing, to question whether he or she can adopt a particular procedure or a particular order of questioning of a claimant when the Board member

legitimately holds the view that the standard order prescribed by the Guideline is not the best or fairest way to proceed in the circumstances.

[148] In exhibit A-1, counsel objected to the Guideline on the basis that it violates natural justice. The Member stated that she had no difficulty with counsel going first but suggested that if his objection was a matter of routine, that in the future he put it in writing in advance of the hearing.

[149] In exhibit A-4 the Member stated the following:

> Je vais suivre une autre procedure aujourd'hui. Généralement c'est quand il n'y a pas d'agent, c'est le commissaire qui commence l'examen. Je vais permettre à Maître de commence l'examen, et si j'ai des questions après pur clarifier ce qui manque, pour remplir les lacunes, alors je vais le faire. Mais je vais donner des indications à Maître pour le guider, ce qui me concerne en ce moment.

[150] In exhibit A-6, the Member said she was not fully persuaded that changing the order of questioning was necessary because she was "very experienced in dealing with claims of gender and gender violence" but proceeded to grant the exception. A similar result occurred in A-7.

[151] In exhibits A-8 and A-9, the Member does not consider the particular circumstances of the claimant before him but addresses the validity of the Guideline in general. Although it is not clear from his reasons whether the Member considered whether the applicant before him fell within the paragraph 23 examples, a review of the Tribunal Record for each of these cases (which are part of the consolidated action) shows that the applicant's counsel in each case did not raise a specific objection to the implementation of Guideline 7 based on the circumstances of the particular

claimant. Counsel raised only a general objection to the Guideline without stating why the claimant should be questioned by counsel first.

[152] In the cases adjudicated by a Board Member opposed to the implementation of the guideline, (Exhibits A-2, A-3, A-11, B-1), a Mr. Steve Ellis, each set of reasons includes an "Appendix A" that is a 38 page analysis of why the Guideline in his view violates natural justice and why he therefore refuses to apply it. It is clear from his reasons that Member Ellis believes that he has the discretion to reject the guideline in its entirety.

[153] There are several decisions in which counsel submitted evidence of pyschological or emotional fraility, or the Board was otherwise aware of the condition, and the Member allowed the order of questioning to be reversed: B-2, B-3, B-5, B-8, B-11, B-12, C-2, C-3, C-4, C-6. In others, a RPO was not present at the hearing and the Member opted to have counsel question first: B-9, C-9, C-15.

[154] In the cases attached as Exhibits C-7 and C-8 to the Kiyani affidavit, the Board Member states that the order of questioning is being varied on the Member's own motion, rather than upon application by the claimant, after having taken into account the particular circumstances of the claimant.

[155] In Exhibit B-7, while the Member refers to "exceptional circumstances" she accedes to a request to change the order of questioning because counsel indicated that the claimant, an 18 year

old Iranian national, was accustomed to different institutions "…and because counsel was Iranian and knowledgeable of Iranian culture…".

[156] These examples indicate to me that members understand that the illustrations of exceptional circumstances provided by the Guideline are simply that and that members feel free to apply them broadly.

[157] In contrast, the strongest evidence put forward by the applicants is an excerpt from the Board's decision in *Baskaran* (Board File: TA1-07530), attached to Mr. Boulakia's affidavit, in which the Member stated:

> We have been told that we have to do the questioning first and your counsel will be asking you questions after that, and that's the procedure we have to follow.…

[158] The applicants point to this excerpt as indicating that members would feel under pressure to conform to the practice outlined in the Guideline, out of loyalty to the institution and, in some cases, from a lack of confidence in their own discretion and ability to make independent decisions as to the correct procedure to follow. The *Baskaran* excerpt may be an example of the latter. While troubling, it does not in itself justify the conclusion that this was a broadly held view among Board members.

[159] Professor Galloway's evidence as a former Board Member also lends support to the applicants' contentions as to how the Guideline would be interpreted and applied by RPD members. However, he had no direct experience with the implementation of the Guideline and his evidence as

to how the Guideline would be interpreted and applied by members was, while helpful, largely speculative.

[160] The respondent asks the Court to give greater weight to the testimony of Mr. Paul Aterman which indicated that Board members retain the discretion to determine the appropriate questioning procedure at a particular hearing. At page 38 of the transcript of the first cross-examination on September 14, 2005, he stated:

> How the individual is treated within that hearing is a matter of discretion for the member. The member can look and say "In this given circumstance, the questioning should be done by counsel", or the member may say "in the circumstances it's more appropriate for the questioning to be done by the RPO or member." Those are discretionary choices which the guideline makes clear are open to members…

[161] Mr. Aterman also expressed the view on cross-examination that members exercise their judgment with respect to how and when to apply the Guideline bearing in mind the particular circumstances of any given case (September 15, 2006 transcript at 79-80). Those comments are supported by the examples of decisions deviating from the Guideline that are attached to the Kiyani affidavit.

[162] Reference was made during argument to a decision by Board Member K. Brennenstuhl, *R.K.N. (Re)* [2004] R.P.D.D. No.14, which was apparently distributed to other RPD members for their assistance on the interpretation and application of Guideline 7. This action was cited by the applicants as illustrating the Board's efforts to impose Guideline 7 on the RPD members and thereby fetter their discretion. However, the distribution of the decision is not in my view evidence of fettering so long as members did not consider themselves bound to follow Member

Brennenstuhl's conclusions. There is no evidence before me that this was the case. The *R.K.N.* decision has not been identified by the Chairperson as a jurisprudential guide nor does it fall within the category of "persuasive decision", which the Deputy Chair, Refugee Protection Division may designate under a policy adopted by the Board as "models of sound reasoning" which members are encouraged to adopt. See the Board's Policy Note on Persuasive Decisions, December 13, 2005.

[163] I accept that the language of Guideline 7 could be construed as mandatory in nature by an inexperienced and less confident Board member and that Board members in general may, as found by Justice Blanchard, feel some top-down pressure to follow it. But that does not necessarily lead to the conclusion that members consider themselves bound to apply it as if it were legislation, a regulation or a formal rule made under the Chairperson's authority.

[164] As Doherty J.A. observed in *Ainsley*, guidelines are not rendered invalid merely because they regulate the conduct of those to whom they are directed. A guideline remains a guideline even if those affected by it change their practice to conform to the guideline.

[165] On the face of the record in this case, the evidence does not in my view support a finding of fettering similar to that considered by the courts in *Ainsley* and *Ha.* Unlike the case of the policy statement in *Ha*, for example, the text of Guideline 7 itself allows for consideration of the particular circumstances of each case and for exceptions to the standard practice to be made. If members were in any doubt about this, the general policy statement which the Chairperson has issued respecting all of the guidelines states expressly that they are not binding and cites a decision of this court to that

effect: *Fouchong v. Canada (Secretary of State)* (1994), 88 F.T.R. 37, 26 Imm. L.R. (2d) 200 (F.C.T.D.).

[166] Moreover, again unlike the case in *Ha*, the policy offers guidance to the RPD members as to how to exercise their discretion, albeit in a structured way. And further, unlike *Ha*, the evidence before me indicates that members have chosen to disregard the "standard practice" when they deemed it necessary and for reasons that go beyond the type of exceptional circumstance described in paragraph 23.

[167] With regard to the second *Ainsley* factor, the practical effect of non-compliance with the guideline, the threat of coercive action is not made out on the facts. There is no evidence on the record to suggest that the Chairperson has threatened to, or has in fact, sanctioned any Board member for non-compliance with Guideline 7. Indeed, the Chairperson does not have that authority. The evidence is that at least one Member, Mr. Ellis, has refused to implement the Guideline from the outset and there is no evidence that he has been sanctioned in any way.

[168] The evidence indicates that the Board was monitoring compliance with the implementation of the Chairperson's guidelines through a voluntary reporting system employing "Hearing Information Sheets". Members were invited to self-report on their use of the guidelines. Paul Aterman's evidence was that the response rate on these forms was very low. Thus it is difficult to understand how that might be perceived as coercive. At most, this would seem to be a normal and unthreatening procedure to gauge the effects of a policy.

[169] There is also evidence of e-mails from the Vice-Chair inquiring whether members were applying the guidelines and that members were asked to explain whether there were exceptional circumstances or other reasons for not following them. Mr. Aterman conceded that managers were required to monitor individual members' compliance with the guidelines but, again, there is no evidence of any consequences flowing to those who chose to ignore or to not strictly apply them.

[170] Finally, the Board's performance appraisal forms for members indicate that application of the guidelines "in appropriate circumstances" will be one factor taken into consideration. As I read the evidence, this provision applied to all of the guidelines and there is no evidence of any member ever receiving a poor performance appraisal for failing to apply Guideline 7.

[171] There is considerably more evidence before me as to the manner in which Guideline 7 is actually being applied by RPD members than there was before my colleague in *Thamotharem*. On that evidence in these proceedings, I am not satisfied that the applicants have demonstrated that the discretion of RPD members to determine the procedure to be followed in the refugee proceedings before them has been fettered by the implementation of Guideline 7.

[172] That is not to say that fettering could not be made out in a particular case. As held in *Leung v. Ontario (Criminal Injuries Compensation Board)* (1995), 24 O.R. (3d) 530, 82 O.A.C. 43 (Ont. Div. Ct.), the application of a policy guideline may amount to an unlawful fettering of a Board's discretion, if applied without due consideration to the evidence and submissions in a particular case.

Such a situation may arise where a member decides to apply the Guideline without exception and ignores the evidence or submissions of counsel that there is reason to vary the procedure.

Is Guideline 7 beyond the scope of the Chairperson's authority?

[173] The applicants submit that Guideline 7 is *ultra vires* or beyond the scope of the Chairperson's statutory authority to issue guidelines. This argument was extended in the applicants' written argument to the other guidelines issued as part of the Board's action plan but the analysis in these reasons will be confined to the question in relation to Guideline 7. The Chairperson's authority to issue guidelines is set out in IRPA paragraph 159(1)(h), reproduced here again for convenience:

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 … (*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 and the Director General of the Immigration Division, to assist members in carrying out their duties;	**159.** (1) Le président est le premier dirigeant de la Commission ainsi que membre d'office des quatre sections; à ce titre : … *h*) après consultation des vice-présidents et du directeur général de la Section de l'immigration 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 ;

[174] The applicants submit that the guideline-making power under paragraph 159 (1) (h) is only to be used to identify decisions of the Board which may be used as jurisprudential guides. This interpretation of the enactment, I was advised during oral argument, is based on the fact that there is no comma before the word "and" in the English version. I am not persuaded that is the correct

interpretation. As noted in *Sullivan and Driedger on the Construction of Statutes*, 4th ed., 2002 at 312-314, punctuation may be of assistance in cases of ambiguity but Canadian courts have been reluctant to place much reliance on it as an aid to interpretation due to its inherent unreliability.

[175] In this context, I do not believe that there is any ambiguity in the interpretation of the paragraph that might be resolved by reference to a missing comma. The legislative intent from the plain language employed is that the Chairperson is authorized to both issue guidelines and to identify certain decisions of the Board as models for the members to emulate. This is, perhaps, clearer in the French version"…il donne des directives écrites aux commissaires **et** précise les décisions de la Commission qui serviront de guide jurisprudentiel" [emphasis added]. See further, *Policy on the Use of Jurisprudential Guides*, Policy No. 2003-01 (Ottawa: Immigration and Refugee Board of Canada, March 21, 2003).

[176] The issue before me is whether the Chairperson overstepped the bounds of the authority provided by the statute to issue guidelines and imposed a mandatory rule which required legislative action, or the approval of the Governor-in-Council and at least passive acquiescence of both Houses of Parliament under the terms of section 161 of IRPA.

[177] Section 161 rules are "regulations" as defined in s. 2 of the *Interpretation Act*, R.S. c. I-23, as they are "made or established…in the execution of a power conferred by or under the authority of an Act". They are also, presumably, subject to the application of the *Statutory Instruments Act*, R.S. c. S-22 and the requirements for examination, review, pre-publication and consultation set out in the *Government of Canada Regulatory Policy, 1999*.

[178] The term "guideline" does not appear to be defined in the statutes. The definition provided by the Canadian Oxford Dictionary, 2001 Edition, is "a principle or criterion, guiding or directing action". "Directives" as employed in the French version, may also be construed as directing action. The definition provided by Le Petit Robert, 2002 edition, is "indication, ligne de conduite donnée par une autorité." In *Thamotharem*, Justice Blanchard employed the definition from the Oxford English dictionary: "a line for guiding; a directing or standardizing principle laid down as a guide to procedure, policy, etc."

[179] The applicants submit that a plain reading of paragraph 159 (1) (h) indicates that the kind of guidelines envisioned are those which facilitate a consistent, economical and sound decision making process. Guideline 7, they submit, is not about the decision-making process but is concerned with the setting of fundamental procedural norms, and with an attempt to transform the Board from its established role as a quasi-judicial body, as recognized in *Singh*, to a "Board of Inquiry."

[180] As the applicants' argument goes, an examination of the Refugee Protection Division Rules ("the Rules") supports this interpretation. The Rules clearly and exhaustively set out the procedure to be followed by the RPD. While the Rules covered complicated procedural issues such as how claims may be allowed without a hearing (Rule 19), and how to proceed with claims involving issues of inadmissibility and exclusion (Rules 23-25), the Rules also spell out lesser aspects such as the procedure for scheduling hearings (Rule 21) and the appropriate size of paper to be used (Rule 27). The specificity of the Rules on matters of procedure as minute as paper size leads to the

conclusion that something as fundamental as the order of questioning is not the proper subject of a guideline.

[181] Moreover, the applicants submit, changes to procedural norms which seek to alter the very nature of the Board are the proper purview of the legislature and legislation and not of the Board's administration. The applicants submit that a change as fundamental as the order of questioning should have been enacted when IRPA was introduced. It is now improper for the Board to make major procedural changes through guidelines when Parliament had failed to do so through the legislation.

[182] The respondent's answer is that the Chairperson clearly has the statutory authority to issue guidelines to Board members. Parliament has legislated that the RPD must hold a hearing and give claimants a reasonable opportunity to present evidence, question witnesses and make representations; however a tribunal is free, within reason, to determine its own procedures. The respondent further argues that the role of the panel is properly characterized as inquisitorial in nature, not adversarial, and therefore a member can lead the inquiry into the claim: *Sivasamboo v. Canada (Minister of Citizenship and Immigration)* [1995] 1 F.C. 741, 87 F.T.R. 46 para. 18 (F.C.T.D.).

[183] I think that it is settled that administrative tribunals are free, within reason, to determine their own procedures as they are "masters in their own house" with respect to internal administrative procedures. In the absence of specific rules laid down by statute or regulation, tribunals control their own procedures subject to the proviso that they comply with the duty of fairness and, where they

exercise judicial or quasi-judicial functions, the rules of natural justice: *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at para 16, 57 D.L.R. (4th) 663.

[184] In this instance, Parliament has seen fit to equip the Board with two mechanisms by which to determine its process; the rule making authority under s.161 and the authority to issue guidelines and to identify Board decisions as jurisprudential guides under paragraph 159 (1) (h). The choice of instrument has been left to the Chairperson, subject to the requirements that changes to the Rules require the approval of the Governor-in-Council and must be laid before Parliament. There is no limitation in the statute on the scope of the guidelines that the Chairperson may issue so long as they are intended to “assist members in carrying out their duties”. Nor is there any restriction from issuing guidelines that pertain to procedural matters. There is no express conflict between Guideline 7 and any of the Rules made pursuant to s.161.

[185] No doubt the guideline route is easier to follow as it avoids the hurdles and delays that accompany the making of delegated legislation such as regulations and rules. That process also exposes proposals to greater scrutiny and may well result in revisions or changes before formal approval is granted. It may well be preferable that a significant change of procedure before the Board should be implemented through a change to the Rules as opposed to a guideline. However, I am not persuaded that the Chairperson’s authority to make guidelines is not broad enough to encompass the adoption of a procedure such as the standard order of questioning contemplated by Guideline 7.

[186] In *Thamotharem*, Justice Blanchard did not make a specific finding as to whether the Chairperson's authority was exceeded by Guideline 7. He noted, however, at paragraph 103 of his reasons that while the enactment explicitly authorized the Chairperson to make and issue guidelines to assist members in carrying out their duties, the guidelines cannot be mandatory in the sense that they leave little room for the exercise of discretion by each Board member to conduct a full and proper hearing. Were that the intent, the proper course of action would be to make a s. 161 rule. He concluded that "…the Chairperson is not authorized to make rules that have the force of a statutory instrument in the guise of a guideline."

[187] Justice Blanchard went on to address the question of whether Guideline 7 presented a recommended non-binding approach to Board members or served as a mandatory pronouncement which fetters the members' discretion. If it were found to be the latter, as he did find, Guideline 7 could then also be said to be elevated to the status of a general rule, unlawful in the circumstances.

[188] For the reasons given above, I do not share my colleague's view that Guideline 7 constitutes a mandatory pronouncement which fetters the members' discretion. Accordingly, I do not find that the Guideline operated as a mandatory rule and as such was outside the Chairperson's authority.

Does questioning by the Board Member result in a reasonable apprehension of bias?

[189] Counsel for the applicant Shurlyn Jones (IMM-1877-05) argued that as a result of the diminishing presence of RPOs in refugee hearings, the role of the Board member is being distorted giving rise to a reasonable apprehension of institutional bias. This, the applicant submits, threatens the independence and impartiality of the Board and reaches the level of institutional bias discussed

by the Supreme Court in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, 140 D.L.R. (4th) 577 [*Régie*].

[190] This applicant argues that this is a constitutional issue going directly to the independence of the tribunal. It matters not whether Guideline 7 was implemented as a guideline or a rule, because the result remains the same. The Board member becomes both the examiner and the person making the ultimate decision regarding the claim for refugee protection. This situation would be obviated if RPOs were present at every hearing and conducted the initial questioning as the Rules appear to contemplate. It is never permissible, the applicant submits, for the member to engage in an "examination-in-chief" of the claimant.

[191] In *Régie*, the Supreme Court dealt with the question of the independence of quasi-judicial tribunals in the context of s. 23 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 which guarantees the right to a full and equal, public and fair hearing by an independent and impartial tribunal. As explained in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52, the standard of independence articulated in *Régie* stemmed from the Quebec Charter, a quasi-constitutional statute, and does not apply to tribunals created by other jurisdictions. In other contexts, the standard is to be determined by the express will of the legislature. If the legislation is silent or insufficiently precise, the courts will generally infer that Parliament or the legislature intended that the tribunal's process will comport with the principles of natural justice. In some instances, but generally not, the tribunal may attract *Charter* requirements of independence.

[192] In my view, the question of the independence of the IRB is not squarely raised in these proceedings on the records before me and I do not intend to attempt to decide that question. I accept, of course, as stated at paragraph 42 of Justice Gonthier's reasons for the majority in *Régie* citing *R. v. Lippé*, [1991] 2 S.C.R. 114 , [1990] S.C.J. No. 128 (QL) that impartiality can have an institutional or structural aspect.

[193] Institutional bias was made out in *Régie* on a detailed review of the legislation and the structure of the institution in question. Crucial to the outcome was the Court's view of the role of staff counsel who were involved in every stage of the proceedings, including the investigation, prosecution and adjudication of complaints.

[194] At paragraph 44 of his reasons, Justice Gonthier referred to the well-established test for institutional impartiality put forward by Justice de Grandpré in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394. Justice Gonthier summarized the test in these words:

> …The determination of institutional bias presupposes that a well-informed person, viewing the matter realistically and practically -- and having thought the matter through -- would have a reasonable apprehension of bias in a substantial number of cases. In this regard, all factors must be considered, but the guarantees provided for in the legislation to counter the prejudicial effects of certain institutional characteristics must be given special attention.

[195] Justice Gonthier noted that in applying this test, greater flexibility must be shown to administrative tribunals than would be required of the courts and the institutional constraints under which the tribunals operate must be taken into account. Moreover, a plurality of functions in a single administrative agency is not necessarily problematic.

[196] Institutional bias will not be found unless a well-informed person would have a reasonable apprehension in a substantial number of cases. Failing that, allegations of an apprehension of bias cannot be brought on an institutional level but must be dealt with on a case-by-case basis: C*anadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129.

[197] In the absence of evidence to the contrary, there is a strong presumption that a decision maker will act impartially: *Zundel v. Citron,* [2000] 4 F.C. 225, 189 D.L.R. (4th) 131 (F.C.A.) leave to appeal refused, [2000] S.C.C.A. No. 322.

[198] In *Kozak*, above, at paragraphs 51-57, the Federal Court of Appeal noted three considerations of particular relevance to the question of bias in the context of RPD decision making. First, that the content of the duty of fairness owed by the Board falls at the high end of the continuum of procedural fairness. Secondly, that the Board has a particularly difficult mandate of administrative adjudication. And third, that the notion of bias connotes circumstances giving rise to a reasonable and informed belief that the decision maker has been influenced by some extraneous or improper considerations.

[199] In the particular circumstances of that case, the Court found there was sufficient evidence of external pressures and influences bearing on the decision makers that a reasonable apprehension of bias was established. Specifically, that the lead case strategy employed in that case was designed not only to bring consistency to future decisions and to improve their accuracy, but to reduce the

number of positive decisions that might otherwise be rendered and to reduce the number of potential claimants.

[200] The circumstances surrounding the Board's adoption of the standard order of questioning do not, in my view, compare with those in *Kozak*. There is no suggestion that any improper influence was brought to bear on the outcome of the decisions rendered by the RPD members who applied the Guideline or that the application of the Guideline was intended to have any effect on the results of the claims. Indeed, the uncontradicted evidence is that the claim acceptance rate has not varied for the periods before and after the adoption of the Guideline.

[201] I am not persuaded that a reasonable apprehension of bias arises merely because the member conducts the questioning. As stated by Dr. Payne on cross-examination, it matters less who does the questioning than how it is carried out. In the particular circumstances of an individual case, aggressive questioning may amount to a breach of fairness, as is illustrated by two decisions cited by the applicant: *Farkas v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 190, [2001] F.C.J. No. 356 (F.C.T.D.) (QL) and *Sandor,* discussed above.

[202] In *Farkas*, a Board ruling was set aside because of persistent and aggressive questioning by one of the Board members. Similarly in *Sandor*, the Court found that extensive questioning by a Board member constituted a breach of natural justice and the denial of the right to a fair hearing. But these decisions do not support the proposition that a change in the order of questioning in itself gives rise to a reasonable apprehension of bias.

[203] In my view, the question of bias in this context has to be raised on a case-by-case basis. I note, without deciding the matter, that in the Jones application record there is evidence of what counsel described as “long, nasty, brutish and hostile” examination of the claimant by the Member. That evidence may support a finding that in the particular circumstances of that case, a reasonable apprehension of bias is made out. That is to be decided by the judge hearing the merits of the case. It does not, in my view, support a finding that institutional bias results from the questioning order called for by Guideline 7.

When must an objection to the use of Guideline 7 be raised?

[204] The question of waiver arises in these proceedings because a number of the applicants neither raised an objection to the Guideline 7 procedure at the Board hearing, nor sought a decision to vary the order of questioning from the member. In some cases, it was not raised as a ground for judicial review prior to leave being granted and was raised then only after the reasons for decision in *Thamotharem* were released.

[205] While I have found that the applicants were not denied procedural fairness by the imposition of Guideline 7 in itself, certain of the applicants may be able to establish a denial of procedural fairness by its application in their particular cases.

[206] Since its implementation in June 2004, this Court has examined Guideline 7 in a number of decisions. The jurisprudence to date has not dealt specifically with the issue of waiver as it relates to an applicant’s ability to argue Guideline 7 upon judicial review. Among the cases, there are two

common scenarios in which the Court has addressed Guideline 7. The first scenario is one in which the applicant raised an objection to the implementation of Guideline 7 at the hearing before the Board and the issue of waiver was not dealt with on judicial review. These cases include *Thamotharem, Jin, Vazquez, Fabiano* and *Martinez*, all cited above.

[207] The second common scenario is cases in which it is unclear whether the applicant objected to Guideline 7 at the hearing, but the issue was raised in the judicial review of the Board's decision and the Court dealt with the question of procedural fairness without reference to waiver. These cases include *Sy v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 379, [2005] F.C.J. No. 462 (QL), *Liang,* and *Cortes Silva* above.

[208] An implied waiver was addressed in *B.D.L*, above, where Justice Yvon Pinard stated at para. 5 -6 that because

> …the applicant did not think it necessary to object and did not establish the existence of any harm… In view of the particular facts of the case at bar, the argument now relied on by the applicant as to unfairness of the procedure is entirely without basis.

[209] The particular facts in *B.D.L* were that the applicant not only did not object but in response to questions from the member at the close of the hearing, expressly confirmed that he had said everything he had wanted to.

[210] In two cases which were decided before the implementation of Guideline 7 but which relate to the order of questioning at a refugee hearing, the Court found a breach of the duty of fairness despite a failure to object at the hearing. In *Ganji,* the Court quashed a decision of the Board in

which the Board had seized control of the applicant's case and conducted the examination. In *Herrera,* as discussed above, counsel had consented to the procedure without full disclosure of the issues to be raised. The Court refused to give any weight to the consent.

[211] It appears, therefore, that the jurisprudence of this Court regarding when an applicant must raise an objection to the order of questioning in order to have it dealt with upon judicial review is unsettled. In order to arrive at the correct approach to be applied in these consolidated cases I will rely upon the general principles of waiver developed in the jurisprudence.

[212] As observed by the Federal Court of Appeal in *Kozak*, above at paragraph 66, parties are not normally able to complain of a breach of a duty of procedural fairness by an administrative tribunal if they did not raise it at the earliest reasonable moment.

[213] The principle of common law waiver is described by Justice MacGuigan in *In re Human Rights Tribunal and Atomic Energy of Canada Limited,* [1986] 1 F.C. 103, (1985) 24 D.L.R. (4th) 675 (F.C.A.), leave to appeal to S.C.C. refused, [1986] 2 S.C.R. v. Justice MacGuigan stated that at common law, even an implied waiver of objection to an adjudicator at the initial stages is sufficient to invalidate a later objection. Justice MacGuigan noted:

> The only reasonable course of conduct for a party reasonably apprehensive of bias would be to allege a violation of natural justice at the earliest practicable opportunity. Here, AECL called witnesses, cross-examined the witnesses called by the Commission, made many submissions to the Tribunal, and took proceedings before both the Trial Division and this Court, all without challenge to the independence of the Commission. In short, it ... impliedly ... waived its right to object [emphasis added].

[214] The reasoning of Justice MacGuigan was applied by the Court of Appeal in *Yassine v. Canada (Minister of Employment and Immigration)* (1994), 172 N.R. 308, 27 Imm. L.R. (2d) 135 where an applicant did not object until after the Refugee Division's decision was released. Justice Stone for the Court stated at paragraph 7:

> It must also be noted that no objection was taken to the procedure that the Presiding Member adopted for receiving the additional information…That surely was the time to raise an objection and to ask the panel to reconvene the hearing, assuming that the information could not otherwise be received. The appellant was then in possession of all of the new information and was aware that the panel intended to take notice of it. Not only was no objection made at that time, which I would regard as the "earliest practicable opportunity" to do so ... the appellant remained silent until after the Refugee Division's decision was released on April 18, 1991. Thus, even if a breach of natural justice did occur, I view the appellant's conduct as an implied waiver of that breach [emphasis added and citation omitted].

[215] The reasoning of the Court of Appeal in *Atomic Energy* was accepted by the Supreme Court, in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577.

[216] In *Zundel v. Canada (Canadian Human Rights Commission) (re Canadian Jewish Congress)* (2000), 195 D.L.R. (4th) 399, 264 N.R. 174 [*Zundel*] the Court of Appeal considered the question of whether the doctrine of waiver may be relied upon in the face of a finding of reasonable apprehension of bias. The appellant had cited *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, 89 D.L.R. (4th) 289 [*Newfoundland Telephone*] for the proposition that a finding of bias rendered the hearing void, leaving no room for waiver to operate. *Newfoundland Telephone*, however, did not address the question of waiver and the objection to the proceedings was raised at the very outset.

[217] In *Zundel*, the appellant argued that he had not waived his objection and did so promptly once a court ruling favouring his position was handed down in another case. The Court of Appeal noted that it was the framework of the legislation that gave rise to the complaint of unfairness and nothing had prevented the appellant from objecting at the beginning of the proceedings. In those circumstances, waiver was implied.

[218] In concluding his analysis for the Court in *Zundel*, Justice Stone accepted that any waiver to be effective must be made freely and with full knowledge of all the facts relevant to the decision whether to waive or not. In *Kozak*, while counsel for the appellants had consented to the procedure, he could not have known of the background facts suggesting bias.

[219] The rationale for why an applicant must raise a violation of natural justice or apprehension of bias at the earliest practical opportunity was articulated by Justice Pelletier (as he was then) in *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 371, 4 Imm. L.R. (3d) 131(F.C.T.D) aff'd [2001] 4 F.C. 85 (F.C.A.), where he stated at paragraph 25:

> There is a powerful argument in favour of such a requirement arising from judicial economy. If applicants are permitted to obtain judicial review of adverse decisions by remaining silent in the face of known problems of interpretation, they will remain silent. This will result in a duplication of hearings. It seems a better policy to provide an incentive to make the original hearing as fair as possible and to avoid repetitious proceedings. Applicants should be required to complain at the first opportunity when it is reasonable to expect them to do so.

Justice Pelletier went on to say at para. 26 "[t]he crucial element is the reasonableness of the expectation that the claimant complain at the first opportunity."

[220] From the above discussion, I would take the principle that an applicant must raise an allegation of bias or other violation of natural justice before the tribunal at the earliest practical opportunity. The earliest practical opportunity arises when the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection.

[221] In the present cases, counsel for the applicants would have been aware of the implementation of Guideline 7 from December 7, 2003. If they were of the view that its application in a particular case would result in a denial of their client's right to a fair hearing, the earliest practical opportunity to raise an objection and to seek an exception from the standard order of questioning would have been in advance of each scheduled hearing, in accordance with Rules 43 and 44, or orally, at the hearing itself. A failure to object at the hearing must be taken as an implied waiver of any perceived unfairness resulting from the application of the Guideline itself.

[222] I wish to stress, however, that the operation of the doctrine of waiver does not preclude an applicant from arguing that the manner in which the hearing was conducted breached the duty of fairness by reason of, for example, badgering cross-examination as was found in *Herrera*, if that ground is otherwise properly before the Court.

[223] The respondent submits that the Court should not consider grounds for judicial review that were not expressly pleaded in the applications for leave. In these proceedings, several applicants raised the Guideline 7 issue in their memoranda of fact and law or supplementary memoranda for the first time after the release of the decision in *Thamotharem*.

[224] The applicants rely upon the decision of the Supreme Court in *Native Women's Association of Canada v. Canada* [1994] 3 S.C.R. 627, 119 D.L.R. (4th) 224 in which the Court observed that a "basket clause" in the prayer for relief permitted a court to exercise its discretion to grant a declaration even though it was not specifically pleaded. The Court also referred to s.18.1 of the *Federal Courts Act*, which among other things, sets out the various forms of relief which may be granted an applicant.

[225] The *Native Women's Association* decision cannot be extended, in my view, to support the proposition that applicants may raise new grounds that were not specifically pleaded in their applications for judicial review.

[226] Rule 301 of the *Federal Court Rules*, sets out the requirements for an application for judicial review. It states:

> An application shall be commenced by a notice of application in Form 301 setting out
>
> ...
>
> (e) a complete and concise statement of the grounds intended to be argued, including reference to any statutory provision or rule to be relied on.

[227] This Court has held that it will only deal with grounds of review raised by the applicant in the notice of application and supporting affidavits: *Métis National Council of Women v. Canada (Attorney General)*, [2005] 4 F.C.R. 272, 2005 FC 230. (See also *Schut v. Canada (Attorney General)* (2000), 186 F.T.R. 212, [2000] F.C.J. No. 424 (F.C.T.D.) (QL)). The same position has

been taken by the Federal Court of Appeal: *Canada (Human Rights Commission) v. Pathak,* [1995] 2 F.C. 455, 180 N.R. 152, leave to appeal refused [1995] S.C.C.A. No. 306.

[228] I note that in *Stumpf v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 148, 289 N.R. 165, the Court of Appeal allowed the applicants to raise an issue in oral arguments which had not been raised in the judicial review or in any of the proceedings before the Board. The issue in this case was the failure of the Board to consider the designation of a representative for a minor refugee applicant as required by subsection 69(4) of the *Immigration Act*, R.S.C. 1985, c. I-2. The Court determined that it was appropriate to consider it at that time because the record disclosed all of the relevant facts, and there was no suggestion that the Minister would be prejudiced if the issue was considered.

[229] It is not clear that the records in each of the 19 applications consolidated disclose all of the relevant facts. For instance, it is not clear through reading the applicable Tribunal Records whether there was evidence before the Board Member of why the order of questioning outlined in Guideline 7 should not be followed in a given case, particularly if it was raised before the hearing. Thus I would conclude that, unlike in *Stumpf*, the respondent may be prejudiced by the failure of the applicants to raise the issue at an earlier stage of the proceedings.

[230] In *Marshall v. Canada (Minister of Citizenship and Immigration)* 2004 FC 34, [2004] F.C.J. No. 73 (QL) the Court stated at paragraph 2:

> The applicant at the hearing raised the issue of reasonable apprehension of bias by the presiding member. However this issue was not raised in the applicant's original pleadings, but only in a further Memorandum of Argument on behalf of the Applicant filed subsequently to receiving the Minister's

> Memorandum of Argument. Given that Rule 301(e) requires a complete and concise statement of the grounds intended to be argued, I believe it is too late at this stage as it was not part of the original application. In any event if there was such an issue, it should have been raised by motion before the presiding member and not now on judicial review [emphasis added].

[231] The Court of Appeal has also held that arguments not made before the tribunal cannot be raised on judicial review: *Toussaint v. Canada (Labour Relations Board)* (1993), 160 N.R. 396 , [1993] F.C.J. No. 616 (QL); *Society of Composers, Authors & Music Publishers of Canada v. Canadian Association of Internet Providers* (2001), 267 N.R. 82, 2001 FCA 4.

[232] In conclusion, I agree with the respondent that the applicants in this case who did not raise issues of procedural fairness respecting Guideline 7 before the Board and in their Applications for Leave and for Judicial Review should be precluded from doing so by way of written and oral argument at this time. If the objection was made in a timely manner at or before the hearing, the applicants are entitled to raise it as a ground for judicial review in their applications for leave.

[233] While claimants seeking decisions from the Board respecting the procedure to be followed at its hearings should normally follow the requirements set out in RPD Rules 43 and 44, that is by filing a written submission supported by evidence without delay before the hearing, I do not accept the respondent's submission that failure to do so necessarily invokes the waiver doctrine. As I read the jurisprudence, waiver will not be implied where the party against whom it is claimed has made an objection to the procedure before or during the hearing itself. What the doctrine seeks to prevent is the litigant who sits mute through the procedure and tries to take advantage of the issue before a higher forum.

[234] If the applicants failed to cite a denial of procedural fairness in their applications for leave, judicial review of the applications should be confined to the grounds for which they sought leave. The common "basket clause" formula "such further and other grounds as the applicants may advise and this Honourable Court permit" is not a complete and concise statement of the grounds intended to be argued within the meaning of Rule 301. However, in some cases, the issue was identified in the memorandum of fact and law filed with the application.

[235] In view of the unsettled state of the law on these issues and that prior to *Thamotharem* this Court had consistently denied applications based solely on Guideline 7, applicants should not be penalized for the failure of counsel to specify the ground in the Notice of Application if it is clear from the materials filed with the application that procedural fairness was in issue. That is not to be taken as an invitation to expand the grounds for which leave has been granted. If the issue of Guideline 7 is only raised in a further memorandum of fact and law filed subsequent to the granting of leave, there has been an implied waiver and the applicants are restricted to the issues identified in the initial application and memorandum.

[236] Turning to the application of these principles to the cases before me, I make the following findings:

- Cases in which there was no waiver because of a timely objection at or before the Board hearing and the denial of procedural fairness was identified as a ground for judicial review in the leave application either expressly or through a basket clause: IMM-9766-04 (Restrepo Benitez); IMM-1144-05 (Quadri); IMM-4044-05 (Roy); IMM-470-05 (Martinez & others); IMM-2150-05 (Matheen); IMM-353-05 (Rincon & others); IMM-1419-05

(Gomez & others); IMM-1877-05 (Jones); IMM-712-05 (Guirguis & others); IMM-407-05 (Mejia); IMM-9797-04 (Bilomba); IMM-2709-05 (Trujillo); IMM-2034-05 (Ortiz). These applications are not barred from proceeding on the procedural fairness issue in relation to the application of Guideline 7 in that case.

- Cases in which no objection was raised before or during the hearing and for which waiver will be implied: IMM-4064-05 (Kamalendran); IMM-9220-04 & IMM-3994-05 (Arachchige); IMM-3313-05 (Robinson); IMM-9452-04 (Gyankoma); IMM-934-05 (Savagoli). These applications are barred from proceeding on the ground of procedural unfairness in relation to Guideline 7.

Conclusions

[237] Based on the analysis above I make the following findings on each of the issues.

- Although the order of questioning in refugee determination proceedings engages the security of the person interests of claimants, this case concerns classic administrative law issues that may be determined under the principles of natural justice and fairness without invoking the *Charter*. It is therefore not necessary for the Court to determine the scope and effect of fundamental justice under section 7 with regard to the application of the Guideline. In the alternative, if a *Charter* analysis is required, fundamental justice does not require that the questioning order employed in the civil and criminal courts be extended to refugee determination hearings. The

legislative intention to avoid the formalities attendant upon court proceedings is not inconsistent with the requirements of fundamental justice

- After considering the factors laid out by the Supreme Court in *Baker* and the further factors submitted by the applicants, it has not been established that natural justice requires that counsel for a refugee claimant be provided with the opportunity to question the claimant first. The opportunity for the applicant to make written submissions and provide evidence to the Board, to have an oral hearing with the participation of counsel, and to make oral submissions, satisfies the participatory rights required by the duty of fairness and Guideline 7 does not, in itself, breach that duty.

- While the language of Guideline 7 could be construed as mandatory in nature by inexperienced and less confident Board members, and although members may feel some top-down pressure to follow it, this does not lead to the conclusion that members consider themselves bound to apply the Guideline as if it were legislation, a regulation or a formal rule made under the Chairperson's authority. On the face of the record in this case, the evidence does not support a finding of fettering. Although fettering could be established in a particular case, the application of Guideline 7 in itself, does not fetter the discretion of Board members. Whether fettering has occurred must be established on a case-by-case basis.

- Administrative tribunals are free, within reason, to determine their own procedures as they are "masters in their own house" with respect to internal administrative procedures, subject to the proviso that they comply with the duty of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. The Chairperson's authority to make guidelines is

broad enough to encompass the adoption of a procedure such as the standard order of questioning contemplated by Guideline 7. As Guideline 7 does not constitute a mandatory pronouncement which fetters the members' discretion, it does not operate as a mandatory rule and as such remains within the Chairperson's authority.

- A reasonable apprehension of institutional bias does not arise merely because Board members conduct the questioning of refugee claimants in the absence of a refugee protection officer or in advance of claimants' counsel. In the particular circumstances of an individual case, aggressive questioning by the member or the refugee protection officer may amount to a breach of fairness, but the question of bias in this context has to be raised on a case-by-case basis. Whether a reasonable apprehension of bias is made out is to be decided by the judge hearing the merits of the case.

- The common law principle of waiver requires that an applicant must raise an allegation of bias or a violation of natural justice before the tribunal at the earliest practical opportunity. If counsel were of the view that the application of Guideline 7 in a particular case would result in a denial of their client's right to a fair hearing, the earliest practical opportunity to raise an objection and to seek an exception from the standard order of questioning would have been in advance of each scheduled hearing, in accordance with Rules 43 and 44, or orally, at the hearing itself. A failure to object at the hearing must be taken as an implied waiver of any perceived unfairness resulting from the application of the Guideline itself. If the objection was made in a timely manner at or before the hearing, the applicants are entitled to raise it as a ground for judicial review in their applications for leave. If the applicants failed to cite a denial of

procedural fairness in their applications for leave, judicial review of the applications should be confined to the grounds on which leave was sought.

Certified Questions

[238] The applicants in this case have submitted a number of questions for certification:

The proposed questions are as follows:

1. Does the implementation of paragraphs 19 and 23 of the Chairperson's Guideline 7 violate principles of natural justice by unduly interfering with the claimant's right to be heard?

2. Has the implementation of Guideline 7 led to the fettering of Board members' discretion?

3. Does Guideline 7 violate natural justice by distorting the independent role of Board members?

4. Does Guideline 7 violate the principles of fundamental justice under s. 7 of the *Charter of Rights and Freedoms*?

5. Is Guideline 7 unlawful because it is *ultra vires* the guideline making authority of the Chairperson under the IRPA?

6. If Guideline 7 and the procedure mandated by it breaches natural or fundamental justice, can a refugee claimant in any way implicitly waive the breach, for example by failing to object to the procedure?

7. Is Guideline 7 *ultra vires* the IRPA and Regulations thereunder?

8. Does "reverse order questioning" constitute a denial of the principles of fundamental justice and denial of s. 7 of the *Charter* in:
   a) Denying the right to effective and competent counsel?
   b) Denying the right to be heard?

9. Does reverse order questioning as mandated by Guideline 7 constitute:
   a) A breach of the right to an independent judiciary and constitute a reasonable apprehension of institutional bias contrary to the preamble of the *Constitution Act, 1867?*
   b) A breach of the right to a hearing before a fair and independent tribunal and a reasonable apprehension of institutional bias contrary to s.7 of the *Charter*?

10. With respect to Guideline 7 and the objection/non-objection of the claimant's counsel at the refugee hearing:
    a) Does the respondent confuse the doctrine of waiver with that of the failure to object before the trier of fact as constituting an issue estoppel on judicial review?
    b) If no such confusion exists, then what "right" is being purportedly waived by the claimant at the hearing by not registering an objection to Guideline 7?
    c) As a matter of fundamental justice, is the exercise of a Board member's purported discretion pursuant to any Guideline ever in the claimant's hands to "waive"?

[239] The first two questions suggested by the applicants were two of the questions certified in *Thamotharem.* The respondent agrees that these be certified in this case and also requests that the third question certified by Justice Blanchard in *Thamotharem* be again certified, which I agree should be done.

[240] The respondent submits and I agree, that the questions regarding independence of Board members be re-written as follows: Does the role of Refugee Protection Division members in questioning refugee claimants, as contemplated by Guideline 7, give rise to a reasonable apprehension of bias?

[241] The respondent submits that the procedural fairness issues raised by the applicants can be dealt with through administrative law principles and therefore resort to the *Charter* is unnecessary. While that is the finding I have reached, it remains a serious question of general importance.

[242] The respondent also contends that the *vires* of Guideline 7 is adequately subsumed under the question dealing with fettering of Board member's discretion. I do not agree.

[243] Based on the questions proposed for certification by the applicants and the respondent's reply, I would certify the following questions which I believe pass the test articulated by the Court of Appeal in *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4, [1994] F.C.J. No. 1637 (QL):

1. Does Guideline 7, issued under the authority of the Chairperson of the Immigration and Refugee Board, violate the principles of fundamental justice under s. 7 of the *Charter of Rights and Freedoms* by unduly interfering with claimants' right to be heard and right to counsel?

2. Does the implementation of paragraphs 19 and 23 of the Chairperson's Guideline 7 violate principles of natural justice?

3. Has the implementation of Guideline 7 led to fettering of Refugee Protection Division Members' discretion?

4. Does a finding that Guideline 7 fetters a Refugee Protection Division Member's discretion necessarily mean that the application for judicial review must be granted, without regard to whether or not the applicant was otherwise afforded procedural fairness in the particular case or whether there was an alternate basis for rejecting the claim?

5. Does the role of Refugee Protection Division Members in questioning refugee claimants, as contemplated by Guideline 7, give rise to a reasonable apprehension of bias?

6. Is Guideline 7 unlawful because it is *ultra vires* the guideline-making authority of the Chairperson under paragraph 159 (1) (h) of the *Immigration and Refugee Protection Act*?

7. When must an applicant raise an objection to Guideline 7 in order to be able to raise it upon judicial review?

All of these questions, in my view, transcend the interests of the immediate parties to the litigation, raise issues of broad significance and could be determinative of the appeal

"Richard G. Mosley"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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