

**NOTE:**

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**COVID-19 PRACTICE NOTICE FOR MATTERS BEFORE THE  
REFUGEE PROTECTION DIVISION (RPD) AND  
THE REFUGEE APPEAL DIVISION (RAD)**

**MAY 25, 2020**

**1. Introduction**

1.1. The COVID-19 pandemic has implications for the adjudication of claims before the Refugee Protection Division (RPD) and appeals before the Refugee Appeal Division (RAD).

1.2. COVID-19 necessitates temporary changes to some procedural requirements at the RPD and the RAD.

1.3. The COVID-19 Practice Notice also provides guidance to members on the potential relevance of COVID-19 on a claimant's presentation of their evidence and the substantive legal definition of a refugee.

**2. Procedural Issues**

2.1. Refugee determination during COVID-19 requires adjustments to current procedures.

**2.2. *Easing Procedural Requirements for Applications***

2.2.1. Given counsel's difficulties in accessing files, claimant's limitations in obtaining documents and communicating with counsel, and the IRB's limited registry access, the following procedures would allow claims to proceed, while ensuring fairness in the refugee process.

**2.2.2. *Late disclosure and post-hearing evidence***

2.2.2.1. Claimants will experience difficulties in obtaining disclosure. They may be unable to procure evidence due to COVID-19 restrictions, and when they can, it may be delayed. For example, a witness in the country of origin may have difficulties notarizing an affidavit, or a claimant may experience delays in obtaining a psychiatric assessment from a doctor in Canada.

2.2.2.2. In recognition of these obstacles, restrictions should be eased on the 10 day disclosure requirement under Rule 33(3) of the *Refugee Protection Division Rules*. The RPD should not

require a formal Rule 50 application to extend disclosure time, and the RPD Practice Notice on late disclosure should be suspended. When disclosing the documents, a simple statement that the documents were delayed due to COVID-19 should suffice as an explanation of the delay.

2.2.2.3. Similarly, the requirement for a formal post-hearing evidence application should be suspended and the Rule 43(3)(c) requirement to justify the lateness of evidence that is relevant and credible should be replaced with a simple statement about COVID-19 delays.

### 2.2.3. *Postponements and Adjournments*

2.2.3.1. Where the claimant, the claimant's family member with whom they reside, or the claimant's counsel has contracted COVID-19 or is experiencing COVID-related symptoms, it will generally be inappropriate for a hearing to proceed as scheduled and an adjournment should be granted. In these circumstances, the RPD should suspend the need for a formal Rule 54 adjournment application and permit an adjournment request to be made by way of letter. In many provinces, employers are legally barred from requiring medical certificates to confirm absences due to COVID-19 and many healthcare providers discourage those experiencing COVID-19 symptoms from attending their office to obtain such certificates. Given this, the requirement under Rule 54(6) for the claimant to produce a medical certificate should be specifically waived for an adjournment request pertaining to COVID-19-related concerns about the claimant or the claimant's family's health.

2.2.3.2. Many law offices have been closed or have reduced their operating hours since the onset of the COVID-19 pandemic and many claimants will have been unable to meet and retain counsel due to stay-at-home orders. This may make it markedly more difficult for claimants to secure counsel. Where a claimant is unrepresented, the RPD Member should proactively at the outset of the hearing offer an adjournment in order for the individual to retain counsel and should provide the individual with information about how to contact the relevant provincial legal aid provider.

### 2.2.4. *Abandonment and re-openings*

2.2.4.1. COVID-19 presents new challenges to claimants, and obstacles may result in BOC deadlines and hearings dates missed, leading to claims being inadvertently abandoned.

2.2.4.2. Difficulties in notifying the RPD about an address change, the need to relocate due to vulnerability or illness of a family member or roommate, and confusion over the suspension of time frames for BOC filing may all cause claims to be abandoned.

2.2.4.3. Rule 8 extensions for BOC deadlines should not require formal applications, and COVID-19 factors should be taken into account.

2.2.4.4. Applications for the appointment of designated representatives and for the designation of claimants as vulnerable pursuant to the Chairperson Guideline 8 often include a mental health or other medical assessments. This expectation should be relaxed in light of the evidentiary limitations noted below.

2.2.4.5. Prior to issuing an abandonment notice, efforts should be made to flag claims and inadvertent abandonments. Should a case be declared abandoned, re-opening applications should be permitted without a formal Rule 62 application and COVID-19 factors should apply.

### 2.2.5. *RAD appeals*

2.2.5.1. Formal applications under Rule 29 of the *Refugee Appeal Division Rules* for an extension of time to file a notice and an appeal record should not be required, and COVID-19 factors should be applied.

2.2.5.2. The need for a formal application for the admission of additional evidence in RAD appeals should be suspended, and COVID-19 factors should be taken as satisfying the Rule 29(4)(c) factor in explaining the lateness of the new evidence.

### 2.3. *Communication to counsel/claimant*

2.3.1. Due to limitations imposed by the COVID pandemic and the resultant restrictions in counsels' practice, and difficulty obtaining evidence, extra care should be given when communicating with counsel and unrepresented claimants.

2.3.2. New issues could arise because of COVID-19, yet the restrictions in place may delay them from being put forward. For example, domestic violence is on the rise and may be a new factor in a refugee claim for either a reserved RPD case, or an appeal pending before the RAD. Claimants and appellants should be given an opportunity to provide further evidence or submissions in ongoing cases in order to avoid unnecessary applications to re-open.

2.3.3. The RPD and the RAD should give 30 days notice prior to rendering a decision, to ensure relevant submissions and/or evidence is before the member, and also to ensure that new evidence already submitted has reached the file.

## 3. **Evidentiary Matters**

3.1. The COVID-19 pandemic must be considered in assessing the ability of claimants and appellants to obtain and present their evidence.

### 3.2. *Corroborative Evidence*

3.2.1. Individuals may encounter difficulties in obtaining corroborative documents, including medical and identity documents, and witness statements and/or testimony during the pandemic and its aftermath.

3.2.2. The failure to provide corroborative documents or witnesses should not result in a presumptive adverse inference against the claimant or appellant.

3.2.3. Members should attempt to decide the case based on the evidence available, including the testimony of the claimant. The failure to provide a document (including an identity document, medical document, police report) or the evidence of a witness should not be the sole basis to dismiss a claim during this time. If a member feels that they cannot decide a claim without a particular document or witness testimony, the matter should be adjourned and sufficient time should be given to allow the claimant/appellant to make reasonable efforts, taking into account the impact of COVID-19, to obtain the document or the witness' testimony.

3.2.4. Evidence relating to the impact of ever-changing country conditions, such as travel restrictions, state surveillance activities and stay-at-home orders, may not be available in objective country and human rights reports. The non-availability of documentation of this impact in these traditional sources should not be used as a sufficient basis to conclude that these impacts are not occurring.

3.2.5. Until in-person delivery recommences at IRB registry offices, the requirement to produce original documents should be waived. Even after this time, Members should waive the requirement to provide original documents where COVID-19 related conditions makes it impractical for claimants and/or counsel to obtain and disclose such documents. In these circumstances, no adverse inference should be drawn by the claimant's inability to provide the original document.

3.2.6. On appeal, RAD members should interpret and apply s.110(4) of *IRPA* broadly, taking into account the impact of COVID-19 in the analysis of whether evidence was reasonably available or reasonably expected to be available at the time of the RPD rejection.

#### **4. Refugee definition**

4.1. As further explained below, the COVID-19 pandemic – and states' response to it – is a relevant factor that should be considered in each claim and may be relevant to various elements of the international refugee definition.

#### **4.2. *The relevant timeframe in which to consider COVID-19:***

4.2.1. In deciding a claim for refugee protection, decision-makers must ask whether returning the claimant to their country of nationality (or, if stateless, their country of former habitual residence) would expose them to a forward-facing risk described in s.96 or 97 of the *IRPA* based on the conditions prevailing on the date of the hearing. Decision-makers should not rely on the existence of deferrals of removal, global reduction in air travel and other practical barriers to speculate as to whether conditions may improve by the time of removal.

#### **4.3. *Nexus to the Convention:***

4.3.1. In many cases, state-imposed restrictions in response to the COVID-19 are generalized in nature and are not imposed on the basis of a *Convention* ground. However, where coercive public health measures are used to target a particular group or individual – whether by design or

by selective/disproportionate enforcement – or where public health is used a pretext for some other discriminatory state purpose, such treatment may have a nexus to a *Convention* ground. Similarly, where COVID-19 related healthcare or treatment is deliberately denied by the state to a particular group or individual for a discriminatory purpose, such treatment may have a nexus to a *Convention* ground.

#### **4.4. *Increased objective risk:***

4.4.1. Many states' responses to the COVID-19 pandemic have resulted in a significant increase in state surveillance of the public. For claimants fearing state-based persecution, this may result in increased objective risk. For example, detailed screening of international travellers returning through airports may mean that (i) even low-interest targets are more likely to come to the attention of state authorities and (ii) the fact a returnee made a refugee claim abroad is more likely to come to the attention of state authorities. Even following their return, increased state use of social media and smartphone apps to track COVID-19 infections may more readily bring at-risk individuals to the attention of authorities, even when the state may not have actively sought out those individuals on its own.

4.4.2. Coercive quarantine orders and other COVID-19 related measures may give state authorities increased means and leeway to target real or perceived political dissidents and members of disfavoured groups under the pretense of public health.

4.4.3. In some countries, stay-at-home orders require individuals to return to and remain in the residence/village/town in which they are registered. For claimants fleeing domestic violence, such orders may result in them having to reside in the same home as their agent of persecution if returned to their country of nationality, possibly placing them at increased risk. Moreover, increased tension and inter-personal conflict amongst family members residing together under stay-at-home orders may cause problematic relationships to escalate into abusive ones.

4.4.4. Stay-at-home orders that require individuals to return to the places of registration may also be relevant for claimants who had previously journeyed to other parts of their country to avoid family/clan/tribal disputes, local gangs, or corrupt local officials. Such orders may require them to return to and remain in places where they were previously at risk. In some cases, the return of the claimant may result in a conflict being renewed and a pattern of persecution being resumed in a manner which would not have occurred had the claimant been able to stay away.

#### **4.5. *Lack of state protection:***

4.5.1. States' responses to the COVID-19 pandemic may limit individuals' access to regular state protection mechanisms.

4.5.2. In some countries, state authorities may have suspended constitutional or other civil liberties protections as part of its response to the pandemic. The implementation of legislation, policy reforms and actions plans intended to protect vulnerable groups may be delayed or cancelled as state resources are directed instead to respond to the pandemic.

4.5.3. In many countries, courts have closed. This may limit individuals' ability to seek release from illegal detention, to challenge other illegal state activity, or to obtain restraining orders. Even where individuals have access to the courts, judicial authorities may be less willing to intervene in state activity that is seen as part of the response to COVID-19 pandemic. For example, quarantine detentions tend to attract less due process than criminal detentions and are more likely to be viewed as presumptively justified by exigent circumstances.

4.5.4. Shutdowns may also affect institutions which facilitate access to state protection such as human rights commissions, police complaint boards, and shelters.

4.5.5. Stay-at-home orders may limit individuals' ability to contact and access state protection, including being able to physically travel to police stations to seek assistance or to file a report. In some countries where police are deployed to enforce quarantines, stay-at-home orders and other public health measures, there may be fewer police available to respond to other criminal concerns. This may be particularly troubling in the countries where police already have a record of treating some crimes as a low priority (e.g., domestic violence).

#### **4.6. *Internal flight alternative:***

4.6.1. The COVID-19 pandemic may be relevant to both branches of the IFA test.

4.6.2. The first branch of the test is principally concerned with whether the agent of persecution has the means and motivation to locate and pursue the claimant to the IFA. As mentioned, above, many states' responses to the COVID-19 pandemic have resulted in a significant increase in state surveillance of the public. For example, increased state use of social media and smartphone apps to track COVID-19 infections may more readily bring individuals to the attention of authorities in the IFA. Similarly, where stay-at-home orders and shutdowns are in place, the arrival of a new person to a community may be more readily come to the attention of state authorities.

4.6.3. The second branch of the test is principally concerned with whether the claimant can safely travel to and remain in the IFA location and whether it is reasonable to expect the claimant to do so. In terms of the ability of a claimant to travel to the IFA during the COVID-19 pandemic, decision-makers must consider external and internal border closures; cancellations of planes, trains, and other modes of transport; and the risk of infection of requiring the claimant to be travelling at this time. In terms of the ability of the claimant to remain in the IFA during the COVID-19 pandemic, decision-makers should consider whether stay-at-home orders permit the claimant to live in the IFA; whether COVID-19 is spreading in the IFA and whether healthcare is available to the claimant there; and whether the claimant would be able to find accommodation and employment during any shutdowns. For claimants who are elderly or who have an underlying medical condition that make them increasingly susceptible to COVID-19, decision-makers should consider whether it would be reasonable at all to require them to return to and relocate within a country where COVID-19 is spreading uncontrollably.