

## **CARL POSITION ON RESUMING REFUGEE PROTECTION DIVISION (RPD) PROCESSING OF CLAIMS**

**MAY 25, 2020**

1. The COVID-19 pandemic has had a dramatic impact on the refugee determination process in Canada. Given the impact of the suspension of RPD proceedings on individual claimants and their families, and on the administration of the RPD itself and its growing backlog, it is imperative that the division resume operations as soon as it is safe and feasible to do so. However, the manner in which it does so must maintain fairness while balancing health and safety requirements with administrative imperatives.
2. No one should be compelled to participate in an in-person hearing if they believe that doing so poses a risk to their health or safety. This means that the IRB will have to be flexible in its approach and must not impose a requirement that a claimant appear in person in any situation where there is a risk that they or their counsel might be exposed to COVID as a result.
3. There are other measures that can be implemented now to address backlogs in the system, even before a return to in-person hearings, including increased streaming to paper-based file review and pre-hearing conferences. These are discussed below.
4. It is understood that the IRB is also exploring the use of video technology for remote refugee adjudication. It is CARL's position, however, that notwithstanding the extraordinary challenges posed by the pandemic, remote hearings are generally not a viable alternative to in-person hearings and in no case should they proceed in the absence of informed consent by the claimant. In addition to raising serious privacy and confidentiality concerns, refugee adjudication by means of video technology raises serious procedural fairness issues and concerns about how the use of this technology will impact on the refugee claimant's access to counsel. This issue requires further study and the development of procedures to safeguard the privacy and due process rights of vulnerable claimants. CARL's preliminary recommendations are set out below.

### **Increased streaming to file-review process**

5. Many refugee claims could be accepted without *viva voce* evidence, and could be processed remotely before the IRB offices are reopened. The range of cases presumptively eligible for paper screening should be expanded from the current list, and should include, *inter alia*:
  - claim profiles that are currently streamed to short hearings;
  - claims that are identified by counsel as straightforward, well-documented and likely to succeed without the need for a hearing; and

- any other profiles where there is a significant possibility that the claim could be accepted without a hearing including *inter alia* claims from vulnerable individuals such as unaccompanied minors, torture survivors and victims of sexual and gender-based violence.
6. The RPD should review the files of claimants meeting the above-noted criteria and contact the claimants/counsel to advise they have been selected for possible paper review and to seek any available supporting evidence (recognizing the impact of the pandemic on evidence gathering and the potential need for additional time in which to gather evidence). Upon receipt, members should evaluate whether the claims can be accepted based on the existing record without the need for oral or further documentary evidence.

### **Pre-hearing conferences**

7. In respect of both (a) cases that were streamed to paper review but not decided, and (b) cases proceeding to a hearing, members should conduct pre-hearing conferences with counsel in order to identify the (outstanding) issues and to determine whether some or all of those issues can be resolved through the submission of additional documentary or affidavit evidence or written submissions. For the sake of efficiency, and to ensure that all issues considered relevant by the member are addressed, this conference should be conducted by the member with carriage of the file. Following the conference the member should provide written confirmation of the issues and outcome of the conference.
8. If, upon receipt of the additional information, the member can render a positive decision without a hearing, s/he should do so. In cases where it is determined that an oral hearing is nevertheless required, the member should narrow and identify the issues remaining to be canvassed at the oral hearing, providing written confirmation of these issues to counsel.

### **Remote hearings**

9. Remote hearings are an inadequate and insecure substitute for in-person hearings in the context of refugee status determination. As a general principle, they should be avoided in all but the most extraordinary circumstances. However, where mitigating circumstances exist such that a remote hearing may be more desirable for refugee claimants than further delay, and the case cannot be resolved through the file review process, voluntary remote hearings may be appropriate if minimum standards, as set out below, are met, and an appropriate balancing of health, backlog and fairness issues can be achieved.
10. Location: Given the risk of COVID exposure, remote hearings must account for the likelihood that all participants may be in separate locations for the hearing. Additional precautions must be taken when a claimant cannot be physically present with their counsel and/or with an interpreter. Remote hearings must allow for claimants to take breaks as needed and to consult with their counsel privately by phone or videoconference at that time (through the interpreter if need be). Optimally, the IRB's own videoconferencing platform for remote hearings would permit such private communication between the claimant and their counsel.

11. Prioritization: Claimants should be given an opportunity to notify the IRB if they wish to have a remote hearing. Some claimants, especially those who are separated from their families, may be anxious to proceed and may be willing to do so by way of remote hearing. These claims should be prioritized.
12. Consent: Remote hearings should be conducted only in cases where the claimant provides free and informed consent. For this to be possible, the Board must provide a document to all claimants identified for remote hearings laying out in plain language what it means to have a hearing remotely. Consent to participate in a remote hearing must not, however, be construed as waiver of the right to raise procedural fairness issues during or following the hearing. In addition, client consent does not absolve the Board of its obligation to ensure the fairness of its proceedings and the duty to stop a remote hearing if issues arise indicating that the claim is not well suited to remote hearing.
13. Issues: Remote hearings should be restricted to cases that cannot be resolved on paper and where there are no issues of exclusion, no Ministerial interventions, and no need for a designated representative (other than a co-claimant family member).
14. Confidentiality: Remote hearings must be conducted only if the confidentiality of the proceedings can be guaranteed and the technology employed meets the highest standards of security. This enhanced security requirement is necessary in light of the privacy rights of claimants, their particular vulnerability, the extraordinary sensitivity of some of the information provided, and potential adverse parties' interest in that information (including former domestic partners, foreign governments and armed groups). The IRB must ensure that all participants are aware of their obligation to maintain the confidentiality of the proceedings, and are able to implement measures to protect that privacy. Refugee shelters, shared homes and apartments may not allow for confidentiality. Childcare obligations may likewise impede a claimant's ability to participate properly and confidentially. Some counsel's offices may have appropriate facilities to permit social distancing while employing the proper technology, but many will not. Interpreters may not be able to guarantee confidentiality when participating remotely from their private residences.
15. Technology: If any hearings are to take place by video, the IRB must ensure that all participants have access to and employ technology that meets the highest standards of data protection. This will generally preclude reliance on unsecured networks. The Board must provide information to claimants, counsel, members and interpreters concerning how to most successfully use the videoconferencing platform employed by the tribunal. This information must include not only how to obtain and use the relevant software but also how to best optimize audio and video quality and what to do in the case of technical failures during a hearing. The information provided to claimants and counsel should also provide guidance on using the technology during the hearing, such as whether participants' microphones should be enabled while others are speaking. A few days prior to the commencement of the hearing, the registry must communicate with all parties so as to ensure that all of the technical requirements are in place to allow the hearing to proceed. The registry should provide an opportunity for parties to test their equipment if necessary, by communicating with a member

of registry staff by video. In addition, the IRB must provide a location where claimants can go to participate in their remote hearing if they do not have personal access to the technology required to do so, or if they lack the ability or understanding necessary to operate such technology.

*Guidelines for remote hearings*

16. The IRB should issue guidelines to ensure that claimants are not disadvantaged by having their hearings held remotely, even where consent has been obtained. These guidelines should address both procedural issues (such as how to provide a document electronically during the hearing or how to make objections) and substantive issues (such as credibility determination).
17. The guidelines should educate members concerning their special role during a remote hearing, including confirming all parties' comfort with and understanding of the process, reviewing with parties how the remote hearing technology will be used, providing for breaks during the hearing, informing parties of what to do should they become disconnected during the hearing, and advising parties that they may stop the hearing due to technological difficulties. Furthermore, the guidelines should provide that the parties have the right to object to continuing with the proceedings if they are of the view that any technical difficulties render the proceedings unfair. The guidelines must likewise remind members to pay close attention to difficulties in communication or remote interpretation, and to make adjustments in the hearing format if necessary (such as adjournments).
18. Errors of interpretation or miscommunication between an interpreter and a claimant are more likely under circumstances when a claimant, interpreter and member are all in different locations. The guidelines should instruct members to avoid drawing negative credibility inferences based on remote testimony given through an interpreter in all but the clearest of cases. Likewise, the guidelines should instruct members not to make credibility determinations based on demeanour under any circumstances, since a claimant's behavioural and verbal-behavioural presentation (e.g. hesitancy, fluidity, pace of speech) may be significantly affected by the heightened strain and added cognitive demands that the experience of testifying remotely will place on them. Members must be reminded that a claimant's remote hearing may be the first time the individual has ever used video technology and that the individual may feel afraid to testify in that way.
19. The guidelines should instruct members to take into account the psychological difficulties associated with testifying remotely because claimants will be deprived of in-person access to their counsel and other support systems, and should instruct members to be flexible concerning the order of questioning as claimants in remote hearings may find it easier to testify if counsel questions first.